

FILED

DEC 08 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 292657-III

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

DOUGLAS CAMPBELL and MICHELLE A. CAMPBELL, husband and
wife, and ROBERT E. SUKERT II, an unmarried person,

Appellants,

v.

DONALD W. OAKLAND and CHERRIS J. OAKLAND, husband and
wife,

Respondents.

RESPONDENTS' RESPONSE BRIEF

Jeff Slothower, WSBA 14526
LATHROP, WINBAUER, HARREL,
SLOTHOWER & DENISON, LLP
P.O. Box 1088
Ellensburg, Washington 98926
(509) 962-8093

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I. INTRODUCTION

In this case Appellants Douglas Campbell and Michelle A. Campbell (“Campbell”) and Robert E. Sukert, II (“Sukert”) seek to avoid their contractual obligations to Respondents Donald and Cherris Oakland (the “Oaklands”). In their attempt to avoid their contractual obligations, Appellants present no evidence and instead make vague, general, unsubstantiated statements that are at odds with the terms of the contract between Appellants and Respondents, Appellants’ own actions and the facts.

II. RESPONSES TO ASSIGNMENTS OF ERROR

2.1 Response to Assignment of Error 1:

The trial court did not err in granting summary judgment in favor of the Oaklands because Appellants came forward with no disputed facts demonstrating clear, cogent and convincing evidence that the alleged misrepresentation was material or that Appellants were justified in relying on the alleged misrepresentation. As a result the trial court did not err in concluding Appellants were not entitled to rescind the contract.

2.2 Response to Assignment of Error 2:

The issue of whether the trial court erred in failing to reduce the cash bond is moot and there is no reason for this court to address this issue.

2.3 Response to Assignments of Error 3 and 4:

The trial court did not err in failing to establish a supersedeas bond because when Appellants requested a supersedeas bond amount there was no appeal pending.

2.4 Response to Assignments of Error 5 and 6:

The trial court properly applied the “Lodestar” method of determining Respondents’ attorneys’ fees and the costs awarded by the trial court are all recoverable.

III. RESPONSE TO STATEMENT OF THE CASE

The Oaklands owned property near the intersection of Highway 903 and Bullfrog Road in the vicinity of Roslyn in Kittitas County, Washington. The property is near the Suncadia Master Planned Resort and in an area where there has been intense speculation on real estate over the last several years.

In February of 2007 Respondents had entered into a Purchase and Sale Agreement with Appellant Sukert, who owned adjoining commercial and suburban property that he had acquired over the years and rezoned. CP 229, *l.* 15 to CP 230, *l.* 14. In March of 2007 Sukert rescinded the offer and that transaction did not close. CP 230, *ll.* 15-16.

In April of 2007, the Oaklands listed the property for sale with Paul Ingram, a real estate agent in Cle Elum, Washington. CP 230, *ll.* 22-23. Mr. Ingram marketed the property as having a potential for commercial zoning and as being presently zoned Suburban. CP 239. At various times, Mr. Ingram identified the property as Suburban 2, as opposed to Suburban.¹

On July 19, 2007 Kittitas County reviewed all of its development regulations, including the suburban zone, and changed the minimum lot size

¹ In some of Ingram’s marketing materials, he identified the property as Suburban 2. See CP 236. “Suburban 2” also appears in the materials as “Suburban II.” See CP 25.

in the suburban zone from 1 acre to 5 acres. CP 231, *ll.* 14-15. However, the County allowed all owners of land zoned Suburban the option of converting their property to 1-acre parcels, and thus from July 19, 2007 to July 19, 2008 the property Campbell and Sukert purchased from the Oaklands could have been divided into smaller parcels and used for 1-acre density. This was referred to as a “sunset clause.” CP 231, *ll.* 20-22. Despite Appellants’ attempts to confuse the situation, the action by Kittitas County was not a site-specific rezone of the Oakland property, but instead was a change in the text of the zoning code that applied to the entire County.

On September 6, 2007, Campbell made an offer to purchase the property from the Oaklands. CP 231, *ll.* 23-24. Initially, the offer from Campbell was an all-cash at closing, no feasibility, no contingency offer. Mr. Campbell and the Oaklands ultimately agreed to modify the purchase and sale agreement to allow for the sale and purchase of the property pursuant to a real estate contract with a balloon payment. CP 231, *l.* 24 to CP 232, *l.* 14. The real estate contract provided as follows:

“15. CONDITION OF THE PROPERTY. Buyer accepts the property in its present condition and acknowledges that Seller, his/her agents, and sub-agents, have made no representation or warranty concerning the physical condition of the property or the uses to which it may be put other than as set forth herein. Buyer agrees to maintain the property in such condition as it complies with all applicable laws. “

The real estate contract further provided:

“29. OPTIONAL PROVISION-ALTERATIONS. Buyer shall not make any substantial alternations or improvements on the property without the prior written

consent of Seller, which consent will not be unreasonably withheld.”

Finally, the real estate contract contains the following paragraph:

“34. ENTIRE AGREEMENT. This contract constitutes the entire agreement of the parties and supersedes all prior agreements and understandings, written or oral. This contract may be amended only in writing executed by Seller and Buyer.”

CP 173-181.

