

NO. 45433-5-II

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

TOM MOYER THEATRES, an Oregon partnership,

Respondent,

v.

MICHAEL J. WALKER, DEBORAH A. WRAY, AND KRISTIN D.
STUMP, Co-Trustees of the Amended and Restated Walker Family Trust
dated August 18, 2001; AND GREENWAY TERRACE, LLC, an Oregon
limited liability company,

Appellants

BRIEF OF RESPONDENT

J. Kurt Kraemer, WSBA No. 29509
Katie Jo Johnson, WSBA No. 46143
McEwen Gisvold, LLP
1100 SW Sixth Avenue, Suite 1600
Portland, OR 97204
(503) 226-7321

Attorneys for Respondent

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
II. COUNTERSTATEMENT OF ISSUES	2
III. COUNTERSTATEMENT OF THE CASE.....	2
IV. SUMMARY OF ARGUMENT	8
A. Assignment of Error: Trial Court Finding of Fact No. 11	9
1. Preservation of Error.....	9
2. Standard of Review.....	10
3. Argument.....	12
B. Assignment of Error: Trial Court Finding of Fact No. 15	16
1. Preservation of Error.....	16
2. Standard of Review.....	18
3. Argument.....	18
C. Assignment of Error: Trial Court Conclusions of Law Nos. 1 and 2	22
1. Preservation of Error.....	22
2. Standard of Review.....	22
3. Argument.....	23
D. Assignment of Error: Admission of Exhibits 13 through 18 and 20.....	33
1. Preservation of Error.....	33

2.	Standard of Review.....	34
3.	Argument.....	35
VI.	RAP 18.1 FEE REQUEST.....	38
VII.	CONCLUSION.....	38

TABLE OF AUTHORITIES

Table of Cases

Washington Cases

<i>Brothers v. Public School Employees of Washington</i> , 88 Wn. App. 398, 408, 945 P.2d 208 (1997)	38
<i>Crafts v. Pitts</i> , 161 Wn.2d 16, 29, 162 P.3d 382 (2007)	23
<i>Crafts v. Pitts</i> , 161 Wn.2d at 24	24
<i>Cunningham v. Reliable Concrete Pumping, Inc.</i> , 126 Wn. App. 222, 225, 108 P.3d 147 (2005)	10
<i>Davis v. Globe Machine Mfg. Co.</i> , 102 Wn.2d 68, 77, 684 P.2d 692 (1984)	9
<i>Eagle Group, Inc. v. Pullen</i> , 114 Wn. App. 409, 416-17, 58 P.3d 292 (2002), <i>rev. den.</i> , 149 Wn.2d 1034 (2003)	33
<i>In re H.J.P.</i> , 114 Wn.2d 522, 532, 789 P.2d 96 (1990)	11
<i>In re Marriage of Littlefield</i> , 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997)	23
<i>In re Marriage of Mueller</i> , 140 Wn. App. 498, 505, 167 P.3d 568 (2007), <i>rev. den.</i> , 163 Wn.2d 1043, 187 P.3d 270 (2008)	11
<i>In re Personal Restraint of Gentry</i> , 137 Wn.2d 378, 410-11, 972 P.2d 1250 (1999)	10
<i>In re Trust and Estate of Melter</i> , 167 Wn. App. 285, 301, 273 P.3d 991 (2012)	11
<i>Johnson v. Mt. Baker Park Presbyterian Church</i> , 113 Wn. 458, 194 P. 536 (1920)	32

<i>King County v. Wash. State Boundary Review Bd.</i> , 122 Wn.2d 648, 675, 860 P.2d 1024 (1993).....	10
<i>Matteson v. Ziebarth</i> , 40 Wn.2d 286, 294, 292 P.2d 1025 (1952)	37
<i>Merriman v. Cokeley</i> , 168 Wn.2d 627, 631, 230 P.3d 162 (2010).....	10
<i>Mueller v. Garske</i> , 1 Wn. App. 406, 409, 461 P.2d 886 (1969).....	9
<i>State v. Dobbs</i> , 180 Wn.2d 1, 11, 320 P.2d 705 (2014).....	11
<i>State v. Magneson</i> , 107 Wn. App. 221, 224 n. 1, 26 P.3d 986 (2001), <i>rev. den.</i> , 145 Wn.2d 1013, 37 P.3d 291 (2001)	12
<i>State v. Mak</i> , 105 Wn.2d 692, 719, 718 P.2d 407, <i>cert. den.</i> , 479 U.S. 995 (1986)	34
<i>State v. Williams</i> , 96 Wn.2d 215, 220, 634 P.d 868 (1981).....	22
<i>State v. C.J.</i> , 148 Wn.2d 672, 686, 63 P.3d 765 (2003).....	34
<i>Thorndike v. Hesperian Orchards</i> , 54 Wn.2d 570, 575, 343 P.2d 183 (1959)	10

Rules and Regulations

ER 103(a).....	33
ER 408.....	36, 38
RAP 18.1.....	38

I. INTRODUCTION

This is an appeal from a judgment entered in favor of Tom Moyer Theatres ("TMT") on its claim for specific performance. TMT's claim was based upon an undisputed right to relocate utilities that run through its property and service the property of its neighbor to the west, a mobile home park owned and operated by Greenway Terrace, LLC ("Greenway").¹

TMT and Greenway have – for years – worked on the logistics of relocating the water meter and waterlines that cross TMT's property and serve Greenway's property. All of those discussions and plans contemplated moving the water meter and waterlines exclusively to Greenway's property and off of TMT's property entirely. TMT re-engineered and re-worked those plans several times in order to accommodate Greenway. However, after it became clear that Greenway would never be entirely satisfied, TMT was eventually forced to seek relief from the trial court in the form of specific performance allowing it to move forward with its undisputed right to relocate the utilities. TMT was

¹ Greenway identifies Michael J. Walker, Deborah A. Wray, and Kristin D. Stump, Co-Trustees of the Amended and Restated Walker Family Trust dated August 18, 2001 as co-appellants, but the assignments of error given by Greenway relate solely to TMT's specific performance claim, for which Greenway is the sole defendant. The reformation claim, for which the Co-Trustees were also defendants is not at issue in this appeal.

entitled to the relief it received at the trial court level, and that relief should be upheld.

II. COUNTERSTATEMENT OF ISSUES

- A. Whether the trial court properly issued its findings of facts and conclusions of law given the relevant standards and the parties' positions both prior to and during the litigation.
- B. Whether the trial court properly admitted certain exhibits given the objections raised and the standards governing those objections.

