70064-2

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No. 70064-2

WASHINGTON COURT OF APPEALS
DIVISION ONE

THE MCNAUGHTON GROUP, LLC, A Washington Limited Liability Company,

Respondent

v.

HAN ZIN PARK AND REGINA KYUNG PARK, Husband and Wife, and the Marital Community Property Comprised Thereof,

Appellants

Appeal from Washington Superior Court
for Snohomish County
No. 06-2-11471-8

APPELLANTS' OPENING BRIEF

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ASSIGNMENTS OF ERROR

1. The trial court erred by allowing this matter to proceed to trial and by granting judgment on a void contract, a real estate contract that had no legal description. The lack of a legal description in a real estate contract makes the contract void. Tax numbers do not replace a legal description for platted property. An incomplete reference to a non-existent document is also insufficient.

2. The trial court erred by granting judgment to the plaintiff without requiring that the plaintiff prove that the defendants were not ready, willing, and able to sell their property. The only way to recovery on a contract that is void due to the statute of frauds is to prove that the sellers were not prepared to close. The defendants have always been prepared, and enthusiastic, to close. The defendants were also forced to remain ready to sell by the filing of the lis pendens.

3. The trial court erred in ordering appellants' former counsel to come to the trial and to testify at the behest of the respondents and against the express objections of the appellants. The trial court further erred by allowing the plaintiff to present inadmissible character and prior-act evidence that had no bearing on the case at bar, all to the complete prejudice of the defendants, denying them a fair trial.

STATEMENT OF THE CASE

Summary

Han and Regina Parks (the "Parks") own approximately 4.5 acres of land in Edmonds, Washington. After retiring the Parks sought to sell their land. They had some negotiations with The McNaughton Group, LLC ("TMG") in 2004 but those negotiations failed to culminate in a real estate contract.

In 2005 the parties again negotiated on the sale of the appellants' property to the respondent. An agreement was executed but the agreement did not contain a legal description, rendering the agreement void.

The sale did not close for a number of reasons. TMG then brought this action against the Parks seeking specific performance and damages. The Parks disputed the validity of the contract and plead that the TMG complaint failed to state a cause upon which relief could be granted.

Several motions for summary judgment were brought and heard. The matter proceeded to a six-day jury trial. The trial judge refused to allow the Parks to argue the lack of legal description or the question as to the purchase price. The trial court also ordered the Parks' former counsel to testify on behalf of the opposing party over the strenuous objection of the Parks, among other errors. Judgment was rendered in favor of TMG

for over $900,000.00. This appeal followed.

The Parks seek to have the judgment of the trial court overturned in its entirety and to have the alleged contract between the parties be declared void as a matter of law. The Parks believe that this case should have been determined in their favor at their first summary judgment motion. The Parks ask, in the alternative, for a new trial to allow them to have a fair and just trial of the case on all of the remaining merits, if any.

Earlier pleadings in this case included a third-party defendant. That party is no longer a part of this case.

Facts

At the outset the relative negotiating disparity between the parties should be understood. TMG proclaimed itself the largest developer in Snohomish County. [RP 108]. It employed dozens of people, including two attorneys and several other parties with significant real estate experience Conversely, the defendants, the Parks, had both been born and had their early education in South Korea. [RP 368] They were both medical professionals at the University of Washington. [RP 373,584-5] They had sold one other parcel of land in Washington State approximately 30 years earlier. [RP 785]

The situation that is the basis of this case began in 2004 when the

Parks decided to sell their property. [RP 380-1] The Parks own homestead property in Edmonds, Washington, consisting of approximately 4.5 acres in four separate but contiguous parcels, and containing their home and two other homes that they held for rental. [RP 378] They owned their property for several years, raising two daughters, both dentists. [RP 376] The Parks also had a contract to purchase another contiguous lot from the City of Edmonds. [RP 458] The sale to TMG included an assignment of the contract that they had with the City of Edmonds. [RP 310]

1. Preparing for the Sale

Since the Parks had only sold one other property in Washington State in their lifetimes they contacted a real estate broker [RP 380] who then contacted several potential buyers and identified four. [RP 381] TMG appeared to be the best option so they negotiated only with TMG. [RP 381] The parties came very close to an agreement to transfer the property in September, 2004, but TMG withdrew their offer. [RP 388]

The parties came back together in February, 2005, [RP 61] and were able to come up with an agreement. That contract is the basis of this lawsuit. The document itself is a virtual hodgepodge of real estate terms and concepts but without a legal description. [TR EXH 10] The document also has several internal conflicts and references to undefined addenda and

is therefore void for violating the statute of frauds. On the first page of the agreement the words "counter addendum and three pages of prior addendum" were found. This phrase has come to be the center point of significant debate between the parties. Each of the parties believes that that language refers to a different document. The Parks believe that the phrase refers to a document called the "counter offer addendum". [TR EXH 115, TR EXH 160A] TMG argues that the phrase refers to an "Addendum B" which contains the word "counteroffer" hand written in the body of the document. [TR EXH 10, p. 10] TMG objected to the counter offer addendum of the Parks, claiming that it was not signed by TMG. However, the original was lost so it is not known if it was signed or not.

