

66723.8

66723.8

No. 66723-8

---

IN THE COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION 1

---

224 WESTLAKE, LLC,  
a Washington limited liability company,

Plaintiff/Respondents,

v.

ENGSTROM PROPERTIES, LLC,  
a Washington limited liability company,

Defendant/Appellant.

---

PRAECIPE - BRIEF OF RESPONDENT

---

Christopher I. Brain, WSBA #5054  
Adrienne D. McEntee, WSBA #34061  
TOUSLEY BRAIN STEPHENS PLLC  
1700 Seventh Avenue, Suite 2200  
Seattle, Washington 98101  
206.682.5600

Attorneys for Plaintiff/Respondent

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2011 JUL -8 PM 3:13

ORIGINAL

TO: CLERK OF THE COURT

AND TO: OPPOSING COUNSEL

YOU ARE HEREBY REQUESTED to substitute the attached Brief of Response for that filed on June 30, 2011. This Praecipe is being filed to correct the typographical errors listed below and the corrected Brief of Respondent is attached hereto as Exhibit A.

1. Table of Contents, Page i, under Section V, Subsection D, the word “to” replaced with the word “the.”
2. Table of Contents, Page ii, under Section VI, Subsection C, the word “court” replaced with the word “Court.”
3. Page 3, in the first line of last paragraph, the word “clean-up” replaced with the words “clean up.”
4. Page 6, under No. 3, the word “conclusions” replaced with the word “conclusions.”
5. Page 8, in fifth line from the top, the word “investigate” replaced with the word “investigates.”
6. Page 8, in the sixth line from the top, the word “a” inserted between the words “to” and “single-asset.”
7. Page 8, in the first line of the last paragraph, the word “Investco-related” replaced with the word “Investco”-related.

8. Page 9, in the first line, the word “build” replaced with the word “builds.”

9. Page 9, in the Section B heading, the word “Clean-“ replaced with the word “Clean.”

10. Page 10, in line 9, the comma and the word “and” have been deleted.

11. Page 12, in Subheading 1, the word “up” replaced with the word “Up.”

12. Page 13, in the second line from the top, the word “to” inserted between the words “sale” and “close.”

13. Page 15, in the last line on the page, the word “taken” replaced with the word “take.”

14. Page 33, in the fourth line from the top, the word “extend” replaced with the word “extended.”

15. Page 37, in the first line at the top of the page, the word “Westlake” replaced with the word “Westlake’s.”

16. Page 38, in the fourth line from the bottom, the extra period after the word “used” has been deleted.

17. Page 39, in the eighth line of the first paragraph, the word “an” has been inserted before the word “injured.”

18. Page 40, in Footnote 6, the second to the last word “Closing” replaced with the word “closing.”
19. Page 42, in the sixth line of the first paragraph, the amount of money “\$463,310.00” replaced with “463,310.”
20. Page 42, in Footnote 7, the first word “Engstrom’s” replaced with the word “Engstrom.”
21. Page 48, in the second line from the bottom of the page, the word “the” has been inserted before the word “trial.”

DATED this 8 day of July, 2011.

TOUSLEY BRAIN STEPHENS PLLC

By   
Christopher I. Brain, WSBA #5054  
Adrienne D. McEntee, WSBA #34061  
1700 Seventh Avenue, Suite 2200  
Seattle, Washington 98101  
206.682.5600

*Attorneys for Plaintiff/Respondent*

**CERTIFICATE OF SERVICE**

I, Betty Lou Taylor, hereby certify that on the 8th day of July, 2011, I caused to be served true and correct copies of the foregoing to the following person(s) in the manner indicated below:

---

Sylvia Luppert, WSBA #14802  
REAUGH OETTINGER & LUPPERT, P.S.  
1601 Fifth Ave., Suite 2200  
Seattle, WA 98101-1625

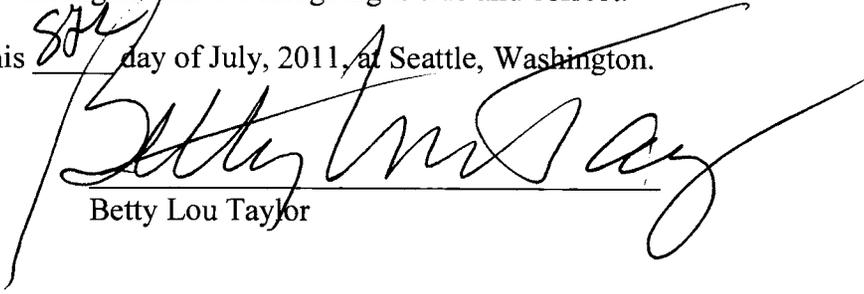
- U.S. Mail, postage prepaid
- Hand Delivered
- Overnight Courier
- Facsimile
- Electronic Mail

*Attorneys for Defendant/Petitioner*

---

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

EXECUTED this 8<sup>th</sup> day of July, 2011, at Seattle, Washington.

  
Betty Lou Taylor

# EXHIBIT A

No. 66723-8

---

---

IN THE COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION 1

---

---

224 WESTLAKE, LLC,  
a Washington limited liability company,

Plaintiff/Respondents,

v.

ENGSTROM PROPERTIES, LLC,  
a Washington limited liability company,

Defendant/Appellant.

---

---

BRIEF OF RESPONDENT

---

---

Christopher I. Brain, WSBA #5054  
Adrienne D. McEntee, WSBA #34061  
TOUSLEY BRAIN STEPHENS PLLC  
1700 Seventh Avenue, Suite 2200  
Seattle, Washington 98101  
206.682.5600

Attorneys for Plaintiff/Respondent

**TABLE OF CONTENTS**

I. INTRODUCTION ..... 1

    A. Substantial Evidence Related to Engstrom’s Breach of Contract ..... 1

    B. Facts Pertaining to the Assignment..... 5

II. ISSUES PERTAINING TO ENGSTROM’S ASSIGNMENTS OF ERROR ..... 6

III. WESTLAKE’S COUNTER ASSIGNMENT OF ERROR ..... 7

IV. ISSUE PERTAINING TO WESTLAKE’S COUNTER ASSIGNMENT OF ERROR ..... 7

V. STATEMENT OF THE CASE..... 7

    A. “Investco” is a Successful Decades-Old Conglomeration of Real-Estate Investment and Development Companies ..... 7

    B. IPDC Entered Into an Option Agreement With Engstrom That Required Engstrom to Conduct Environmental Clean-Up as a Condition Precedent to Closing ..... 9

    C. As a matter of Course, IPDC Assigned the POA to an “Investco”-Related Single Asset Entity, 224 Westlake, LLC ..... 11

    D. Engstrom Breached the Environmental Clean Up Provisions..... 12

    E. But for Engstrom’s Breach, Westlake Would Have Closed ..... 16

    F. Procedural History ..... 17

VI. ARGUMENT ..... 18

    A. Engstrom May Not Seek Review of the Trial Court’s Partial Denial of Summary Judgment Regarding the Assignment ..... 18

B. Substantial Evidence Supports the Findings of Fact Which, in Turn, Support the Conclusions of Law ..... 22

C. The Trial Court’s Damage Award Was Reasonable and Supported by Substantial Evidence ..... 39

D. The Trial Court’s Award of Fees is Supported by the Record..... 43

E. The Trial Court Erred by Granting Summary Judgment on the Issue of Waiver ..... 47

F. Respondent is Entitled to an Award of Fees and Costs on Appeal..... 49

VII. CONCLUSION..... 50

## TABLE OF AUTHORITIES

### Cases

<u>Allard v. First Interstate Bank of Wash., N.A.</u> , 112 Wn.2d 145, 768 P.2d 998 (1989), opinion amended, 773 P.2d 420 (1989).....	43, 46, 47
<u>Amjems, Inc. v. F.R. Orr Constr. Co., Inc.</u> , 617 F.Supp. 273, (D.C. Fla. 1985).....	22
<u>Bailie Comme'n, Ltd. v. Trend Bus. Sys.</u> , 53 Wn. App. 77, 765 P.2d 339 (1988).....	34
<u>Bland v. Mentor</u> , 63 Wn.2d 150, 385 P.2d 727 (1963).....	23
<u>Bowers v. Transamerica Title Ins. Co.</u> , 100 Wn.2d 581, 675 P.2d 193 (1983).....	44, 45
<u>Cowan v. Chalamidas</u> , 98 N.M. 14, 644 P.2d 528, 530-31 (N.M. 1982) .....	21
<u>Cultum v. Heritage House Realtors, Inc.</u> , 103 Wn.2d 623, 694 P.2d 630 (1985).....	41
<u>Dorsey v. King Cnty.</u> , 51 Wn. App. 664, 754 P.2d 1255 (1988).....	22
<u>Ernst Home Center, Inc. v. Sato</u> , 80 Wn. App. 473, 910 P.2d 486 (1996).....	21, 28
<u>Ferree v. Doric Co.</u> , 62 Wn.2d 561, 383 P.2d 900 (1963).....	29
<u>Frank Coluccio Constr. Co. v. King Cnty.</u> , 136 Wn. App. 751, 150 P.3d 1147 (2007).....	29
<u>In re Estate of Jones</u> , 152 Wn.2d 1, 93 P.3d 147 (2004); RAP 10.3(g) .....	23
<u>In the Matter of the Welfare of S.V.B.</u> , 75 Wn. App. 762, 880 P.2d 80 (1994).....	49
<u>Island Cnty. v. Mackie</u> , 36 Wn. App. 385, 675 P.2d 607 (1984).....	37
<u>Iverson v. Marine Bancorporation</u> , 86 Wn.2d 562, 546 P.2d 454 (1976).....	42