III. COUNTERSTATEMENT OF THE CASE

TMT is the owner of 6.25 acres of certain undeveloped real property located at 7110 NE 117th Avenue, Vancouver, Washington (the "TMT Property").²

Greenway is the owner of an adjacent 12.23 acres of real property containing a mobile home park, located to the west of the TMT Property (the "Greenway Property").³

² TMT's predecessor-in-interest, TMT Development Co., Inc., purchased the TMT Property from the Amended and Restated Walker Family Trust dated August 18, 2001 (the "Trust") pursuant to a Purchase and Sale Agreement and Addendum dated December 13, 2001 (the "Agreement"). Ex. 2; CP 381 (FoF 1; 4). TMT Development Co., Inc. subsequently assigned all of its right, title, and interest in the Agreement to TMT with the Trust's consent, pursuant to the terms of the Agreement. Ex. 24; CP 381 (FoF 5). The Trust conveyed the TMT Property to TMT by Statutory Warranty Deed signed on January 22, 2002 and recorded in Clark, County Washington on January 23, 2002 (the "TMT Deed"). Ex. 1; CP 381 (FoF 6).

The utilities that service the mobile home park located on the Greenway Property run through the TMT Property and connect at NE 71st Street, which is located to the east of the TMT Property. Ex. 8; RP (6/25/13) at 75:16-76:6. Therefore, in the Agreement and in Exhibit C to the TMT deed, the Trust reserved for itself a nonexclusive appurtenant easement over the TMT Property for continuous and unrestricted access through the TMT Property to the Greenway Property⁴ and for unrestricted and unlimited access to the TMT Property for any necessary repairs or maintenance to the underground utilities located on the TMT Property that serve the Greenway Property ("Utilities"). Ex. 2, at p. 10; Ex. 1, at p. 7; CP 381 (FoF 9).

The Easement states in relevant part:

Buyer shall have the right to relocate or alter utilities which are located in the 6.25 acres after closing but in no event shall such relocation or alteration interrupt Seller's utility service without Seller's prior express written consent.

Ex. 2, at p. 10; Ex. 1, at p. 7; CP 382 (FoF 10).

³ The Trust retained ownership of the adjacent 12.23 acres of real property located at 11515 NE 71st Street, Vancouver, Washington (the "Greenway Property"), and later conveyed the Greenway Property to Greenway by Statutory Warranty Deed signed on March 28, 2002 and recorded in Clark County, Washington on May 23, 2002. Ex. 26; CP 381 (FoF 7; 8).

⁴ Access is not at issue in this appeal.

The purpose of TMT moving the Utilities, as intended by the parties as part of the Agreement, was to facilitate future development. CP 382 (FoF 12). In the years following execution of the Agreement, the purpose of future development continued to be a primary factor for both parties. CP 382 (FoF 13). No location for movement of the Utilities was specified in the Agreement, however the parties intended that the new location of the Utilities would facilitate future development. CP 382 (FoF 14).

With respect to whether that relocation should be (1) to somewhere else on the TMT Property, or (2) to somewhere onto the Greenway Property, the position of both parties for several years was consistently that it should be to somewhere onto the Greenway Property.⁵

For years, TMT and Greenway worked on the logistics of relocating the water meter and waterlines that cross the TMT Property to the Greenway Property:

⁵ When Greenway attempted to eliminate the option of relocating the Utilities to somewhere on Greenway's Property at the summary judgment stage, the Court declined to do so given the position of the parties both prior to, and during, this litigation with respect to that option. RP (6/7/13) at 28:7-15 ("Essentially, what Greenway is asking is that the Court find that there is no right to movement of the utilities off of TMT's property onto Greenway's property, contrary to the fact that—also appears to be undisputed—that all of the discussion about the movement of the utilities, anticipated relocation to the Greenway property, and that from what counsel has indicated that Greenway wants the utilities moved off of TMT's property onto Greenway's property.").

- In July 2008, TMT transmitted a utility service covenant required by the City of Vancouver to relocate the water lines and water meter onto Greenway's Property,⁶ and an engineering plan for that relocation. Ex. 7; Ex. 9; Ex. 10; Ex. 11; RP (6/25/13) at 73:1-75:13; 77:20-78:14; 78:15-81:5; 82:6-83:20; 117:14-118:3.
- Greenway responded in October 2008 not with concerns about the proposed location of the water lines and water meter on Greenway's Property, but rather with a proposed "waterline relocation agreement" with indemnification provisions regarding the work. Ex. 12; RP (6/25/13) at 83:21-85:2.
- Greenway sent further correspondence about the contemplated work in February 2009, demanding that TMT fulfill its "obligation" under the Agreement to move the utilities onto Greenway's Property. Ex. 13; RP (6/25/13) at 85:10-86:2.
- In June 2009, TMT declined to sign the unnecessary "water relocation agreement," again asked for Greenway's

⁶ The Agreement provided that "in no event shall such relocation or alteration interrupt Seller's utility service without Seller's prior express written consent. Ex. 2, at p. 10; Ex. 1, at p. 7; CP 382 (FoF 10).

execution of the requisite utility service covenant and agreed to alleviate Greenway's concerns by providing indemnification to Greenway for any "claims arising out of acts or omissions" of TMT's contractors. Ex. 20; RP (6/25/13) at 92:1-93:1; 93:15-17.

But as soon as those indemnification "concerns" were put to rest, Greenway began to raise new and different "concerns" with the engineering itself:

- In June 2010, Greenway complained that the plan proposed locating the water meter in a potential future right-of-way that ran north-south between Greenway's Property and TMT's Property and that the "meter needs to be moved to the west⁷ and outside of this right of way." Ex. 14, at 3; Ex. 15; RP (6/25/13) at 86:19-87:23; 88:10-89:2. TMT responded by re-engineering its plan so that the water meter was outside of that potential north-south right-of-way. Ex. 3; Ex. 6; Ex. 7; RP (6/25/13) at 116:23-118:16.
- In 2011, Greenway complained that the re-engineered plan proposed locating the water meter in a different potential

⁷ "to the west" meant further into Greenway's Property, which was located to the west of TMT's Property.

future right-of-way, located along the southern border of the Greenway Property. Ex. 16; Ex. 17; Ex. 18; RP (6/25/13) at 89:13-24; 90:6-22; 91:4-21. TMT responded by providing an alternative location outside of any potential future right-of-way. Ex. 4; RP (6/25/13) at 45:8-22.

- Greenway then complained that the alternative location may require an easement to the City of Vancouver for maintenance. RP (6/25/13) at 45:23-46:4. But that easement would be required in any event. Ex. 22; RP (6/25/13) at 53:24-59:3.

