IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

GEONERCO INC., and/or assigns n/k/a RIVERSIDE HOMES INC., an Oregon corporation d/b/a Riverside Homes Vancouver, Appellant, v. GRAND RIDGE PROPERTIES, IV, LLC, an Oregon limited liability company, Respondent.	No. 39589-4-II ORDER GRANTING MOTION FOR RECONSIDERATION AND AMENDING OPINION

On February 7, 2011, respondent filed a motion for partial reconsideration of this court's opinion filed on January 19, 2011. After a review of the motion, it is hereby

ORDERED that the motion for partial reconsideration is granted. It is further

ordered that the opinion is amended as follows:

On page twelve, the entire section under the heading of Attorney Fees, shall be deleted:

> Riverside requests attorney fees and costs on appeal under terms authorized in the REPSA. It also requests that we vacate the trial court's award of attorney fees and costs to Grand Ridge as the prevailing party in the CR 60(b) motion. RAP 18.1 allows attorney fees if applicable law authorizes them. Here, the REPSA provided for reasonable attorney fees and costs in an action arising from the REPSA. Because we reverse the trial court order favoring Grand Ridge, we vacate the trial court's award of attorney fees and costs to Grand Ridge and award Riverside fees and costs on appeal. On remand the trial court must reconsider the CR 60(b) motion consistent with this opinion and may reconsider which party is the prevailing party entitled to attorney fees under the REPSA. The trial court may also reconsider Grand Ridge's request to strike Riverside's award of attorney fees under the judgment.

The following language shall be inserted in its place:

> Riverside requests attorney fees and costs on appeal under terms authorized in the REPSA. It also requests that we vacate the trial court's award of attorney fees and costs to Grand Ridge as the prevailing party in the CR 60(b) motion.
>
> RAP 18.1 allows attorney fees if applicable law authorizes them. The REPSA provided for reasonable attorney fees and costs to the prevailing party in an action arising from the REPSA. But when both parties prevail on major issues on appeal, neither party qualifies as a prevailing party. *Am. Nursery Products, Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 234-35, 797 P.2d 477 (1990).
>
> Here, Riverside prevailed on the CR 60(b) issue. But Grand Ridge, through the doctrine of judicial estoppel, prevailed on the major issue of whether Riverside was barred from seeking specific performance by Grand Ridge of REPSA closing conditions other than tendering title. Because both parties prevailed on major issues, neither party is entitled to attorney fees and costs on appeal. Thus, we decline to award Riverside its attorney fees and costs on appeal.
>
> Further, because we reverse the trial court order favoring Grand Ridge, we vacate the trial court's award of attorney fees and costs to Grand Ridge. On remand the trial court must reconsider the CR 60(b) motion consistent with this opinion and may reconsider which party is the prevailing party entitled to attorney fees under the REPSA. The trial court may also reconsider Grand Ridge's request to strike Riverside's award of attorney fees under the judgment.

DATED this _____ day of _____, 2011.

_____
Worswick, J.

We concur:

_____
Armstrong, J.

_____
Schindler, J.

No. 39589-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

GEONERCO INC., and/or assigns, n/k/a RIVERSIDE HOMES INC., an Oregon corporation d/b/a Riverside Homes Vancouver, Appellant, v. GRAND RIDGE PROPERTIES, IV, LLC, an Oregon limited liability company, Respondent.	No. 39589-4-II ORDER CORRECTING CAPTION

On January 11, 2011, this court issued its part-published opinion in the above matter. The caption contained a typographical error in the respondent's name. It is hereby

ORDERED that the respondent's name in the caption is changed to:

GRAND RIDGE PROPERTIES, IV, LLC, an Oregon limited liability company.

DATED this _____ day of _____, 2011.