It was not until the Oaklands had moved out of the house on the property and were at the closing that they became aware that Mr. Sukert was also involved in the transaction and would be purchasing the property along with Mr. Campbell. CP 232, *ll.* 15-19.

Mr. Campbell and Mr. Sukert understood the property to be zoned suburban. CP 239-241. Campbell and Sukert purchased the property with the intention of rezoning the property from the suburban zone to a commercial zone and then using the property for commercial purposes. CP 48, *ll.* 7-10; CP 53, *ll.* 16-19; CP 57, *ll.* 10-13; CP 239. In addition to the rezone to commercial purposes and apparently as an alternative plan, Campbell and Sukert intended to split the property and use it for development as residential use at a greater density for resale or renting. CP 53, *l.* 20 to CP 54, *l.* 4; CP 48, *ll.* 9-12; CP 239. In February of 2008, Campbell and Sukert contend they learned that the suburban zoning had been changed and that the minimum lot size was now 5 acres as opposed to 1 acre. CP 239. Campbell and Sukert mistakenly believed that they were now precluded from dividing the property into 1-acre parcels. CP 239.

Campbell and Sukert contend they learned of the zoning change from an appraiser who was working with their mortgage broker in February of 2008. CP 239. It does not appear Campbell or Sukert did anything to verify the information they received from their mortgage broker, nor did they undertake any additional effort to attempt to subdivide the property and, thus, Campbell and Sukert let the one-year “sunset clause” expire in July of 2008 without having divided the property into 1-acre parcels. See generally, CP 239, CP 50 and CP 59. During this period of time, Campbell and Sukert had a land use consultant, David Taylor, who was the former Kittitas County Planning Director, working with them on options for the development of the property. CP 48, *l.* 13 to CP 49, *l.* 3; CP 57, *ll.* 5-9. Campbell and Sukert did take steps to start to rezone the property to a commercial zone but abandoned that effort. CP 242-246.

On February 12, 2009, almost one year to the day after learning that the zone had been changed, Campbell and Sukert approached the Oaklands and attempted to negotiate a reduced balloon payment due under the real estate contract. CP 239-241. Campbell and Sukert asserted the property was worth less because the suburban zone had changed and that they could no longer split the property. CP 239-241. In the letter from Mr. Campbell to the Oaklands, Mr. Campbell does not offer an explanation of why the attempt to rezone the property to commercial use was abandoned, nor does he explain why the option to divide the property into 1-acre parcels up until July 19, 2008 was not pursued. CP 239-241. Significantly, in the letter attempting to renegotiate the balloon payment, Mr. Campbell makes no

mention of rescinding the contract. Mr. Campbell does not suggest that he and Sukert believe the zone change prior to closing was a misrepresentation. Lastly, Mr. Campbell fails to mention that they were attempting to borrow \$600,000.00, when the payoff on the real estate contract was \$365,000.00. CP 65, *ll.* 18-20; CP 173-181; CP 186-191. Mr. Campbell does not mention that the property actually would have appraised for \$485,000.00, which is \$20,000.00 more than Campbell and Sukert paid the Oaklands for the property initially. CP 67, *ll.* 3-14. In fact, Mr. Campbell lied to the Oaklands when he asserted in his letter that “\$340,000.00 to \$350,000.00 was the correct appraisal.” CP 239.

Shortly after they purchased the property, Campbell and Sukert began making improvements to a garage located on the property. They did this without obtaining permits from Kittitas County and without permission of the Oaklands, which they were required to obtain under the real estate contract. CP 232, *l.* 20 to CP 233, *l.* 6.

Campbell and Sukert assert they are entitled to rescission and restitution apparently based upon the alleged failure of the Oaklands to disclose the zoning of the property had been changed by the County after the property was listed but before Campbell and Sukert made an offer on the property. They also asserted below that the garage was not eligible for use as a legal dwelling unit and therefore could not be rented out, thus presumably another basis for rescission. CP 3, *ll.* 8-11.

IV. ARGUMENT

4.1 Standards for Summary Judgment

The object and function of summary judgment is to avoid a useless trial where there are no issues of material fact.² Campbell and Sukert, as the parties opposing the motion for summary judgment, must, by affidavit or other extraneous material, show specific facts demonstrating that there is a genuine issue of material fact for trial.³ As this court said in *Tiger Oil Corp. v. Yakima County*⁴:

“After the moving party submits adequate affidavits, the nonmoving party must set forth specific facts rebutting the moving party's contentions and disclosing that a genuine issue of material fact exists. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 12-13, 721 P.2d 1 (1986). Mere allegations or conclusory statements of facts, unsupported by evidence, do not sufficiently establish such a genuine issue. *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989). In addition, the nonmoving party “may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value.” *Seven Gables Corp.*, 106 Wn.2d at 13.”

² *Fahn v. Cowlitz County*, 93 Wn.2d 368, 610 P.2d 857 (1980), appeal after remand 95 Wn.2d 679, 628 P.2d 813 (1981); *Palmer v. Waterman S.S. Corp.*, 52 Wn.2d 604, 328 P.2d 169 (1958), certiorari denied 359 U.S. 985, 79 S.Ct. 940, 3 L.Ed.2d 933 (1959).