At no time did Greenway provide its own engineered plan. The only "plan" it proposed was a sketch locating the water meter even further west into Greenway's Property, and even that "plan" would require an easement to the City of Vancouver. Ex. 22; RP (6/25/13) at 53:24-59:3.⁸

At trial, TMT presented its alternative engineered plans that had been developed over the course of several years with Greenway input as Exhibit 3 and Exhibit 4, and explained why those plans were the least impactful options of relocating the water meter and waterlines. RP (6/25/13) at 107:23-111:5. TMT also proposed a straight payment to

⁸ Despite Mr. Mike Walker's contention that this "plan" was "shot down" by TMT, the evidence shows that it was discussed only with the City of Vancouver and not with TMT. RP (6/25/13) at 53:24-58:20; 97:4-5.

Greenway of the estimated cost of relocation (\$40,000) for Greenway to complete the work as it saw fit. Ex. 21; RP (6/25/13) at 93:18-95:21. Greenway offered no engineered plans of its own and did not rebut the \$40,000 amount. However, to ensure that Greenway received every possible opportunity to propose an alternative plan, the trial court gave Greenway the opportunity post-trial to present its own alternative plan. RP (6/26/13) at 266:4-268:2. Greenway refused to do so. RP (8/16/13) at 18:22-19:3; CP 383 (FoF 18).

The trial court therefore properly ordered Greenway to elect one of the three alternatives provided by TMT. CP 377-379.

IV. SUMMARY OF ARGUMENT

The trial court's findings of fact and conclusions of law were properly issued given the relevant standards and the parties' positions both prior to and during the litigation. In addition, the trial court properly admitted the disputed exhibits given the objections raised and the standards governing those objections.

///

///

///

///

///

V. ARGUMENT

A. Assignment of Error: Trial Court Finding of Fact No. 11 (Greenway specifically requested that TMT move all of the Utilities in response to TMT's proposed plan to move the waterlines and water meter off of the TMT Property and onto the Greenway Property).

1. Preservation of Error

Greenway is precluded from attempting to assign error to Trial Court Finding of Fact No. 11 given its position at trial.

Greenway's counsel stated during the summary judgment proceeding that: "I think Greenway wants them [the utilities] moved off of TMT's property." RP (6/7/13) at 20:19-20. For Greenway to now attempt to assign error to that undisputed finding is improper. *See, e.g., Davis v. Globe Machine Mfg. Co., Inc.*, 102 Wn.2d 68, 77, 684 P.2d 692 (1984) ("A party cannot properly seek review of an alleged error which the party invited").

In addition, Greenway is now precluded from attempting to take a different position than the one taken at the trial court level: that Greenway wanted the utilities moved off of TMT's property. *See, e.g., Mueller v. Garske*, 1 Wn. App. 406, 409, 461 P.2d 886 (1969) ("A party is not permitted to maintain inconsistent positions in judicial proceedings. It is

not as strictly a question of estoppel as it is a rule of procedure based on manifest justice and on a consideration of orderliness, regularity and expedition in litigation"); *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 225, 108 P.3d 147 (2005) (stating that the estoppel doctrine seeks to "preserve respect for judicial proceedings" and to "avoid inconsistency, duplicity, and . . . waste of time").

2. Standard of Review

A finding of fact may not be overturned if it is supported by substantial evidence. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959). Evidence is substantial when it is sufficient "to persuade a fair-minded, rational person of the truth of the declared premise." *King County v. Wash. State Boundary Review Bd.*, 122 Wn.2d 648, 675, 860 P.2d 1024 (1993). Evidence may be substantial even though it is contradicted. *In re Personal Restraint of Gentry*, 137 Wn.2d 378, 410-11, 972 P.2d 1250 (1999) ("Conflicting evidence may still be substantial, so long as some reasonable interpretation of it supports the challenged findings. * * * That there may be other reasonable interpretations of the evidence does not justify appellate court reversal of a trial court's credibility determinations") (internal citations omitted); see also *Merriman v. Cokeley*, 168 Wn.2d 627, 631, 230 P.3d 162 (2010) ("A

reviewing court may not disturb findings of fact supported by substantial evidence even if there is conflicting evidence").

When the standard of proof is clear, cogent and convincing evidence, the fact at issue must be shown to be "highly probable." *State v. Dobbs*, 180 Wn.2d 1, 11, 320 P.3d 705 (2014); *In re H.J.P.*, 114 Wn.2d 522, 532, 789 P.2d 96 (1990) ("An appellate court will not disturb the trial court's findings of fact if they are supported by 'substantial evidence' which satisfies the 'highly probable' test") (internal citations omitted).

Review of a trial court's decision does not allow re-weighing of the evidence or second guessing the finder of fact. *See, e.g., In re Marriage of Mueller*, 140 Wn. App. 498, 505, 167 P.3d 568 (2007), *rev. den.*, 163 Wn.2d 1043, 187 P.3d 270 (2008) ("Reviewing a trial court decision under this standard does not permit us to weigh evidence, which is a trial court function. We merely review the factual findings to determine whether they are properly supported by substantial evidence, and whether they in turn support the legal conclusions.") (internal citations omitted).

The evidence and all reasonable inferences are to be viewed "in the light most favorable to the prevailing party," which in this case is Respondent TMT, and the Court is to "defer to the trier of fact on issues of credibility." *In re Trust and Estate of Melter*, 167 Wn. App. 285, 301, 273 P.3d 991 (2012).

Unchallenged findings are accepted as true and become verities on appeal. *See, e.g., State v. Magnuson*, 107 Wn. App. 221, 224 n. 1, 26 P.3d 986 (2001), *rev. den.*, 145 Wn.2d 1013, 37 P.3d 291 (2001) (internal citations omitted).

3. Argument

Trial Court Finding of Fact No. 11 states that:

Greenway specifically requested that TMT move all of the Utilities in response to TMT's proposed plan to move the waterlines and water meter off of the TMT Property and onto the Greenway Property.

CP 382, at ¶ 11. This is undisputedly supported by substantial evidence, including statements made by Greenway.

In a letter dated February 13, 2009, Greenway's counsel responded to the engineered plan submitted by TMT to relocate the water meter and waterlines onto Greenway's Property, by stating in part:

I understand TMT wants to move the water meter to the southeast corner of the LLC's property and abandon the water lines on its property. In order to accomplish these steps, TMT asked Mr. Walker to sign a Utility Service Covenant required by the City of Vancouver. Prior to signing the Covenant, Mr. Walker requested that TMT sign a Waterline Relocation Agreement which Mr. Walker felt was necessary to protect the LLC from incurring any loss as a result of the water meter being moved. TMT responded to Mr. Walker by explaining that Mr. Moyer felt the Waterline Relocation Agreement was unnecessary and by failing to sign the Covenant, Mr. Walker waived certain of TMT's

obligations under the Addendum to the Purchase and Sale Agreement ("Addendum") under which TMT purchased its parcel from the LLC.