ACTING CHIEF JUDGE

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

GEONERCO, INC. and/or assigns, n/k/a RIVERSIDE HOMES, INC., an Oregon corporation d/b/a Riverside Homes Vancouver, Appellant, v. GEONERCO RIDGE PROPERTIES IV, LLC, an Oregon limited liability company, Respondent.	No. 39589-4-II PART PUBLISHED OPINION

Worswick, A.C.J. — Geonerco, Inc., n/k/a Riverside Homes, Inc. (Riverside) appeals the trial court's entry of an order under CR 60(b) in favor of Grand Ridge Properties IV, LLC (Grand Ridge). Riverside contends that the relief the trial court ordered exceeded its authority under CR 60(b) and that the trial court erred in concluding that the doctrines of waiver, res judicata, and judicial estoppel barred Riverside from enforcing any further conditions to closing on the property subject to this dispute. We agree with Riverside as to the CR 60(b) issue, disagree as to the judicial estoppel issue, and reverse and remand for further proceedings.[1]

[1]Riverside also argues that a liquidated damages clause in the real estate purchase and sale agreement (REPSA) between the parties precluded the relief ordered by the trial court. Because we reverse based on CR 60(b), we do not reach Riverside's liquidated damages argument.

FACTS

In 2000, Grand Ridge agreed to finish 22 residential lots on a tract of land in Clark County and to sell the finished lots to Riverside. *Geonerco, Inc. v. Grand Ridge Props. IV, LLC.*, 146 Wn. App. 459, 461, 191 P.3d 76 (2008). In May 2002, as part of this agreement, Grand Ridge and Riverside negotiated and signed a real estate purchase and sale agreement (REPSA). *Geonerco*, 146 Wn. App. at 461.

In 2006, Riverside informed Grand Ridge that it was willing and able to close on the REPSA and directed its escrow agent to prepare the closing documents. *Geonerco*, 146 Wn. App. at 463. But Grand Ridge refused to convey the lots to Riverside without amending the REPSA to reflect an increased purchase price of each lot due to unforeseen project costs. *Geonerco*, 146 Wn. App. at 463. Riverside responded by suing Grand Ridge for specific performance of the REPSA. *Geonerco*, 146 Wn. App. at 463. Grand Ridge, in its answer, sought recission of the contract and asserted as affirmative defenses that incomplete or unspecific terms in the REPSA and ambiguous terms in the REPSA addenda barred Riverside's claim.

Riverside moved for partial summary judgment to strike Grand Ridge's affirmative defenses. *Geonerco*, 146 Wn. App. at 463. In its motion, it repeatedly represented to the trial court that Grand Ridge's defenses should fail because "Riverside has waived all conditions to closing and notified [Grand Ridge] that it is ready willing and able to close. The only outstanding obligation of the parties at this point is the obligation to close—for Riverside to pay the contract purchase price and [Grand Ridge] to convey title." I CP at 67-68. When Grand Ridge also moved for summary judgment, Riverside repeatedly reiterated this position in its responsive

briefing: "As a matter of law, all conditions or contingencies based on [Grand Ridge's] performance have been waived under common law . . . . Riverside waived all conditions or contingencies to closing, accepting the condition of the property 'as is.' The only remaining obligation of [Grand Ridge] is to tender title." I CP at 141.

In June 2007, the trial court granted summary judgment in favor of Riverside and ordered specific performance. Specifically, it ordered Grand Ridge "to sell to [Riverside], and to fully cooperate in any activities necessary to closing the sale, the property at issue in this proceeding . . . ." II CP at 258. It further specified that "[c]losing of the sale shall take place no later than thirty-five (35) days after entry of an order on [Riverside's] request for an award of attorney's fees and costs." II CP at 258.

Grand Ridge appealed the trial court's summary judgment order. Because of the pending appeal, the trial court entered a stay order extending the time for closing until 35 days after final resolution of Grand Ridge's appeal. We affirmed the trial court's grant of summary judgment. *Geonerco*, 146 Wn. App. at 461. Grand Ridge filed a petition for review with the Washington Supreme Court. Because it was paying $6,673.48 per month in finance charges on the property, Grand Ridge moved the trial court to modify the stay to allow Grand Ridge to convey title to the property to Riverside. The trial court denied Grand Ridge's motion. Subsequently, Grand Ridge abandoned its appeal. We terminated appellate review on January 16, 2009. Thus, closing had to occur by February 20, 2009.

On January 20, 2009, Grand Ridge reopened escrow with the title company and notified Riverside that it was ready to proceed with closing. But on February 4, 2009, Riverside notified

Grand Ridge that closing could not occur because it believed Grand Ridge needed to perform additional work on the lots as a condition of closing under the REPSA. And Riverside refused to relinquish its interest in the property, leaving a cloud on the title that interfered with Grand Ridge's ability to finance or sell the property.

