

**No. 294218-III**

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

---

**JOHN K. EACHO**  
Respondent

v.

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

---

Respondent's Brief

**FILED**

**AUG 19 2011**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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## INTRODUCTION

This litigation arose from the closing of a real estate transaction, a routine procedure, gone horribly wrong in this case. Mr. John Eacho, the Plaintiff, is an elderly man, who has suffered from deteriorating health over the last 30 years including having bladder cancer, a kidney transplant, back surgery, a hip replacement, a knee replacement, shingles, and two eye surgeries. He has been on continuous medication for decades. In 2007 at the time of the real estate closing that is the subject of this litigation Mr. Eacho was 81 years old, residing in a large house, by himself. Mr. Eacho met with a realtor to put the house up for sale to secure additional retirement income. He entered into a Real Estate Earnest Money Purchase and Sale Agreement (REPSA) with a prospective Buyer, the Uribes. Pursuant to the REPSA, the corporation of Gustafson & Hogan (G&H, Inc.) was designated as the Closing Agent. Mr. Eacho did not know and had never met any of the principals of G&H, Inc. This was a unique real estate transaction, the Seller, Mr. Eacho, was temporarily financing the transaction. Under the terms of the REPSA, the payments of \$1,000 per month were not even covering the principal and interest on the contract. The transaction involved negative amortization for one year, after which time the entire principal on the contract came due. Presumably the Buyers, the Uribes, would get traditional financing for the purchase of the property

at that time. Obviously, under the terms of this Seller financed transaction, the Seller needed greater protection of his interest in the real property.

On February 28, 2007, at the offices of G&H, Inc., the real estate closing took place. Mr. Gustafson testified that this was his closing file, but he was not present at the time of the closing, nor was any other lawyer. Mr. Gustafson had reviewed the closing file along with a number of similar files, the night before the scheduled closing date as he prepared to leave on vacation to Hawaii the next day. Mr. Eacho arrived at the G&H, Inc. office for the closing and a member of the G&H, Inc. clerical staff presented him with the closing documents and had him sign each of the documents. He paid a fee and then left assuming the closing agents knew what they were doing, and that the transaction had been properly closed. The REPSA provided that "Acceptable Insurance" was a contingency to the contract. The other closing documents were not form documents, but were specifically drafted by G&H, Inc.. The Deed of Trust prepared by G&H, Inc. specifically provided that the Buyer must insure the property that is the subject of the REPSA. Under the terms of the Deed of Trust, this required insurance was a policy naming the Seller as the primary beneficiary. The Closing Instructions drafted by G&H, Inc. appointed G&H, Inc. as the Closing Agent and outlined the responsibilities of the firm in closing the real estate transaction. The Closing Instructions

provide that G&H, Inc. would "prepare" the appropriate documents, and "receive and hold" the appropriate documents necessary to close the transaction.

The Closing Instructions specifically provided that if a new policy of fire, hazard or casualty insurance on the property was necessary, and both the REPSA and the Deed of Trust did state that such "Acceptable Insurance" was necessary, the Buyer was required to arrange for the policy outside of escrow and provide evidence to the closing agent that the required insurance coverage had been procured before the closing date. This is the essence of the Plaintiff-Respondent's claim; G&H, Inc. as the Closing Agent, did not require the Buyer to provide evidence of the existence of an insurance policy naming the Seller as the primary beneficiary, prior to closing this transaction. The Defendant-Appellant's closing file has a note stating that insurance would be issued by Farmers Insurance but there is no copy of a declaration of insurance coverage, there is no correspondence, no emails, just a reference that Farmers Insurance was the designated carrier for the Buyers, the Uribes. There is no evidence in the closing file to indicate that G&H, Inc. made any attempt to verify, before the closing, that there was an insurance policy naming Mr. Eacho as the primary beneficiary of any insurance policy. G&H failed to follow its enumerated duties, failed to follow the provisions

of its own Closing Instructions, Deed of Trust and Promissory Note, or the REPSA, failed to close this real estate transaction in accordance with industry standards, and then the inevitable happened, disaster struck.

On July 4, 2007, six months into the contract there was a fire in an outbuilding, a three car insulated garage, with drywall finish, heated, with a bathroom. The structure was valued by Mr. Eacho at well over \$100,000, and the entire structure was destroyed by the fire. After the fire, Farmers Insurance dealt directly with the Uribes, the named insureds under the policy, and placed their own valuation of the structure at \$67,000. Farmers Insurance then depreciated the value of the outbuilding and wrote a check to the Uribes for \$31,635.90. The Uribes took the money and abandoned the property, relocating to the west side of Washington state. Plaintiff-Respondent, Eacho, contacted a series of lawyers to help him determine who the insurance carrier was, when he would be paid for the destruction of the outbuilding, and how he could recover his property, since the Buyers, the Uribes, were now in arrears on the mortgage payments and had disappeared, with the insurance payment.

In the Fall of 2007, with winter coming on, the house was abandoned and subject to vandalism. The third lawyer retained by Mr. Eacho, Mr. Phil Brooke, was able to find a post office box in Seattle through which he could correspond with the Uribes. They steadfastly

declined to tell him where they were located; so Mr. Eacho, needing to get back into the house, to prevent weather damage, agreed to the negotiation of a Deed in Lieu of Foreclosure to avoid a drawn out traditional judicial foreclosure process against what appeared to be judgment proof defendant. Following the recovery of the property, Mr. Eacho pursued this claim against G&H, Inc. for breach of its contractual duties as the closing agent for this transaction. The lawsuit for this transaction was heard by Judge Kathleen O'Connor, and following a bench trial, judgment was entered in the amount of \$31,635.90 in favor of Mr. Eacho, the exact amount of the payment made by Farmers Insurance Company to the Uribes under the insurance policy.

## I.

### **RESPONSE TO DEFENDANT-APPELLANT'S FIRST ASSIGNMENT OF ERROR**

The Defendant-Appellant's first assignment of error proposes:

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

Brief of Defendant-Appellant p. 15.

Defendant-Appellant ignores the specific Findings of Fact entered by the Trial Court. Moreover, Defendant-Appellant's brief raises no specific challenges to any of the Trial Court's Findings of Fact. Washington case law holds that unchallenged findings of fact are verities

on appeal. See, Washington State Bar Assn. v. Great Western Federal Savings & Loan, 91 Wn.2d 48, 586 P.2d 870 (1978), at p.53; Edmonson vs. Popchoi, 155 Wn. App 376, 228 P.3d 78 (2010); See also, Robel v. Roundup Corp., 148 Wn. 2d 35, 59 P. 3d 611(2002).

