IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

BATTLE GROUND PLAZA, LLC, a California limited liability corporation, Respondent/Cross Appellant, v. DOUGLAS M. RAY; EUGENE ANDERSON and WILLIAM MACRAE-SMITH, as co-personal representatives of the Estate of Irwin P. Jessen, Appellants/Cross Respondents, SCOTT BROTHERS OIL, INC.; TIME OIL COMPANY, INC., Third Party Defendants.	)	No. 64937-0-I UNPUBLISHED OPINION FILED: September 27, 2010

Ellington, J. — This case involves an order enforcing a purchase and sale agreement on a property harboring a known defect. The sellers represented and warranted that the property was free of environmental contamination, but contaminants were discovered and the transaction never closed. The purchaser sued for specific performance and damages. The trial court granted specific performance and also ordered the sellers to clean up the property and reduce the price.

We agree with the trial court that the contract is enforceable, but remand for

reconsideration of the remedy.

BACKGROUND

Douglas Ray and Irwin Jessen (Sellers) own the Battle Ground Plaza Shopping Center.[1] Among the lessees in the shopping center were a dry cleaning business known as Grace's Cleaners and a mini-mart convenience store and gas station operated by Scott Brothers Oil, Inc.

On December 20, 2000, Sellers agreed to sell the shopping center to Bruce Feldman, Inc., the predecessor of Battle Ground Plaza, LLC (BGP).[2] The purchase price was $3,285,000. Bruce Feldman, BGP's manager, drafted the PSA. The agreement contained several provisions pertinent here. Paragraph 21(a)(2) granted BGP 90 days (beginning on December 20, 2000) to "inspect the soil conditions and other hazardous materials on or about the Property and to notify the Seller in writing that Purchaser approves" of the condition of the property.[3] In paragraph 30(N) of the PSA, Sellers represented and warranted that "[t]he Property and the land thereunder do not contain hazardous material or conditions."[4]

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[1] Jessen died in 2006. Eugene Anderson and William McCrae-Smith were appointed co-personal representatives of his estate.

[2] Bruce Feldman, Inc. assigned its interest in the PSA to BGP on August 1, 2001. Feldman is BGP's manager.

[3] Ex. 2 at 7.

[4] Id. at 14. The paragraph further provides: "Hazardous material or conditions shall herein be defined as any condition that requires remedial work of the property owner under either Federal or Washington law. Seller agrees and hereby does indemnify, agree to defend with counsel of Purchaser's choice and hold harmless Purchaser from any and all claims, causes of action, costs (including attorney's fees) damages, liability, cost of any remedial work or harm of any kind or nature which Purchaser may experience as the result of the breach of any of Seller's representations

On February 23, 2001, BGP obtained a phase I environmental assessment which recommended subsurface testing in the vicinity of the cleaners and the mini-mart gas station. Three days later, BGP waived the soil conditions contingency in paragraph 21(a)(2). On February 27, 2001, BGP paid $20,000 in earnest money as required by the PSA, with the remainder of the purchase price to be tendered in cash at closing.

A dispute arose between the parties regarding the income and expenses of the shopping center and applicable time frames. On April 27, 2001, the parties entered into an addendum to the PSA reducing the price to $3,000,000 and changing the closing date to July 1, 2001 "[p]roviding Sellers are not then in default (or breach) of the [PSA]."[5] The addendum also provided that BGP could extend the closing date to August 1, 2001 by paying an additional $10,000.

BGP contacted commercial real estate mortgage broker Richard Brooke to assist in securing financing. BGP submitted a loan application to EverTrust Bank. On May 18, EverTrust vice president John Gooding informed BGP that the bank could not accept the application until several issues were clarified, including the loan amount, operating expenses, and the results of the environmental reports.

On June 1, 2001, BGP obtained a limited scope phase II subsurface investigation that revealed subsurface contamination at Grace's Cleaners and the mini-mart gas station. Sellers stated they were unaware of the contamination prior to

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and warranties contained in this agreement." Id.