³ *Plaisted v. Tangen*, 72 Wn.2d 259, 432 P.2d 647 (1967); *Leland v. Frogge*, 71 Wn.2d 197, 427 P.2d 724 (1967); *Meissner v. Simpson Timber Co.*, 69 Wn.2d 954, 421 P.2d 674 (1966); *Retail Store Employees Local 631 v. Totem Sales, Inc.*, 20 Wn. App. 278, 579 P.2d 1019 (1978).

⁴ Court of Appeals of Washington, Division III, No. 28563-4-III, November 16, 2010.

A material fact is one upon which the outcome of the litigation depends.⁵ In ruling upon a motion for summary judgment a court is permitted to pierce the pleadings and grant relief by summary judgment when it clearly appears, from uncontroverted facts set forth in the affidavits, depositions or admissions on file, that there are no genuine issues of fact upon which the outcome of the litigation depends.⁶

While affidavits and declarations in opposition to a motion for summary judgment must be based upon personal knowledge and not hearsay, the affidavits must also contain “specific” facts, not ultimate or conclusory facts or statements.⁷ As the court said in *Klossner v. San Juan County*⁸:

A defendant cannot push a plaintiff out of court by swearing that the plaintiff has no case, nor may a plaintiff remain in court simply by swearing that he or she does have a case.

The Sukert Declaration, the only declaration filed in opposition to the Motion for Summary Judgment, fails to provide specific facts and instead provides conclusory statements, such as the following:

the Oaklands and their agents represented that the Property was zoned “suburban” or “suburban II.”

CP 22, ll. 21-22.

⁵ *Ruffer v. St. Frances Cabrini Hospital*, 56 Wn. App. 625, 784 P.2d 1288 (1990), review denied; *State v. Kelly*, 114 Wn.2d 1023, 792 P.2d 535 (1990).

⁶ *Preston v. Duncan*, 55 Wn.2d 678, 349 P.2d 605 (1960).

⁷ CR 56(e); *Peninsula Truck Lines, Inc. v. Tooker*, 63 W.2d 724, 388 P.2d 958 (1964); *Ragland v. Lawless*, 61 Wn. App. 830, 812 P.2d 872 (1991).

⁸ 21 Wn. App. 689, 586 P.2d 859 (affirmed 93 Wn.2d 42, 605 P.2d 330) (1980).

the Oaklands and their agents did not disclose the rezone to us.

CP 24, l. 2.

We would not have purchased the property had we known...

CP 24, l. 3.

Mr. Sukert is doing nothing more than relying on the bare allegations of Appellants' Amended Complaint. CP 1-4. These argumentative assertions do not create issues of fact upon which the outcome of the litigation is determined and are therefore ineffective to defeat a motion for summary judgment.⁹ These bold assertions do not preclude the Court from granting the Oaklands' motion for summary judgment.¹⁰

4.2 Rescission of a Real Estate Contract

Rescission of a real estate contract can occur only when there is mutual consent to rescind the contract, a demand to rescind by one side with acquiescence by the other, or a material breach by one party with a claim of rescission by the other.¹¹ In Appellants' Opening Brief, they assert at page 17 that "all of the cases cited by the Sellers in support of their motion for summary judgment involve claims for *damages* and are not on point."¹² In their Opening Brief, Appellants then launch into a three-page "cut and paste" from a variety of cases, and in doing so simply ignore the law and the arguments advanced by Respondents at the trial court on the law.

⁹ *Meyer v. University of Washington*, 105 Wn.2d 847, 719 P.2d 98 (1986).

¹⁰ *Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 753 P.2d 517 (1988).

¹¹ *Vandercook v. Reece*, 120 Wn. App. 647, 86 P. 3d 206 (2004).

¹² Opening Brief of Appellants, page 17.

Specifically, Respondents based much of their argument on the Washington Court of Appeals case entitled *Bloor v. Fritz*¹³. In *Bloor*, the trial court rescinded the contract between the Bloors and the Fritzes, required the Fritzes to pay the purchase price, accrued interest, late charges and foreclosure fees, ordered the Bloors to return the property to the Fritzes, and lastly awarded attorneys' fees based upon a Lodestar multiplier.¹⁴ The differences between the case at hand and the facts in *Bloor* are the type of alleged misrepresentation and the fact that the *Bloor* decision was arrived at after a trial and not a motion for summary judgment. In *Bloor*, the court concluded as follows:

“Contract rescission is an equitable remedy in which the court attempts to restore the parties to the positions they would have occupied had they not entered into the contract. *Hornback v. Wentworth*, 132 Wn.App. 504, 513, 132 P.3d 778 (2006), review granted, 158 Wn.2d 1025, 152 P.3d 347 (2007). We review a trial court's decision to rescind a contract for an abuse of discretion. *Hornback*, 132 Wn.App. at 513, 132 P.3d 778. A court sitting in equity has broad discretion to shape relief. *Hough v. Stockbridge*, 150 Wn.2d 234, 236, 76 P.3d 216 (2003).”

The clear import of the *Bloor* case is that a trial court has broad discretion to shape relief in a case based upon a request for rescission.

¹³ 143 Wn. App. 718, 180 P.3d 805 (2008).

¹⁴ *Id.* at 727.