The Honorable Judge Kathleen M. O'Connor entered Findings of Fact on August 20, 2010, at the conclusion of trial. CP 357-368. On appeal from a bench trial, Findings of Fact are reviewed to determine whether they are supported by substantial evidence and, if so, whether the findings support the conclusions of law adopted by the trial court. See, Edmonson v. Popchoi, supra, at p. 383. Substantial evidence is evidence in sufficient quantum to persuade a fair minded person of the truth of the declared premise. See, Holland v. Boeing Co., 90 Wn. 2d 384, 583 P. 2d 621 (1976). The deference accorded to the Findings of Fact entered by the trial court judge under the substantial evidence standard recognizes that the trial judge is in a better position than the reviewing court to evaluate the credibility and demeanor of the witnesses, and that where the evidence is conflicting. The trial court judge may believe entirely the testimony of some of the witnesses and disbelieve entirely the testimony of others as well as draw from the evidence any reasonable inference fairly deducible therefrom. See, State v. Hill, 123 Wn. 2d 641, 870 P. 2d 313 (1994) at

p.644; see also, Dempsey v. Joe Pignataro Chevrolet, Inc., 22 Wn. App 384, 589 P.2d 1265 (1979) at p.390.

**A. Breach of Contract by Defendant – Appellant**

By admission of the Defendant-Appellant, as well as by terms of the document, the “Closing Agreement and Escrow Instructions for Purchase and Sale Transaction,” hereinafter referred to as Closing Agreement, prepared by Gustafson & Hogan P.S., Inc. (hereinafter G&H, Inc.) constitutes a contract for services between it and Plaintiff John Eacho. Brief of Defendant-Appellant p. 15. Mr. Eacho provided monetary compensation in consideration of which G&H, Inc. was contracted to perform certain services as Closing Agent in the closing of the real estate transaction which is the subject of this litigation. CP 364.

The specific components of the real estate transaction are set forth in the following Findings of Fact:

“3. On July 27, 2007, plaintiff entered into a Real Estate Purchase and Sale Agreement (REPSA) with Ms. Barbara J. Uribe. (D-101, pp.137-154)

...

5. The January 27, 2007 REPSA incorporated by reference a “Seller Financing Addendum” which indicated plaintiff John Eacho as seller was receiving \$20,000 cash as a down payment and the balance of \$275,000 was seller financed to be memorialized by a promissory note and secured by a Deed of Trust. The addendum further specified specific “LPB” forms for the Promissory Note and Deed of Trust. The payment terms were to be \$1,000 per month at 8% interest per annum

which created a negative amortization such that the amount of the specified balloon payment due on March 1, 2008 was to be \$284,996. (D-101, p.147)

6. The January 27, 2007 REPSA also included by reference a document titled "Addendum to Purchase and Sale Agreement (Buyer's Procurement of Insurance)" which in pertinent part, paragraphs 2 and 4 thereof, made the agreement contingent upon the buyer obtaining "acceptable insurance" and further provided that the insurance contingency shall be deemed satisfied unless within 14 days after mutual acceptance of the agreement the buyer gives notice of inability to obtain acceptable insurance. (D-101, p.144)

7. The REPSA paragraph 14(a) provided in pertinent part that "Notice must be given in writing." (D-101, p.140)

8. There was never "Notice" to any interested party of the buyer's inability to obtain acceptable insurance."

CP 357-358.

The specific obligations and acts of Defendant-Appellant, G & H Inc., as Closing Agent in this transaction are set forth in the following Findings of Fact:

"21. Said Closing Agreement and escrow instructions required the Closing Agent to "select" documents as necessary to close the transaction, to "prepare" documents as necessary to close the transaction, to "receive" documents as necessary to close the transaction, to "hold" documents necessary to close the transaction and to "deliver" documents as necessary to close the transaction. (D-101, p.110, "Documents")

22. Prior to the closing date, the Closing Agent did not receive or hold evidence of the required insurance coverage designating the beneficiary Eacho as the first loss payee.

23. G&H, Inc. charged fees to the buyer and seller in the amount of \$975.00 for its services. (D-101, p.99)"

CP 361.

In his Complaint Plaintiff - Respondent alleged, and the trial court found, that Defendant-Appellant Gustafson & Hogan breached its contract with Mr. Eacho by failing to "receive and hold documents to establish that the Uribes obtained "Acceptable Insurance" on the real property that named Mr. Eacho as the first beneficiary." CP 364; CP 5.

A failure to perform a contractual duty constitutes a breach of contract. Seabed Harvesting, Inc. v. Dept. of Natural Resources, 114 Wn. App. 791, 797, 60 P.3d 658 (2002).

In order to succeed on a breach of contract claim, plaintiff must establish:

1. That the contract imposed a duty;
2. The duty was breached; and
3. The breach proximately caused the damage.

See, Seabed Harvesting, Inc. v. DNR, supra, at p. 797.

The role of Defendant-Appellant Gustafson and Hogan, P.S. Inc. in the closing of this transaction is outlined by the trial judge in the following Findings of Fact:

"12. Gustafson & Hogan, P.S., Inc. (hereafter "G&H, Inc.") prepared a Promissory Note in the amount of \$275,000 dated February 28, 2007 with Barbara J. Uribe as maker and John K. Eacho as holder which in pertinent part paragraph 7 provided that "Maker shall pay all real estate taxes and hazard insurance premiums pursuant to paragraphs 2 and 3 of the Deed of Trust securing this obligation, and shall provide holder with annual proof that same have been timely paid." (D-101, p.89)

13. The Deed of Trust dated February 28, 2007, prepared by G&H, Inc. in pertinent part specified in paragraph 3 that the Grantor Barbara J. Uribe had an obligation "to keep all buildings now or hereafter erected on the property described herein continuously insured against loss by fire or other hazards in an amount not less than the total debt secured by this Deed of Trust. All policies shall be held by the beneficiary, and be in such companies as the beneficiary may approve and have loss payable first to the beneficiary as its interest may appear and then to Grantor." (D-101, p.104)

14. Said Deed of Trust designated G&H, Inc. as Trustee and John K. Eacho as beneficiary who, by the terms of the Deed of Trust, was to be the first loss payee of the obligated insurance.

15. G&H, Inc. prepared a document entitled "Closing Agreement and Escrow Instructions for Purchase and Sale Transaction" regarding the closing between Buyer Uribe and Seller Eacho. (D-101, p.110)

16. Said Closing Agreement and Escrow Instructions was admitted by defendant to be in pertinent

part a contract between G&H, Inc. and seller John K. Eacho.

