

NO. 294218

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION NO. III

JOHN K. EACHO

Respondent/Plaintiff

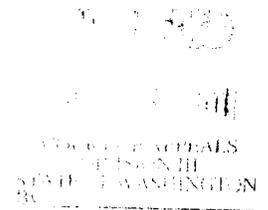
vs.

GUSTAFSON & HOGAN, P.S., INC.,

Appellant/Defendant

BRIEF OF APPELLANT

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR.....2

 A. The trial court's determination that Gustafson & Hogan breached its contract with Eacho was not supported by substantial evidence.2

 B. The Trial Court abused its discretion by granting plaintiff's motion in limine regarding Gustafson & Hogan's affirmative defense of contributory negligence which was, in effect, a motion to strike the defense.2

 C. The trial court erred in awarding attorney fees and costs to Eacho2

 D. The trial court erred in awarding pre-judgment interest.....2

III. STATEMENT OF CASE2

 A. Facts Surrounding February 28, 2007 Closing2

 B. Pertinent Pretrial Procedure10

 C. Trial, Courts Decision, and Pertinent Post-Trial Procedure13

IV. ARGUMENT AND AUTHORITIES.....15

 A. The trial court's determination that Gustafson & Hogan breached its contract with Eacho was not supported by substantial evidence.15

 B. The Trial Court Abused its discretion by granting plaintiff's motion in limine regarding Gustafson & Hogan's affirmative defense of contributory negligence which was, in effect, a motion to strike the defense.17

 C. The Trial Court Erred in Awarding, Attorney Fees and Costs to Eacho21

D.	The Trial Court Erred in Awarding Pre-Judgment Interest.....	23
V.	CONCLUSION.....	25

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>C-C Bottlers, Ltd. v. JM Leasing, Inc.</i> , 78 Wn.App. 384, 896 P.2d 1309 (1995).....	21
<i>Dautel v. Heritage Home Ctr., Inc.</i> , 89 Wn.App. 148, 948 P.2d 397 (1997).....	24
<i>Douglas Northwest, Inc. v. Bill O'Brien & Sons Construction, Inc.</i> , 64 Wn.App. 661, 828 P.2d 565 (1992).....	24
<i>Ermine v. City of Spokane</i> , 143 Wn.2d 636, 23 P.3d 492 (2001).....	21
<i>French v. Gabriel</i> , 116 Wn.2d 584, 806 P.2d 1234 (1991).....	17, 19, 20
<i>Kiewit-Grice v. State</i> , 77 Wn.App. 867, 872, 895 P.2d 6 (1995).....	24
<i>Labriola v. Pollard Group, Inc.</i> , 152 Wn.2d 828, 100 P.3d 791 (2004).....	21
<i>Lakes v. Von Der Mehden</i> , 117 Wn.App. 212, 70 P.3d 154 (2003).....	24
<i>Lybbert v. Grant County</i> , 141 Wn.2d 29, 1 P.3d 1124 (2000).....	17, 18, 19, 20
<i>Norris v. Church & Company</i> , 115 Wn.App. 511, 63 P.3d 153 (2002).....	21
<i>Oltman v. Holland America Line U.S.A., Inc.</i> , 163 Wn.2d 236, 178 P.3d 981 (2008).....	17, 19, 20
<i>Pearson Construction Corp. v. Intertherm, Inc.</i> , 18 Wn.App. 17, 566 P.2d 575 (1977).....	24

<i>Peoples Mortgage Company v. Vista View Builders,</i> 6 Wn.App. 744, 496 P.2d 354 (1972).....	15
<i>Prier v. Refrigeration Engineering Company,</i> 74 Wn.2d 25, 442 P.2d 621 (1968).....	24
<i>Raymond v. Fleming,</i> 24 Wn. App. 112, 600 P.2d 614 (1979), rev. denied, 93 Wn.2d 1004 (1980).....	19
<i>Ridgeview Properties v. Starbuck,</i> 96 Wn.2d 716, 638 P.2d 1231 (1982).....	15
<i>Schlener v. All State Insurance Company,</i> 121 Wn.App. 384, 88 P.3d 993 (2004).....	21
<i>Trotz v. Vig,</i> 149 Wn. App. 594, 203 P.3d 1056 (2009).....	15
<i>Wynn v. Earin,</i> 163 Wn.2d 361, 181 P.3d 806 (2008).....	22, 23

I. INTRODUCTION

Gustafson & Hogan, P.S., Inc. (hereinafter referred to as GH), the appellant and defendant below, is a Spokane law firm that, as part of its practice, closes real estate transactions. John Eacho (hereinafter referred to as Eacho), the respondent and plaintiff below, is a real estate investor. This case arises from GH's closing of a seller-financed real estate transaction between Eacho, as seller, and Barbara Uribe (hereinafter referred to as Uribe), as buyer.