Regarding the "three pages of previous addendum" (sic), there is no description of the three pages in the purchase agreement. None of the documents that are proposed by TMG to fit this description are signed by either party, the Parks or TMG, or have any other connection with the alleged agreement. [TR EXH 10]

2. The Counteroffer Addendum

The Parks' document, the counter offer addendum, is significant to the parties because it appears to raise the purchase price by $180,000. To

understand this document reference is made to the 2004 negotiations. One of the terms of the 2004 documentation that the Parks wanted included in the final contract was an agreement that TMG would "advance" the Parks $180,000 against the sales price if TMG ever needed the Parks to vacate their home prior to closing. [TR EXH 2, p. 9, RP 418] The Parks wanted to be sure that they had sufficient funds to purchase a new home or to make other living arrangement.

The document was created on February 20, 2005, and in the middle of the second negotiations on the sale. The realtor presented the Parks with the document that she had labeled a "Counteroffer Addendum". This document was drafted by the realtor and has the same appearance as several other documents drafted by the realtor for this transaction. This "Counteroffer Addendum" (COA) appeared to raise the price that would be paid by TMG. It appears that the realtor had used the possible "advance" required by the Parks, stated above, and added it to the original offer price, rather than the existing price.

Upon receipt of the COA the Parks were thrilled. [RP 461-2] The Parks had not asked or negotiated for the increase. They did not know why TMG had increased its offer but they were willing to accept the new price. They signed the COA and returned it to the realtor. Neither party

has been able to find the original to show whether or not it was signed by TMG.

3. Addendum B

As soon as the dispute between the parties became apparent TMG offered a document titled "Addendum B" and claimed that it was the counter addendum that was reference on the first page of the agreement. In fact, the agreement had two Addendum Bs. [TR EXH 10, p. 10, 11] The Addendum B that is proposed by TMG states that it is an addendum to the agreement dated February 19, 2005. This cannot be right. There was no agreement dated February 19, 2005 between these parties.

Addendum B contains some initials from the parties that postdate execution of Addendum B and the COA. These initials are attached to the confusing extension of the counteroffer. The words state "This counteroffer is good til 2/25/05". But no counteroffer was being made at that time. If the handwritten phrase, written by the realtor, were excluded entirely from the document the document would still be complete. The handwritten phrase adds nothing and takes nothing away from the document. Yet, the realtor had it initialed by both parties at the bottom, originally, then initialed again. The Parks have argued that this document, by itself, is so confusing that it renders the contract uncertain, resulting in

a necessary determination that the parties did not have a meeting of the minds on this agreement, if it were effective. The Parks have testified that it was replaced by the COA.

In reviewing these two documents, the COA and the Addendum B, it is apparent that Addendum B was presented to the Parks for signature on February 19, 2005, but that the COA was presented the next day, on February 20, 2005, when it was signed by the Parks and transmitted to TMG.

4. Delivery of the Completed Agreement

Following the signing of most of the documents on February 20, 2005, parts of the documents were again circulated to allow for changes in the feasibility study time, but not on any issue regarding the price. No further discussions or signatures were needed relative to the price and none were given. All initials for the purchase price were dated earlier than February 28, 2006. The final documents were executed on February 28, 2005. The next day, on March 1, 2005, the realtor faxed a copy of the whole agreement, including the COA, to the Parks. [TR EXH 160A] The COA that the Parks received had not been signed by TMG but the copy did have TMG's fax line at the bottom, showing that TMG had had the document at one time. The Parks were assured by the realtor that the

transaction was complete under the terms that they had discussed, including the increase in price. [RP 464] TMG deposited $200,000.00 as earnest money, which was received by the Parks. [TR EXH 51, 53, 54]

At about the same time the Parks indicated that they were having trouble renting their properties because the sale was imminent. TMG offered that it would pay the Parks $2,000 per month to compensate for the rental of the homes, which payments were made during the duration of the agreement. The homes remained vacant during that time and became dilapidated and unusable. They have never been re-rented. One has now burned down and the other has suffered such extensive damage that it is unrecoverable. [RP 332]

Under the terms of the contract TMG was allowed to work to plat the property over a period of one year. As that first year came to a close the Parks were contacted by TMG, through the realtor, with a request that they extend the agreement for six 30 day periods, for which TMG would pay $10,000 for each extension. [RP 332] The Parks agreed. All six extensions were used and were paid for by TMG. [TR EXH 17-22] It is unclear why TMG would make this offer, as the contract allowed them two 90 day extensions for $10,000 each. [TR EXH 10, Addend p. 3 of 4, para 10] Apparently, that clause was forgotten by TMG when it made its

offer for the extension.

5. The Parks Become Aware of a Problem

Some time during June, 2006, and while the extension payments were being made, the Parks became informed that TMG intended to pay $2,425,000 for the property, and no more. The Parks became confused, since they had signed the COA which raised the price to $2,580,000. The Parks immediately attempted to contact the realtor. [RP 476] The realtor failed and refused to respond to any of their calls. [RP 562] The Parks then sent letters, then registered letters to the realtor requesting information. None of the correspondence was answered by the realtor.