In *Bloor*, a purchaser of property was trying to rescind the contract because they alleged that it had not been disclosed to them that the house had been used as a methamphetamine lab. Before the court addressed rescission, it went through an analysis of whether there was in fact a negligent misrepresentation by the sellers' real estate agent. Negligent misrepresentation must be proven by clear, cogent and convincing evidence.¹⁵ The court analyzed six elements of negligent misrepresentation: (1) the defendant supplied information for the guidance of another in a business transaction that was false; (2) the defendant knew or should have known that the information was supplied to guide the plaintiff in his business transactions; (3) the defendant was negligent in obtaining or communicating the false information; (4) the plaintiff relied on the false information; (5) the plaintiff's reliance was reasonable; and (6) the false information proximately caused the plaintiff damages. After the negligent misrepresentation analysis, the *Bloor* court analyzed whether rescission was the appropriate remedy.

Appellants in this case assert all they are required to show is there was a misrepresentation that was material, they relied on the misrepresentation and their reliance was justified. Appellants are asserting they are entitled to rescind the contract because of either negligent or intentional misrepresentation. Both negligent and intentional misrepresentation must be proven with clear, cogent and convincing

¹⁵ *Bloor* at 815.

evidence.¹⁶ Appellants have come forward with no clear, cogent and convincing evidence that the Oaklands and/or their agents negligently and/or intentionally misrepresented the property that would entitle Appellants to rescind the real estate contract.

4.2.1 The Oaklands Had No Duty to Disclose the Zoning of the Property.

A seller has a duty to disclose all material facts not reasonably ascertainable to the buyer.¹⁷ Thus, a seller has no liability for non-disclosure of facts that a buyer could reasonably ascertain on their own. In this case, the zone of the property on September 6, 2007 when the Purchase and Sale Agreement was entered into and the zone and uses allowed in the zone when the transaction closed later in September are a matter of public record and were and are reasonably ascertainable by Appellants. At the trial court, Appellants offered evidence that they went to the County to verify the zoning. CP 23, ll. 4-8. Appellants offered hearsay evidence, which the trial court considered over objection, that they went to the County offices on an unspecified date and spoke to an unspecified person who gave them the maps showing the property was zoned suburban. CP 23, ll. 4-8; CP 27 to CP 28. Appellants also provided hearsay evidence, which the trial court considered over objection, that at some unspecified time Mr. Sukert spoke with a Mr. Valoff at the County. CP 23, ll. 14-16. However, this conversation was clearly after the sale. What

¹⁶ *Id.*; see also, CP 10, l. 16 to CP 11, l. 5.

¹⁷ *McRae v. Bolstad*, 32 Wn. App 173, 646 P.2d 771; *Alexander Myers & Co. v. Hopke*, 88 Wn.2d 449, 565 P.2d 80 (1977).

Appellants fail to acknowledge is that a zone text change is a legislative act of the County, notice of which is presumed under the law.¹⁸

The real estate contract signed at closing clearly stated Appellants were taking the property “As Is” and with no representation as to what the property could be used for. An “As Is” clause generally means that the buyer is purchasing property in its present state or condition.¹⁹ The term implies that the property is taken with whatever faults it may possess and that the seller or lessor is released of any obligation to reimburse the purchaser for losses or damages that result from the condition of the property.²⁰ Appellants, by their own admission, bought the property to use for commercial purposes, which would have required a rezone, or to split into two 1-acre parcels. Appellants abandoned the commercial rezone and did not take advantage of the opportunity to divide the property prior to July of 2008, some 10 months after closing.

The zone and whether the garage could be rented were not material facts because Appellants intended to change the use of the property. The zone and whether Appellants could convert and rent the garage were both facts Appellants could easily ascertain. The fact that Appellants failed to do so is not the Oaklands’ problem. The Oaklands and their agent had no duty to disclose the zone and whether the garage could be converted to a rental dwelling. Thus, the Oaklands have no liability for the alleged non-disclosure, if it occurred.

¹⁸ See, e.g., RCW 36.70C.040(4)(b), which establishes the time for commencing a Land Use Petition Act appeal of a legislative action as the date the legislation is enacted.

¹⁹ *Olmsted v. Mulder*, 72 Wn. App 169, 863 P.2d 1355 (1993).

²⁰ *Id.*

4.2.2 Any Representations with Respect to Zoning Were Immaterial and Were Not Relied on By Appellants.

Appellants' stated purpose of acquiring the property was to rezone the property to commercial. CP 48, *ll.* 7-10; CP 53, *ll.* 16-19; see also, CP 57, *l.* 10 to CP 58, *l.* 3. Appellants allege their alternative plan was to divide the property and use it as rental property. CP 48, *ll.* 9-12; CP 53, *l.* 20 to CP 54, *l.* 4. It is at this point that Appellants' story begins to crumble. Mr. Sukert adamantly testified that his plan was to rezone the property but if the rezone failed the fallback plan was to split the property. Mr. Sukert says that he talked to David Taylor, his land use consultant, who told him that if it was zoned suburban it could be split in half. CP 48, *ll.* 15-24. However, Mr. Taylor testifies that he never discussed subdivision of the property into two parcels with Mr. Sukert or Mr. Campbell. CP 57, *ll.* 10-22; CP 59, *ll.* 3-15. Mr. Sukert also testified that at the time they purchased the property it was actually in two separate tax parcels. CP 48, *ll.* 20-24. Thus, the clear conclusions and inferences to be drawn from this evidence is that the fallback plan to split the property into two parcels was either not necessary or, at the very least, contrived by Appellants after they were unable to make the balloon payment due on the real estate contract.