<u>Jacks v. Blazer,</u> 39 Wn.2d 277, 235 P.2d 187 (1951).....	34
<u>Jenson v. Richens,</u> 74 Wn.2d 41, 442 P.2d 636 (1968).....	36
<u>Johnson v. Rothstein,</u> 52 Wn. App. 303, 759 P.2d 471 (1988).....	18, 19
<u>Jones v. Best,</u> 134 Wn.2d 232, 950 P.2d 1 (1998).....	48
<u>Landberg v. Carlson,</u> 108 Wn. App. 749, 33 P.3d 406 (2001), <u>review denied</u> , 146 Wn.2d 1008, 51 P.3d 86 (2002) .....	43, 49
<u>Mason v. Mortg. America, Inc.,</u> 114 Wn.2d 842, 792 P.2d 142 (1990).....	39, 41, 42
<u>Okeson v. City of Seattle,</u> 130 Wn. App. 814, 125 P.3d 172 (2005).....	23
<u>Park Ave. Condo. v. Buchan Devs.,</u> 117 Wn. App. 369, 71 P.3d 692 (2003).....	34
<u>Prager’s Inc. v. Bullitt Co.,</u> 1 Wn. App. 575, 463 P.2d 217 (1969).....	37
<u>Razor v. Retail Credit Co.,</u> 87 Wn.2d 516, 554P.2d 1041 (1976).....	41, 42
<u>Reynolds v. Farmers Ins. Co.,</u> 90 Wn. App. 880, 960 P.2d 432 (1998).....	47
<u>Robbins v. Hunts Food &amp; Indus., Inc.,</u> 64 Wn.2d 289, 391 P.2d 713 (1964).....	passim
<u>Seidler v. Hansen,</u> 14 Wn. App. 915, 547 P.2d 917 (1976).....	24, 25
<u>Sherrell v. Selfors,</u> 73 Wn. App. 596, 871 P.2d 168, <u>review denied</u> , 125 Wn.2d 1002 (1994) .....	23
<u>Singleton v. Frost,</u> 108 Wn.2d 723, 742 P.2d 1224 (1987).....	44
<u>State v. Van Auken,</u> 77 Wn.2d 136, 460 P.2d 277 (1969).....	24

<u>Stevens v. Security Pacific Mortg. Corp.</u> , 53 Wn. App. 507, 768 P.2d 1007 (1989).....	39
<u>Thomas v. French</u> , 99 Wn.2d 95, 659 P.2d 1097 (1983).....	38
<u>Turner v. Gunderson</u> , 60 Wn. App. 696, 807 P.2d 370 (1991).....	40
<u>Wenatchee Sportsmen Ass'n v. Chelan Cnty.</u> , 141 Wn.2d 169, 4 P.3d 123 (2000).....	23
<u>Wilkinson v. Smith</u> , 31 Wn. App. 1, 639 P.2d 768 (1982).....	44
<u>Yakima Co. v. Evans</u> , 135 Wn. App. 212, 143 P.3d 891 (2006).....	25
 <b>Rules</b>	
RAP 18.1.....	49
RAP 18.1(a) .....	49

## I. INTRODUCTION

Engstrom asks this Court to overturn the trial court's findings and conclusions to upend the trial court's award of damages and reasonable attorneys' fees. Because the trial court's findings, its award of damages and attorneys' fees, and resulting judgment are supported by substantial evidence, the trial court's decision should be affirmed.

### A. **Substantial Evidence Related To Engstrom's Breach of Contract**

This dispute addresses the reasonableness of a seller's refusal to reasonably extend the closing date of real property, a material contractual provision that allowed the buyer to confirm whether the seller's mandatory environmental clean up was adequate. Engstrom Properties, LLC ("Engstrom") and Investco Properties Development Corporation ("IPDC") entered into a Real Estate Purchase Option Agreement ("POA") for the purchase of a building Engstrom owned at 224 Westlake in Seattle (the "Property"). The POA allowed for a two-year option and feasibility period, during which time Engstrom received \$600,000 in scheduled option payments, and authorized the parties to assign the POA with written consent, "which consent shall not be unreasonably withheld."

Materially, the POA required Engstrom to clean up environmentally hazardous materials on the Property including two underground storage tanks. As part of the clean up process, Section 3.5 of the POA authorized IPDC to independently contract for additional environmental testing, and required Engstrom to agree to a reasonable extension of the closing date to accommodate IPDC's right to test whether the clean up was effective. Engstrom's timely completion of the environmental clean up activities was a material condition precedent to closing.

After Engstrom timely received two years of payments totaling \$600,000, IPDC notified Engstrom on October 23, 2008 that it had assigned the POA ("Assignment") to Investco-related entity, 224 Westlake, LLC ("Westlake") and exercised its option to purchase the Property. The parties agreed to an initial closing date of March 2, 2009, conditioned on Engstrom's completion of the environmental clean up.<sup>1</sup>

After removing the underground storage tanks, Engstrom hired environmental consultant RK Environmental ("RK") to test for contamination. Westlake independently contracted for testing with a

second consultant, the Riley Group (“Riley”). Both consultants took initial samples and determined the site remained contaminated. In November/December 2008, a contractor removed soil from the site, covered the area with concrete, and in December 2008, RK represented that the site was clean.

But the site was not clean. At Westlake’s request, Riley returned to the site, drilled through the newly-laid concrete, independently tested the soil, and determined that the soil still contained contamination levels above the state-required clean up levels. Westlake demanded that Engstrom complete the environmental clean-up for which it had bargained. In response, Engstrom hired a second consultant, Pinnacle GeoSciences (“Pinnacle”). Pinnacle agreed that the soil was contaminated, but recommended that it remain.

Fearing that the State would require it to perform future clean up work and that it would be unable to obtain construction financing for the contaminated site, Westlake demanded a second time that Engstrom complete the environmental clean up. Despite repeated demands by Westlake’s attorneys, Engstrom did not respond.

---

<sup>1</sup> Although Section 5.1 of the POA specified a March 1, 2009 closing date, March 1, 2009, was a Sunday. Pursuant to Section 17, the date for performance rolled over to

Finally, one week before the March 2, 2009 closing, Engstrom disclosed, without prior notice as required by the POA, that it had done additional work at the building and again claimed the site was clean. Again, Engstrom had done so without providing Westlake with the required notice. Again, Engstrom hired RK, who had already erroneously claimed the site was clean. Again, Engstrom removed soil. And again, Engstrom covered the site with concrete, which caused Westlake's consultant—again—to undertake additional time and expense to drill through the concrete to again test the soil.

Most egregious, once Westlake learned about RK's additional work, on February 23, 2009, Engstrom unreasonably refused to extend the closing date. Specifically, Westlake asked that Engstrom agree to extend the closing date by 30 days to afford Westlake sufficient time to probe for, test, and analyze soil samples. Engstrom refused, unwilling to extend the closing date by more than four days, to March 6, 2009, even though it knew that four days was an insufficient period within which to obtain results. The trial court appropriately found that Engstrom's refusal to extend the closing date beyond March 6, 2009 was unreasonable and

---

Monday, March 2, 2009. Engstrom does not dispute this fact. CP 356 (FOF 7).

found that Engstrom had materially breached Section 3.5 POA, thereby discharging Westlake's obligation to close.

**B. Facts Pertaining to the Assignment**

The second issue, raised by Engstrom several months into the litigation, addresses IPDC's assignment of the POA to Westlake. After IPDC informed Engstrom of the Assignment, Westlake and Engstrom corresponded and spent months performing under the POA. Even after the sale fell through and litigation ensued, the parties agreed that the issue was whether Engstrom and Westlake had fulfilled their obligations under the POA. The Assignment was never an issue.

Nonetheless, many months into litigation Engstrom moved for summary judgment that the Assignment was void. Westlake responded that Engstrom had waived any objection to the Assignment. Westlake also responded that Engstrom's decision to withhold consent for the first time several months into the litigation was unreasonable.

At a trial on the merits, the trial court considered substantial evidence that Engstrom never investigated the financial capability of either IPDC or Westlake to close. Based on this evidence, the trial court properly found that a reasonably prudent person in Engstrom's position, having received all monies to which it was entitled under the POA, would

not have withheld consent. Thus, the trial court properly concluded that Engstrom's refusal to consent to the Assignment was unreasonable.