[5] Ex. 3.

receiving the report.

On June 19, 2001, Gooding informed BGP that EverTrust would not provide financing for the property. Gooding's letter stated that the primary reasons for his decision included inability to accurately underwrite the project's cash flow, poor quality of proposed guarantor financial data, and the age and condition of the proposed collateral. That same day, BGP exercised its right to extend the closing date to August 1, 2001 by paying an additional $10,000 in earnest money. On June 26, 2001, EverTrust informed BGP that it would reconsider the loan application "when the current issues are resolved. We need a more responsive ownership, a clear plan for the redevelopment, all environmental issues resolved, and proof that a manager who knows the retail industry is in charge."[6]

BGP did not tender the purchase price on August 1, 2001.

During the next several months, the parties apparently sought to consummate the transaction despite ongoing disagreements about the scope and extent of their contractual duties. In October 2001, Sellers hired Three Kings Environmental, Inc. to perform environmental remediation. BGP indicated that closing would occur when remediation was complete.

On October 4, 2001, Sellers' attorney informed BGP:

> You are correct that we do not agree on our client's duties concerning the environmental situation. My client intends to live up to its contractual duties under the [PSA]. Nowhere does it state that my client has to clean up the property to the satisfaction of your client or your client's lender. As I stated in my previous correspondence, if your client wants to run the center, please close this transaction. . . .

[6] Ex. 144.

> . . . With regard to the environmental situation, my client is proceeding with due diligence with having the situation analyzed and corrected. I anticipate that we will receive a clean bill of health from the State of Washington in the very near future.[7]

In November 2001 and April 2002, remediation was completed and the Department of Ecology issued "no further action" letters.

In March 2002, without having tendered the purchase price, BGP filed suit for breach of contract, specific performance, and damages. Sellers argued they were not in breach of the PSA because they had remediated the property. Thereafter, however, testing indicated the remediation efforts were insufficient, and the Department of Ecology withdrew its no further action determination.

On May 2, 2007, following a bench trial, the court issued a memorandum opinion. The court debated the propriety of requiring specific performance of an executory contract for sale of a property with a defect known prior to closing, but ultimately concluded that equity permits such relief. As set forth in the memorandum opinion, BGP was to tender the $3,000,000 purchase price to Sellers, less stigma damages and other offsets, before BGP could seek enforcement of the environmental contamination warranty. Sellers were then to complete remediation under the court's supervision. The court described this application of specific performance as closely resembling a cost to cure theory. The court refused to award lost income to BGP because it never tendered the purchase price or assumed ownership of the property. The court also awarded attorney fees and costs to BGP as the prevailing party.

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[7] Ex. 122.

On May 28, 2008, the court entered findings of fact, conclusions of law, and an order of specific performance. Two days later, it entered an amended order. In contrast to the memorandum opinion,[8] which expressly required BGP to tender the purchase price prior to specific performance, the findings of fact and amended order required Sellers to fully remediate the property to the court's satisfaction as a condition of closing.

The order also provided that the request for a finding of full remediation could be made only by BGP unless BGP tendered the purchase price, in which case either party could make the request within 12 months of the issuance of "no further action" letters from the Department of Ecology. The order provided that closing take place no later than 60 days after the court determined the warranty was satisfied. This provision effectively allowed BGP to back out of the deal even after Sellers remediated simply by declining to tender the purchase price and then refusing to ask the court for a determination that the environmental warranty was satisfied.

On July 2, 2008, Sellers filed a CR 60(b)(3) motion for relief from the requirement to replace the leaky underground storage tanks at the mini-mart as part of the remediation. They argued replacement was no longer necessary because Scott Brothers Oil had stopped selling gasoline at the site. BGP and Scott Brothers Oil opposed the motion. The trial court granted the motion. A Division Two commissioner

[8] The court's findings of fact and conclusions of law expressly incorporated its memorandum opinion. "A memorandum opinion may be considered as supplementation of formal findings of fact and conclusions of law." Ellerman v. Centerpoint Prepress, Inc., 143 Wn.2d 514, 523 n.3, 22 P.3d 795 (2001).

granted permission for entry of the order under RAP 7.2(e) but allowed BGP to appeal the grant of the order.