While moving the water meter is certainly a step in the right direction, this alone will not solve the problem, as the LLC's electrical, phone and cable lines cross TMT's property as well. These utility lines are also subject to the easement established in the Addendum. **If TMT wants to move the water meter, which Mr. Walker has no problem with, it makes sense for TMT to move these other utility lines at the same time so that TMT and the LLC will not need to deal with each other on future utility issues.**

* * *

Now is an appropriate time for TMT to move all of the utility lines so they no longer run through TMT's property. I want to point out that, despite your statement in your October 30, 2008 letter to Mr. Walker, his failure to sign the Utility Service Covenant did not waive any of TMT's obligations under the Agreement or the Addendum, **including its obligation to move the utilities.** * * *

While I recognize moving the utility lines will result in some cost to TMT, **these costs were clearly contemplated under the Agreement and the Addendum.** Moving the lines will eliminate the need for the parties to work with one another on utility issues in the future. In addition, once you move the utility lines, the responsibility and cost of maintaining and repairing the utility lines will shift to Mr. Walker.

* * *

The LLC expects that TMT will honor its obligations until the utility lines are moved, at which time the LLC will take over all repair and maintenance obligations.

* * *

We believe some form of agreement is necessary **to comply with the requirement in Section 1 of the Addendum** which provides that in no event can TMT move the utilities without the prior written consent of the LLC. The Waterline Service Agreement serves as the LLC's written consent, whereas the Utility Service Covenant does not satisfy the written consent provision.

Ex. 13 (emphasis added). As set forth in Section D, below, this Exhibit was properly admitted and directly supports Finding of Fact No. 11. However, even if the Court were inclined to exclude Exhibit 13, there is still sufficient evidence supporting Finding of Fact No. 11.

Mr. Walker confirmed in his testimony that Mr. Zipper, on behalf of Greenway, requested that all of the utilities be moved onto Greenway's property at the same time as the water lines:

QUESTION: So now I want to jump ahead in time two years to July of 2008 when you received the utility covenant from TMT Development Company Inc. When you learned that TMT was proposing to move—excuse me—was proposing to move Greenway's water lines off of the 6.25 acres and onto Greenway's property, what was your reaction?

MR. WALKER: I mean, at first I was kind of shocked, because that was not the agreement ever.⁹

⁹ Mr. Walker's assertion of "shock" was rejected by the Court at the summary judgment stage, RP (6/7/13) at 28:7-15, and is belied by the years of the parties working on the logistics of relocating the water meter and waterlines onto the Greenway Property and by Mr. Walker's own "plan" discussed with the City of Vancouver, as discussed in Section III, above.

But, at the same time, it was almost like—it would alleviate one of the many problems that had occurred, but not all of them, which is why I think Mr. Zipper sent them a letter back at some point asking if they would not—consider moving all of the utilities at once instead of just the water lines. And they rejected that offer.

RP (6/26/13) at 197:25-198:14.

In addition, Mr. Brady Berry, the civil engineer with WHPacific that put together TMT's proposed plans, testified that the plans contained the following note requested by Greenway:

* * * if you look in No. 7, it just says, 'It is the intent of the design to intercept and connect existing water lines on the Greenway Terrace LLC property, and that no part of the water line at the completion of the work will be on TMT property.' **That was a note that was added at the request of the Greenway property owners.**

Ex. 3; RP (6/25/13) at 113:6-12 (emphasis added).

There is substantial evidence to support Trial Court Finding of Fact No. 11 and it should be upheld.

///

///

///

///

///

///

B. Assignment of Error: Trial Court Finding of Fact

No. 15 (The parties have evidenced mutual agreement that leaving the Utilities on the TMT Property does not make sense and is contrary to their original intent).

1. Preservation of Error

As set out in Section A(1), above, Greenway is also precluded from attempting to assign error to Trial Court Finding of Fact No. 15 given its position at trial, which invited any alleged "error" and is inconsistent with its current argument.

In addition to those statements set out in Section A(1), Greenway took the definitive position at the summary judgment stage that the utilities should be moved onto the Greenway property.

When the trial court asked Greenway's counsel "what's wrong" with the two locations that had been proposed by TMT, Greenway's counsel responded only that Greenway wanted the utilities to be placed in a different location on Greenway's property:

THE COURT: And what's wrong—

MS. SCHROEDER: And Greenway said no.

THE COURT: --with those locations?

MS. SCHROEDER: One of them is in a right of way that will have to be moved if—there is a road that has to be—when—I believe when the

Greenway property is developed on the shared property line between the TMT property and Greenway property, there is going to be a road put in there. And so one of the locations, that meter would have to be moved.

And in the other location, I believe it would be out of the right of way, but it would require Greenway to grant an easement to the City of Vancouver. And it's not willing to do so.

It wants to put the meter in a completely different location, and TMT has said no.¹⁰

RP (6/7/13) at 21:18-22:14 (emphasis added).

The trial court noted:

Essentially, what Greenway is asking is that the Court find that there is no right to movement of the utilities off of TMT's property onto Greenway's property, contrary to the fact that—also appears to be undisputed—that all of the discussion about the movement of the utilities, anticipated relocation to the Greenway property, and **that from what counsel has indicated that Greenway wants the utilities moved off of TMT's property onto Greenway's property.**

* * *

Both parties agree that relocation would be better for all concerned to have those utilities on Greenway's property so that they are responsible

¹⁰ While Greenway's counsel does not specify what "completely different location" she is referencing, the evidence established that the only different location contemplated by Greenway was that discussed with the City of Vancouver (not TMT) and which was further west into Greenway's Property and also required an easement. Ex. 22; RP (6/25/13) at 53:24-59:3.

for—they already are responsible for the repair and maintenance of those utilities. Problems have occurred as a result of those. **So both parties have agreed by their conduct, and even here in argument of the case, that it would be better to have the utilities on the defendants' property.**

If I further understand the argument, it primarily seems to be the difficulty with the location of the water meter. And somewhere it just seems to me there must be some engineering ability to find a location for that that would be satisfactory.

RP (6/7/13) at 28:7-29:14.

2. Standard of Review

The standard of review with respect to Trial Court Finding of Fact No. 15 is the same as that set forth in Section A(2), above.

3. Argument

Trial Court Finding of Fact No. 15 states that:

The parties have evidenced mutual agreement that leaving the Utilities on the TMT Property does not make sense and is contrary to their original intent.

CP 382, at ¶ 15. This is also undisputedly supported by substantial evidence, including statements made by Greenway's own counsel.