Grand Ridge filed a motion for relief from judgment under CR 60(b). Specifically, Grand Ridge requested that the trial court (1) determine that Grand Ridge had satisfied the specific performance portion of the judgment against it, (2) determine that Riverside no longer had any legal interest in the property due to its failure to close, (3) strike Riverside's award of attorney fees and costs under the judgment against Grand Ridge, and (4) award Grand Ridge attorney fees and costs for the CR 60(b) motion.

After a hearing, the trial court entered findings of fact and conclusions of law. The trial court found that Riverside's failure to close had caused Grand Ridge to suffer damages. It concluded that (1) the doctrines of waiver, judicial estoppel, and res judicata barred Riverside from requiring Grand Ridge to perform further work on the lots before closing; (2) Grand Ridge had fully satisfied its obligations under the REPSA and judgment; and (3) Riverside had failed to satisfy the judgment and had breached the REPSA. The trial court also denied Grand Ridge's request to strike Riverside's attorney fees award under the judgment.

Instead of granting the relief Grand Ridge requested, the trial court modified the judgment in several ways. First, it ordered Riverside to tender into escrow the property's purchase price—minus an offset for its attorney fees award under the judgment and plus interest from February 20, 2009, to the actual closing date—by August 3, 2009 (a 163-day extension from the

February 20, 2009 closing date originally ordered). Second, it ordered that Riverside's failure to close by August 3 would terminate its legal interests in the property. Third, it ordered that Grand Ridge could sell the property to a third party if Riverside failed to close by August 3. Finally, it determined that if Grand Ridge sold the property to a third party, it would be entitled to a judgment for an award of damages in an amount encompassing (1) the difference between the purchase price specified in the REPSA and the price for which Grand Ridge actually sold the property to a third party, (2) the cost to bring the property into compliance with permit requirements to sell the property to a third party, (3) any and all incidental costs Grand Ridge incurred in retaining or reselling the property, and (4) interest calculated from February 20, 2009, to the actual closing date. Riverside appeals.

ANALYSIS

I. CR 60(b)

Riverside contends that the trial court erred in ordering it to close on the property or pay damages to Grand Ridge because trial courts do not have authority under CR 60(b)(6) to grant affirmative relief. Grand Ridge counters that trial courts do have the authority to grant such affirmative relief under CR 60(b)(6) and under the trial court's inherent equitable powers.

We review matters of law, such as the interpretation of court rules, de novo. *Burt v. Dep't of Corr.*, 168 Wn.2d 828, 832, 231 P.3d 191 (2010). CR 1 provides that the civil rules govern procedure in all suits in superior court whether they are cases at law or in equity. CR 60(b) provides:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons . . .

> (6) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application[.]

Washington courts look to federal cases interpreting federal counterparts to state court rules as persuasive authority when the rules are substantially similar. *See, e.g., Luckett v. Boeing Co.*, 98 Wn. App. 307, 311-12, 989 P.2d 1144 (1999); *Peoples State Bank v. Hickey*, 55 Wn. App. 367, 370-71, 777 P.2d 1056 (1989). Fed. R. Civ. P. 60(b)(5) is substantially similar to Washington's CR 60(b)(6).[2] As the Ninth Circuit Court of Appeals has stated: "'Rule 60(b) is available only to set aside a prior judgment or order; courts may not use Rule 60(b) to grant affirmative relief in addition to the relief contained in the prior order or judgment.'" *Delay v. Gordon*, 475 F.3d 1039, 1044-45 (9th Cir. 2007) (quoting 12 James Wm. Moore, Moore's Federal Practice § 60.25 (Daniel R. Coquillette et al., eds., 3d 2004)).

Grand Ridge, citing *Pacific Security Companies v. Tanglewood, Inc.*, 57 Wn. App. 817, 818, 790 P.2d 643 (1990), contends that trial courts may grant affirmative relief under Washington's CR 60(b). In *Pacific Security*, however, the trial court originally entered a decree of foreclosure ordering a sheriff's sale of real property and providing for entry of a deficiency judgment against the debtors for any deficiency after the sale. 57 Wn. App. at 819. After the sale and a change in circumstances, the debtors moved for an order extinguishing all liens on the

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[2] Fed. R. Civ. P. 60(b)(5) provides:

> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: . . .
>
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable.