On September 5, 2008, the court entered an order and judgment awarding BGP $610,068 in attorney fees and costs.

Sellers appeal the order enforcing the contract and requiring specific performance. BGP appeals rulings denying lost income, awarding fees, and relieving Sellers of any obligations regarding the storage tanks.

DISCUSSION

Sellers argue that the trial court committed multiple errors in finding that an enforceable contract existed and granting specific performance to BGP as a remedy for breach of warranty of the PSA. We review a grant of specific performance for abuse of discretion.[9] "A trial court abuses its discretion if its decision is 'manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons.'"[10] The primary goal in interpreting a contract is to ascertain the parties' intent."[11] We determine this intent by viewing the contract as a whole, its objective, the conduct of the parties, and the reasonableness of the parties' interpretations.[12] The parties do not rely upon extrinsic evidence regarding interpretation of the PSA, and the court's findings simply set forth its provisions. We therefore look to its language to determine

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[9] Egbert v. Way, 15 Wn. App. 76, 81, 546 P.2d 1246 (1976).

[10] Wick v. Clark Cnty., 86 Wn. App. 376, 382, 936 P.2d 1201 (1997) (quoting Goodwin v. Bacon, 127 Wn.2d 50, 54, 896 P.2d 673 (1995)).

[11] Paradise Orchards Gen. P'ship v. Fearing, 122 Wn. App. 507, 516, 94 P.3d 372 (2004).

[12] Id.

the obligations of the parties as a matter of law.[13]

Sellers contend there was no contract to enforce because the PSA terminated automatically when BGP failed to tender the purchase price on the closing date. "[W]hen an agreement makes time of the essence, fixes a termination date, and there is no conduct giving rise to estoppel or waiver, the agreement becomes legally defunct upon the stated termination date if performance is not tendered."[14] Because the PSA contained a time is of the essence clause and BGP failed to tender the purchase price, Sellers argue there is no contract to be specifically performed.

BGP responds that the August 1, 2001 closing date did not apply because BGP's agreement to that date was conditioned on there being no default or breach.

This is a determinative threshold issue. The language of the addendum unambiguously indicates that the August 1, 2002 closing date was contingent on lack of default or breach. Sellers were not in default. But because Sellers were in breach of the environmental warranty in paragraph 30(N), the agreement specifies no definite closing date. A reasonable closing date may be implied,[15] but under the circumstances, the time is of the essence rule cannot operate to terminate the PSA.

Sellers argue that when BGP waived "solely as a condition to closing" the inspection and other contingencies and paid the earnest money, and then, fully aware

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[13] Mut. of Enumclaw Ins. Co. v. USF Ins. Co., 164 Wn.2d 411, 424 n. 9, 191 P.3d 866 (2008).

[14] Mid-Town Ltd. P'ship v. Preston, 69 Wn. App. 227, 233, 848 P.2d 1268 (1993).

[15] Turner v. Gunderson, 60 Wn. App. 696, 703, 807 P.2d 370 (1991).

of the contamination, tendered additional earnest money to extend closing to August 1, BGP waived its right to enforce the warranty granted in paragraph 30(N).

Waiver is the intentional abandonment or relinquishment of a known right. It must be shown by unequivocal acts or conduct showing an intent to waive, and the conduct must also be inconsistent with any intention other than to waive.[16] The correspondence here does not reveal an intent to waive the warranty. In the February 26, 2001 waiver letter, BGP expressly stated it did not waive any other provisions of the PSA, including paragraph 30(N). In addition, paragraph 19 of the PSA states that "Purchaser shall accept the premises 'as is', subject to the representations and warranties of the Seller as contained in Section 30" of the PSA.[17] Moreover, the PSA, which was drafted by BGP, provided that the provisions of paragraph 21 were "solely for the benefit of Purchaser and which may [be] waived by Purchaser."[18] BGP's waiver of the conditions in paragraph 21 did not waive the warranty under paragraph 30(N).