The representation of the zoning of the property by Mr. Ingram, the Oaklands' realtor, was immaterial since Appellants intended to rezone the property from suburban to commercial. The marketing flyers, which were produced by Paul Ingram and viewed by Appellants, identified the property at one point as Suburban II and a second time as Suburban. In each instance, the marketing flyers had the following words at the bottom:

“Information From Reliable Sources, But Not Guaranteed.” CP 25-26. The language put Appellants on notice that they should verify the information if they were concerned about the information.

Furthermore, the real estate contract that Appellants signed specifically says they are accepting the property in its present condition and contains an acknowledgement that the seller and the seller’s agent have made no representation or warranty concerning the physical condition of the property or how the property may be used. CP 173-181. The contract further indicates that the real estate contract is the final and entire agreement of the parties. CP 173-181.

Appellants, in an effort to create an issue of fact, make the conclusory statement that “We would not have purchased the property had we known it had been rezoned to “Rural Residential”...” CP 24, *ll.* 3-4. However, that is not what they indicated to the Oaklands when they wrote a letter in the spring of 2009. CP 239-241. This conclusory statement creates no material issue of fact. If the Oaklands had a duty to disclose the zoning²¹, the disclosure of the zoning, right or wrong, was not material and was not relied on by Appellants.

Appellants also argue the change in zoning substantially diminished the value of the property, however, Appellants presented no evidence of this and did not rely on their appraiser, Rick Winters. Mr. Winters did not testify to what Appellants desired the facts to be. The amount required to pay the contract off was \$365,000. CP 173-181; CP 186-191. However,

²¹ See CP 9, *l.* 15 to CP 10, *l.* 14.

Mr. Winters testified that Appellants were trying to get a loan based on an appraised value of \$600,000, not the amount owed on the real estate contract. CP 65, *ll.* 18-20. Mr. Winters also testified the difference in value between closing in September 2007 and Appellants' attempts to refinance the property in 2008 was based on comparable sales, in other words market factors, not the rezone. CP 66, *ll.* 13-15. Ultimately, Mr. Winters' determination of value, which was never finalized because he was never paid for the appraisal, was \$485,000.00, some \$20,000.00 more than the \$465,000.00 purchase price of the property in September of 2007. CP 67, *ll.* 5-23; see also CP 173-174. Campbell and Sukert's statement that the rezone diminished the value of the property is not supported by the facts in the record and is simply not true.

The misrepresentation, if it occurred, was also not material because the change in zone did not prevent Appellants from trying to rezone the property to commercial. In fact, Appellants applied for a rezone from suburban to commercial, went through the process and ultimately withdrew their application of their own accord, indicating a willingness to further explore options with the City of Cle Elum and with the City of Roslyn. CP 60, *l.* 13 to CP 61, *l.* 25; see also CP 62-63.

Appellants failed to mitigate their damages and their damages, if any, were not proximately caused by the representation as to the rezone. Sukert testified Appellants learned the property had been rezoned in February of 2008 and thus they were no longer able to split the property into two (2) one (1) acre parcels. CP 49, *l.* 24 to CP 50, *l.* 18. First, their

realization was mistaken because a sunset clause allowed the property to be split, but Appellants did not take the time to determine the existence of the sunset clause and its practical effect. CP 23, *ll.* 14-21. Even though the zone was different, they still had the ability to split the property until July of 2008. It was February of 2008 when Appellants learned of the rezone, yet they did not seek rescission when they sent the Oaklands a letter in February 2009 seeking a reduction in the purchase price. Appellants did not seek rescission until they could not make payments under the contract and thus commenced this lawsuit in October of 2009. Appellants are not entitled to rescission when they failed to act with reasonable promptness.²² Furthermore, Appellants' delay in seeking rescission indicates they have waived their right to rescission.²³

Appellants assert there are disputed facts as to whether the misrepresentation was material, however the undisputed facts in the record suggest that the zone of the property was not material because (a) whether the property was zoned suburban, rural residential, or some other zone still allowed the Appellants to rezone the property to commercial, which they started to do and then abandoned; (b) the change in the zone did not thwart their backup plan, if that plan truly existed, because they had approximately 11 months during which they could have split the property into two parcels; and (c) Appellants both acknowledged in the real estate contract that there was no representation as to use. Thus, the undisputed facts are that any

²² *Ferguson v. Jeanes*, 27 Wn. App. 558, 619 P.2d 369 (1980).

²³ *Id.*

representation as to the zoning was not material and was not relied on by Appellants and thus cannot serve as the basis for rescission and restitution.

4.2.3 If Appellants' Relied on the Representations With Respect to Zoning Their Reliance Was Not Justified.

The real estate contract, as discussed above, provides in clear and unambiguous terms the seller is making no representations as to the use the property can be put to other than those set forth in the real estate contract. The real estate contract contains no recitation of the uses the property can be put to. CP 173 to 181. Thus, Appellants' continued reliance on an alleged prior representation as to the zoning was not justified. Secondly, the written representations as to zoning made by Ingram when he prepared the flyers clearly state the information is from reliable sources, but is not guaranteed. CP 25 to CP 26. The logical message to a prospective purchaser is that if the information on the flyer is important to you, you should verify the information.