17. Said document specified that G&H, Inc. be referred to as "the Closing Agent" and "to act as their closing and escrow agent according to the following agreements and instruments." (D-101, p.110)

18. Said instructions specified there were to be matters completed by the Buyer and Seller outside of escrow and not part of the Closing Agent's duties. One of said items to be completed by the parties outside of escrow was stated as follows: "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." (D-101, p.113 "Fire on Casualty Insurance.")

19. A new policy of insurance was required by terms of the contract between buyer and seller."

CP 359-360.

Buyer Uribe had in fact obtained insurance on the property from Farmers Insurance Company of Washington. CP 362; Ex. D101, p. 38. However, the policy named only Uribe as loss beneficiary. CP 362; Ex. D101, p. 38.

The fact that the clerical staff in Defendant-Appellant's office did not understand the insurance requirements for this transaction is shown by Findings of Fact numbers 30, 31 and 32:

"30. Prior to the closing date a telephone inquiry was made to G&H, Inc. by "Brittney" of Farmers regarding "lending information (Uribe). (D-101, p. 133)

31. By fax transmittal from G&H, Inc. on February 27, 2007 to Farmers Insurance regarding "Uribe Insurance Binder" it was stated: "Brittney, there is no lender, this is a cash deal so, here is the information I have for her ... call with questions, Jessica Sawyer. (D-101, p. 129)

32. The fax transmission from G&H, Inc. to Farmers was materially inaccurate. This was not a cash deal, and there was a lender; the seller Eacho."

CP 362-363.

As a direct consequence of the failure of Defendant-appellant to "receive and hold" a document establishing that "Acceptable Insurance" had been provided by the Buyer, Mr. Eacho lost the benefit of \$31,635.90 paid by Farmers to Uribe on August 8, 2007, under the terms of the insurance policy that did exist. This failure by Defendant-Appellant constituted a material breach of its contract with Plaintiff -Respondent to close this real estate transaction in accordance with the contractual terms of the Closing Agreement and real estate industry standards. *See*, CP 365; RP Vol. I p. 99-101.

**B. Defendant – Appellant's Assertion of Waiver by Plaintiff - Respondent**

In its Brief, Defendant-Appellant argues that the requirement of the closing documents that the Buyer procure hazard insurance for the

protection of the property benefitting Plaintiff-Respondent, as the Seller, was somehow “waived” by Mr. Eacho. Brief of Appellant, p.16. Waiver is the intentional and voluntary relinquishment of a known right, and not only requires proof, but the burden is on the party asserting the existence of the waiver to establish that proof by convincing evidence. See, Panorama Residential Protective Assoc. v. Panorama Corp. of Washington, 97 Wn. 2d 23, 28, 640 P.2d 1057 (1982), at p. 28.

Defendant-Appellant seeks to have the court look at the documents involved in the closing of this real estate transaction in isolation. Plaintiff-Respondent submits that you cannot merely look at any one of these documents, whether the Real Estate Purchase and Sale Agreement (REPSA), or the Deed of Trust, or the Closing Agreement in isolation. All of the documents in the closing of this real estate transaction are designed to work together. RP Vol II. p. 32. As has been admitted, the Closing Instructions constitute a contract between the Buyer, the Seller and the Closing Agent. Brief of Defendant-Appellant p. 15; CP 243. The REPSA contemplates execution of a standard form Promissory Note and a standard form Deed of Trust, as well as a statutory warranty deed, and all of these documents have to be interpreted together. Ex P1.

Defendant-Appellant makes much of paragraph 2 and 3 of the Addendum to Purchase and Sale Agreement (Buyer's Procurement of

Insurance), hereinafter referred to as the "Insurance Addendum" which provides, in pertinent part, "Insurance Contingency. This Agreement is contingent upon Buyer obtaining 'Acceptable Insurance.'" Defendant-Appellant asserts this provision creates a contingency that resulted in a waiver of the insurance requirement. However, Defendant-Appellant does not properly address the requirements of paragraph 4 of the same document that states that:

...This insurance contingency shall be deemed "satisfied" unless within [14] days Buyer gives Notice of inability to obtain Acceptable Insurance.

Ex P1.

Moreover, such "Notice" must be in writing, and there was no such written "Notice" ever filed. Ex D101; RP Vol. II p. 41.

Paragraph 1 of the Insurance Addendum, advises that it is possible that the Buyer may have difficulty for a variety of reasons in obtaining insurance. Ex P1. The purpose of this standard contingency agreement is to provide the Buyer an opportunity to get out of the requirements of the Earnest Money Agreement should the Buyer not be able to obtain "Acceptable Insurance." The Insurance Addendum document in no way releases the Buyer from providing evidence of the required "Acceptable Insurance" to the Closing Agent at the time of sale. So, by operation of the closing documents, if you are the Closing Agent, you must have a

“Notice” in the closing file under paragraph 4 of the Insurance Addendum that "Acceptable Insurance" was not obtainable by the Buyer. Ex P1. Without such a "Notice" of the inability to obtain such insurance, the Closing Agent must assume, by operation of this agreement, that the contingency for "Acceptable Insurance" was "satisfied."

Plaintiff-Respondent asserts that it is important to review the Closing Agreement that sets forth the responsibility of the Closing Agent with regard to the closing of this transaction.<sup>1</sup> Brief of Defendant-Appellant p. 16; Ex P6. What the Closing Agent contracted with the Buyer and Seller to do was to "select" and "prepare" and "receive and hold" the documents necessary to close this real estate transaction. CP 361; Ex P6. Although the REPSA served as the roadmap for the closing, it did not contain the final closing instructions or provide sufficient detail as to what specific conditions had to be met for the closing to proceed. This was the role of the Closing Instructions. Ex P6. Defendant-Appellant is the person who prepared the Closing Agreement and the Escrow Instructions, and the Deed of Trust. RP Vol. II p. 26. The Insurance Addendum mandated that

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<sup>1</sup> It should be noted, that, whether he be designated an Escrow Agent or Closing Agent, or both, makes little difference in the law; the important element is that as an agent, holder, or trustee for the parties, he occupies a fiduciary relationship to all parties to the escrow. As an agent, trustee, or holder, the Closing Agent owes a fiduciary duty to his principals in the same way that all agents are held to such standards. See, National Bank v. Equity Investors, 81 Wn.2d 886, 506 P.2d 20 (1973).

there be "Acceptable Insurance" for the benefit of the Seller. Ex P1.

Paragraph 3 of the Deed of Trust provides in pertinent part, as follows:

3. To keep all buildings now or hereafter erected on the property described herein continuously insured against loss by fire or other hazards in an amount not less than the total debt secured by this Deed of Trust. All policies shall be held by the Beneficiary, and be in such companies as the Beneficiary may approve and have loss payable first to the Beneficiary as its interest may appear and then to the Grantor. The amount collected under any insurance policy may be applied upon any indebtedness hereby secured in such order as the Beneficiary shall determine...