## **II. ISSUES PERTAINING TO ENGSTROM'S ASSIGNMENTS OF ERROR**

1. Is Engstrom precluded as a matter of law from seeking review of the order denying summary judgment, which was based upon the presence of material, disputed facts? (Assign. No. 1)

2. Where Engstrom failed to object to the manner of presentation of findings of fact and conclusions of law, and fails to establish any prejudice on appeal, can Engstrom establish error? (Assign. No. 2)

3. Does substantial evidence of Engstrom's unreasonableness support the findings of fact and conclusions of law? (Assign. Nos. 3 and 4)

4. Did the trial court err in its damages award where that award is supported by substantial evidence? (Assign. Nos. 5 and 8)

5. Did the trial court err when it applied standard reasonableness factors to billing reports submitted by Westlake's counsel, and awarded Westlake its reasonable attorneys' fees? (Assign. Nos. 6 and 7)

6. Where Section 10 of the POA expressly provides that the nonprevailing party must pay the prevailing party reasonable attorneys'

fees and related costs from an action to enforce the POA's terms, should this Court award Westlake their attorneys' fees on appeal?

### **III. WESTLAKE'S COUNTER ASSIGNMENT OF ERROR**

The trial court erred by granting the Order Denying/Granting Defendant's Motion for Summary Judgment dated October 30, 2009.

### **IV. ISSUE PERTAINING TO WESTLAKE'S COUNTER ASSIGNMENT OF ERROR**

Since the evidence presented on summary judgment raises genuine issues of material fact as to whether Engstrom waived any right it may have had to object to the Assignment, did the trial court err in partially granting Engstrom's motion for summary judgment?

### **V. STATEMENT OF THE CASE**

#### **A. "Investco" Is A Successful Decades-Old Conglomeration of Real-Estate Investment and Development Companies**

As discussed extensively at trial, "Investco" is not a company in and of itself, but a brand used to describe a series of real estate companies controlled since 1983 by Michael Corliss through Corliss' grantor trust, Evergreen Capital Trust ("ECT"), of which Corliss is the sole beneficiary. RP 26, 28, 159-60, 163-65. Since that time, "Investco"-related companies have developed 4,000 to 5,000 apartment units in three states,

approximately four and-a-half million square feet of industrial space, and approximately one million square feet in retail developments. RP 162.

The “Investco” business model is one in which an operating entity associated with Investco and ECT enters into purchase agreements and investigates the feasibility of real property projects. If a project is determined to be feasible, it is assigned to a single-asset limited liability company (“LLC”) owned by ECT and other investors for development. RP 161, 165. Each investment is managed and maintained by a separate LLC, a common way to develop real estate, and a structure that simplifies the financial and accounting procedures for each project. RP 161, 166-67. ECT owns approximately 70 percent of the equity of all of “Investco”-related entities. RP 165. In nearly every project, ECT is the financial guarantor. In essence, ECT is the financial arm, or balance sheet, of “Investco” and its related LLC projects. RP 165.

Other “Investco”-related entities perform operating and management functions for the single-asset companies. For example, IPDC is a property development company responsible for due diligence, site acquisition, design, and property management over residential projects during a project’s feasibility period. RP 28. Investco Management Services is a property management company that manages apartment

buildings “Investco” builds. RP 160. Finally, Investco Financial Corporation (“IFC”) is “Investco’s” umbrella operating company and acts as the asset manager for ECT, managing 175 to 200 different real property projects at any given time. RP 164-65, 407. None of “Investco’s” operating companies own real property. RP 26, 161.

**B. IPDC Entered Into An Option Agreement With Engstrom That Required Engstrom To Conduct Environmental Clean Up As A Condition Precedent To Closing**

On November 20, 2006, one of “Investco’s” operating companies, IPDC entered into the POA with Engstrom to purchase the Property. Exh.

1. To secure the option, IPDC paid \$600,000, comprised of an initial \$75,000 option price, followed by seven quarterly payments to Engstrom of \$75,000 each. Id. (§§ 2.1(b), (d)). If, before December 31, 2008, IPDC elected to exercise the option, the option payments applied to the Property’s \$4,550,000 purchase price. Id. (§§ 2.1(c), (d)).

During the option period, IPDC was authorized to conduct financial and economic feasibility studies and perform development work, including inspections, analyses, and tests, drawings, and designs. Id. (§§ 3.1, 3.2). IPDC planned to make use of the existing building’s heavy timber structure to create a mixed-use retail and residential structure,

including apartments and lofts with exposed beams on upper floors and a restaurant or other retail on the first floor. RP 34.

Engstrom acknowledged that the Property was potentially contaminated by reason of underground fuel storage tanks located below the basement floor of the building on the Property. Id. (§ 3.5). As a result, Engstrom agreed to assume the full, exclusive responsibility for clean up of the hazardous substances, agreed that IPDC could, at its own cost and expense, perform confirmatory testing to insure that the Property was indeed clean of all hazardous substances, ~~and~~. Id.

Purchasing property with contaminants was a deal breaker. RP 42, 194. As a policy, IPDC and other “Investco”-related companies do not take environmental risks. RP 171. “Investco”-related entities have not purchased property with contaminants for decades. RP 171-72.

Contaminated property can prevent construction or permanent financing, can pose risk to ECT as the guarantor, and makes any future sale of the property extremely difficult. RP 172. Engstrom’s clean up was a material condition precedent to closing. RP 177-78; Exh. 1.

**C. As a Matter Of Course, IPDC Assigned The POA To An “Investco”-Related Single-Asset Entity, 224 Westlake, LLC**

Section 13 of the POA allowed either party to assign the POA on prior written consent. Id. In addition, IPDC was authorized to transfer the POA to an entity in which it owned 51 percent of the ownership interests. Id. And such “consent shall not be unreasonably withheld.” (emphasis added). Id.

Consistent with “Investco’s” business model, IPDC assigned the POA to Westlake, an “Investco”-related, single-asset LLC of which ECT beneficially owned 60 percent. RP 196-99. Subsequently, IPDC provided Engstrom with written notice of the Assignment on October 23, 2008, along with notice that it intended to exercise the option and close the sale by the March 2, 2009 date provided in the POA. Exhs. 2, 3. At the time IPDC notified Engstrom of the Assignment, IPDC and Westlake had already made all \$600,000 in option payments, and expended \$436,310 in development and feasibility costs. RP 38-39; Exhs. 49, 50 to 220, & 253.

Engstrom did not object to, or question in any way, the Assignment. RP 372-75. Even after litigation commenced, Engstrom did not complain about the Assignment. CP 11-16. Engstrom’s belated

objection to the Assignment came nearly a year after learning of the Assignment when it moved for summary judgment. CP 20-25.

**D. Engstrom Breached the Environmental Clean up Provisions**

1. In Its First Attempt at Environmental Clean Up, Engstrom's Consultant Erroneously Concluded The Site Was Clean

In November of 2008, after Westlake notified Engstrom that it would exercise its option to purchase the Property, Engstrom initiated the clean up process. RP 43, 247. Engstrom retained Spooner Construction ("Spooner") to remove the tanks, and RK to assess the completeness of the work. RP 203-04, 207-208. Although Engstrom did not notify Westlake as required by Section 12 of the POA, Westlake learned of the clean up activities and arranged, at the time of the initial excavation, for its consultant Riley to take soil samples during the excavation. RP 43, 44, 247.

The Riley samples showed contaminated soil. Exh. 10. In response, Engstrom continued to remove soil from the site, arranged for RK to test, and poured a concrete slab over the area. RP 212, 250. RK then issued a report dated December 8, 2008 claiming that clean up was complete and no further action required. Exh. 7. The next day, Engstrom

wrote to Westlake about RK's clean up and indicated that it expected the sale to close on or before December 31, 2008, implying it expected Westlake to accept RK's findings. Exh. 6.

As authorized under the POA, Westlake elected to do its own testing and asked Riley to verify that the contaminated soil had been removed according to environmental guidelines. RP 249. Due to weather complications, and the limited availability of the unique piece of equipment needed to drill through the new concrete slab for testing, Riley was unable to take samples until January 14, 2009. RP 252-53. Those, and other samples, revealed contamination above state-mandated levels. RP 256; Exh. 10. Specifically, Riley noted contamination against the north wall, where RK had failed to test as required by the Washington State Department of Ecology. RP 248, 254-55.

2. Engstrom Secretly Re-hired Its Consultant for a Second "Clean" Assessment and Refused to Allow Sufficient Time for Westlake to Conduct Any Confirmatory Testing

After reviewing Riley's report, Engstrom retained Pinnacle, which confirmed the Property contained high levels of diesel and heavy oils. Exh. 12. But because contamination was found beneath the footings of structural columns supporting the building, Engstrom decided, based on

Pinnacle's recommendation, that further clean up would be cost prohibitive, and concluded that remaining contamination could be addressed in the future. Id. Westlake found this position unacceptable. The POA required Engstrom, alone, to be responsible for clean up. Further, environmental regulations change frequently, tending to become stricter over time. RP 221; Exh. 1 (§ 3.5).