The subject of the transaction was a single family home and outbuilding. The closing took place on February 28, 2007. Approximately four months later, on July 4, 2007, the outbuilding was completely destroyed by fire. Uribe had a policy of fire insurance with Farmers Insurance Group and received \$31,635.90 from that company in insurance proceeds. Uribe kept the insurance money and stopped making contract payments. Eacho had no insurance covering his seller's interest.

Eacho sued GH, claiming it was negligent, and breached its contract with him, by failing to ensure, as part of the closing process that Each had insurance protecting his seller's interest. A bench trial resulted in a decision in favor of Eacho. The trial court also awarded costs, attorney fees, and pre-judgment interest. GH now appeals.

II. ASSIGNMENTS OF ERROR

- A.** The trial court's determination that Gustafson & Hogan breached its contract with Eacho was not supported by substantial evidence.

- B.** The Trial Court abused its discretion by granting plaintiff's motion in limine regarding Gustafson & Hogan's affirmative defense of contributory negligence which was, in effect, a motion to strike the defense.

- C.** The trial court erred in awarding attorney fees and costs to Eacho

- D.** The trial court erred in awarding pre-judgment interest

III. STATEMENT OF CASE

A. Facts Surrounding February 28, 2007 Closing

At the time of the transaction, Eacho was a college graduate, former teacher, and experienced businessman and real estate investor. (Verbatim Report of Proceedings "VRP" Vol. I at 27-29.)¹ At one time, he managed a company that sold mobile homes, and eventually he bought a lot and started his own business. (VRP Vol. I 28.) He had also purchased and sold commercial real estate, bought and sold real property

¹ Because testimony in this trial occurred on multiple dates, which resulted in multiple, non-consecutively numbered VRP volumes, VRP citation in this brief is two volumes as follows: Volume I – Testimony from July 21, August 20, and September 9, 2010; Volume II – Testimony from July 22, 2010.

on contract, and invested in real estate contracts by buying the purchaser's interest. (VRP Vol. I 48-49.)

In the Purchase and Sale Agreement for the subject property, Eacho and Uribe selected GH as the closing agent without any input or request from, or prior notice to GH, (Exhibit P1) and agreed on a closing date of on or before February 28, 2007. Id.

Under customary practices and standards applicable to closing agents, GH was obligated to close the transaction in keeping with the intent of the parties as expressed in the Earnest Money Agreement. (VRP 107, VRP II 6,7.) The Earnest Money Agreement stated that the document had significant legal consequences and that the parties were bound by all terms and provisions thereof. (Exhibit P1)

On January 27, 2007 Eacho and Uribe, signed an "Addendum to Purchase and Sale Agreement" which stated, in pertinent part:

[...]

2. Insurance Contingency. This agreement is contingent upon buyer obtaining "acceptable insurance." For purposes of this provision, acceptable insurance means a preferred replacement type insurance policy issued by an admitted insurer in the state of Washington that either...

3. Application. Buyer must make a complete application for acceptable insurance no later than _____ days (5 days if not filled in) after

mutual acceptance of this agreement. If buyer fails to make application within the agreed time, this insurance contingency shall be deemed waived.

4. Insurance Deadline. This insurance contingency shall be deemed satisfied unless, within _____ days (14 days if not filled in) after mutual acceptance of this agreement, buyer gives notice of inability to obtain acceptable insurance. If buyer is unable to obtain confirmation from the person or entity with whom the application for insurance was made that acceptable insurance will be available on the property (and that an underwriting review regarding such insurance has been completed by the insurer, with buyer having made a good faith effort to obtain such confirmation regarding acceptable insurance), and buyer gives notice of such inability within the time stated at the beginning of this paragraph 4, then this agreement shall terminate and the earnest money shall be refunded to buyer.

(Exhibit P1) (Emphasis added.)