TMT's right to relocate the Utilities was and is undisputed. Ex. 2, at p. 10; Ex. 1, at p. 7; CP 382 (FoF 10). It is also undisputed that the purpose of TMT moving the Utilities was to facilitate future development. CP 382 (FoF 12; 13; 14). With respect to whether that relocation should

therefore be (1) to somewhere else on the TMT Property, or (2) to somewhere onto the Greenway Property, the position of both parties for several years was consistently that it should be to somewhere onto the Greenway Property.

Greenway's counsel, Mr. Steven Zipper, testified unequivocally that leaving the waterlines on TMT's property "wouldn't make sense, there would still be problems" and that moving the waterlines to Greenway's property "just simply made sense, it was smart." Ex. 51, at 46:11-13; 47:5-6.

In fact, Mr. Robert Pile with TMT Development Co Inc. (the manager of TMT) testified that TMT had never proposed to relocate the utilities anywhere other than on Greenway's property. RP (6/25/13) at 77:6-11.

In addition, Mr. Zipper confirmed that movement of the utilities had always been contemplated by the parties as part of the sale of the property.

MR. ZIPPER: * * * so the—especially the waterlines but I think all of them, they're not very deep in the ground, and Mr. Moyer, as I was mentioning, had plans to develop this property, and, to develop the property, he needed to move the utilities. He couldn't develop the property with the utilities where they were.

Ex. 51, at 12:22-13:10.

Mr. Zipper further confirmed with respect to the sale agreement:

MR. ZIPPER: My intent was to document what Tom Moyer and Mike Walker had agreed to, and what that was, and it did at the time and it still seems very clear and simple to me, Mike Walker wanted to sell the Trust's property, Tom Moyer wanted to buy it. There were utilities spidering all over the place and Tom Moyer was going to develop the property he needed to move the utilities. **Mike Walker, on behalf of the Trust, wanted to give Tom Moyer Theatres flexibility and the ability to develop the property and move the utilities but, at the same time, making sure that the Trust was protected.** So that if Tom Moyer Theatres was going to move them somewhere, Mike was going to get prior notice, and that he would need to provide consent before they just went ahead and did whatever they wanted to do. **He wanted to be involved in the process so that it could be done right, done in a way that he was comfortable with, but he wanted to give Tom Moyer Theatres flexibility to move the utilities on its property so that it could develop the property in the most effective manner.**

Ex. 51, at 16:19-18:2.

Mr. Walker also testified that Mr. Moyer had intentions to develop the property, but that the timeframe was open:

MR. WALKER: He said he was going to develop it.

QUESTION: When?

MR. WALKER: I don't know. He didn't have a specific plan. But isn't that what TMT does? They buy property and develop it.

RP (6/26/13) at 213: 6-9.

The testimony of Mr. Alan Laster, TMT's counsel, is consistent with both Mr. Zipper and Mr. Walker:¹¹

QUESTION: But then—I want to focus on this 'relocate or alter utilities' language.

MR. LASTER: Mm-hmm.

QUESTION: What's your understanding of the meaning of that language?

MR. LASTER: I think exactly what it says, is that the buyer had the right to relocate or alter those utilities and move them, move those lines.

QUESTION: Move them where?

MR. LASTER: Anywhere, but the discussion was ultimately to move them off of the parcel being acquired and onto other property of the seller so that, you know, there would be no further need for this easement. And so the—you know, the mobile home park would have control over its utilities and service, and it wouldn't be the responsibility of the buyer any more, and the parties could just develop their properties and treat their properties separately.

¹¹ It is incorrect for Greenway to characterize Mr. Laster as the single piece of evidence in support of TMT's position. However, even if the Court were to agree with Greenway, there is no minimum quantum associated with substantial evidence. *See, e.g., Williams v. Bartz*, 52 Wn. 153, 100 P. 186 (1909) ("If there is substantial evidence in the record sustaining the verdict and judgment, though it be but the evidence of one witness and that witness the person in whose favor the verdict and judgment is rendered, we have no rightful power to reverse the judgment for want of facts, no matter how strongly we may be convinced that the evidence preponderates with the other side").

RP (6/25/13), at 152:6-21.

QUESTION: And so if this sentence means what you're stating it means, that it gives TMT Development Company Inc., who was the party that entered into this agreement at that time, the right to do work on Greenway—I'm sorry, the Walker Family Trust's property, the seller's property, wouldn't that need to be documented in this agreement?

MR. LASTER: Not necessarily. I think the parties could agree that the right to relocate, you know, included the right to have that work done and transfer it across the line. * * *

RP (6/25/13), at 153:8-16. There is substantial evidence to support Trial Court Finding of Fact No. 15 and it should be upheld.

C. Assignment of Error: Trial Court Conclusions of Law Nos. 1 and 2

1. Preservation of Error

As set out in Sections A(1) and A(2), above, Greenway is also precluded from attempting to assign error to Trial Court Conclusions of Law Nos. 1 and 2 given its position at trial, which invited any alleged "error" and is inconsistent with its current argument.

2. Standard of Review

Conclusions of law are reviewed *de novo* and are upheld if supported by the findings of fact. *State v. Williams*, 96 Wn.2d 215, 220,

634 P.2d 868 (1981). A decree of specific performance "rests within the sound discretion of the trial court." *Crafts v. Pitts*, 161 Wn.2d 16, 29, 162 P.3d 382 (2007). A trial court abuses that discretion if its decision is "manifestly unreasonable or based on untenable grounds or untenable reasons." *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997) (citations omitted). A court's decision is manifestly unreasonable if it is "outside the range of acceptable choices, given the facts and the applicable legal standard." *Id.* at 47. The decision is based on untenable grounds if "the factual findings are unsupported by the record." *Id.* Finally, the decision is based on untenable reasons if it is "based on an incorrect standard or the facts do not meet the requirements of the correct standard." *Id.*

3. Argument

Trial Court Conclusion of Law No. 1 states that:

Plaintiff has met its burden of proving by clear and unequivocal evidence its contract right to move the Utilities off of the TMT Property and onto the Greenway Property, which right is consistent with the parties original intention to move the Utilities in a manner that would facilitate the development of each parcel of property.

CP 383, at ¶ 1. Trial Court Conclusion of Law No. 2 states that:

Each of the three alternatives proposed by the Plaintiff for moving Greenway's

waterlines and water meter off of the TMT Property and onto the Greenway Property is a fair and reasonable exercise of its contractual right to move the Utilities off of the TMT Property and onto the Greenway Property and is consistent with the parties' original intent to move the Utilities in a manner to facilitate future development.

CP 383, at ¶ 2. Greenway argues only that the findings of fact do not support Trial Court Conclusions of Law Nos. 1 and 2. Opening Brief, at 38. However, there can be no real dispute that those conclusions of law are adequately supported pursuant to an abuse of discretion standard.