At this point, Engstrom stopped all communication with Westlake and again elected to perform additional site clean up without notifying Westlake. RP 383-92. Concerned that insufficient time existed to complete clean up and confirmatory testing before closing, Westlake's counsel, on February 9, 2009, inquired about the status of the clean up, demanded "complete clean up," and asked for an addendum to the POA to extend the closing. Exhs. 9, 13. Engstrom did not respond to Westlake's February 9 letter and request. RP 381-83. With the March 1, 2009 closing just weeks away, Westlake's counsel wrote Engstrom again on February 20. Exh. 14. Only on February 23 did Engstrom disclose it had done additional work at the Property, retaining Spooner and RK to excavate and conduct testing. RP 218; Exh. 16. Despite contracting to do so, Engstrom never notified Westlake of its additional clean up activities. RP 43, 179, 383-92; Exh. 1 (§ 3.5).

Although Engstrom, for a second time, claimed the Property was clean, Westlake's contamination concerns were not resolved. RK's memorandum, delivered to Westlake on February 26, 2009, just days before closing, contained only a data summary. RP 222-27; Exhs. 18, 20. Despite recounting the removal of soil, RK did not offer any opinion or conclusion. Id. Specifically, RK did not conclude that the quality of the soil fell within acceptable ecological ranges. Id.

In response, Westlake gave Engstrom notice of its intent to perform additional confirmatory testing and that a reasonable 30-day extension of the closing date to March 31, 2009 would be required to arrange for testing, test, and complete the analysis. Exhs. 1 (§ 3.5), 20.

But Engstrom would agree to only a four day extension, to March 6, 2009. Exhs. 16, 17, 19-23. Yet as both Engstrom's and Westlake's consultants testified, four days was insufficient for Westlake to arrange, perform, analyze confirmatory testing, and render a written opinion. Lab testing alone typically takes two weeks. RP 212. The standard time required is three to four weeks. RP 261. Even on an expedited schedule, at least nine days would be required. RP 261-62. Indeed, Engstrom's attorney conceded it may be a "stretch to take the samples and test them in

this time frame.” Exh. 19. Although Westlake was able to schedule the unique drill rig for March 4, it cancelled the appointment once Engstrom unreasonably refused to extend the closing date. RP 266-68.

**E. But For Engstrom’s Breach, Westlake Would Have Closed**

Rather than reasonably extend the closing date, Engstrom accused Westlake of being financially incapable of closing the deal. Exh. 21. Despite Westlake’s assurance that it had the funds to close the sale, as well as numerous attempts to cooperate with Engstrom, Engstrom refused to extend the closing date more than four days. Exhs. 16, 17, 19-23. Financing was never a problem for Westlake. RP 322-27, 418-20. Indeed, Westlake’s guarantor, ECT, provided funds sufficient for the sale to close; Westlake advised Engstrom of this fact on March 5, 2009. RP 176; Exhs. 22, 48.<sup>2</sup> After 27 months, during which time Engstrom received \$600,000 and IPDC and Westlake invested \$436,310 into developing the Property, Engstrom refused to budge. Westlake would have closed the sale had it been allowed to confirm that the site was clean. Engstrom’s unreasonable actions made this outcome impossible.

---

<sup>2</sup> Engstrom’s references to “The Worst Economic Conditions Since the Great Depression” and the problems faced by Lehman Brothers and Merrill Lynch as a factors in the failure of this deal are wholly unsupported by the record and should be disregarded. App. Brief at 8, 33.

**F. Procedural History**

Westlake filed its complaint for breach of contract on March 26, 2009. CP 3-10. On April 30, 2009, Engstrom filed its Answer and Counterclaims. CP 11-16. On August 27, 2009, Engstrom moved for summary judgment that the Assignment from IPDC to Westlake was void. CP 20-25. The trial court, unpersuaded by Westlake's arguments that consent was not required because IPDC and Westlake's shared ownership interests, erroneously concluded that Westlake had not raised genuine issues of material facts regarding waiver. However, the trial court ultimately denied summary judgment:

Engstrom cannot unreasonably withhold consent to assignment according to the Agreement. Even though he was not asked at the time of the Agreement, this requirement still exists. Genuine issues of material fact preclude judgment on this issue.

CP 157-58. Engstrom moved for discretionary review of the trial court's denial of summary judgment. His request was denied. CP 452-57.

After a five-day trial, the trial court entered detailed findings of fact and conclusions of law in favor of Westlake. CP 354-64. Months later, the trial court entered detailed findings of fact and conclusions of law concerning prejudgment interest, attorneys' fees and costs. CP 421-

26. After entry of judgment, Engstrom appealed. CP 419-20, CP 427-30. Westlake cross appeals as to the trial court's summary judgment order. CP 458-59.

## VI. ARGUMENT

Substantial evidence supports all of the trial court's factual findings challenged by Engstrom. Engstrom's refusal to extend the closing date by more than four days, when the process for confirmatory testing takes up to four weeks, was unreasonable and constituted a material breach of the POA. Equally unreasonable was Engstrom's attempt to withhold consent to the Assignment nearly a year after the fact, and after Engstrom had received all option payments. Finally, substantial evidence supports the trial court's award of damages, attorneys' fees, and the resulting judgment.

### A. **Engstrom May Not Seek Review of the Trial Court's Partial Denial of Summary Judgment Regarding the Assignment**

#### 1. Engstrom's Argument Is Legally Prohibited

"[A]n order denying summary judgment, based upon the presence of material, disputed facts, will not be reviewed when raised after a trial on the merits." Johnson v. Rothstein, 52 Wn. App. 303, 306, 759 P.2d 471 (1988). Engstrom claims that the trial court erred in denying summary

judgment that the Assignment was void.<sup>3</sup> However, Engstrom's assignment of error mischaracterizes the trial court's ruling. The trial court's ruling did not turn on whether the Assignment was void, but instead addressed whether Engstrom's refusal of consent was unreasonable. CP 157-58. Because the trial court based its summary judgment order on the presence of material, disputed facts as to the reasonableness of Engstrom's actions, and a trial has been held to resolve those disputes, the order is not reviewable. Id.

In Johnson, supra, the trial court denied defendants' motion for summary judgment on claims of breach of fiduciary duty and negligent misrepresentation because material disputes existed, and subsequently conducted a trial on merits. Id. at 303-04. Following an adverse judgment, defendants appealed the denial of partial summary judgment. Id. The Court of Appeals dismissed defendants' appeal, sua sponte, holding that the summary judgment denial could not be appealed following trial where denial was based upon determination that material facts had to be resolved by the trier of fact. Id. at 306-09. Summary

---

<sup>3</sup> Engstrom also argues inexplicably that the trial court determined that an assignment had not occurred. App. Brief at 19. Engstrom is not correct. The trial court expressly denied Engstrom judgment because genuine issues of material fact existed as to Engstrom's actions in withholding consent and whether those actions were unreasonable. CP 157-58.

judgment, the court concluded, is not a substitute for trial and is irrelevant to a final judgment. Id. at 305.

Here, the trial court ruled: “Engstrom cannot reasonably withhold consent to assignment, according to the Agreement. Even though he was not asked at the time of the Assignment, this requirement still exists. Genuine issues of material fact preclude judgment on this issue.” CP 158 (emphasis added). Engstrom subsequently proceeded to trial on the merits, offering the trial court the opportunity to adopt Engstrom’s version of events. The trial court declined to do so, finding instead that Engstrom acted unreasonably in refusing to consent to the Assignment. CP 356-62. As the trier-of-fact ultimately resolved material, disputed facts the order is not reviewable as a matter of law.

## 2. Engstrom’s Argument Also Fails On The Merits

Although improper for consideration on appeal, Engstrom’s argument that the Assignment is void also fails on the merits. Even where the assigning party requests consent after an assignment has occurred under a contract requiring prior written consent, the objecting party may not unreasonably withhold consent. CP 482. For example, in Robbins v. Hunts Food & Indus., Inc., 64 Wn.2d 289, 391 P.2d 713 (1964), a stock purchase agreement included a provision that any assignment required

prior written consent, which consent could not be unreasonably withheld. Notice of an assignment was not given “until several days after the transaction.” Id. at 292. Nevertheless, the court held that there were genuine issues of fact whether the consent was unreasonably withheld. Id. at 296. In other words, as long as an opportunity exists to evaluate the assigning party, and despite the failure to comply with formalities, the reasonableness requirement remains. See Ernst Home Center, Inc. v. Sato, 80 Wn. App. 473, 482, 910 P.2d 486 (1996) (rejecting argument that assignee’s lawsuit was premature because objecting party did not receive formal assignment, despite knowing consent had been requested, because to dismiss for “any such technical and easily curable deficiency” would be “a waste of time and resources.”).

Although not specifically addressed by Washington courts, other courts have concluded that knowledge of an assignment without a formal request for consent may be adequate. Those courts have held that a formal request for consent is not always required where the objecting party had actual, constructive, or implied notice of an assignment. See Cowan v. Chalamidas, 98 N.M. 14, 16-17, 644 P.2d 528, 530-31 (N.M. 1982) (finding lessor had knowledge of proposed offer to buy tenant’s leasehold and was aware of proposed assignment or sublease); Amjems, Inc. v. F.R.

Orr Constr. Co., Inc., 617 F.Supp. 273, 277-78 (D.C. Fla. 1985)

(recognizing potential for actual, constructive, or implied notice of assignment); CP 445.