Given the date the Addendum was signed, Uribe had to apply for insurance by February 2, 2007, and if she failed to make such application the insurance requirement was waived. (Exhibit P1) Alternatively, Uribe was obligated to give notice to Eacho of an inability to obtain acceptable insurance within 14 days or by February 10, 2007. (Id) If she provided the requisite notice of inability, Eacho was free to walk away from the transaction after refunding the earnest money. (Id.; VRP Vol II, 72, 73)

At the end of January 2007, the transaction was delivered to GH for closing. (VRP Vol. II 24.) GH received a copy of the purchase and sale agreement from the real estate agent, John L. Scott. (VRP Vol. II 24.) Mr. Gustafson, the GH partner responsible for this closing, had one of his assistants order the title insurance. (VRP Vol. II 25.) GH deposited the earnest money provided by the buyer into GH's trust account. (VRP Vol. II 25.) GH then waited until such time as the preliminary title insurance commitment came to their office, which took anywhere from a couple of days to a couple of weeks. (VRP Vol. II 25.)

After receiving the title insurance commitment, GH examined the condition of the title and determined the steps it needed to be taken next. (VRP Vol. II 25.)

GH then prepared documents to effect consummation of the transaction as reflected in the parties' January 27, 2007 agreement. (VRP Vol II 25; Exhibit D 101.) Nearly all were prepared on or about February 27, 2007. (CP 53.) They included a Promissory Note, a Settlement Statement, a Notification to Utility Providers, a Quit Claim Deed assuring that Uribe was taking title to the subject property as her sole and separate property, a Statutory Warranty Deed conveying the property from Eacho to Uribe, and a Deed of Trust to secure the Promissory Note entered into

between Uribe and Eacho. (Exhibit D101.) GH was not a signatory or party to the Deed of Trust. (Id)

Because the transaction involved seller financing Mr. Gustafson himself drafted the seller financing documents, specifically the Note and Deed of Trust. (VRP Vol. II 25.) He also prepared the settlement statement and oversaw his assistants in the drafting of other involved documents. (VRP Vol. II 25.)

Unlike the Earnest Money Agreement, the Deed of Trust (DOT), for security purposes imposed an obligation on Uribe to insure the property against fire loss. (Exhibit P5) The DOT required Uribe to provide a policy to Eacho the beneficiary, and for Eacho to approve the coverage and insist on being named a loss payee. (Id.) The DOT did not require or command the closing agent to ascertain before the closing date, that the buyer was going to keep the promise made at the time of closing by signing the DOT. (VRP 21.) The DOT placed the obligation on the buyer, and the closing agent simply prepared the document imposing that obligation on the buyer. (VRP 21.)

Mr. Gustafson determined that, in order to close the transaction, the seller, Eacho, needed to bring \$5,155.91 to closing. (VRP Vol. II 27.) Shortly before the closing date, Mr. Gustafson called Eacho to tell him that. (VRP Vol. II 27.) During this telephone conversation, the issue of

insurance came up. (VRP Vol. II 29.) Eacho informed Mr. Gustafson that he had contacted his own insurance agent, and that the insurance was already arranged. (VRP Vol. II 29.) Mr. Gustafson asked Eacho about that, because it is unusual for a seller to arrange for insurance. (VRP Vol. II 29.) Mr. Gustafson asked Eacho if he was aware that the buyer may also have an obligation to provide insurance. (VRP Vol. II 29.) Eacho told Gustafson that it was arranged, and became somewhat condescending toward Mr. Gustafson, telling him that he had been doing real estate transactions for many years, that it [the insurance] had been taken care of, and that Mr. Gustafson did not need to worry about that. (VRP Vol. II 29.)

At trial, Eacho acknowledged having a pre-closing conversation with Mr. Gustafson about insurance. (VRP 107.) He testified that he told Mr. Gustafson he didn't need insurance because the buyer was going to get it and thus he didn't see any reason to pay for it (VRP 108, 109). On the date of closing, GH prepared closing instructions. (Exhibit P6.) They specifically provided that the terms and conditions of the closing were those set forth in the parties' Purchase and Sale Agreement, including any addenda. (Id.) The closing agreement and instructions stated they were not intended to modify, amend, or supersede the terms and conditions of the

parties' Agreement, and that if there was a conflict between the escrow instructions and Agreement, the Agreement controlled. (Id.)

The closing instructions included a provision with respect to fire or casualty insurance which stated:

Fire or Casualty Insurance. If a new policy of fire, hazard or casualty insurance on the property is necessary to close the transaction, the buyer will arrange for the policy to be issued, outside of escrow, and will provide evidence of the required insurance coverage to the closing agent before the closing date. Unless otherwise instructed, the closing agent shall have no responsibility to contract for or obtain any policy of fire, hazard or casualty insurance on the property, or any assignment of such policy.