Likewise, Fed. R. Civ. P. 60(b)(6) is substantially similar to Washington's CR 60(b)(11), which Grand Ridge also relies on as authorizing the trial court's order.

property and discharging their debts to creditors. *Pacific Security*, 57 Wn. App. at 819. The debtors also moved for a monetary judgment. *Pacific Security*, 57 Wn. App. at 820. The trial court dismissed the debtor's motion because it found that the debtors should have sought relief in a separate action. *Pacific Seurity*, 57 Wn. App. at 820.

Division Three of this court stated that parties may invoke CR 60(b)(6) for relief '"where a change in circumstances after the judgment is rendered makes it inequitable to enforce the judgment."' *Pacific Security*, 57 Wn. App. at 820 (quoting *Metropolitan Park District of Tacoma v. Griffith*, 106 Wn.2d 425, 438, 723 P.2d 1093 (1986)). The court held that, because a judgment ordering a sheriff's sale and authorizing a deficiency judgment has prospective application and because a change in circumstances had occurred, the debtors properly brought their motion under CR 60(b)(6). *PacificSecurity, 57,* Wn. App. at 821. The court, however, did not expressly state that the debtors properly sought a monetary judgment under CR 60(b)(6). It only reversed and remanded "for resolution of the substantive issues presented." *Pacific Security*, 57 Wn. App. at 821. Thus, *Pacific Security* does not support the proposition that parties may seek affirmative relief under CR 60(b)(6). We find federal case law interpreting the federal counterpart to CR 60(b) persuasive and hold that the trial court did not have authority to grant affirmative relief under CR 60(b).

II. EQUITABLE POWERS OF THE COURT

Grand Ridge argues that, if the trial court lacked the power to grant affirmative relief under CR 60(b), it had the inherent power to impose terms on Riverside to ensure an equitable result. Grand Ridge contends that the trial court's award of damages to Grand Ridge was

appropriate pursuant to such inherent power.

> [A] trial court's inherent authority to sanction litigation conduct is properly invoked upon a finding of bad faith. . . . The court's inherent power to sanction is "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."

State v. S.H., 102 Wn. App. 468, 475, 8 P.3d 1058 (2000) (quoting *Chambers v. NASCO*, Inc., 501 U.S. 32, 43, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991)) (internal citation omitted). Sanctions are appropriate "if an act affects 'the integrity of the court and, [if] left unchecked, would encourage future abuses.'" *S.H.*, 102 Wn. App. at 475 (quoting *Gonzales v. Surgidev Corp.,* 120 N.M. 151, 899 P.2d 594, 600 (1995)). However, a court must find bad faith in order to exercise these inherent powers. *See In re Recall of Pearsall-Stipek*, 136 Wn.2d 255, 267, 961 P.2d 343 (1998). Moreover, a court must "exercise caution in invoking its inherent power, and it must comply with the mandates of due process, both in determining that the requisite bad faith exists and in assessing fees." *Chambers*, 501 U.S. at 50; *see also In re DeVille*, 361 F.3d 539, 548-49 (9th Cir. 2004) (due process requires notice and an opportunity to respond to the charges before inherent powers sanctions are imposed).

It appears from the record that the trial court did not consider the question of whether Riverside had engaged in bad faith litigation conduct. Because the trial court did not find that Riverside engaged in such conduct, it lacked authority to sanction Riverside under its inherent powers. The trial court's damage award against Riverside was also improper under the court's inherent powers because Riverside was not afforded sufficient due process.