In sum, existing Washington authority supports the notion that a decision to withhold consent to an assignment must be reasonable, even if the party seeking consent notifies the objecting party of an assignment after-the-fact. Here, Engstrom was notified of the Assignment months in advance of the closing and after having received all option payments. CP 356 (FOF 6-8). Where Engstrom had an opportunity to evaluate Westlake before closing but neglected to object to or ask questions about the Assignment, the dispute is factual. Substantial evidence supports the findings and conclusion that Engstrom acted unreasonably. Id. (FOF 9).

**B. Substantial Evidence Supports the Findings of Fact Which, in Turn, Support the Conclusions of Law**

Review of a trial court's decision following a bench trial is limited to determining whether the findings are supported by substantial evidence and whether those findings support the conclusions of law. Dorsey v. King Cnty., 51 Wn. App. 664, 668-69, 754 P.2d 1255 (1988). Substantial evidence is a quantum of evidence sufficient to persuade a rational and fair minded person that the premise is true. Wenatchee Sportsmen Ass'n v.

Chelan Cnty., 141 Wn.2d 169, 176, 4 P.3d 123 (2000). Evidence may be substantial even if there are other reasonable interpretations of the evidence. Sherrell v. Selfors, 73 Wn. App. 596, 600-01, 871 P.2d 168, review denied, 125 Wn.2d 1002 (1994). A trial court's findings of fact are entitled to the benefit of all evidence and reasonable inferences therefrom. Okeson v. City of Seattle, 130 Wn. App. 814, 825, 125 P.3d 172 (2005). In determining the sufficiency of evidence, the reviewing court needs only to consider evidence that is favorable to the prevailing party. Bland v. Mentor, 63 Wn.2d 150, 155, 385 P.2d 727 (1963). Any unchallenged findings of fact are verities on appeal. In re Estate of Jones, 152 Wn.2d 1, 8, 93 P.3d 147 (2004); RAP 10.3(g).

1. Engstrom Had Notice of the Trial Court's Findings and Conclusions but Failed to Object Below

Engstrom concedes that it received Westlake's findings and conclusions prior to the trial's commencement on October 11, 2010. App. Brief at 22; RP 5. Indeed, the record shows that the trial court considered Westlake's findings and conclusions at or near the time it reviewed Engstrom's proposed findings and conclusions. RP 5. Nonetheless, Engstrom argues that that the two-month period of time that elapsed between receipt and entry of the findings and conclusions on December

20, 2010 occurred in violation of CR 52(c). In doing so, Engstrom implies it is entitled to notice of a trial court's entry of findings and conclusions. This argument contradicts the plain language of the rule, which requires that the defeated party receive a copy of the proposed findings and conclusions at least five days prior to their submission. CR 52(c).

Even if Engstrom could establish it was entitled to notice of entry, Engstrom waived its right to object on appeal because Engstrom had multiple opportunities to object below and failed to do so. For example, in Seidler v. Hansen, 14 Wn. App. 915, 547 P.2d 917 (1976), the Court of Appeals rejected plaintiff's argument that the trial court erred in failing to provide notice of presentation where the appellant failed "to afford the trial court the opportunity to rule on asserted error." Id. at 919-20 (citing State v. Van Auken, 77 Wn.2d 136, 460 P.2d 277 (1969)). "As a general rule, an appellate court will consider only those issues properly presented to the trial court." Id. (citation omitted).

Although Engstrom had opportunities to object to the findings and conclusions, it failed to do so, thereby depriving the trial court of any opportunity to address Engstrom's claim. Namely, Engstrom did not bring a motion for reconsideration pursuant to CR 59. Moreover, although Engstrom filed a lengthy opposition in response to Westlake's proposed

fees and costs, the opposition failed to object to the December 20, 2010 findings and conclusions. CP 377-86. Engstrom had the further opportunity to raise objections to the December 20, 2010 findings and conclusions at the January 19, 2011 presentation hearing related to fees and costs. Appendix A. As a result, Engstrom has waived the right to object.

2. Engstrom Has Not Established That Any Error In The Manner of Presentation Was Prejudicial

Finally, even if Engstrom had not waived its right to object, Engstrom cannot establish prejudice because Engstrom received a copy of Westlake's proposed findings and conclusions prior to trial, which provided Engstrom notice of Westlake's theory, as well as notice of the requested judgment amount. See Seidler, 14 Wn. App. at 919 (holding plaintiff suffered no prejudice where plaintiff received actual notice of evidence to be presented and amount of requested judgment by way of defendant's motion). Thus, where Engstrom has afforded itself of that opportunity to challenge the findings and conclusions on appeal, Engstrom cannot establish prejudice. See Yakima Co. v. Evans, 135 Wn. App. 212, 222-23, 143 P.3d 891 (2006) (declining to reverse judgment based on violation of CR 52(c) where defeated party could challenge the sufficiency

of findings and conclusions on appeal and therefore suffered no prejudice).

3. Substantial Evidence Supports the Finding that a Reasonably Prudent Person in Engstrom's Position Would Not Have Unreasonably Withheld Consent to the Assignment

As described in Section A, supra, the sole issue for determination as to the Assignment is whether substantial evidence supports the findings of fact and conclusions of law. Despite Engstrom's assignments of error to Finding of Fact 10 and Conclusions of Law 2 and 4, substantial evidence in the record supports them and they must therefore be upheld.

Section 13 of the POA provides:

This Agreement is not generally assignable by Purchase or Seller without Seller's or Purchaser's prior written consent, which consent shall not be unreasonably withheld....

Exh. 1 (emphasis added). The question of the reasonableness or unreasonableness of a party's action in withholding consent to assignment is one of fact. Robbins, 64 Wn.2d at 296. "[Reasonableness] is to be measured by the action which would be taken by a reasonable man in like circumstances. Reason, fairness, and good faith must be the guide. Whim, caprice, or opportunism, however expedient the end, will not suffice." Id. at 296-97.

Applying Robbins, the trial court found that Engstrom acted unreasonably when it objected to the Assignment for the first time nearly one year after having been notified of the Assignment and only after the start of litigation. CP 3-10; CP 26-27; CP 356 (FOF 6 and 9); CP 482; Exh. 3. Moreover, at the time Westlake notified Engstrom of the Assignment, Engstrom had already received all \$600,000 of option payments, all of which had been paid by Westlake from funds contributed by its members as capital. CP 322-23; CP 356 (FOF 10); CP 482; Exhs. 1 (§ 2.1(b)), 50, 52, 77, 78, 106, 134, 135, 186.

Furthermore, the trial court specifically discredited Engstrom's position that Engstrom would not have consented to IPDC's assignment to an LLC with multiple members whose financial ability and judgment Engstrom knew nothing about. CP 356 (FOF 10); CP 482. Despite earlier claims, Engstrom testified at trial that he never conducted any investigation into, or requested any documents pertaining to, the financial capabilities of either IPDC or Westlake. RP 175, 372-75. Of note, after learning of the Assignment, Engstrom embarked on substantial cleanup of the Property, which the trial court found to be inconsistent with a party that did not have confidence in the party with whom it dealt. CP 356 (FOF 10); CP 482. Specifically:

I find it very odd that there was no effort made on his [Engstrom] part to look into the financial wherewithal of either 224 Westlake or the people who owned it.

I believe that he had no intention of unreasonably withholding consent at this particular point in time. And as a matter of fact, he went ahead and engaged in a significant cleanup of the building.

RP 481.

The trial court's finding and conclusions reflect Washington authority that requires a party objecting to assignment to present unbiased evidence to support those concerns. See Ernst Home Center, 80 Wn. App. at 485-86 ("The landlord's ultimate problem, here, was a problem of proof-the landlord was able to articulate appropriate concerns, but not to produce evidence which a trier of fact could examine objectively."). Reliance on "considerations of personal taste and convenience" is improper. Id. at 486 (citation omitted). Nor may a party withhold consent to obtain a litigious or contractual advantage. See Robbins, supra, 64 Wn.2d at 297 (concluding party unreasonably withheld consent to obtain provisions in a modification agreement they were not entitled to as a condition to an assignment).

Here, Engstrom claimed to be concerned about Westlake's financial ability and reputation, but failed to produce any objective

evidence in support of this concern, which it first raised over one year after the Assignment. In any event, Engstrom's "concern" was specious, since the reputation and financial capabilities of IPDC and Westlake are, in essence, one and the same. Both are part of the "Investco" family of companies. RP 161-67.

The trial court appropriately concluded that a reasonably prudent person in Engstrom's position would not have withheld consent to the Assignment, and that Engstrom's refusal of consent a year later was unreasonable. CP 356 (FOF 10); CP 361-2 (COL 4).