Ex. P5.

The Deed of Trust clarifies that this is a Seller financed real estate transaction, and, in effect, defines the term "Acceptable Insurance" in the Insurance Addendum to be an insurance policy that provides that any loss shall be payable first to the beneficiary, the Seller. Ex P5.

The Closing Agreement also provides for "Matters to be Completed by the Buyer and the Seller," specifying that certain actions are to be completed outside of escrow and are not part of the duties of the Closing Agent. Ex P6. In effect, the Closing Agreement, the Insurance Addendum, and the Deed of Trust, read together, required Defendant-Appellant to "receive and hold" the documents necessary to establish that the Uribes had Acceptable Insurance on the property that named Mr. Eacho as the first beneficiary. CP361.

The “Closing Agreement and Escrow Instructions” further provided:

**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 assignment to such policy. (Request for Admission No. 4 Dec. 23, 2008)

Ex. P6.

The Closing Agent, under this provision of the Closing Agreement, was not required to go out and buy insurance for either party. Defendant-Appellant emphasizes this point in their Brief, but their argument misses the key point; while the duty of the Closing Agent is not to “procure” insurance; its duty is to “receive and hold” the documents necessary to make certain that “Acceptable Insurance” had, in fact, been procured by the Buyer, so that the transaction could be closed in accordance with the requirements of the integrated real estate transaction documents. *See*, Brief of Defendant-Appellant p. 10.

At this point, it should be noted that any insurance taken out by the Buyer had to be “new insurance” because the Buyer had no insurable interest in the property until the real estate transaction was closed and

complete. So, it is necessary by operation of the REPSA, and by the operation of the Promissory Note and Deed of Trust, that the Buyer arrange for an insurance policy outside of escrow.

Furthermore, the above referenced provision of the Closing Agreement provides that the Buyer will provide evidence of the required insurance to the Closing Agent. Ex P6 p. 4. Evidence of the insurance policy has to be "received" by the Closing Agent before the closing date. Ex P6. A real estate transaction closing is complete when all of the documents, the Deed of Trust, the Promissory Note, and the Deed, are executed, filed, and delivered. See, Washington Bar Assn. v. Great Western, supra at p.55. The Closing Agreement specifically provided that the Closing Agent was to "receive and hold" the documents necessary to close the transaction. Ex P6. This closing process occurs over time, not necessarily on a single date, and the Closing Agent has time before he or she closes the transaction to make sure that all of the necessary documents have been "received," and specifically, in the instant case, that the necessary "Acceptable Insurance" had been procured. The trial court's Conclusion of Law #6 provides specifically as follows:

6. One of the material purposes of the series of documents, Promissory Note, Deed of Trust and Closing Agreement and Escrow Instructions prepared by G&H, Inc. was to protect the Seller Eacho with insurance coverage

should there be a hazard loss to the real property which secured the Seller's loan to the Buyer."

CP 365.

Defendant-Appellant, as the contracted Closing Agent, had a duty to "receive and hold" the insurance documents which the Deed of Trust requires. Ex P5; Ex P6. At that point in time, the Seller would have been protected in accordance with the documents prepared by the Closing Agent. The facts of this case establish that Defendant-Appellant, as the person appointed to be the Closing Agent, and to be in charge of the closing of this real estate transaction, failed in his duty to determine that the required "Acceptable Insurance" had been procured by the Buyer for the benefit of Plaintiff-Respondent.

Washington courts hold that a failure to perform a contractual duty constitutes a breach of contract. See Seabed Harvesting v. Dept. of Natural Resources, 117 Wn. App. 791, at 797 (Div. II 2002); Defendant-Appellant breached its contract with Plaintiff-Respondent, by failing to obtain from the Uribes at the time of closing, evidence that the Uribes had an insurance policy on the real property that listed the Seller, Mr. Eacho, as the first beneficiary. See, Owens v. Harrison, 120 Wn. App. 909, 915, 86 P.3d 1266 (2004).

C. **Plaintiff-Respondent Had No Duty to Determine if Buyer Had Met the Requirement to Obtain Acceptable Insurance.**

In its Statement of the Case Defendant-Appellant went to great lengths to try to establish the business expertise of the Plaintiff-Respondent John Eacho characterizing him as an “experienced business man and real estate investor” that had “... purchased and sold commercial real estate, bought and sold real property on contract, and invested in real estate contracts by buying the purchaser’s interest.” Brief of Defendant-Appellant p.2. Defendant-Appellant’s effort to emphasize Mr. Eacho’s experience seems to be an attempt to lay the foundation for suggesting that Mr. Eacho had some “duty” to determine whether the Buyer had procured "Acceptable Insurance" prior to, or even after, the closing of this real estate transaction. The reality is that all the statements regarding Mr. Eacho’s life experience may have been true at one time; however, at the time of the closing of this real estate transaction, Mr. Eacho was an 82-year-old man, and was now in sharply declining health, had retired in 1982 when he got bladder cancer, and had not worked for decades. RP Vol. I p. 30-34. Plaintiff-Respondent John Eacho gave a graphic description of the medical conditions that affected his life at the time of this real estate transaction, stating:

Well, I had all kinds of operations. My knees and my hips have been replaced. Probably one that would affect you the

most are the eyes. The eyes, of course. But they were bad. I had all three problems with my eyes at the time of this transaction. And I had just got them fixed. They took the two of the cataracts out and they had given me a shot for macular degeneration on – the left eye is practically gone. But I get a shot every six weeks to try and stop it from spreading. As far as my thought process, I'm not near the person I was. I wasn't when I did that contract. In between that and my eyes, I didn't – I – if somebody said sign here, I signed so that's all. I've had a year and a half of dialysis. And then I received a kidney since the matter, they flew it out here. And that's been – it's been seven years, and I'm going on my eighth year with that kidney. ...

RP Vol. I p. 30-34.

Mr. Eacho, at the time of this transaction, was a man suffering greatly from the infirmities of old age and relied on the expertise of Defendant-Appellant to close the real estate transaction in conformance with the contract documents and industry and community standards.

As the Trial Court specifically found in Findings of Fact #25:

"25. The expert testimony established that generally, closing a seller financed transaction without proof of insurance designated the Seller as the first loss payee is not in conformance with industry and community standard. In situation where buyer and seller, in a seller financed residential real estate transaction, waive the necessity for a policy of hazard insurance covering the subject property which names the seller and the primary beneficiary, it is standard to obtain express waiver of said condition."

CP 361-362; *See*, RP Vol. I p. 99-100.