(Exhibit P6) (Emphasis added.)

Based on the documents available to GH in late February 2007, the closing transaction did not require a policy of fire or casualty insurance by virtue of the Real Estate Purchase and Sale Agreement. (VRP 107, 108.) Eacho had apparently waived the insurance requirement because there was no evidence Uribe had provided an acceptable application, and the agreement specifically provided that if she failed to do so on or before February 2, 2007, the insurance contingency was waived. (VRP 11, 18.) Moreover, the contingency was waived because in the absence of any indication of insurance, Eacho had the right to terminate the transaction

within 14 days of January 27, 2007 but he did not do so. (Id.) Accordingly, insurance was not necessary to close the transaction, in keeping with the agreement of the parties as expressed in the closing agreement and escrow instructions. (VRP 17, 18.)

At the time of closing, there was no notification in GH's file that either Eacho or Uribe were unable to obtain insurance. (VRP Vol. II 41.) Mr. Gustafson's understanding with regard to insurance was that in the closing agreement and escrow instructions, Eacho and Uribe agreed they would be handling insurance outside of the closing. (VRP Vol. II 44.) Accordingly, Mr. Gustafson did not consider it his job to make sure there was insurance. (VRP Vol. II 44.) This was confirmed when Mr. Gustafson talked to Eacho prior to closing and Eacho told him insurance was taken care of and that he had made sure with his insurance agent that the property was insured. (VRP Vol. II 44.)

On the day of closing Eacho did not ask anyone at GH if there was appropriate insurance coverage on the property, or for any evidence of insurance. (VRP 59-60.)

At the conclusion of the February 28, 2007 closing, GH provided Eacho a complete copy of the closing documents. (CP 55.) Eacho never asked GH to obtain additional evidence of insurance based on the requirement in the Deed of Trust. (VRP 60.)

Between February 28, 2007 and the loss on July 4, 2007, Eacho never contacted GH with respect to insurance on the property. (VRP 66.)

At trial, Eacho's standard of care expert, Martin Weber, acknowledged the closing instructions stated that "the following terms (including insurance) must be completed or the parties outside of escrow are not part of the closing agents' duties under instructions." (VRP 106). Mr. Weber agreed that insurance, if required, was to be procured by the buyer outside of escrow and that the duty to acquire the insurance was not the closing agents' Id. He further testified that the closing instructions stated it was an obligation of the buyer if insurance was required, and that the buyer was to provide proof of insurance if necessary to close the transaction. (VRP 107.)

Additionally, Mr. Weber agreed that the Deed of Trust, by its language, did not impose any duty on the closing agent to check and make sure the buyer had attained insurance or that insurance was in place. (VRP 121,122.)

B. Pertinent Pretrial Procedure

When the case was filed on December 16, 2008, the only cause of action Eacho asserted was breach of contract. (CP 1-6.)

On May 22, 2009, GH filed its Answer to Eacho's complaint, denying that a breach of contract occurred. GH also alleged, as affirmative

defenses, failure to join necessary or indispensable parties [Uribe], failure to mitigate, and Eacho's acceptance without protest or objection of GH's performance under the contract. (CP 108-111.)

Eacho moved for summary judgment on the breach of contract claim on April 20, 2009. (CP 8-9.)

On July 7, 2009, the court denied the motion, finding that material issues of fact existed. (CP 128-129.)

On August 12, 2009, a stipulated order for leave to amend the complaint was entered which allowed Eacho to "add a claim for negligence." (CP 133-134.) The amended complaint, adding a cause of action for negligence, was filed on August 18, 2009. (CP 135-137.)

On August 19, 2009, counsel for GH took Eacho's deposition. (VRP Vol. I 146-48.) There, Eacho was questioned extensively regarding his education, and his experience in real estate investing and with real estate contracts. (VRP Vol. I 146-48.) He was also questioned extensively regarding his knowledge of the absence of insurance protecting his seller's interest and steps he took, or failed to take, to insure his interest. (VRP Vol. I 146-48.)

In the wake of the amended complaint, Eacho filed a witness and exhibit list on January 11, 2010. This filing identified attorney Martin Weber as an expert on the standard of care. (CP 142-145.)

On January 15, 2010, an amended civil case schedule order was entered, setting the matter for trial on February 23, 2010. (CP 146.)