4. The Trial Court's Findings and Conclusions, Regarding Engstrom's Breach of Contract Are Supported By Substantial Evidence

The question of whether a party breached a contract is a question of fact reviewed for substantial evidence. Frank Coluccio Constr. Co. v. King Cnty., 136 Wn. App. 751, 762, 150 P.3d 1147 (2007). Findings of Fact 26 through 28, and Conclusions of Law 11, 12, 14, and 15 are supported by substantial evidence in the record and must therefore be upheld.<sup>4</sup> Specifically as explained herein, substantial evidence supports

---

<sup>4</sup> Engstrom argues that Conclusions of Law 11, 12, 13 and 15 are factual. App. Brief at 3. If so, they should be treated as findings of fact. See Ferree v. Doric Co., 62 Wn.2d 561, 567, 383 P.2d 900 (1963) (holding that a conclusion of law which partakes of the nature of a finding of fact may be treated as such).

the trial court's findings and conclusions that Engstrom failed to provide Westlake with required written notice and failed to reasonably extend the closing date to enable Westlake to perform environmental testing.

Section 3.5 of the POA includes five key provisions that direct the Seller's obligations, and the Purchaser's rights, with respect to the environmental clean up of the Property:

1. The parties acknowledge that there are two (2) underground storage tanks that exist on the Property. Seller shall on or before Closing remove the tanks, complete any clean up of the Property required by any applicable state, federal, or local rule, regulation, ordinance, statute, ruling, decision, or other determination relating to Hazardous Substances ... and provide Purchaser with written notice of the completion of such tank removal and clean up.
2. [T]he removal of the tanks and completion of any required clean up of the Property is a condition to Purchaser's obligation to Close....
3. Seller further agrees to notify Purchaser in writing at the commencement of such tank removal and clean up work ....
4. Purchaser may ... contract for any additional environmental testing, at its own cost, Purchaser may deem necessary or appropriate....
5. The parties further agree that the Closing date shall be extended as is reasonably necessary to complete such tank

removal, clean up and permitted confirmatory testing.

Exh. 1 (§3.5) (emphasis added).

*a.* Engstrom Breached The POA's Notice Provisions

Section 3.5 gave Westlake the right to an environmentally clean building. Id. To ensure Westlake would get an environmentally clean building, Section 3.5 authorized Westlake to retain its own environmental consultants to test the site. Id. Part and parcel to Westlake's right to a clean building is the right to formal, written notice of Engstrom's commencement and completion of work. Id. Section 12 required Engstrom to personally serve such notice on Westlake, or to send Westlake notice by certified mail or courier. Id. (§ 12).

Engstrom conducted two excavations at the site. In both cases, Engstrom failed to comply with Section 3.5's notice provision. RP 43, 44, 179, 247, 383-92. Engstrom's actions with respect to its second excavation in February of 2009 were particularly egregious. At the time Engstrom commenced its second excavation, Westlake had already notified Engstrom that it rejected Engstrom's claim that the site was clean and had demanded the right to perform confirmatory testing. Exhs. 11, 13, 14.

Despite Westlake's demand, Engstrom failed to communicate with Westlake in any way for approximately one month. RP 62-63, 381-92. Specifically, Engstrom did not notify Westlake of the second excavation in writing, orally, or otherwise. Id. Rather, Engstrom hid its excavation work from Westlake, poured a concrete slab, and then claimed for a second time, one week before closing and without a conclusive opinion, that the site was clean. Exhs. 16, 18.

As a result, Westlake's consultants would, for the second time, need to drill holes in the concrete and arrange for confirmatory testing under the unreasonable demand that it do so within the five business days before to closing. RP 252-53, 266-68. Had Engstrom provided Westlake with the required written notice, Westlake could have performed its confirmatory testing while the excavated site was still open and without the need to drill. RP 251-52.

*b.*     Engstrom Refused to Reasonably Extend the Closing Date

But Engstrom's contravention of Section 3.5's requirements did not end with its decision to hide its excavation work from Westlake. Engstrom's unreasonable conduct continued. Although Engstrom finally renewed communications with Westlake, it did not do so until February

23, 2009, just one week before the scheduled closing date. Exh. 16. Then, despite Westlake's repeated and futile attempts to communicate with Engstrom for a month, and despite Section 3.5's requirement that closing be extended for Westlake to confirm the site was clean, Engstrom refused to extend the closing date for more than four days. Exhs. 16, 17, 19-23.

Four days was insufficient for Westlake to arrange for boring, testing and an analysis and report of the findings. RP 212, 261-62. Lab results alone can take two weeks, with the entire process taking up to four weeks. Id. Engstrom argued that an extension of four days was reasonable and did not reflect a "drop dead" date, but no evidence exists to support that contention. RP 392-400, 519-20. Rather, the record shows that Engstrom refused Westlake's requests for a 60-day extension, refused Westlake's request for a 30-day extension, failed to make any counteroffer, and despite acknowledging that the short time frame would be a "stretch," went to the escrow office on March 6, 2009 and signed closing documents, demanding that Westlake close. Exhs. 9, 14, 19, 20, 23. The trial properly found that Engstrom's refusal to extend the closing date beyond four days—after 27 months and \$600,000 in option payments—was unreasonable.

5. Engstrom's Failure To Reasonably Extend the Closing Date Was A Material Breach

Engstrom's argument that its failures under the POA were not material fails. "A breach or non-performance of a promise by one party to a bilateral contract, so material as to justify a refusal of the other party to perform a contractual duty, discharges that duty." Jacks v. Blazer, 39 Wn.2d 277, 285, 235 P.2d 187 (1951). A material breach is one "serious enough to justify the other party in abandoning the contract ... one that substantially defeats the purpose of the contract." Park Ave. Condo. v. Buchan Devs., 117 Wn. App. 369, 383, 71 P.3d 692 (2003). The materiality of a breach is a question of fact, and depends on the circumstances of each particular case. Bailie Commc'n, Ltd. v. Trend Bus. Sys., 53 Wn. App. 77, 82-83, 765 P.2d 339 (1988).

IPDC and Westlake contracted for a clean building. Purchasing an environmentally clean building was of paramount importance, and the requirement that Engstrom clean the site was non-negotiable, as made clear in the testimony of Michael Corliss:

Q. (By Mr. Brain): Mr. Corliss, does your company have a position on purchasing buildings with contaminated soil?

A. We do not take environmental risks, is what we refer to that as.

Q. How long has that been the policy at your company?

A. Since the problem property that we had on the city waterway in Tacoma back in 1986.

...

Q. Since that time have you purchased property that had contaminated conditions on it?

A. No.

RP 171-72.

Engstrom's refusal to reasonably extend the closing date so that Westlake could confirm Engstrom's claim that the site was clean, despite Engstrom's contractual agreement to do so, constituted a material breach. It substantially defeated the purpose of the contract: To purchase Property that was environmentally clean, as required by any applicable state, federal, or local rule, regulation, ordinance, statute, ruling, decision, or other determination relating to Hazardous Substances. Exh. 1. (§ 3.5).

"Investco" and its related entities do not take environmental risks, a policy that has been in place for decades. RP 171-72. Contaminated property can prevent financing, creates a risk for "Investco's" guarantor, ECT, and makes any future sale difficult. Id. A building that Westlake cannot confirm is free of contaminants is a deal breaker. RP 42, 194. The trial court's findings and conclusions should be upheld.

6. Engstrom's Completion of Environmental Clean Up Was a Material Condition Precedent To Westlake's Obligation to Close

The record does not support Engstrom's argument that it was Westlake, not Engstrom, who refused to tender performance. Where performance of one party is a condition precedent to performance of another, one is not required by law to do a useless act and tender performance where the other party cannot or will not perform its part of the agreement. Jenson v. Richens, 74 Wn.2d 41, 46, 442 P.2d 636 (1968).

Westlake's obligation to close was conditioned on Engstrom's compliance with the environmental clean up provisions in Section 3.5, a conclusion of law that Engstrom concedes. CP 362 (COL 8).

Specifically, "the removal of the tanks and completion of any required clean up of the Property is a condition to Purchaser's obligation to Close...." Id. Once Engstrom refused to comply with Section 3.5's requirement to reasonably extend the March 2, 2009 closing date beyond four days, it became useless for Westlake to proceed with testing, and Westlake's obligation to close terminated.

In sum, the trial court properly found that Engstrom did not provide Westlake with the required written notice that it had commenced and completed clean up activities and did not agree to reasonably extend

the closing date to accommodate Westlake's right to perform confirmatory testing. CP 360 (FOF 26-28). The trial court properly concluded that Engstrom's failures to comply with Section 3.5 of the POA constituted material breaches that discharged Westlake's duty to close. CP 362-63 (COL 11-13, 15).

7. The Remaining Findings and Conclusions of Which Engstrom Complains Are Immaterial to the Issues on Appeal

In conjunction with Engstrom's erroneous objection to notice of presentation of the December 20, 2010 proposed findings of fact and conclusions of law, Engstrom has assigned error to approximately twenty findings and conclusions, most of which Engstrom concedes are insubstantial. Because Engstrom fails to support the assignments of error described below with any legal argument, they should not be considered on appeal. Island Cnty. v. Mackie, 36 Wn. App. 385, 394-95, 675 P.2d 607 (1984) (holding that assignments of error unsupported by legal argument need not be considered on appeal).