Sellers rely on a Wisconsin case, Lambert v. Hein,[19] for the proposition that a purchaser's decision to close despite knowledge of defects constitutes a waiver of any claims for breach of warranty. In Lambert, the real estate contract contained a provision that allowed the buyers to inspect the home and nullify the purchase if they

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[16] Dep't of Rev. v. Puget Power & Light Co., 103 Wn.2d 501, 505, 694 P.2d 7 (1985).

[17] Ex. 2 at 6.

[18] Id.

[19] 218 Wis.2d 712, 582 N.W.2d 84 (Wis. Ct. App. 1998).

did not approve. The contract also stated that purchasers agreed to take the property as is but that warranties survived closing.[20] Although the inspection disclosed a defect, the purchasers closed and sued for breach of warranty. In rejecting the purchaser's claim, the court reasoned that the purpose of the inspection and disapproval procedure is to afford a buyer the opportunity to discover defects and choose whether or not to proceed, thereby avoiding litigation.[21]

This situation is different. The PSA does not provide that failure to terminate or waive a contingency would result in acceptance of the property as is. Rather, paragraph 19 stated that BGP would accept the property as is subject to the warranty in paragraph 30(N). Because the holding of Lambert was based on the court's interpretation of contractual provisions that are not present in the PSA, it cannot be read to support Sellers' waiver argument.

We thus agree with the trial court that the PSA is enforceable and that BGP did not waive its right to enforce the environmental warranty. The remaining question is what remedy is appropriate.

Generally, courts have discretion to order specific performance of a real estate purchase agreement.[22] To obtain specific performance, a party must present clear and unequivocal evidence that "'leaves no doubt as to the terms, character, and existence of the contract.'"[23] The equitable remedy is appropriate "only when (1) damages are

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[20] Id. at 727–28.

[21] Id. at 729–30.

[22] Paradiso v. Drake, 135 Wn. App. 329, 335, 143 P.3d 859 (2006).

[23] Kruse v. Hemp, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993) (quoting Powers

not an adequate remedy for the buyer, (2) the buyer has not defaulted on its obligations, and (3) the contract does not expressly bar specific performance."[24] Here, paragraph 29 of the PSA authorizes specific performance if Sellers are in default.[25]

Sellers contend, however, that BGP defaulted when it failed to tender the purchase price on August 1, 2001 as required by the addendum. Sellers also challenge the court's finding that the environmental contamination caused BGP to lose its financing.

But as discussed above, under the terms of the addendum, BGP agreed to close on August 1 only if Sellers were not in breach or default. Because Sellers breached the environmental warranty, BGP's duty to tender the purchase price did not arise.

Further, the evidence supports the court's finding that "[h]ad the property not been contaminated, the purchaser could have secured financing from EverTrust on the terms stated."[26] Review of findings of fact "is limited to determining whether substantial evidence supports the findings and, if so, whether they support the trial court's conclusions of law and judgment."[27] The record shows that contamination was only one

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v. Hastings, 93 Wn.2d 709, 713, 612 P.2d 371 (1990)).

[24] Paradiso, 135 Wn. App. at 335.

[25] Paragraph 29 provides that "[i]f Seller is in default, (1) Purchaser may elect to treat this contract as terminated, in which case all payments and things of value received hereunder shall be returned to Purchaser and Purchaser may recover such damages as may be proper, or (2) Purchaser may elect to treat this contract as being in full force and effect and Purchaser shall have the right to an action for specific performance or damage, or both." Ex. 2 at 11–12 (emphasis added).

[26] Clerk's Papers at 459.