On January 22, 2010, defendant filed a motion to strike Martin Weber as an expert witness because of plaintiff's failure to comply with the CSO deadline for the disclosure of experts. (CP 147-148.)

The court did not rule on the motion to strike. Instead, on January 26, 2010, the trial court issued another amended case schedule order, setting the matter for trial on June 1, 2010, and setting new dates for the disclosure of witnesses, including experts. (CP 155.)

On April 15, 2010, Eacho's counsel took the deposition of Richard Perednia, GH's liability expert. Mr. Perednia testified that, among other things, he had an opinion relative to Eacho's responsibilities to see to it that his seller's interest was insured. Mr. Perednia also testified he was critical of Eacho for not pursuing Uribe for the insurance money Uribe received from Farmers. (CP 228-235.)

On May 18, 2010, defendant filed its answer to plaintiff's first amended complaint. (CP 194-196.) Therein, defendant asserted comparative fault on the part of Eacho for failing to purchase or obtain insurance in his own right and failing to require the Uribes to purchase or acquire insurance. Defendant also asserted comparative fault on the part of Eacho for his failure to pursue the Uribes for reimbursement of the fire

damage insurance proceeds which Uribe received from Farmers. (CP 194-196.)

The next day, on May 19, 2010, Eacho filed a motion in limine, arguing that GH should not be allowed to leave as is fault on the part of Eacho or Uribe (CP 197-204.) because those affirmative defenses were not asserted until GH filed its answer to the first amended complaint. Eacho claimed that in the meantime, he had "proceeded, both in discovery and in preparing for trial, in reliance on the fact that contributory and third-party fault were not at issue." (CP 197-204.)

On May 27, 2010, GH filed its response to Eacho's motion in limine, arguing that Eacho was on notice of GH's intent to allege that Eacho's damages were proximately caused by the acts and/or omissions of Eacho, by virtue of GH's answer to plaintiff's original complaint, the questions put to Eacho at his April 2009 deposition, and the opinions expressed by Mr. Perednia at his deposition in April of 2010. (CP 228-235.)

C. Trial, Courts Decision, and Pertinent Post-Trial Procedure

Trial commenced on July 21, 2010, over a month after GH filed its answer to Eacho's amended complaint. On the first day of trial the court granted Eacho's motion in limine with respect to the affirmative defenses

of contributory negligence and "anything relating to negligence." (VRP Vol. I 17-18.)

On July 28, 2010, the court issued its memorandum decision. It determined that GH breached its contract with Eacho when GH closed the transaction without proof of insurance submitted by Uribe that named Eacho as a loss payee. (CP 247-252.) With regard to Eacho's negligence claim, the court determined that GH was negligent for closing the transaction without proof of insurance. (CP 247-252.)

The court awarded \$31,635.90 in damages to Eacho, the amount of the Farmers insurance payment. The court also determined that Eacho was entitled to prejudgment interest because the aforementioned figure was a liquidated amount, and that Eacho was entitled to reasonable attorney fees because of the attorney fee provision in the closing agreement and escrow instructions. (CP 247-252.) Findings of Fact and Conclusions of Law consistent with the courts memorandum decision were entered on August 20, 2010. (CP 357.)

On September 9, 2010, the court entered judgment against GH for \$31,635.90 including \$11,721.75 in prejudgment interest and \$46,207.75 in attorney fees and costs. (CP 345-347.)

IV. ARGUMENT AND AUTHORITIES

A. The trial court's determination that Gustafson & Hogan breached its contract with Eacho was not supported by substantial evidence.

A trial court's bench trial findings and conclusions must be supported by substantial evidence. *Ridgeview Properties v. Starbuck*, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982). Substantial evidence is evidence "in sufficient quantum to persuade a fair-minded person of the truth of the declared premise." *Id.*

The essential elements of contract are: (1) subject matter, (2) the parties, (3) a promise, (4) the terms and conditions, and (5) consideration. *Trotz v. Vig*, 149 Wn. App. 594, 605-06, 203 P.3d 1056 (2009). Thus, a party alleging breach of contract must prove, to succeed on his claim, the existence of a contract, consideration, breach and damages. *Peoples Mortgage Company v. Vista View Builders*, 6 Wn.App. 744, 747, 496 P.2d 354 (1972).