Moreover, as described in detail below, Engstrom's assignments of error fail because they pertain to minor matters that are irrelevant and do not prejudice Engstrom. See Prager's Inc. v. Bullitt Co., 1 Wn. App. 575, 577, 463 P.2d 217 (1969) (holding that although findings deviated from

the statement of facts, they related to minor matters, and thus any error was not reversible); see also Thomas v. French, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983) (holding that error without prejudice is not grounds for reversal):

Finding of Fact 1. Engstrom failed to allege any prejudice from the omission of the word “Purchase,” a non-issue on appeal.

Finding of Fact 2. Engstrom failed to allege any prejudice from the omission of the word “prior,” which is consistent with Washington case law, as described, supra, in Section B(2).

Finding of Fact 3. Engstrom failed to allege any prejudice from the characterization of the initial payment as a quarterly payment.

Finding of Fact 17. Engstrom failed to allege any prejudice from the use of “contracted” in lieu of “contacted,” and “confirm” rather than “used.”

Finding of Fact 23. The reference to “data dump” pertains to Roy Kuroiwa’s February 25, 2009 memo, which he characterized as a “data summary,” rather than as an opinion or conclusion. RP 226-27.

**C. The Trial Court's Damage Award Was Reasonable and Supported by Substantial Evidence.**

1. The Trial Court Properly Awarded Westlake Damages that Accrued From Engstrom's Breach

“Contract damages are ordinarily based on the injured party's expectation interest and are intended to give that party the benefit of the bargain by awarding him or her a sum of money that will, to the extent possible, put the injured party in as good a position as that party would have been in had the contract been performed.” Mason v. Mortg. America, Inc., 114 Wn.2d 842, 849, 792 P.2d 142 (1990) (citing Stevens v. Security Pacific Mortg. Corp., 53 Wn. App. 507, 521-522, 768 P.2d 1007 (1989)). Generally, an injured party is entitled to recover all damages naturally accruing from the breach. Mason, 114 Wn.2d at 851.<sup>5</sup> When, as here, one of the parties to a bilateral contract impliedly repudiates the contract prior to performance, the other party's performance is excused, and the injured party is entitled to damages, including the return of any down payment or option payments. Turner v. Gunderson, 60

---

<sup>5</sup> Johnson v. Brado, 56 Wn. App. 163, 168-69, 783 P.2d 92 (1989), cited by Engstrom for the proposition that an injured party is limited to damages measured by the difference in market value of property as represented and at the time of sale, is not on point. In Johnson, unlike here, a defrauded purchaser brought a negligent misrepresentation action against the seller after both parties had performed under the contract and the purchaser possessed the property. Id. 166-68. Here, Westlake's obligations were discharged when Engstrom refused to reasonably extend the closing date.

Wn. App. 696, 698, 807 P.2d 370 (1991) (holding seller who demanded immediate payment of amount due under purchase and sale contract created when purchaser exercised option repudiated agreement, which constituted “anticipatory breach” and purchaser entitled to return of down payment).

Engstrom’s argument that Westlake forfeited the \$600,000 in option payments fails because Section 2.1(d)’s language specifically conditions forfeiture on Engstrom’s compliance under the POA’s other provisions. Exh. 1 (§ 2(d)) (“Except as otherwise provided in this Agreement....”). Here, Engstrom refused to reasonably extend the closing date, as required under Section 3.5 of the POA. Exh. 1 (§ 3.5). Because Engstrom’s refusal constituted a material anticipatory breach of the POA, Westlake was no longer obligated to close and was free to pursue damages, including the return of its down payment. Exh. 1 (§10(b)).<sup>6</sup>

Finally, Engstrom makes the baseless argument that Westlake is not entitled to damages related to its development and feasibility during the option period. Engstrom does not argue that such expenses would not naturally accrue from the breach, the touchstone for an award of

---

<sup>6</sup> Engstrom is incorrect that Westlake terminated the POA. The POA terminated by operation of law once Engstrom unreasonably refused to extend the closing date.

•  
•

expectation damages. Instead, Engstrom incorrectly asserts that such an award is prohibited under a provision of the POA that purports to indemnify Engstrom for damages that might have occurred while Westlake engaged in development activities during the option period and a provision that purports to indemnify Engstrom for any liens. Exh. 1 (§§ 3.2, 3.3). But neither provision impedes Westlake’s right to “pursue any other remedy, including but not limited to, an action for specific performance or actual damages against the Seller.” Exh. 1 (§10(b)).

2. The Award of Damages is Supported By Substantial Evidence

“The amount of damages is a matter to be fixed within the judgment of the fact finder.” Mason, 114 Wn.2d at 850 (citing Rasor v. Retail Credit Co., 87 Wn.2d 516, 554 P.2d 1041 (1976)). “A trier of fact has discretion to award damages which are within the range of relevant evidence.” Mason, 114 Wn.2d at 850 (citing Cultum v. Heritage House Realtors, Inc., 103 Wn.2d 623, 633, 694 P.2d 630 (1985)). “An appellate court will not disturb an award of damages made by the fact finder unless it is outside the range of substantial evidence in the record, or shocks the conscience, or appears to have been arrived at as the result of passion or

prejudice.” Mason, 114 Wn.2d at 850 (quoting Rasor 87 Wn.2d at 531).<sup>7</sup>

Engstrom fails to demonstrate that the trial court’s award is outside the range of substantial evidence. To the contrary, the trial court admitted approximately 170 exhibits, comprised of receipts and cancelled checks, which establish not only the \$600,000 in option payments made to Engstrom, but also proved that Westlake, pursuant to Section 3.2 of the POA, incurred and paid individual invoices totaling \$436,310 in development expenses for architects, engineers, surveyors, traffic consultants, permits, and site plans, among other development-related expenses. CP 422; Exhs. 49, 50 to 220, 253. Engstrom offered no contradictory evidence.<sup>8</sup> CP 422.

In sum, had Engstrom performed as required under the POA, Westlake would have had the benefit of its investment, including the \$600,000 in option payments that were to be incorporated into the

---

<sup>7</sup> Engstrom incorrectly relies on Iverson v. Marine Bancorporation, 86 Wn.2d 562, 546 P.2d 454 (1976). But Iverson is irrelevant to the facts in this case. Iverson involved an appeal by a tenant who argued she was entitled more damages than awarded for loss of use of her possessions during a period in which they were in storage, an argument the reviewing court rejected. Id. at 565-66.

<sup>8</sup> Although Engstrom objects to the trial court’s admission of Exhibits 49 and 253, Engstrom offers no argument to support reversal. This omission is fatal to Engstrom’s argument, since the admission of evidence is within trial court’s discretion and will not be overturned absent an abuse of discretion. See Herring v. Dep’t of Social and Health Serv., 81 Wn. App. 1, 21, 914 P.2d 67 (1996). Moreover, because Engstrom failed to make the specific objections it now makes on appeal, they should be disregarded. App. Brief at 43.

purchase price, and \$436,310 in other costs.<sup>9</sup> Exhs. 1 (§§ 2.1(b), (d), 3.2).

The trial court properly concluded that the \$1,036,310 in damages naturally accrued from Engstrom's breaches.

**D. The Trial Court's Award of Fees is Supported by the Record**

A prevailing party may recover attorneys' fees authorized by statute, equitable principles, or agreement between the parties. Landberg v. Carlson, 108 Wn. App. 749, 758, 33 P.3d 406 (2001), review denied, 146 Wn.2d 1008, 51 P.3d 86 (2002). On appeal, the court will focus on whether reasonable attorney fees are available in the case at hand, and if so, whether the trial court's award, as a whole, was reasonable. Allard v. First Interstate Bank of Wash., N.A., 112 Wn.2d 145, 768 P.2d 998 (1989), opinion amended, 773 P.2d 420 (1989). The trial court has considerable discretion with respect to attorneys' fees, and an award will not be reversed absent an abuse of that discretion. Herring at 81 Wn. App. 33. "An abuse of discretion exists only where no reasonable person would take the position adopted by the trial court." Singleton v. Frost, 108

---

<sup>9</sup> Although Engstrom assigns error to Finding of Fact 8, which does not accurately reflect the amount of damages related to feasibility and development work, Engstrom fails to allege any prejudice from the incorrect number, which was specifically corrected and included in the February 18, 2011 Findings of Fact and Conclusions of Law Concerning Prejudgment Interest, Attorneys' Fees and Costs, and reflected in the Judgment. RP 428-29; RP 441-46.

Wn.2d 723, 730, 742 P.2d 1224 (1987) (quoting Wilkinson v. Smith, 31 Wn. App. 1, 14, 639 P.2d 768 (1982)).

The trial court reasonably applied the lodestar methodology, as set forth in Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 581, 593-94, 675 P.2d 193 (1983), by first multiplying counsels' reasonable hourly rate by the number of hours expended on the lawsuit, and secondly, by adjusting that amount to reflect factors, such as the contingent nature of success in the lawsuit. CP 399, 425. To aid the trial court's consideration of Westlake's fees, the trial court reviewed in camera the Detail Fee Transaction File which set forth the times and work performed by each billing attorney/paralegal. CP 423.