**D. Defendant - Appellant's Effort to Assert a Verbal Waiver of Required Insurance Coverage by Plaintiff-Respondent is Not Supported by the Record.**

Defendant-Appellant has made much of a telephone conversation between Defendant-Appellant Steve Gustafson and the Seller, Mr. Eacho that took place prior to the closing of the real estate transaction. *See*, Brief of Appellant, pp. 6-7, 9. The trial court specifically found in Findings of Fact #26:

"26. Prior to the closing date, Mr. Gustafson had a phone conversation with Mr. Eacho. The purpose of the phone conversation, in part, was to advise Mr. Eacho of the date and time of the closing. Mr. Gustafson indicated that they also discussed insurance coverage for the property and Mr. Eacho mentioned he had insurance coverage with Hartford. Mr. Eacho did not have a clear recollection of the conversation but does acknowledge he insured this property with Hartford when he resided there."

CP 362.

Defendant-Appellant testified as to his recollection of this discussion of insurance in that telephone conversation. RP Vol. II p. 27-31; 79. Defendant-Appellant argues that this conversation constituted a verbal waiver by Mr. Eacho of the responsibility of the Buyer, Uribe, to provide a certificate of insurance at the time of closing establishing hazard insurance on the subject property payable to the benefit of the Seller, Mr. Eacho.

As Plaintiff-Respondent argued, and as was accepted by the trial court in its Findings of Fact, it is unreasonable to believe that a lawyer acting as a Closing Agent in a real estate transaction would accept, verbally over the phone, a “waiver” of something so critical to the closing of the real estate transaction as hazard insurance. What is more unreasonable to believe is that if such a material, critical “waiver” took place verbally by one of the parties to the real estate transaction, the lawyer, as Closing Agent, would not make a note of the “waiver” in the closing file, or confirm the matter in writing by letter, or by email, or take some other action to document the existence of this crucial “waiver.” Under Washington law, a waiver is the intentional abandonment or relinquishment of a known right, and the intent to waive such a right must be shown by unequivocal acts or conduct by a party which are inconsistent with any intention other than to waive. See, Mid-town Limited Pship. v. Preston, 69 Wn. App 227, 233, 848 P.2d 1268 (1993). Neither the documents involved in the closing of this real estate transaction, nor the testimonial evidence considered by the trial court, establishes the intent of the Seller, Mr. Eacho, to waive the required "Acceptable Insurance" in the closing of this transaction.

The Trial Judge, having weighed the evidence and having evaluated the credibility of the witnesses, made the following Finding of Fact #27 and 28:

"27. To the extent the aforementioned conversation is presented to apply a verbal waiver of the insurance requirements, it is not persuasive. Nor does the Closing Agent's file contain any written notice notation of a verbal waiver of said contractual condition of hazard insurance.

28. The Closing Agent's file contains no signed written waiver of the contracts obligation for the buyer to provide hazard insurance on the subject policy and name the seller as primary beneficiary."

CP 362.

The trial judge was in a position to observe the witnesses, Defendant-Appellant Steve Gustafson, and Plaintiff-Respondent John Eacho, and to observe their conduct and demeanor. The trial judge was presented with two versions of the facts regarding the phone conversation, she rejected one, and accepted the other. Since there was substantial evidence to support her choice, Plaintiff-Respondent asserts that this Finding of Fact cannot be disturbed on appeal. See, Bergman v. Johnson, 66 Wn. 2d 858, at p. 862, 405 P. 2d 715 (1965), and Thorndike v. Hesperian Orchards Inc., 54 Wn.2d 570, 343 P. 2d 183 (1959).

Based on its Findings of Fact, which are unchallenged here, the trial court entered the following conclusion of law on the issue of waiver:

13. The defendant asserted the affirmative defense of waiver. Defendant bears the burden of proof on this issue. The defendant did not meet its burden of proof regarding an alleged waiver by the plaintiff of the written provisions of the contract documents requiring hazard insurance benefitting the plaintiff."

CP 366.

## II.

### **RESPONSE TO DEFENDANT-APPELLANT'S SECOND ASSIGNMENT OF ERROR**

The Defendant-Appellant's Second Assignment of Error proposes as follows:

The Trial Court abused its discretion by granting Plaintiff's Motion in Limine regarding Gustafson's and Hogan's affirmative defense of contributory negligence which was, in effect, a motion to strike the defense.

Brief of Defendant-Appellant, p. 17.

Defendant-Appellant's Second Assignment of Error states that the trial court struck G&H, Inc.'s comparative negligence affirmative defense and concluded that G&H, Inc. had waived the defense by not timely filing its Answer to Plaintiff's Amended Complaint. *Id.* The specific facts of this case provide the details that support the Trial Court's determination.

On May 18, 2010, just fourteen days prior to the scheduled trial date, Defendant-Appellant filed Defendant's "Answer to Plaintiff's First Amended Complaint and Affirmative Defenses" raising, for the first time,

the issue of contributory negligence on the part of Plaintiff-Respondent, John Eacho. CP 194-196. Despite having received Plaintiff-Respondent's Amended Complaint on August 18, 2009, Defendant-Appellant did not file an Answer until May 18, 2010, a full nine months later. CP 135-137; CP 194-196. By the time Defendant-Appellant filed its Answer, asserting for the first time the defense of contributory negligence, the deadline for amendment of claims and defenses had long since past, as had the deadline for completion of discovery. CP 155. Prior to this belated filing of an Answer raising this new affirmative defense, Plaintiff-Respondent relied, both in discovery and preparing for trial, on the fact that contributory negligence was not an issue.

Just prior to trial, in its Motion in Limine, Plaintiff-Respondent asserted that the Defendant-Appellant should not be allowed, "at the eleventh hour, to change the landscape of this litigation through the untimely assertion of additional claims and defenses." CP 198. Under Civil Rule 8(c) a defendant intending to set forth a defense of contributory negligence is required to affirmatively plead the issue.

Defendant-Appellant relies on two cases French v. Gabriel, 116 Wn. 2d 584, 805 P. 2d 1234 (1991) and Lybbert v. Grant County, 141 Wn. 2d 129, P. 3d 1124 (2000) for the proposition that delay in filing an Answer does not constitute a waiver of an affirmative defense. However,

the two cases cited by Defendant-Appellant both dealt with the procedural issue of the waiver of the affirmative defense of “insufficiency of service of process,” and provide little guidance on waiver of the substantive issue of contributory negligence. The third case cited by Defendant-Appellant is Oltman v. Holland America Line, 163 Wn. 2d 236, 178 P. 3d 981 (2008) wherein the plaintiff asserted that the defendant had, by failing to file a timely Answer, waived its affirmative contract defenses of forum selection, improper venue, and other contract limitations. The defendant, Holland America Line, had filed their Answer only eleven days past the twenty day time limit of Civil Rule 12(a)(1) for serving an Answer. In the Oltman case the Supreme Court looked at the issue of waiver of affirmative defenses in the context of the short timeline between the date that the Answer was due and the date that the Answer was actually filed and reasoned:

[U]nder the common law doctrine of waiver, waiver of affirmative defenses can occur under certain circumstances in two ways: if the defendant’s assertion of the defense is inconsistent with the defendant’s previous behavior and if defendant’s counsel has been dilatory in asserting the defense.”