In the instant case, there was no substantial evidence supporting the trial court's determination that GH had a contractual obligation to ensure that Eacho's seller's interest was covered by insurance. GH's contract with Eacho required it to close the transaction in compliance with the agreement between Eacho and Uribe. The Real Estate Purchase and Sale Agreement and its Addenda constituted a contract between Eacho and

Uribe, and that contract clearly provided that the insurance requirement imposed upon the buyer, Uribe, could be waived. The Deed of Trust imposed an obligation on Uribe, the purchaser, to insure the property against loss by fire and a requirement that Uribe provide a policy of insurance to the beneficiary, Eacho. But the insurance coverage referenced in the Deed of Trust was a separate and distinct undertaking from the insurance agreement executed in January 2007 by the parties, and therefore apparently waived. The GH Closing Agreement and Instructions included a provision with respect to fire and casualty insurance. But that provision stated that, if a new policy of fire, hazard or casualty insurance on the property was necessary to close the transaction, the buyer (Uribe) would arrange for the policy to be issued, outside of escrow, and provide evidence of the required insurance coverage to the closing agent before the closing date. According to the contract(s) between Eacho and Uribe, a new policy of insurance was not necessary to close the transaction.

Given the above, the trial court's conclusion that GH breached its contract with Eacho was not supported by substantial evidence.

B. The Trial Court Abused its discretion by granting plaintiff's motion in limine regarding Gustafson & Hogan's affirmative defense of contributory negligence which was, in effect, a motion to strike the defense.

The elimination of GH's affirmative defense of contributory negligence came in the form of the trial court's granting plaintiff's motion in limine on the issue. In effect, the court struck GH's comparative negligence affirmative defense and concluded that GH had waived the defense by not timely filing its answer to plaintiff's amended complaint. See, *Oltman v. Holland America Line U.S.A., Inc.*, 163 Wn.2d 236, 178 P.3d 981 (2008).

A trial court's ruling on a motion to strike an affirmative defense is discretionary and reviewed for abuse of discretion. *Oltman, supra*, at 244, citing *Phillips v. Richmond*, 59 Wn.2d 571, 574-75 (1962).

Mere delay in filing an answer does not constitute a waiver of an affirmative defense. *French v. Gabriel*, 116 Wn.2d 584, 593-94, 806 P.2d 1234 (1991). Rather, striking an affirmative defense asserted in an untimely answer is only appropriate if the plaintiff can show estoppel or waiver. See, *Lybbert v. Grant County*, 141 Wn.2d 29, 1 P.3d 1124 (2000).

The elements of estoppel are: (1) an admission, statement or act inconsistent with a claim afterwards asserted, (2) action by another in [reasonable] reliance upon that act, statement or omission, and (3) injury

to the relying party from allowing the first party to contradict or repudiate the prior act, statement or omission. *Lybbert, supra*, at 35, citing *Board of Regents v. City of Seattle*, 108 Wn.2d 545, 551, 741 P.2d 11 (1987).

Here, GH did not engage in any acts that would satisfy the elements of equitable estoppel. Certainly they did not engage in any conduct inconsistent with the affirmative defense of contributory negligence. To the contrary, at Eacho's deposition he was questioned extensively regarding his sophistication as a real estate investor and his knowledge of the lack of insurance protecting his seller's interest, and what he did, or failed to do, in response to that knowledge. In addition, GH's liability expert, Mr. Perednia, at his deposition offered an opinion critical of Eacho for not seeing to it that his interest was insured. And, although, in his motion in limine Eacho claimed prejudice in a conclusory way, he did not explain how he was prejudiced or what he would have done differently in the way of trial preparation had he received more notice of GH's intention to claim comparative negligence. Indeed, Eacho could hardly claim that late notice of this affirmative defense deprived him of the ability to adequately prepare for trial, or prepare his experts for their trial testimony. GH filed its answer to plaintiff's amended complaint on May 18, 2010. Trial did not begin to however, until July 18, 2010, two months later.

As for whether GH waived the affirmative defense, waiver of an affirmative defense can occur in two ways: (1) If the defendant's assertion of the defense is inconsistent with the defendant's previous behavior, or (2) defendant's counsel has been dilatory in asserting the defense. *Lybbert, supra*, at 39.