Because affirmative relief is not available under CR 60(b), and because inherent powers

sanctions are not available absent a finding of bad faith, we reverse the trial court's order. The affirmative relief requiring Riverside to pay damages to Grand Ridge and extending the closing date was improper. The only remedy available under CR 60(b) was relief from the judgment, which would include a finding that Grand Ridge was not obligated to sell the property to Riverside, and that Riverside had no more interest in the property. We remand for the trial court to determine whether to grant such relief under CR 60(b). The trial court on remand may also consider whether Riverside engaged in bad faith litigation conduct and whether inherent powers sanctions are appropriate, but may not issue such sanctions without affording Riverside notice and an opportunity to be heard on the issue.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.[3]

III. Judicial Estoppel

Although Riverside assigns error to the trial court's conclusion of law regarding judicial estoppel, it offers no arguments about this doctrine in its opening briefing.[4] A party's brief should contain argument supporting the issues presented, as well as legal authority and references to relevant parts of the record. RAP 10.3(a)(6); *Cowiche Canyon Conservancy v. Bosley,* 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (appellate courts will not consider assignments of error

[3] In the unpublished portion of this opinion, we determine that the trial court did not abuse its discretion when it applied judicial estoppel and we award fees and costs to Riverside.

[4] Instead, Riverside contends only in its reply briefing that judicial estoppel does not apply.

that are not supported by citation to legal authority and relevant parts of the record). Grand Ridge contends that the trial court correctly applied judicial estoppel because of Riverside's previous, multiple representations to that court that it had waived all remaining conditions to closing. Although the trial court erred in granting affirmative relief under CR 60(b)(6), requiring us to reverse the trial court's order and remand, we address this issue because it is likely to recur on remand.

The primary factors of judicial estoppel are whether (1) the party's "later position is clearly inconsistent with the [party's] earlier position," (2) "judicial acceptance of the second position would create a perception that either the first or second court was misled by the party's position," and (3) "the party asserting the inconsistent position would obtain an unfair advantage or imposes an unfair detriment on the opposing party if not estopped." *Ashmore v. Estate of Duff,* 165 Wn.2d 948, 951-52, 205 P.3d 111 (2009). These factors are not exhaustive "but help guide a court's decision." *Ashmore*, 165 Wn.2d at 952. We review a trial court's decision whether to apply judicial estoppel for abuse of discretion. *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007).

First, when originally seeking specific performance of the REPSA, Riverside repeatedly asserted to the trial court that it had waived any remaining conditions to closing as a matter of law, that it accepted the property "as is," and that Grand Ridge had fulfilled all conditions to closing other than tendering title. This is clearly inconsistent with Riverside's current position that it only made an offer to waive such conditions or did not make a continuous waiver.

Second, Grand Ridge originally asserted as a defense to specific performance that it could

not perform certain remaining REPSA conditions related to work on the property due to incomplete, unspecific, and ambiguous terms in the REPSA and its addenda. Riverside asserted to the trial court that such issues did not bar specific performance because it waived all closing conditions other than tender of title by Grand Ridge. The trial court explicitly stated that it relied on those representations when it originally ordered specific performance within 35 days. Judicial acceptance of Riverside's current position would create the perception that Riverside misled the first trial court by its position.

Furthermore, accepting Riverside's position would entitle Riverside to specific performance of contested REPSA provisions not fully analyzed by the trial court due to Riverside's representations of waiver and would require Grand Ridge to perform additional, extensive lot work within an unreasonably short (35-day) period of time. Riverside seeks to impose an unfair detriment on Grand Ridge due to its changed position. Accordingly, we hold that the trial court did not abuse its discretion by applying judicial estoppel and barring Riverside from seeking specific performance by Grand Ridge of closing conditions other than tendering title.

ATTORNEY FEES

Riverside requests attorney fees and costs on appeal under terms authorized in the REPSA. It also requests that we vacate the trial court's award of attorney fees and costs to Grand Ridge as the prevailing party in the CR 60(b) motion. RAP 18.1 allows attorney fees if applicable law authorizes them. Here, the REPSA provided for reasonable attorney fees and costs in an action arising from the REPSA. Because we reverse the trial court order favoring Grand Ridge, we vacate the trial court's award of attorney fees and costs to Grand Ridge and award

Riverside fees and costs on appeal. On remand the trial court must reconsider the CR 60(b) motion consistent with this opinion and may reconsider which party is the prevailing party entitled to attorney fees under the REPSA. The trial court may also reconsider Grand Ridge's request to strike Riverside's award of attorney fees under the judgment.

Reversed and remanded for the trial court to conduct further proceedings consistent with this opinion.

Worswick, A.C.J.

We concur:

Armstrong, J.

Schindler, J.