The court then concluded: “[W]e need 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 no prejudice is established in this case.

Oltman v. Holland American Line, 163 Wn.2d at 246.

Defendant-Appellant's waiver of the substantive issue of contributory negligence in this case is established by its prolonged failure to file an Answer raising this affirmative defense and the resulting prejudice to Plaintiff-Respondent. Defendant-Appellant failed to file an Answer until nine months after it was due, during which time, as has been noted, the deadline for amendment of claims and defenses had long since past, and more importantly, the deadline for completion of discovery had also elapsed. CP 155. The prejudice that the Supreme Court found missing in the Oltman case, supra, is clearly present in the instant case.

Plaintiff-Respondent submits that the cases of Wilson v. Horsley, 137 Wn. 2d 500, 974 P. 2d. 316 (1999), and Oliver v. Flow Int'l. Corp., 137 Wn. App. 655, 155 P.3d 140 (Div. I, 2006) provide more appropriate guidance to the court on the issue of when belated efforts to amend an Answer to add substantive issues to litigation constitutes prejudice.

In the first case, Wilson v. Horsley, supra, Wilson filed a Complaint for personal injuries against Horsley in Cowlitz County Superior Court in 1993. Wilson v. Horsley, 137 Wn. App. at 502. The trial of the matter, was originally set as a jury trial scheduled for May 2, 1994, was continued to June 6, 1994 on Horsley's motion. Id. On April 18, 1994, Horsley filed a Motion for Leave to Amend his Answer to add contributory negligence, self defense, laches, failure to mitigate,

comparative negligence, and intoxication as affirmative defenses. Id. The trial court denied Horsley's Motion to Amend reasoning that allowing the amendment would be "grossly unfair" and "prejudicial" to the interest of the Plaintiff, noting:

The touchstone for denial of a Motion to Amend is the prejudice such an amendment would cause to the non-moving party. [Citation omitted] Factors which may be considered in determining whether permitting amendment would cause prejudice would include undo delay, unfair surprise, and jury confusion." [Citation omitted]

Id. at 505-506.

The court in the Wilson case recognized that the amendments proposed by Horsley would substantially change the case being tried from that which was brought in the initial pleadings. Id. The court noted that Horsley had raised these issues on the eve of trial, after being aware of the factual basis for the proposed amendment since the beginning of the litigation, stating:

Unfair surprise is a factor which may be considered in determining whether permitting amendment would cause prejudice.

Id. at 507.

The case of Oliver v. Flow Int'l Corp., identifies the type of prejudice that warrants denial of a belated effort to assert an affirmative defense, and is directly on point with the instant case, the Court held:

Undue delay on the part of the movant in proposing the amendment constitutes grounds to deny a motion to amend only where such delay works undue hardship or prejudice upon the opposing party. Caruso v. Local Union No. 690 of Int'l Bhd. of Teamsters, 100 Wn.2d 343, 670 P.2d 240 (1983). Flow's showing of prejudice was adequate to justify a denial of the motion. A new round of discovery would have been necessary. [Emphasis Added]

Oliver v. Flow International Corp., 137 Wn. App at 664.

Defendant-Appellant argues that its failure to raise the issue of contributory negligence on the eve of trial should be excused because (a) Plaintiff- Respondent Eacho never moved for default to force an Answer to his Amended Complaint; and (b) Plaintiff-Respondent never inquired about the potential that Defendant-Appellant would attempt to raise additional unplead defenses. Brief of Appellant p.18.

Defendant-Appellant does not dispute that it failed to comply with requirements of Civil Rule 8(c) and did not file an Answer until May 18, 2010, a full nine months after it received Plaintiff-Respondent's Amended Complaint, and long after the Scheduling Order deadlines.

Defendant-Appellant offers no authority for its suggestion that a party's obligation under Civil Rule 8(c) is excused if their opponent does not move to seek default or otherwise inquire about unpled potential defenses. Plaintiff-Respondent submits that Defendant-Appellant's obligations under the Civil Rules are not responsibilities that can be

unilaterally shifted onto others. Since Defendant-Appellant did not raise the issue of contributory negligence in accordance with the rules, whether by choice or by omissions, Plaintiff-Respondent was entitled to rely on that omission, and to proceed to prepare for this litigation with the knowledge that no undisclosed issues would be raised at the time of trial. Under these circumstances, Defendant-Appellant's untimely assertion of contributory negligence as a potential issue for trial was both untimely and improper. Relying upon Wilson v. Horsley, and Oliver v. Flow Int. Corp., supra, Plaintiff-Respondent submits that the trial court did not abuse its discretion in denying Defendant-Appellant's efforts to raise a new affirmative defense in an Answer filed fourteen days prior to the scheduled trial date.

### III

#### **RESPONSE TO DEFENDANT-APPELLANT'S THIRD ASSIGNMENT OF ERROR**

The Defendant-Appellant's third assignment of error proposes as follows:

The Trial Court erred in awarding attorney's fees and costs to Eacho.

Brief of Defendant-Appellant, p. 21.

The authority for the award of attorney's fees was specifically identified by the trial court in Finding of Fact #37.

"37. The Closing Agreement Escrow Instructions provided in pertinent part; 'the parties jointly and severally agree to pay the closing agent's costs, expenses and reasonable attorney fees incurred in any lawsuit arising out of, or in connection with the transaction or these instructions whether such lawsuit is instituted by the Closing Agent, the Parties, or any other person.'; (D-101, p. 112, 'Disputes') [Emphasis Added]

CP 364.

The trial court then made the following Conclusion of Law #9.

"9. In accordance with RCW 4.84.330, the aforementioned (Finding of Fact #37) provision for '...costs, expenses and reasonable attorney fees incurred in any lawsuit arising out of or in connection with the transaction or these instructions...' applies equally to and shall be paid by the Defendant to the prevailing Plaintiff."

CP 365.

RCW 4.84.330 provides, in pertinent part, as follows:

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract or lease or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.