Westlake also provided Engstrom and the trial court with a summary of work performed by Westlake's attorneys, a summary of the fees and costs incurred by Westlake's attorneys, an explanation for counsels' billing practices, including the delegation of tasks to less expensive attorneys, and a description of the attorneys' qualifications justifying their respective hourly rates. Engstrom incorrectly argues that it was entitled to review the Detail Fee Transaction File. But Bowers makes clear that "documentation need not be exhaustive or in minute detail, but must inform the court, in addition to the number of hours worked, of the

type of work performed and the category of attorney who performed the work ( i.e., senior partner, associate, etc.).” Bowers, 100 Wn.2d at 597. This is particularly true here, as the detailed billings are protected by the attorney-client privilege and work product doctrine. CP 406.

In the first step of its lodestar analysis, the trial court found that the hourly rates for the attorneys and paralegals were reasonable.<sup>10</sup> CP 423. After reviewing the detailed billings records, the trial court adjusted the fee award downward from \$123,073.50 to \$110,000.00 related to “hours spent on unsuccessful claims, duplicated effort or otherwise unproductive time.” Bowers, 100 Wn.2d at 597; CP 424.

The trial court then considered whether to adjust the initial lodestar based on the modified contingency fee agreement Westlake had with its attorneys. CP 423. Westlake’s attorneys agreed to a mixed contingency fee. CP 407. The attorneys billed at 50 percent of their normal rate bill to the client, with the client paying all costs. Id. If Westlake lost at trial, their attorneys would not be entitled to the other 50 percent of their normal billing rates. Id. In exchange for taking the risk on a loss, Westlake agreed that if it prevailed at trial, its attorneys would have their full hourly

rates “trued up” plus be entitled to a 15 percent contingency fee based on the amount of the judgment, exclusive of costs and attorneys’ fees awarded. Id.

The agreement posed a significant risk to Westlake’s attorneys in that they would not be able to cover their costs of operation, which amount to 65 to 70 percent of the hourly fees billed. Id. In addition to the risk, the trial court found that the complexity and number of factual and legal issues in the case, the length of the dispute, the amount of briefing, and the results obtained, justified a lodestar adjustment upward that was consistent with Westlake’s modified contingency agreement. CP 423, 424.

Although Engstrom disagrees with the amount of risk involved, it fails to offer any compelling authority to the contrary. In contrast, the Washington Supreme Court has specifically upheld mixed contingent-hourly fee agreements like the one in this case. For example, in Allard, supra, the non-prevailing party challenged the trial court’s award of attorneys’ fees to the plaintiff, contending that the trial court erred by awarding fees based on an hourly rate in addition to those based on the contingent fee agreement. Allard, 112 Wn.2d at 147-48. The Court

---

<sup>10</sup> Engstrom incorrectly claim that the attorneys for Westlake charged hourly rates of \$669. But the majority of work was conducted by two attorneys who billed at respective

rejected the argument, upholding the trial court's award, where the trial court had independently considered reasonableness factors in conjunction with the contingent fee agreement. *Id.* at 149.

Likewise, here Westlake proved that its fees were reasonable at the trial court level. Engstrom has not, and cannot, establish that the position adopted by the trial court was unreasonable.

**E. The Trial Court Erred by Granting Summary Judgment On the Issue of Waiver**

Appellate courts review the grant of a motion for summary judgment *de novo*, considering the facts in the light most favorable to the nonmoving party. *Reynolds v. Farmers Ins. Co.*, 90 Wn. App. 880, 884, 960 P.2d 432 (1998). Summary judgment is only appropriate if the pleadings, depositions, answers to interrogatories, admissions on file, and the affidavits show that there is no genuine issue as to any material fact, that reasonable persons could reach but one conclusion, and that the moving party is entitled to judgment as a matter of law. *Id.*; CR 56(c).

The trial court's determination that the issue of waiver was unsupported by the facts was erroneous. Implied waiver may be found when there are "unequivocal acts or conduct evidencing an intent to

---

hourly rates of \$205 and \$415. CP 321.

waive; waiver will not be inferred from doubtful or ambiguous factors.”

Jones v. Best, 134 Wn.2d 232, 241, 950 P.2d 1 (1998). Westlake established that, after receiving notice of the Assignment, Engstrom interacted with Westlake for several months toward closing the sale. CP 95. Specifically, Engstrom commenced clean up activities on the Property, corresponding with Westlake to arrange access for environmental consultants. Id. For example, in Westlake’s June 23, 2009 letter to Engstrom, Westlake expressly referenced the “Real Estate Purchase Option Agreement dated November 20, 2006, between Engstrom Properties, LLC and Investco Properties Development Corporation subsequently assigned to 224 Westlake LLC...,” and signed as Westlake, by its Manager, IFC. CP 101. Finally, in February 23, 2009 correspondence from Engstrom addressing Westlake’s right to perform confirmatory testing, Engstrom specifically referenced Westlake in the context of a purchaser. CP 103.<sup>11</sup>

Contrary to the trial court’s order, reasonable persons could reach the conclusion that Engstrom’s months-long correspondence with

---

<sup>11</sup> The party alleging waiver must also show that “[t]he person against whom waiver is asserted must have understood that the consequences of his ... actions would be relinquishment of the right.” In the Matter of the Welfare of S.V.B., 75 Wn. App. 762,

Westlake and work toward closing the sale after learning of the Assignment constituted waiver. Specifically, reasonable persons could find that Engstrom had impliedly waived any right to object to the Assignment through its course of dealing. Therefore, the Assignment should be upheld both because Engstrom reasonably withheld consent, and because Engstrom waived its right to object.

**F. Respondent is Entitled to an Award of Fees and Costs on Appeal**

Generally, if attorneys' fees and costs are allowable at trial, the prevailing party may recover fees on appeal as well. Landberg, 108 Wn. App. at 758 (citing RAP 18.1). Attorneys' fees and costs are awardable in this case based upon Section 10(b) of the POA. Exh. 1. Accordingly, should Westlake prevail on appeal, it asks this Court to award it attorneys' fees and costs for defending against Engstrom's appeal under RAP 18.1(a).

---

770, 880 P.2d 80 (1994). That burden is easily satisfied here where Engstrom was expressly notified that the Purchaser would be Westlake, rather than IPDC. CP 95.

**VII. CONCLUSION**

The trial court's findings and conclusions should be affirmed.

DATED this 8 day of July, 2011.

TOUSLEY BRAIN STEPHENS PLLC

By 

Christopher I. Brain, WSBA #5054  
Adrienne D. McEntee, WSBA #34061  
1700 Seventh Avenue, Suite 2200  
Seattle, Washington 98101  
206.682.5600

*Attorneys for Plaintiff/Respondent*

**CERTIFICATE OF SERVICE**

I, Betty Lou Taylor, hereby certify that on the 8th day of July, 2011, I caused to be served true and correct copies of the foregoing to the following person(s) in the manner indicated below:

---

Sylvia Luppert, WSBA #14802  
REAUGH OETTINGER & LUPPERT, P.S.  
1601 Fifth Ave., Suite 2200  
Seattle, WA 98101-1625

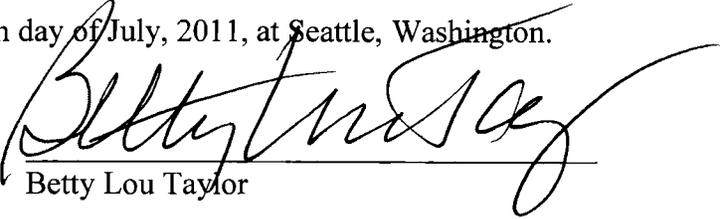
- U.S. Mail, postage prepaid
- Hand Delivered
- Overnight Courier
- Facsimile
- Electronic Mail

*Attorneys for Defendant/Petitioner*

---

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

EXECUTED this 8th day of July, 2011, at Seattle, Washington.

  
Betty Lou Taylor

# APPENDIX A

**CLERK'S MINUTES**

SCOMIS CODE: MTHRG

Judge: Richard McDermott  
Bailliff: Nikki Riley  
Court Clerk: David Witten  
Digital Record: E 942  
Start: 10:35:44  
Stop: 11:05:08

Dept. 38  
Date: 1/19/2011

---

**KING COUNTY CAUSE NO.: 09-2-13811-7 SEA**

**224 Westlake LLC v. Engstrom Properties, LLC**

---

**Appearances:**

Plaintiff appearing by counsel Adrienne McEntee, Christopher Brain  
Defendant appearing by counsel Sylvia Luppert

**MINUTE ENTRY**

This Cause comes on as a Presentation Hearing

Discussion: materials received by the Court, and motions for pre-judgment interest, costs, and attorney's fees.

The Court makes findings, and awards the plaintiff pre-judgment interest in the amount of \$233, 039.00, plus \$340.70 per day until paid.

Recess: 10:39:04 - 10:48:13

Respective parties present oral argument, and respond to inquiry of the Court.

Attorney's fees are awarded to the plaintiff, in the amount of 1/2 of the requested hourly rate, plus adjustments to be determined.

Costs will be awarded, as outlined in the submitted declaration.

Per the Court's request, the plaintiff submits a detailed billing, which the Court will review.

**224 Westlake LLC v. Engstrom Properties, LLC  
King County Cause No. 09-2-13811-7 SEA**

Final Pleadings will be submitted; both parties may notify the Court of any changes requested.