The two facts above suggest the reliance was unreasonable and not justified. Appellants hired David Taylor as a land use consultant to assist them through the rezone process. They started the rezone process and then withdrew their application of their own accord. It was not until the Oaklands commenced the real estate contract forfeiture process that Campbell and Sukert suddenly raised this issue of the change in zoning as a misrepresentation and for the first time asserted it gave them the ability to rescind the contract.

Appellants also contend they relied on the representation as to zoning. There is no evidence they relied on the representation because they immediately began developing the property for commercial purposes, applied to rezone the property, and after learning that the density had been changed, they failed to do independent inquiry to determine what their options were. Had they done that, they would have known that they could still split the property into two (2) one (1) acre parcels.

There is no basis for the Court to rescind a contract when it is clear Appellants were buying the property to rezone it, they had the present ability to rezone it, they started the rezone process and they withdrew from the rezone process of their own accord. The simple fact is Appellants were speculating on land in the area as a result of the Suncadia Master Planned Resort, and now want to shift the responsibility and cost of that speculation to the Oaklands.

4.3 Appellants Are Not Entitled to Rescission Based Upon a Misrepresentation as to Whether the Garage Could be Converted to a Dwelling Unit

Appellants' argument at the trial court that the alleged representations that the garage could be used as a rental serve as the basis for rescission is specious at best.²⁴ The undisputed facts in the record are Appellants did not physically inspect the property until after the Oaklands had signed the closing documents, so they had no idea what the condition of the garage was until after the transaction closed. CP 55, *ll.* 4-6; CP 82, *ll.* 9-13. After closing Appellants improved the garage into a living unit

²⁴ Appellants elected not to address this alternative basis for relief in their Opening Brief.

without getting a building permit from Kittitas County. CP 51, *ll.* 3-11. Appellants acknowledge they should have gotten a building permit. CP 51, *ll.* 7-11. Had Appellants applied for a building permit they would have learned that they could not use the garage for residential purposes.

Their allegations about the representation of the garage also are inconsistent with their stated plan of splitting the property into two parcels and moving an existing building onto the property. CP 48, *ll.* 2-6. Lastly, the real estate contract specifically provides there was no representation as to the specific use or uses the property could be put to. Thus the alleged misrepresentation as to what the garage could be used for was not material, there is no indication that Appellants actually relied on it, and their reliance was not justified because, again, they had signed a real estate contract that specifically says there was no representation as to the use the property could be put to.

4.4 The Trial Court Did Not Err in Not Determining the Supersedeas Amount to Stay Enforcement of the Money Judgment Pending Appeal.

In the trial court, Mr. Tingvall, on behalf of Appellants, argued Appellants just had to pay a supersedeas bond and it was then up to the Oaklands to object. That is contrary to the pleading he filed with no notice, which is captioned as a “Plaintiff’s Trial Brief and Motion to Determine Supersedeas Amount.” CP 109. When Campbell and Sukert asked the trial court to set a supersedeas bond there had been no appeal filed. Appellants were attempting to establish a supersedeas bond amount to stay the action of the trial court when the trial court had not yet even

entered a final order from which appeal might be taken. Appellants could not enter a notice of appeal or post a supersedeas bond until the trial court entered its final order. Appellants' actions in this regard were wholly premature. Further, the posting of a supersedeas bond to stay enforcement of a judgment pending appeal presupposes that a notice of appeal first be filed. That also had not occurred. There is in fact no certainty that an appeal would have been taken from the trial court's yet to be entered final order. What Appellants ignore is that the relief sought by Respondents in the motion for summary judgment was for payment of attorneys' fees and costs from the bond posted by Appellants at the time the trial court enjoined the contract forfeiture proceeding. In addition, the order entered by the trial court, which Appellants had received notice of, clearly authorized payment of the fees from the cash bond. CP 136 to CP 139. Appellants asked the trial court to set the supersedeas bond prior to entry of the order as opposed to coming to court with a notice of appeal and immediately filing the appeal after entry of the order and before payment of Respondents' attorneys' fees from the cash bond. The Judgment and Order Disbursing Bond Proceeds was entered on July 21, 2010. CP 136. Appellants waited a week, until after the bond proceeds had been disbursed, to appeal. (*Notice of Appeal*, filed July 30, 2010.)

In the event the trial court intended to consider Appellants' flawed supersedeas arguments, the Oaklands objected to the severely deficient supersedeas amount proposed by Appellants. The supersedeas amount to be entered should have been based on the total amount of the attorneys'

fees and costs awarded, plus interest at 12% per annum, plus all attorneys' fees and costs that could reasonably be expected to be incurred on appeal. The trial court was presented with a declaration by the Oaklands' counsel, which declaration asserted he has handled and is currently handling appeals to Division III of the Court of Appeals and to the Supreme Court of the State of Washington, and further asserted that any appeal to Division III of the Court of Appeals will result in fees and costs of at least \$7,500.00 - \$15,000.00, and could reach \$20,000.00. CP 273-298. In addition, it is entirely possible that if Appellants were unhappy with the Court of Appeals decision in this case, further appeal to the Supreme Court could occur. This could take several years to accomplish and would incur more than double the attorneys' fees than the Court of Appeals case. At a minimum, the supersedeas amount should also have included interest at 12% per annum for at least two years from the date of judgment and estimated attorneys' fees and costs on appeal of \$25,000.00 plus the current award of attorneys' fees.