While the *Lybbert* court did not specifically address what constitutes "dilatory" conduct on the part of the defense, it must mean more than mere delay. That is because, in *French, supra*, the court clearly held that the mere delay in filing an answer does not constitute waiver.² Significantly, in *French, supra*, the court, in distinguishing a Court of Appeals case where waiver was found, *Raymond v. Fleming*, 24 Wn. App. 112, 115, 600 P.2d 614 (1979), rev. denied, 93 Wn.2d 1004 (1980), discussed the type of conduct that can constitute waiver:

Moreover, defendant's conduct in *Raymond* was "considerably more flagrant" than that of Morris [the defendant in the case at bar]. (Citation omitted.) Morris did not repeatedly ask for more time in response to repeated

² In *Oltman v. Holland America Line U.S.A., Inc.*, 163 Wn.2d 236, 178 P3d 981(208) Amicus Curiae Washington State Trial Lawyers Foundation argued that, with respect to the dilatory conduct component of *Lybbert*, waiver should be found if an affirmative defense is filed in a late answer and the delay causes actual prejudice to the plaintiff. The Supreme Court did not decide whether an affirmative defense raised in an untimely answer is waived if the delay in raising the defense causes prejudice to the plaintiff because the court found that no prejudice was established in that case. *Oltman*, at 246.

requests for an answer. French [the plaintiff] never asked Morris to file an answer sooner than he did. Further, once Morris was late in filing his answer, French could have moved for a default judgment pursuant to CR 55(a). He chose not to do so.

116 Wn.2d at 593.

Here, GH did not engage in any of the conduct that Washington appellate courts have found to constitute waiver through dilatory conduct. GH never asked for more time in response to repeated requests for an answer. Indeed, Eacho never asked for an answer. Certainly Eacho never moved for a default judgment, an option available to him under CR 55(a).

In sum, consistent with *French*, *Lybbert*, and *Oltman*, where an affirmative defense is asserted in an untimely filed answer, striking the affirmative defense is only appropriate if the plaintiff can demonstrate estoppel or waiver. And waiver requires much more than mere delay. At the very least, there must be dilatory conduct, which results in actual prejudice to the plaintiff. GH did not engage in any of the conduct that courts have found to constitute estoppel or waiver, and certainly Eacho made no showing of actual prejudice. Accordingly, the trial court abused its discretion in striking GH's comparative negligence affirmative defense.

C. The Trial Court Erred in Awarding, Attorney Fees and Costs to Eacho

A trial court determination regarding the legal basis for an award of attorney fees is an issue of law which, on appeal, is reviewed de novo. *Schlener v. All State Insurance Company*, 121 Wn.App. 384, 388, 88 P.3d 993 (2004). The amount of an attorney fee award is a matter of trial court discretion, where the standard of review on appeal is abuse of discretion. *Ermine v. City of Spokane*, 143 Wn.2d 636, 641, 23 P.3d 492 (2001).

On the recoverability of attorney fees, Washington follows the American rule. The Court may only award attorney fees to a prevailing party when authorized to do so by contract, statute, or a recognized ground in equity. *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 839, 100 P.3d 791 (2004).

Where a contract provides for an award of attorney fees to the prevailing party, the prevailing party should be awarded attorney fees only for legal work completed on the portion of the claim permitting such an award. *C-C Bottlers, Ltd. v. JM Leasing, Inc.*, 78 Wn.App. 384, 896 P.2d 1309 (1995).

An action in tort does not allow for recovery of attorney fees. *Norris v. Church & Company*, 115 Wn.App. 511, 517, 63 P.3d 153 (2002).

Where a statute or contract provides for an award of reasonable attorney fees to the prevailing party, and the plaintiff, in addition to pursuing a statutory or contract claim, pursues a professional negligence claim, fees incurred with respect to the negligence claim should not be awarded. *See e.g. Wynn v. Earin*, 163 Wn.2d 361, 181 P.3d 806 (2008).

Here, the award of attorney fees and costs was error because it was based on the assumption that GH breached its contract with Eacho. As argued above, that conclusion was not supported by substantial evidence. And even if the escrow instructions were breached, Eacho, after 7/21/2009, postured and pursued this case as a legal malpractice action, and no costs or attorney fees should be awarded for Eacho's prosecution of that claim. More specifically, when this case was filed on 11/13/2008 the only claim asserted was that for breach of contract. Eacho moved for summary judgment on that single cause of action on 4/20/2009,. The matter was fully briefed, and a hearing was held on the motion on 6/19/2009. The Court issued its order denying the motion on 7/7/2009.