Greenway even concedes that Finding of Fact No. 15 supports the conclusion that TMT "had a right to specific performance under the Agreement." Opening Brief, at 39. Greenway's attempt to sidestep this Finding of Fact by asserting that it is "not supported by substantial evidence" is without merit, as addressed in Section B(3), above.

In fact, Conclusions of Law Nos. 1 and 2 are supported by the entirety of the Findings of Fact and underlying evidence. Specific performance is appropriate when "there is a valid binding contract; a party has committed or is threatening to commit a breach of its contractual duty; the contract has definite and certain terms; and the contract is free from unfairness, fraud, and overreaching." *Crafts v. Pitts*, 161 Wn.2d at 24. In

addition, a court should "ensure enforcement will not be oppressive, unconscionable, or result in undue hardship to any party involved." *Id.*

There is no dispute that the subject agreement was a valid and binding contract with definite and certain terms and that it was free from "unfairness, fraud, and overreaching," as required. CP 381 (FoF 2;3). Greenway's counsel conceded immediately in opening statement at trial that: "the existence of the contract is not at issue." RP (6/25/13) at 27:12-13. In addition, Greenway's counsel confirmed that the subject agreement was drafted after input by both parties and that it was important to both parties that TMT be allowed to move the subject utilities in order to facilitate future development.

MR. ZIPPER: My intent was to document what Tom Moyer and Mike Walker had agreed to, and what that was, and it did at the time and it still seems very clear and simple to me, Mike Walker wanted to sell the Trust's property, Tom Moyer wanted to buy it. There were utilities spidering all over the place and Tom Moyer was going to develop the property he needed to move the utilities. **Mike Walker, on behalf of the Trust, wanted to give Tom Moyer Theatres flexibility and the ability to develop the property and move the utilities but, at the same time, making sure that the Trust was protected.** So that if Tom Moyer Theatres was going to move them somewhere, Mike was going to get prior notice, and that he would need to provide consent before they just went ahead and did whatever they wanted to do. **He wanted to be involved in the process so that it could be done right, done in a way that he was**

comfortable with, but he wanted to give Tom Moyer Theatres flexibility to move the utilities on its property so that it could develop the property in the most effective manner.

Ex. 51, at 16:19-18:2. In fact, Greenway admitted at the pleading stage that TMT "has the right under the Agreement to relocate utilities located on the Property." [CP 24, ¶ 15; CP 31, ¶ 15].

Greenway's sole complaint is that the agreement itself did not spell out the precise location of where to move the utilities. But, as acknowledged by Greenway, that has to do with the remedy itself. *Crafts*, 161 Wn.2d at 24 (stating that enforcement should not be "oppressive, unconscionable, or result in undue hardship to any party involved"). And, with respect to that remedy, Greenway was given ample opportunity to present its position of where those utilities should be moved. Greenway presented nothing to contradict TMT's evidence of the most fair and reasonable methods of relocating the utilities: Greenway did not rebut the testimony of TMT's engineer that the alternative plans presented by TMT would be the least impactful to Greenway's property, and Greenway did not present any evidence of its own engineer or its own calculation of costs.

With respect to Exhibit 3, Mr. Walker testified that the issue was with the proposed location of the water meter in a potential right of way

that would come into effect only if and when Greenway develops its property. RP (6/25/13), at 40:19-42:22. However, Mr. Walker testified that there were no current plans to develop that property. RP (6/25/13), at 43:2-5. In addition, Mr. Brady Berry, the civil engineer with WHPacific that put together TMT's proposed plans, testified that any development of Greenway's property beyond its current use would render the current water lines obsolete in any event. RP (6/25/13), at 111:18-25.

Mr. Walker then confirmed that Exhibit 4 had been proposed in an attempt to alleviate his concerns with the location of the water meter provided on Exhibit 3:¹²

QUESTION: Is it your testimony you were describing to the contractor that the placement of the—proposed placement of the water meter was in the right of ways that you described?

MR. WALKER: Yes.

QUESTION: And, as a result, Exhibit 4 was generated.

MR. WALKER: Yes.

RP (6/25/13), at 45:17-22.

¹² Mr. Pile testified that, while Exhibits 3 and 4 were dated October 11, 2012, versions of plans had been shared with Greenway since 2008. RP (6/25/13), at 68:8-69:22; 73:13:22.

And yet, Mr. Walker objected to that proposal as well on the basis that he believed it would require an easement to the City to do maintenance on the water meter. RP (6/25/13) at 45:23-47:3. But an easement would be required in any event. Ex. 22; RP (6/25/13) at 53:24-57:4.

Mr. Walker stated that he had his own idea about where the water meter could be located on his property:

QUESTION: As you sit here today, do you have an alternative location to the water meter as it's identified as No. 1 on Exhibit 3?

MR. WALKER: If I was going to place it on our property?

QUESTION: Yes.

MR. WALKER: Yes.

QUESTION: Where is that?

MR. WALKER: It would be at the opposite end of the property.

RP (6/25/13) at 49:14-20. But even this location would require the same type of easement to the City as found on Exhibit 3. Ex. 22; RP (6/25/13) at 53:24-57:4.

Mr. Walker confirmed that his complaint was not about whether TMT could relocate the utilities to Greenway's property but where exactly on Greenway's property they should go:

QUESTION: Mr. Walker, you testified about Exhibit 22 that you went to the City of Vancouver to discuss a new proposed location for the water meter. Why did you do that?

MR. WALKER: Because during this entire process, no one from TMT ever asked me where I would like to have the meter located. * * *

RP (6/25/13) at 62:12-17.¹³

Indeed, the only objections ever expressed to TMT regarding the proposed plans set forth in Ex. 3 and Ex. 4 were with respect to the potential right-of-way and easement locations:

QUESTION: Do you have under—some understanding of Greenway's objections to the plans identified on Exhibit 3 and 4?

MR. PILE: I do.

QUESTION: What is your understanding?

MR. PILE: Both the right of way concerns of the future additional development of 69th Street in particular, as well as the necessity of an easement to the City of Vancouver for the purposes of providing the water service.

QUESTION: Has any other objection about the plans themselves been expressed, to your knowledge?

MR. PILE: No.

RP (6/25/13), at 95:22-96:7.

¹³ This, of course, is untrue as is evidenced by the extensive re-working of TMT's engineered plans pursuant to Mr. Walker's input, as discussed in Section III, above.

And yet, Greenway never proposed its own plans. RP (6/25/13) at 97:4-5. What Greenway did do was execute a utility service covenant on December 19, 2012. Ex. 19; RP (6/25/13) at 81:6-21. That utility service covenant had been transmitted to Greenway in July 2008 with the note: "Otherwise, I believe that if you sign these documents from the City, we should be able to finally commence work on this project very shortly." Ex. 10; RP (6/25/13) at 80:24-81:5.