4.5 The Court Should Not Address the Issue of Whether the Trial Court Erred in Not Reducing the Cash Bond.

Appellants admit the issue of whether the trial court erred when it refused to reduce the cash bond when Appellants abandoned their claims of specific performance because the evidence did not support specific performance is moot. Yet Appellants ask this Court to rule on this moot issue to give guidance to trial courts and prevent future litigation on the

same issue. The factors for this Court to decide on an admittedly moot issue are not present in this case.²⁵

4.6 The Trial Court Did Not Err in Awarding Attorneys' Fees to Respondents.

4.6.1 The Award of Attorneys' Fees by the Trial Court was Appropriate.

At the trial court, when the Oaklands moved for summary judgment, they asserted that if the court granted summary judgment, they were entitled to an award of attorneys' fees and costs. There are two bases under which the Oaklands could be awarded their attorneys' fees and costs. First, the real estate contract existing between Appellants and Respondents at paragraph 24 provides that the prevailing party in any litigation arising out of the real estate contract is entitled to an award of attorneys' fees and costs. CP 177. Secondly, the court has the discretion under RCW 61.30.110 and 61.30.120 to award reasonable attorneys' fees and costs to the prevailing party in an action brought to enjoin the forfeiture of a real estate contract. At the trial court level, Appellants simply ignored the attorneys' fees argument and elected not to brief it until after the court heard argument on the summary judgment motion and was in the process of entering final documents. Before this Court, Appellants again ignore the contractual basis for an award of attorneys' fees and costs to Respondents as the prevailing party and instead assert that "in light of the undisputed fact that the sellers misrepresented the zoning of the property to the buyers, the trial court should not have awarded any

²⁵ *In Re Detention of R.W.*, 98 Wn. App. 140, 988 P.2d 1034 (1999).

attorney fees to sellers.” *Opening Brief of Appellants*, pp. 27-28. In Washington, attorney fees may be awarded when authorized by a contract, a statute, or a recognized ground in equity. Whether a specific statute, contractual provision, or recognized ground in equity authorizes an award of fees is a question of law and is reviewed de novo.²⁶

Appellants’ argument before this court is circular and ignores the fact that the trial court had both a statutory basis for an award of attorneys’ fees and a contractual basis for an award of attorneys’ fees and made the award of attorneys’ fees based upon that amount.

4.6.2 The Amount of Attorneys’ Fees Awarded by the Trial Court was Appropriate.

Appellants also contend that the amount of attorneys’ fees awarded was excessive and that some of the costs should not have been recoverable and thus the trial court erred when it set the amount of attorneys’ fees and costs. Appellants ignore the trial court’s decision on the amount of attorneys’ fees and costs. The trial court did not award Respondents the actual amount of attorneys’ fees that they had incurred. Instead, the trial court concluded that the “Lodestar method” was appropriate in setting the amount of attorneys’ fees and determined that the hourly rate of attorneys’ fees incurred by counsel for Respondents was \$250.00 per hour. CP 139. The trial court then made the determination that the 69.7 hours spent on the case were reasonable at a rate of \$250.00 per hour for attorneys’ fees of

²⁶ *Kaintz v. PLG, Inc.*, 147 Wn. App. 782, 197 P.3d (2008) (citing *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 106 Wn.2d 826, 849-50, 726 P.2d 8 (1986); and *Tradewell Group, Inc. v. Mavis*, 71 Wn. App. 120, 126, 857 P.2d 1053 (1993)).

\$17,425.00. The trial court then added additional attorneys' fees based upon Respondents' previous attorney, John Wheeler's, declaration regarding attorneys' fees. CP 103-106.

Appellants take issue with the request to have time for legal assistants included in the award of attorneys' fees and costs. The *North Coast*²⁷ case relied upon by the trial court looked specifically at the issue of whether secretarial work could be included in calculating an attorneys' fees award. The *North Coast* court relied upon the decision in *Absher Construction Company v. Kent School District*²⁸ to conclude that secretarial time may be included in an attorneys' fees award. The *North Coast* court reasoned that non-lawyer personnel decreased the expense of litigation and therefore use of non-lawyer personnel's time should not be discouraged.²⁹ The ultimate ruling in the *North Coast* case is that "the services of a 'qualified legal assistant' may be included in an attorney fee award."³⁰ The trial court in this case concluded it had not been presented with sufficient information on the legal assistants' qualifications and thus would not award legal assistant time. Instead the trial court relied on the Lodestar method to award attorneys' fees at \$250.00 per hour. The trial court applied the Lodestar method to calculate the hourly rate of another attorney in Respondents' counsel's office and that of Respondents' prior attorney, Mr. Wheeler. In setting an attorneys' fees award it is appropriate for the

²⁷ *North Coast Electric Company v. Selig*, 136 Wn. App. 636, 151 P.3d 211 (2007).