[27] Saviano v. Westport Amusements, Inc., 144 Wn. App. 72, 78, 180 P.3d 874 (2008).

of many problems that contributed to denial of the loan application. The mortgage broker testified, however, that he would more likely than not would have been able to get a loan for BGP had there been no environmental problems on the property. The court did not err in entering this finding.

Sellers next argue that paragraph 29 expressly authorized specific performance only where Sellers are in default, that breach of the environmental warranty does not amount to default because default arises under paragraph 29 only when "either party fails to perform any covenant or agreement"[28] and that specific performance is unavailable because the environmental warranty specifies the remedy for breach, to wit, indemnification. Sellers argue that "'[w]here the happening of a condition has been foreseen and a remedy has been provided for its occurrence, the presumption is that the prescribed remedy is the sole remedy.'"[29] BGP responds that while the PSA expressly allows specific performance only when Seller is in default, nothing in the PSA precludes this remedy in any other situation.

BGP is correct. The contract contemplates that despite having had the opportunity to inspect and approve the property, the purchaser will be indemnified upon discovering contamination after closing. The contract does not expressly address what remedy is available where the purchaser discovers contamination before closing. The contract therefore does not preclude specific performance in this circumstance.

We conclude, however, that the order entered below does not serve as an

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[28] Ex. 2 at 11.

[29] Appellant's Br. at 38 (quoting Douglas Northwest, Inc. v. Bill O'Brien & Sons Const., Inc., 64 Wn. App. 661, 685, 828 P.2d 565 (1992)).

equitable remedy under the facts of this case. "[G]enerally a decree of specific performance should place the parties, as far as possible, in the condition in which they would have been if the contract had been duly performed at the time the conveyance should have been made."[30] The order entered here suffers several flaws and inequities.

First, PSA paragraph 30(N) warranted that the property did not contain hazardous material or conditions, defined as "any condition that requires remedial work of the property owner under either Federal or Washington law."[31] The contract thus contemplates remediation to the satisfaction of the relevant regulatory agencies. The order, however, requires remediation to the satisfaction of the court and BGP. This effectively unbinds the warranty from any objective measure.

Second, the order relieves BGP of the obligation to tender payment until 60 days after the property is thusly remediated. Because only BGP can ask the court to certify that remediation is complete, the order allows BGP to avoid closing merely by declining to make that request. This provision fails to put the parties in the same position they would have been if the contract had been performed. Similarly, the order does not clearly obligate BGP to close. BGP maintained throughout trial proceedings that it may never close but rather will wait to decide until after the property has been remediated. BGP thus seeks to avoid its obligations altogether; it tenders no funds and makes no commitments. This too does not put the parties in the same position they would have

[30] Chan v. Smider, 31 Wn. App. 730, 736, 644 P.2d 727 (1982).

[31] Ex. 2 at 14.

occupied if the contract had been performed, and we question the equity of an award of specific performance where the party seeking it does not promise to perform after contract conditions are satisfied.

The court also erred in finding that "[t]he value of [the property] at the time the parties contracted for the purchase and sale of the property must be reduced by $510,000 for the stigma as defined in the testimony of Wayne Hunsperger."[32] Hunsperger defined stigma damages as

> an adverse effect on property value produced by the market's perception of increased environmental risk due to contamination. This risk is derived from perceived uncertainties concerning: the nature and extent of the contamination; estimates of future remediation costs and their timing; potential for changes in regulatory requirements; liabilities for cleanup (buyer, sell[er], third party); potential for off-site impacts; and other environmental risk factors, as may be relevant.[33]

This testimony clearly defines stigma as the diminution in value before remediation, not after. Hunsperger noted that the rate of diminution in value decreases as remediation goes forward, and cleaning up the property tends to eliminate any stigma. He calculated stigma damages at $510,000 as of spring 2001, before remediation had commenced. Hunsperger did not testify the property would continue to suffer stigma after remediation was completed.

The court, however, treated stigma as a permanent diminution of value persisting after remediation. "[W]here the damage to real property is permanent, a plaintiff is entitled to recover not only for the costs of restoration and repair, but also for

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[32] Clerk's Papers at 465.