Exhibit 11, sent shortly thereafter, enclosed an early iteration of plans and stated that: "This would ensure that all work will be done on Mr. Walker's property." RP (6/25/13), at 83:8-20.

Mr. Pile of TMT explained the significance of the utility service covenant:

QUESTION: If the water meter is going to be placed on Greenway's side, Greenway needs to sign this utility covenant.

MR. PILE: Correct. It goes with the ownership of the property where the meter would be placed.

RP (6/25/13) at 78:11-14.

QUESTION: To your understanding, is a utility service covenant required to be signed by Greenway if the work is going to be performed on TMT's side of the line?

MR. PILE: No. The—yeah, the purpose s for it to run with the property—the owner of a particular property would be signing this, so, yeah, there

would be no reason for Greenway to sign on behalf of Tom Moyer Theatres if the meter was going to be located on the Tom Moyer Theatres' side of the line.

RP (6/25/13) at 81:22-82:5.

TMT took great care to address Greenway's concerns and propose alternate plans that were the least impactful as possible. Mr. Brady Berry, the civil engineer with WHPacific that put together TMT's proposed plans, testified about the "charge of the project":

QUESTION: Now, on either Plaintiff's Exhibit 3 or 4, the line itself runs—it's a got a jog in it, but it generally runs north and south. Why that location?

MR. BRADY: Well, we were trying to—the—kind of the charge of the project was to try to minimize the impact to the users or the residents of the mobile home park. And so going adjacent to the property line, we're going through several people's yards, and I don't think we could miss one of the mobile homes along that north-south line.

So what we tried to do was go through, make the crossings in more of the road and as close to the existing roads as possible with minimizing the amount of damage to the existing roads. And then we'd connect back in where the existing 2-inch line comes from 73 Street and hook back in, essentially reestablish the connection the way it was originally.

RP (6/25/13) at 110:14-111:5.

In addition, the \$40,000 alternative is directly related to the estimated costs of the two plans TMT proposed (Exs. 3 and 4). Ex. 21; RP (6/25/13) at 94:21-95:21.

Now that the record is closed, Greenway attempts to ignore the fact that it has been given its choice of those uncontested alternatives, including an alternative of being paid a specified amount of money (an amount that was not contested during trial) in order for Greenway to complete the work on its own. And that is after Greenway was given a final opportunity post-trial to propose its own alternative to relocation of the utilities, which Greenway refused to do.¹⁴

There is nothing "oppressive," "unconscionable" or causing "undue hardship" in the court's giving Greenway its choice of uncontested alternatives. Nor is a remedy requiring action (or inaction) to land unusual. *See, e.g., Johnson v. Mt. Baker Park Presbyterian Church*, 113 Wn. 458, 194 P. 536 (1920) (enforcing a restricted building clause on equitable principles). The remedy fashioned by the trial court is appropriate and necessary, and there is no support for Greenway's argument otherwise.

¹⁴ On August 16, 2013, at a hearing on the proposed findings of fact and conclusions of law, Greenway's counsel stated that: "at this point, Defendants are not willing to choose Alternatives 1, 2 or 3 that were discussed at trial, and are not willing to propose an Alternative No. 4. * * * We don't have any alternative proposal to this structure that's laid out." RP (8/16/13) at 18:22-19:3.

D. Assignment of Error: Admission of Exhibits 13 through 18 and 20

1. Preservation of Error

Error may not be predicated upon a ruling which admits or excludes evidence unless "a substantial right of the party is affected, and * * * In case the ruling is one admitting evidence, a timely objection or motion to strike is made, stating the specific ground of objection, if the specific ground was not apparent from the context * * *

ER 103(a).

In this case, the trial court made only a tentative ruling with respect to Greenway's motion in limine regarding Exhibits 13 through 18 and 20:

COURT: So to the extent, again, if there are some that are—fall within being authored solely for settlement as getting into the area of settlement discussion rather than in—other purposes that are allowed, then that would be a limitation. [TMT's counsel] is suggesting those have already been excluded, but if there are things that would go beyond that, then that would be excluded if it is solely for purposes of settlement and clarified in that manner.

RP (6/25/13) at 19:13-20. Therefore, Greenway was required to make its objection at the time any disputed evidence was offered. *See, e.g., Eagle Group, Inc. v. Pullen*, 114 Wn. App. 409, 416-17, 58 P.3d 292 (2002), *rev. den.*, 149 Wn.2d 1034, 75 P.3d 968 (2003) (stating that when a trial court

makes a tentative ruling before trial, "error is not preserved for appeal unless the party objects to admission of the evidence when it is offered, allowing the court an opportunity to reconsider its prior ruling"); *see also State v. Mak*, 105 Wn.2d 692, 719, 718 P.2d 407 (1986), *cert. den.*, 479 U.S. 995 (1986) (it is "well established that if a specific objection is overruled and the evidence in question is admitted, the appellate court will not reverse on the basis that the evidence should have been excluded under a different rule which could have been, but was not, argued at trial") (internal citations omitted).

Greenway's objection to Exhibit 13 at trial was that it covers "settlement discussions not related at all to the easement agreement." RP (6/25/13), at 86:3-7.

Greenway's objections to Exhibits 14, 15, 16, 17, 18 and 20 at trial were that those items of correspondence covered "a brand-new agreement." RP (6/25/13), at 87:24-88:8; 89:3-11; 89:25-90:4; 90:23-91:2; 91:22-24; 93:2-5.

2. Standard of Review

A trial court's decision to admit evidence is reviewed pursuant to an abuse of discretion standard. *See, e.g., State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003).

3. Argument

Exhibits 13 through 18 and 20 are nothing more than TMT and Greenway attempting to proceed with the undisputed right of TMT to relocate or alter the subject utilities. They are not settlement communications in any sense of the word and were properly admitted by the trial court.

Exhibit 13 is a letter drafted by Greenway's counsel that, contrary to Greenway's representation, is directly related to the subject Agreement and Addendum:

* * * Now is an appropriate time for TMT to move all of the utility lines so they no longer run through TMT's property. I want to point out that, despite your statement in your October 30, 2008 letter to Mr. Walker, his failure to sign the Utility Service Covenant did not waive any of TMT's obligations under the Agreement or the Addendum, **including its obligation to move the utilities.** * * *

While I recognize moving the utility lines will result in some cost to TMT, **these costs were clearly contemplated under the Agreement and the Addendum.** Moving the lines will eliminate the need for the parties to work with one another on utility issues in the future. In addition, once you move the utility lines, the responsibility and cost of maintaining and repairing the utility lines will shift to Mr. Walker.