Thereafter, on 7/31/2009, Eacho moved to amend his Complaint to add a cause of action for professional negligence. An Amended Complaint was filed in connection with that motion and, from that point forward, for purposes of discovery and trial, the cause was postured and pursued as a professional negligence claim. Expert witnesses on the standard of care

were identified by both parties, and those experts were deposed and testified at trial. The only discreet legal work performed by Eacho with regard to the breach of contract claim was Eacho's preparation and filing of his original complaint, and the work done on the Motion for Summary Judgment on the contract claim. All other costs and fees expended were in connection with Eacho's professional negligence claim, and no costs and fees should have been awarded with regard to that claim.

Eacho may argue he was entitled to recover all costs and reasonable attorney fees expended because his claims were centered upon and/or arose from the escrow agreement/instructions. But that is not enough. Indeed, in *Wynn v. Earin, supra*, the entire case arguably arose from defendant's violation of the Health Care Information Act by failing to properly secure healthcare records and by providing testimony at a hearing without a release/authorization or subpoena. But because the great majority of the attorney fees expended by plaintiff were in connection with his professional negligence claim, the trial court's determination that only 10% of the plaintiff's requested attorney fees were awardable was affirmed by the Washington Supreme Court.

D. The Trial Court Erred in Awarding Pre-Judgment Interest

Prejudgment interest is recoverable only when (1) the amount claimed is liquidated, or (2) if the amount claimed is unliquidated, it is

determinable by computation with reference to a fixed standard in a contract. *Prier v. Refrigeration Engineering Company*, 74 Wn.2d 25, 32, 442 P.2d 621 (1968); *Kiewit-Grice v. State*, 77 Wn.App. 867, 872, 895 P.2d 6 (1995).

A claim that cannot be readily determined by a fixed standard or which depends on the exercise of discretion or reliance on expert opinion, is not liquidated. *Douglas Northwest, Inc. v. Bill O'Brien & Sons Construction, Inc.*, 64 Wn.App. 661, 690, 828 P.2d 565 (1992).

Unliquidated claims are not rendered liquidated by the fact that the defendant stipulates to the damages or agrees to the reasonableness of an amount. *Lakes v. Von Der Mehden*, 117 Wn.App. 212, 218, 70 P.3d 154 (2003), citing *Hansen v. Rothaus*, 107 Wn.2d 468, 477-78, 730 P.2d 662. See also *Pearson Construction Corp. v. Intertherm, Inc.*, 18 Wn.App. 17, 20, 566 P.2d 575 (1977); *Dautel v. Heritage Home Ctr., Inc.*, 89 Wn.App. 148, 154, 948 P.2d 397 (1997).

Here, the Court's damages award of \$31,635.90, the amount paid on the loss of Farmers, did not represent a liquidated amount. Rather, it was nothing more than a reflection of the opinion of the Farmers Insurance adjuster on the replacement value of the burned structure and depreciation. That GH stipulated to this figure as the amount of damages, or did not contest the amount at trial does not render the amount liquidated.

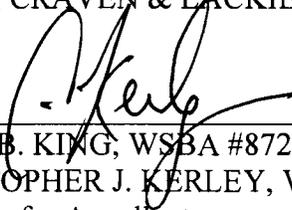
In sum, because the amount of damages awarded by the trial court was not, and is not, liquidated, prejudgment interest is inappropriate.

V. CONCLUSION

Based on the foregoing argument and authorities, GS respectfully requests that the trial courts findings and conclusions be reversed, and that the matter be remanded for a new trial. In the alternative, if a new trial is not ordered, GS respectfully requests that the trial court's award of attorney fees, costs and pre-judgment interest be vacated. If the court determines that some award of attorney fees/cost is appropriate, GS asks that the matter be remanded to the trial court for segregation of fees/costs between the contract claim and the negligence claim.

RESPECTFULLY SUBMITTED this 21 day of July 2011.

EVANS, CRAVEN & LACKIE, P.S.



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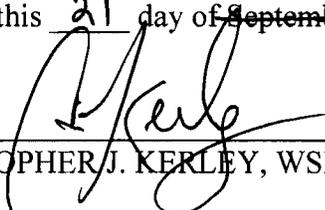
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the 21st day of July, 2011, I caused to be delivered a copy of the foregoing to the undersigned:

Richard Kuhling
James Sloan
Paine Hamblen, LLP
717 W. Sprague Ave., Ste. 1200
Spokane, WA 99201-3505

VIA REGULAR MAIL []
VIA CERTIFIED MAIL []
VIA FACSIMILE []
HAND DELIVERED

Dated at Spokane, Washington this 21 day of ^{July}~~September~~, 2010.


CHRISTOPHER J. KERLEY, WSBA #16489