[33] Ex. 36 at 29.

the property's diminished value."[34] But there is no substantial evidence supporting the order requiring Sellers to fully remediate the property while also granting BGP $510,000 in damages for the reduced property value prior to remediation. Requiring that Sellers clean up the property while also reducing the purchase price based on pre-cleanup stigma amounts to a double recovery for BGP.

On cross-appeal, BGP argues that under Chan v. Smider,[35] the court abused its discretion in refusing to offset the purchase price by the income BGP would have received from the shopping center had it been able to close the transaction.[36] But Chan involved an agreement for sale of an apartment building where sellers refused to close. Chan tendered the down payment into the court registry and sought specific performance. The court ordered the parties to close the transaction and awarded Chan the rents received after the original closing date.

This case is not like Chan. Here, no closing date has yet arisen, Sellers have not refused to close, and BGP maintained throughout trial proceedings that it may never close the transaction but rather will wait to decide after the property has been remediated. The court did not err in refusing to award lost income.

We reverse the order of specific performance as inequitable. We encourage the trial court on remand to review all its options and find the remedy most fair to both

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[34] Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 694–95, 132 P.3d 115 (2006).

[35] 31 Wn. App. 730, 644 P.2d 727 (1982).

[36] In its memorandum opinion, the trial court reasoned that BGP's request for loss of income was not justified because "[p]laintiff did not tender the purchase price nor assume usual vestments of ownership. To award loss of income without assuming possession would be a windfall to the buyer." Clerk's Papers at 240.

parties, whether it be specific performance or damages.[37]

Newly Discovered Evidence

On cross-appeal, BGP argues that the trial court abused its discretion in granting Sellers' CR 60(b)(3) motion for relief from the requirement to replace leaky underground storage tanks at the mini-mart. CR 60(b)(3) permits a court to relieve a party from a final order based on "[n]ewly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b)." A trial court's decision to vacate an order under CR 60(b)(3) is reviewed for abuse of discretion.[38] "Discretion is abused when it is exercised on untenable grounds or for untenable reasons."[39]

BGP argues that the trial court abused its discretion in entering the order because Sellers failed to show they could not have discovered Scott Brothers had stopped selling gas before entry of the amended order of specific performance or within 10 days thereafter. A mere allegation of diligence is not sufficient; the moving party must state facts that explain why the evidence was not available in time to move for a new trial.[40] Sellers contend they discovered that Scott Brothers stopped selling gas when the wife of one of the owners happened to drive by the mini-mart on June 17,

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[37] See Lyall v. DeYoung, 42 Wn. App. 252, 260, 711 P.2d 356 (1985); Friebe v. Supancheck, 98 Wn. App. 260, 269, 992 P.2d 1014 (1999) (benefit of the bargain damages are available for a breach of a purchase and sale agreement).

[38] Luckett v. Boeing Co, 98 Wn. App. 307, 309, 989 P.2d 1144 (1999).

[39] Id. at 309–10 (quoting Lane v. Brown & Haley, 81 Wn. App. 102, 105, 912 P.2d 1040 (1996)).

[40] Vance v. Offices of Thurston Cnty. Comm'rs, 117 Wn. App. 660, 671, 71 P.3d 680 (2003).

2008 and noticed it had closed. They assert Scott Brothers had been selling gas continuously since 1989, and they had no reason to believe it would stop.

We agree the court did not abuse its discretion in accepting this explanation and entertaining the motion. But this does not end the analysis. BGP also argues that the tanks were "fixtures" under the Scott Brothers lease, thereby becoming part of the realty owned by Sellers and subject to the PSA. Accordingly, BGP contends the order violates the PSA because it allows Sellers to convey less than they agreed to sell.

If Sellers are correct that the tanks are fixtures, then the trial court arguably erred in relieving Sellers of the obligation to replace the tanks. The trial court made no ruling on this issue, and we lack sufficient information and briefing to address it. We therefore remand to the trial court for reconsideration in accordance with this opinion.