* * *

We believe some form of agreement is necessary **to comply with the requirement in Section 1 of the Addendum** which provides that in no event can

TMT move the utilities without the prior written consent of the LLC. The Waterline Service Agreement serves as the LLC's written consent, whereas the Utility Service Covenant does not satisfy the written consent provision.

Ex. 13. Greenway's counsel, Mr. Zipper, confirmed that Exhibit 13 should not be characterized as a Rule 408 settlement communication.

QUESTION: Okay. You mentioned a couple times the idea that these communications between counsel—between the parties, let's say, were, in your mind, settlement communications. Is that a fair characterization of your testimony?

MR. ZIPPER: I think that there would be some communications that would be considered settlement negotiations but I also think it—that becomes difficult to answer because this goes back for years, as you know. And so some of these letters—I mean I was trying to settle issues between the parties but I wouldn't necessarily say that that was settlement negotiations in consideration for a pending trial. I was just simply trying to resolve matters. That went on for a long, long time. So I don't really—I think you can—once the case was filed and the issues with the waterline became more focused, I think maybe that might be when it was specifically—oh, I guess I'd say it this way: The negotiations and communications between the parties would probably be considered in furtherance of settlement related to the pending case. Anything outside of that would have been just simply the parties trying to settle matters.

Ex. 51, at 29:12-30:7.

MR. ZIPPER: * * * Mike Walker is very good at reading and understanding those plans. It was not a

role that he asked me to take on or needed me to take on. He understands and always understood where the utilities were, where the main lines might be, he's got records going back from when his father started the park or bought it. So I was not—even back to 2008, I was not too focused on where the practicalities involved in moving a water meter and moving waterlines, I did not have a good understanding of that.

QUESTION: Okay.

MR. ZIPPER: I knew that, you know, for example back—I think back in 2008 where the water meter was proposed to be put was on—I believe it was on Greenway Terrace property, and Mike was informing me back then that I believe as a result of the re-zoning—or a re-zoning of both properties, that when either side is developed, I believe a 30-foot right-of-way easement should be dedicated or built and that the water meter was going to be put in that right-of-way. Meaning that if Mike tried to sell the LLC's property or if he tried to develop it, then he would have to move the water meter again. And so he was—he, I believe through me, notified TMT that that's not a good place to put it because he would have to move it again. That was his understanding.

Ex. 51, at 37:12-38:9. Evidence of relevant transactions between parties should not be excluded. *See, e.g., Matteson v. Ziebarth*, 40 Wn.2d 286, 294, 292 P.2d 1025 (1952) (stating that when testimony is introduced as "one of the actual transactions between the parties" while a proposal is under consideration, it has a "bearing upon appellant's real objection to the proposal and his good faith in opposing it" and the testimony is therefore

relevant and unobjectionable on the ground that it is an offer of compromise). Exhibits 14 through 18 and 20 are likewise evidence of relevant transactions between TMT and Greenway with respect to the undisputed right of TMT to relocate or alter the subject utilities.

Even if the Court were inclined to consider any of the objected exhibits as a "compromise negotiation," those communications would still be admissible pursuant to Rule 408, which allows the admission of evidence otherwise discoverable even though presented in the course of compromise negotiations, along with compromise negotiation evidence offered for another purpose. *See, e.g., Brothers v. Public School Employees of Washington*, 88 Wn. App. 398, 408, 945 P.2d 208 (1997) ("considering the ongoing nature of the discussions and the centrality of the negotiations to the issue of breach, the negotiation evidence was properly admitted").

VI. RAP 18.1 FEE REQUEST

TMT requests an award of its fees and costs incurred in this appeal pursuant to the terms of the Agreement at issue in this litigation and RAP 18.1.

VII. CONCLUSION

The trial court's findings, conclusions and evidentiary rulings are proper and should be upheld. This appeal should be dismissed with

prejudice, and TMT should receive an award of its fees and costs incurred in this appeal.

RESPECTFULLY SUBMITTED this 28th day of May, 2014.

McEWEN GISVOLD LLP

By:



J. Kurt Kraemer, WSBA No. 29509

Katie Jo Johnson, WSBA No. 46143

Of Attorneys for Respondent Tom
Moyer Theatres

NO. 45433-5-II
COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

TOM MOYER THEATRES, an
Oregon partnership,

Respondent,

vs.

MICHAEL J. WALKER,
DEBORAH A. WRAY, and
KRISTIN D. STUMP, Co-Trustees
of the Amended and Restated
Walker Family Trust dated August
18, 2001; and **GREENWAY
TERRACE, LLC**, an Oregon
limited liability company,

Appellants.

DECLARATION OF SERVICE

I certify that on the date set forth below, I served a copy of Brief
of Respondent and Declaration of Service on the following of counsel:

DECLARATION OF SERVICE - 1

MCEWEN GISVOLD LLP
1100 S.W. Sixth Avenue, Suite 1600
Portland, Oregon 97204
Telephone: (503) 226-7321; Facsimile: (503) 243-2687
Email: kurtk@mcewengisvold.com

Steven E. Turner 1409 Franklin St., Ste. 216 Vancouver, WA 98660 steven@steventurnerlaw.com	<input checked="" type="checkbox"/> US Mail <input checked="" type="checkbox"/> Electronic Mail
Michael B. King Carney Badley Spellman, PS 701 Fifth Avenue, Ste. 3600 Seattle, WA 98104 king@carneylaw.com	<input checked="" type="checkbox"/> US Mail <input checked="" type="checkbox"/> Electronic Mail

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 28th day of May, 2014.

McEWEN GISVOLD LLP



Katie Jo Johnson, WSBA No. 46143
McEwen Gisvold, LLP
1100 SW Sixth Ave., Ste. 1600
Portland, OR 97204
Telephone: (503) 226-7321
Fax: (503) 243-2687
E-mail: katiejoj@mcewengisvold.com

DECLARATION OF SERVICE - 2

MCEWEN GISVOLD LLP
1100 S.W. Sixth Avenue, Suite 1600
Portland, Oregon 97204
Telephone: (503) 226-7321; Facsimile: (503) 243-2687
Email: kurtk@mcewengisvold.com

MCEWEN GISVOLD LLP

May 28, 2014 - 4:34 PM

Transmittal Letter

Document Uploaded: 454335-Respondent's Brief.pdf

Case Name: Tom Moyer Theaters v. Michael J. Walker, et al.

Court of Appeals Case Number: 45433-5

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Katiejo Johnson - Email: katiejoj@mcewengisvold.com

A copy of this document has been emailed to the following addresses:

kurtk@mcewengisvold.com
katiejoj@mcewengisvold.com
steven@steventurnerlaw.com
king@carneylaw.com