²⁸ 79 Wn. App. 841, 905 P.2d 1229, 917 P.2d 1086 (1995).

²⁹ *North Coast* at 643-644.

³⁰ *Id.* at 644.

trial court to have relied on the Lodestar method for calculating attorneys' fees. The Lodestar method is the preferred method for calculating attorneys' fees in Washington.³¹ To calculate attorneys' fees under the Lodestar method the court multiplies the number of hours reasonably expended on the matter by a reasonable hourly rate.³² In this case there was no evidence in the record to suggest that the amount of \$250.00 was not a reasonable rate for Respondents' counsel. The trial court strictly followed the Lodestar method once it determined that \$250.00 was a reasonable rate and multiplied by the number of hours that Respondents' counsel had worked on the case. The trial court then applied the same Lodestar method to calculate the hourly rate of another attorney in Respondents' counsel's office and that of Respondents' former attorney, John K. Wheeler. In the *Mahler* case the court said "we have expressed more than modest concern regarding the need of litigants and courts to rigorously adhere to the lodestar methodology."³³ Further, the *Mahler* court said "[c]ourts should not simply accept unquestioningly fee affidavits from counsel,"³⁴ "[f]ee decisions are entrusted to the discretion of the trial court,"³⁵ and the court's role is to "exercise our supervisory role to ensure that discretion is exercised on articulable

³¹ *Somsak v. Criton Technologies/Heath Tecna, Inc.*, 113 Wn. App. 84, 52 P.3d 43 (2002); *In re Settlement/Guardianship of AGM*, 154 Wn. App. 58, 223 P.3d 1276 (2010).

³² *Mahler v. Szucs*, 135 Wn.2d 398, 433, 957 P.2d 632 (1998).

³³ *Id.* at 434.

³⁴ *Id.* at 434-435.

³⁵ *Id.* at 435; see also *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 65, 738 P.2d 665 (1987).

grounds.”³⁶ Here, there is no issue to suggest that the trial court abused its discretion when it when it relied on and calculated the reasonable award of attorneys’ fees and costs using the Lodestar method.

In the trial court Appellants suggested that a portion of the deposition costs was not recoverable because of the amount of the depositions that was actually relied upon. Counsel for Appellants even goes to the ludicrous point of determining the percentage of each deposition that was used. This approach is not supported by case law, which provides that if a deposition is used for any purpose other than impeachment the cost is recoverable.³⁷ Appellants provided absolutely no authority for the notion that the depositions can be parsed out. Appellants also asserted there was no trial so the deposition fees were not recoverable at all, contrary to case law cited above.

Similarly, the trial court did not err in calculating the amount of the award of attorneys’ fees. The simple fact is Appellants sought to rescind the real estate contract and seek restitution for amounts they spent under the real estate contract. The real estate contract clearly provides that the sellers, Respondents herein, are entitled to their attorneys’ fees and costs.

V. ATTORNEYS’ FEES ON APPEAL

Pursuant to RAP 18.1(a) and (b) Respondents are entitled to their reasonable attorneys’ fees and expenses on appeal. Respondents are entitled to those fees and expenses on the same bases as at the trial court,

³⁶ *Id.* at 435.

³⁷ *Spurrell vs. Block*, 40 Wn.App. 854, 701 P.2d 529 (1985).

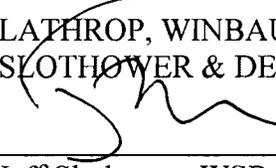
which are (1) that the real estate contract provides authorization for the prevailing party in any suit arising out of the contract to receive reasonable attorneys' fees and costs (CP 177); and alternatively (2) the court has the discretion under RCW 61.30.110 and 61.30.120 to award reasonable attorneys' fees and costs to the prevailing party in an action brought to enjoin the forfeiture of a real estate contract.³⁸ Both the real estate contract and the fact that this was an unsuccessful action to enjoin forfeiture of the real estate contract commenced by Appellants serve as bases for this court to award Respondents' their reasonable attorney fees and costs on appeal under RAP 18.1(a) and (b).

VI. CONCLUSION

The trial court properly concluded there were no material facts presented by Appellants that demonstrated Appellants were entitled to rescind the real estate contract. The trial court did not err in awarding attorneys' fees and costs nor did the trial court err in disbursing Respondents' attorneys' fees from the cash bond. The decision of the trial court should be affirmed and this court should award Respondents their attorneys' fees and costs.

DATED this 7th day of December, 2010.

LATHROP, WINBAUER, HARREL,
SLOTHOWER & DENISON L.L.P.

 #14581 for:

Jeff Slothower, WSBA #14526
Attorney for Respondents

³⁸ See Section 4.6.1, pp. 23-34 above.

CERTIFICATE OF SERVICE

I certify that I have this day caused a copy of the document to which this is attached to be served on the individual(s) listed below and in the manner noted below:

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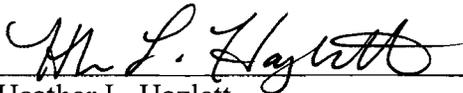
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Pro Se Third Party Respondent

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- BY HAND DELIVERY
- BY OVERNIGHT DELIVERY

I certify, or declare, under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed at Ellensburg, Washington this 7th day of December, 2010.



Heather L. Hazlett
Legal Assistant to Jeff Slothower