Attorney Fees

BGP succeeded below in its request for fees under the PSA. Sellers challenge aspects of this ruling. We disagree with Sellers' contention that BGP did not prevail below. Given that further proceedings will be necessary, we do not address the arguments related to the adequacy of the record.

On cross-appeal, BGP contends the trial court abused its discretion in finding that a reasonable hourly rate for Seattle attorney Ralph Palumbo was the customary Clark County hourly rate of $295 rather than Palumbo's usual hourly rate of $395. Unless the contract provides otherwise, attorney fees are calculated by the lodestar method.[41] In determining the lodestar, the court multiplies the reasonable hourly rate by the number of hours reasonably expended on the lawsuit.[42] The lodestar

methodology "can be supplemented by an analysis of the factors set forth in RPC 1.5(a) which guide members of the Bar as to the reasonableness of a fee."[43] An order limiting a fee award to the local hourly rate without articulating any other basis for the decision is an abuse of discretion.[44]

BGP acknowledges that RPC 1.5(a) authorizes the court to consider local billing rates in determining reasonableness. But it contends that the court abused its discretion in failing to consider other factors set out in RPC 1.5(a). In particular, BGP asserts that the court failed to consider that it retained Palumbo for his expertise in environmental matters because no local attorneys were qualified for the task. We disagree. The court's letter ruling states that "I have also calculated the hourly rate to that prevailing in Clark County with adjustments to the specialty/expertise of the field involved."[45] The award was not an abuse of discretion.

Both parties request an award of reasonable attorney fees and costs under RAP 18.1(a), which authorizes attorney fees and costs to the prevailing party on appeal "[i]f applicable law grants to a party the right" to recover them. Here, the PSA authorizing fees for the prevailing party is authority for fees incurred on appeal.[46] The

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[41] Edmonds v. John L. Scott Real Estate Inc., 87 Wn. App. 834, 856–57, 942 P.2d 1072 (1997).

[42] Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 581, 593, 675 P.2d 193 (1983) (quoting Miles v. Sampson, 675 Fed.2d 5, 8 (1st Cir. 1982)).

[43] Mahler v. Szucs, 135 Wn.2d 398, 433 n.20, 957 P.2d 632 (1998).

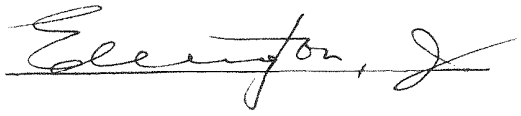
[44] Crest v. Costco Wholesale Corp., 128 Wn. App. 760, 773–74, 115 P.3d 349 (2005).

[45] Clerk's Papers at 550.

[46] Marassi v. Lau, 71 Wn. App. 912, 920, 859 P.2d 605 (1993).

prevailing party is the one who obtains a judgment in its favor.[47] "[I]f both parties prevail on a major issue, neither is a prevailing party."[48] Here, BGP prevailed regarding the existence and enforceability of the PSA, but Sellers prevailed regarding specific performance and stigma damages. Because both parties prevailed on major issues, we conclude that neither party is the prevailing party for the purpose of RAP 18.1, and so decline to award fees on appeal.

Affirmed in part, remanded for reconsideration consistent with this opinion.



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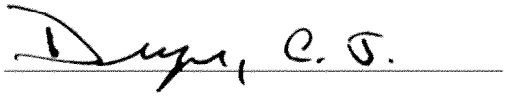

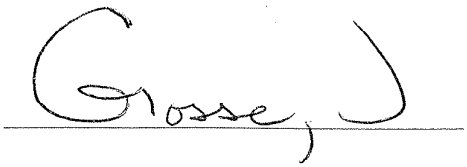

[47] Riss v. Angel, 131 Wn.2d 612, 633, 934 P.2d 669 (1997).

[48] Hertz v. Riebe, 86 Wn. App. 102, 105, 936 P.2d 24 (1997).