The trial court made its final Conclusion of Law #15:

"15. Plaintiff is awarded the principal sum of \$31,635.90 together with prejudgment interest at 12% from August 8, 2007 until paid, actual costs, expenses and attorney fees incurred in prosecution of this claim, and to the extent that they are not duplicative, statutory attorney fees and costs."

CP 366.

Defendant-Appellant argues that attorney fees should only be awarded on the portion of attorney work expended on the breach of contract portion of the Plaintiff's case and not the negligence portion of the Plaintiff's case. Under Washington law, an action is on a contract for purposes of a contractual attorney fees provision if the action arose out of the contract and if the contract is central to the dispute. See, Seattle-First National Bank v. Washington Ins. Guaranty Assoc., 116 Wn.2d 398, 413, 804 P.2d 1263 (1991). Defendant-Appellant makes an erroneous statement that Plaintiff-Respondent postured and pursued the instant case as a legal malpractice action. Brief of Appellant p. 22. Counsel for Plaintiff-Respondent made it apparent on multiple occasions, on the record, and the trial court stated that it was not a legal malpractice action and admonished the defense for continuing to reference it as such. RP Vol. I, p. 1551-155

A review of the records, specifically the Defendant-Appellant's closing file, demonstrates that the facts which surround the breach of contract claim are identical to the facts established in support of the negligence claim. Each claim involved the same documents, the same acts and the same omissions. Ex D101. It is impractical to divide the legal work between the contract claim and the negligence claim.

Plaintiff-Respondent submits that the case of Edmonds v. Scott Real Estate, 87 Wn. App. 834, 942 P. 2d 1072, (Div. I, 1997) is on point with the instant case with regard to the issue of an award of attorney fees. Edmonds, a buyer, brought suit against the Scott Real Estate Agency. Edmonds v. Scott Real Estate, 87, Wn App. at 840. The trial court found that the Defendant Scott Real Estate Agency had breached its fiduciary duty with respect to its disbursement of the earnest money, breached the earnest money agreement, was negligent in preparation of the earnest money agreement, and violated the Consumer Protection Act. Id. The Court of Appeals held:

Scott disputes the court's award of attorney fees to Edmonds to the extent the fees were awarded on connection with her breach of fiduciary duty and negligence claims. It argues that these claims are tort claims, not contract claims, and therefore cannot be encompassed with an award of attorney fees under either the Buyer/Broker Agreement or the Earnest Agreement.

Id. at 855.

The Court went on to hold:

If the Edmonds breach of fiduciary duty and negligence claims were action “on a contract” then the award of attorney fees was proper ‘[A]n action is on a contract for purposes of contractual attorney fees provision if the action arose out of the contract and if the contract is central to dispute.’ Tradewell Group, Inc. v. Mavis, 71 Wn. App. 120, 130, 857 P.2d 1053 (1993). The negligence claims were based on TJOA’s drafting of the Earnest Money Agreement and his breach of duty to act with due diligence

in negotiating the purchase of the property on terms and conditions acceptable to Edmonds. This duty was created under, and defined by, the Buyer/Broker Agreement. The breach of fiduciary duty claims were based on Scott's disbursement of Edmonds earnest money in a manner it claims was not set forth in the Earnest Money Agreement. Therefore, the terms of the Earnest Money Agreement and the contractual relationship created by the agreement are central to these claims, rendering them claims "on a contract" it was proper for the court to award attorney fees in connection with these claims under the contractual attorney fees provisions.

Id. at 855-856.

As in the above cited case, it was proper for the trial court to award attorney fees in this case for all legal work performed on behalf of Plaintiff-Respondent in connection with these claims under the contractual attorney fee provision in the Closing Agreement. The transaction documents that were prepared by the Defendant-Appellant created the contractual relationship between the Plaintiff-Respondent and Defendant-Appellant which is central to all of Plaintiff-Respondent's claims.

Although Plaintiff-Respondent alleged two causes of action, breach of contract and negligence, both claims were based on the same documents, the same acts, and the same omissions involved in the closing of the real estate transaction and the failure of the Defendant-Appellant to "receive and hold" documents establishing that "Acceptable Insurance" protecting the Plaintiff-Respondent, as Seller, had been procured by the

Buyer. Although the causes of action allege different claims of recovery, breach of contract and negligence, both claims relate to the same fact pattern and therefore, the trial court did not abuse its discretion in awarding attorney fees for all of the legal work performed on behalf of Plaintiff-Respondent.

Moreover, and independent of the arguments above, Defendant-Appellant's "Closing Agreement and Escrow Instructions" specifically provides as follows:

"Disputes. Should any dispute arise between the Parties, or any of them, and/or any other party, concerning the property or funds involved in the transaction, the Closing Agent may, in its sole discretion, hold all documents and funds in their existing status pending resolution of the dispute, or join or commence a court action, deposit the money and documents held by it with the court, and ask the court to determine the rights of the parties. Upon depositing said funds and documents with the court, the Closing Agent shall have no further duties or responsibilities under these instructions. The Parties jointly and severally agree to pay the Closing Agent's costs, expenses and reasonable attorney fees incurred in any lawsuit out of or in connection with the transaction or these instructions, whether such lawsuit is instituted by the Closing Agent, the Parties, or any other person. [Emphasis Added]

Ex. P6.

The above quoted dispute provision of the "Closing Agreement and Escrow Instructions" was drafted by the Defendant-Appellant, and specifically provides that the Parties, which includes the Closing Agent,

"jointly and severally agree to pay the Closing Agents costs, expenses and reasonable attorney fees incurred in any lawsuit arising out of or in connection with the transaction or these instructions, whether such lawsuit is instituted by the Closing Agent, the Parties, or any other person." Ex P6. Under Washington law the Defendant-Appellant, as the drafter of this document will have the provisions of the document interpreted against it. Plaintiff-Respondent's negligence cause of action arose out of, or was in connection with, the closing of this real estate transaction. The broad language in the contract does not limit recovery of attorney fees to actions for breach of contract, but rather allows recovery of attorney fees on "any lawsuit... in connection with the transaction or instruction." *See*, Ex p.6. The trial court did not abuse its discretion by awarding Plaintiff the entirety of his reasonable attorney fees where both of his causes of action qualify for recovery under the broad language of the contract.

#### IV

#### **RESPONSE TO DEFENDANT-APPELLANT'S FOURTH ASSIGNMENT OF ERROR**

The Defendant-Appellant fourth assignment of error proposes as follows:

The Trial Court erred in awarding pre-judgment interest.

Brief of Defendant-Appellant, p. 23.

Defendant-Appellant's alleges that the Plaintiff-Respondent's damages of \$31,635.90 did not represent a liquidated amount. Id. at 24. Arguing that it was "nothing more than a reflection of the opinion of the Farmer's Insurance adjuster on the replacement value of the burnt structure and depreciation." Id. Under Washington law, a claim is liquidated "when the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance on opinion or discretion." See, Hanson v. Rothaus, 107 Wn.2d 468, 472, 730 P.2d 662 (1986), at p. 472. There was no dispute before the trial court over the amount paid by Farmer's Insurance Company to Ms. Uribe.

The Trial Court made the following Finding of Fact:

"33. On July 4, 2007, there was a fire at the subject residence which burned and consumed a detached garage which Farmer's designated had a replacement value of \$67,720.50, but which had a coverage limit of \$63,200.00. After subtracting \$36,084.10 for depreciation, Farmer's Insurance made a payment to Uribe on August 8, 2007 in the amount of \$31,635.90 (D-101, p. 38)."

CP 363.

\$31,635.90 is the fixed amount Plaintiff-Respondent claimed as damages at trial.

In the case of Hadley v. Maxwell, 120 Wn. App. 137, 84 P.3d 286 (Div.III, 2004), a case involving personal injury damages arising out of an automobile accident. The Defendant Maxwell appealed an adverse trial

court determination on a liability issue but did not challenge the damages award in favor of the Plaintiff Hadley. Id. On remand for a new trial, on the liability issue alone, the jury found the Maxwells solely liable. Id. The trial judge denied a request for proposed prejudgment interest accrued on the damages award between the 1998 damages verdict and the date of the 2003 liability verdict. Id. at 141. On appeal, Division Three of the Court of Appeals reasoned that, because the Maxwells had never challenged the original damages award and reviewing courts had impliedly affirmed it, the Hadleys were entitled to prejudgment interest for the period between the 1998 damages verdict and the date of the 2003 liability verdict. See, Hadley v. Maxwell, supra at p. 147.

In the instant case, the \$31,635.90 awarded in damages is a liquidated amount, however, even if it were not, since Defendant-Appellant stipulated the amount and did not challenge the amount at trial, under the analysis of the Hadley case, Plaintiff-Respondent is entitled to prejudgment interest.

RCW 4.56.110 provides in pertinent part as follows:

Interest on judgment shall accrue as follows:

(1) Judgments founded on written contracts, providing for the payment of interest until paid at a specified rate, shall bear interest at the rate specified in the contracts: PROVIDED, That said interest rate is set forth in the judgment.

...

(3) Judgments founded on the tortious conduct of individuals or other entities, whether acting in their personal or representative capacities, shall bear interest from the date of entry at two percentage points above the equivalent coupon issue yield, as published by the board of governors of the federal reserve . . .

(4) Except as provided under subsections (1), (2), and (3) of this section, judgments shall bear interest from the date of entry at the maximum rate permitted under RCW 19.52.020 on the date of entry thereof. . .

The Closing Agreement documents and contract do not specify a pre-judgment interest rate, rendering RCW 4.56.110(1) inapplicable. *See*, Ex P.6. RCW 4.56.110(3), relied upon by Defendant-Appellant, is likewise inapplicable, as the instant judgment sounds, fundamentally, in contract. Consequently, the controlling section is RCW 4.56.110(4), which provides for an interest rate of 12% per annum, pursuant to RCW 19.52.020.

RCW 19.52.020 provides in pertinent part:

(1) Any rate of interest shall be legal so long as the rate of interest does not exceed the higher of: (a) Twelve percent per annum; or (b) four percentage points above the equivalent coupon issue yield (as published by the Board of Governors of the Federal Reserve System) of the average bill rate for twenty-six week treasury bills . . .

Accordingly, the trial court did not error in granting Plaintiff-Respondent prejudgment interest for the liquidated damages amount of \$31,635.90 awarded to Plaintiff-Respondent.

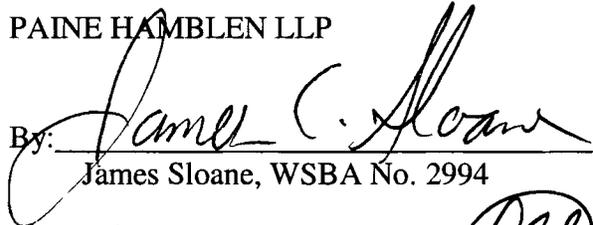
V.

**PLAINTIFF-RESPONDENT'S REQUEST FOR AN AWARD OF ATTORNEY FEES ON APPEAL**

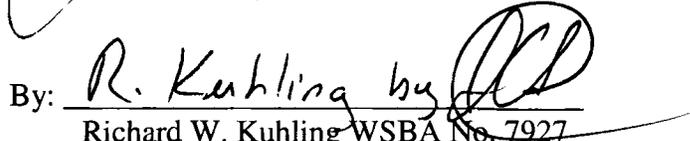
Defendant-Respondent respectfully requests reasonable attorney fees and costs incurred as a consequence of this appeal. When a contract or agreement provides for payment of attorney fees, the prevailing party is entitled to reasonable fees and costs incurred at both trial and appeal. Quality Foods Centers v. Mary Jewell T, LLC, 134 Wn. App. 814, 142 P.3d 206 (Div. I, 2006). Parties whom the Court finds are entitled to an award of attorney fees incurred at the trial level are also entitled to attorney fees on appeal if determined to be the "substantially prevailing party." South Kitsap Family Worship Center v. Weir, 135 Wn. App. 900, 146 P.3d 935 (Div. II, 2006) (fee award justified despite failure to prevail on some issues); DeAtley v. Barnett, 127 Wn. App. 478, 112 P.3d 540 (Div. III, 2005), *review denied*, 156 Wn. 2d 1021, 132 P.3d 735 (2006) and *cert. denied*, 127 S.Ct. 123 (2006). Accordingly, Defendant-Respondent respectfully requests an award for his reasonable attorney fees and costs incurred in consequence of this appeal.

RESPECTFULLY SUBMITTED this 19<sup>th</sup> day of August, 2011.

PAINÉ HAMBLEN LLP

By: 

James Sloane, WSBA No. 2994

By: 

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Spokane, WA 99201-3505

Attorneys For Plaintiff/Respondent

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 19th day of August, 2011, I caused to be served a true and correct copy of the foregoing BRIEF OF RESPONDENT by the method indicated below, and addressed to the following:

James B. King  
Evans, Craven & Lackie, P.S.  
818 West Riverside, Suite 250  
Spokane, WA 99201-0910

- U.S. MAIL
- HAND DELIVERED
- OVERNIGHT MAIL – Federal Express
- TELECOPY (FAX) to:
- E-MAIL:

  
Sheila Espinoza

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