The Parks later learned that their realtor, a dual realtor with TMG, had been instructed by TMG during the summer, 2006, not to contact the Parks. [RP 199] Although she was a dual agent, the realtor agreed not to engage in any contact with the Parks. By this action TMG removed the only professional who is working with the Parks and on their behalf. It was also learned that the realtor had several significant and valuable transactions with TMG prior to the Park matter. In 2005 the realtor had six transactions with TMG, totaling $147,175 in commissions, or 50.07% of her income for 2005. In 2006 she had 29 transactions with TMG, totaling $962,250, or 92.4% of her income in 2006. [RP 200] The Parks

were not notified that the realtor had such involvement with TMG. The transaction in this case is the only transaction the Parks ever had with the realtor.

The Parks then felt compelled to contact TMG to confirm the condition of the transaction. [RP 478] During the early summer of 2006 TMG had contacted the Parks and had discussed another six month extension of the contract. [RP 476] The Parks were amenable to an extension but wanted to know about the purchase price and the COA. They were told, by Mr. Messmer, an attorney at TMG, that TMG was unfamiliar with a COA and that the purchase price was $2,425,000. [RP 475-6, TR EXH 23] The Parks then indicated that they must not have a complete copy of the agreement. Since the realtor would not respond to the Parks Mr. Messmer instructed the realtor to provide the Parks with a full copy of the contract. Based on Mr. Messmer's instruction, the realtor did produce a full copy of the agreement. It did not contain the COA. [TR EXH 160A] The Parks brought this fact to the attention of Mr. Messmer, who responded on September 1, 2006. [TR EXH 32]

As the closing on the sale approached, in September, 2006, the Parks remained unclear regarding the terms of the contract. They voiced their concerns but never received complete responses. Up until the failed

closing, and for some time after that date, the Parks had made diligent and concerted effort to see the agreement completed. [TR EXH 26, 31, 37, 142] They made numerous calls to all parties, they send numerous and extensive letters in an effort to explain their confusion and to seek information. Throughout the summer of 2006 the Parks made every effort possible to see that the transaction was completed correctly. Their efforts were met with little or no response from either the realtor or TMG.

6. The Failed Tender and Closing

Throughout the negotiating time TMG indicated that it would tender performance of the contract on September 12, 2006. [TR EXH 32] This date was found on a number of documents, and as late as Friday before the scheduled Monday closing. [TR EXH 34] However, the correct final date to tender performance under the contract was September 11, 2006. [TR EXH 37] The Parks informed TMG that the final closing date should be September 11. TMG did not respond to that information. However, on September 11 TMG apparently realized its error. TMG then had all of their documents prepared on September 11, but not tendered to the Parks. The Parks testified that they were never informed of a September 11 closing. [RP 486] The Parks testified that they were at home that entire day and could have gone to the closing if one had existed.

[RP 486]

After the closing failed to occur TMG brought this action, claiming specific performance and damages. [CP 608-650]

TMG then filed a Notice of Lis Pendens, [CP 651-2] which is a document that is filed with the County Auditor, the recording office for all real estate related documents, for the purpose of letting the public know that TMG was suing the Parks to obtain the land. Such a notice of lis pendens is a significant cloud on the Parks' title and renders the property unsaleable. The Parks denied the claims in the complaint. [CP 562-605]

TMG engaged in discovery and took the depositions of the Parks. Once that initial discovery had been completed the case appeared to grind to a halt. No further discovery was had by any party and no substantive pleadings were filed until July, 2011. There were a number of procedural pleadings regarding the continuance of the trial date, but little else.

Throughout the negotiating period, and following the commencement of pleadings TMG continued to proceed with the platting of the Park property. Although the Parks had not proceeded to the closing, TMG must still have believed that it would obtain the Park land. TMG attended meetings and had their contractors complete the engineering necessary for the platting process. The plat was approved in January,

2007, and four months after the failed closing. [RP 116]

The McNaughtons, owners of TMG, filed personal bankruptcy in 2012. Later in the year TMG filed for Chapter 7 bankruptcy. No action is being taken by the Parks to attempt to collect against TMG. The Parks now only seek to contest and to defend against the claim of TMG and to obtain any setoff that may be deserved.

RECENT PROCEDURAL EVENTS

As trial approached the Parks brought a three part motion before the court. [CP 559-61] They were heard by Judge Downes. The first part was for a finding that the agreement between the parties was invalid as it violated the Statute of Frauds. The second part concerned using a deposition as the testimony of Dr. Park. The third was for summary judgment against TMG.

In response to this motion, Judge Downes determined that there were issues of material fact regarding the agreement between the parties so summary judgment could not be granted. Secondly, Judge Downes declined to allow Dr. Park to testify only by deposition. Third, Judge Downes found that there were issues of material fact concerning TMG and that summary judgment would be improper at this point. [CP 462-4]

As the parties stood to leave the courtroom Mr. Lars Neste, counsel

for the realtor, made an oral motion to the court to ask if the court would find that the contract was valid as a matter of law. Mr. Neste represented the realtor and did not represent either TMG or the Parks, the only two parties to the agreement. The court agreed to consider the matter. The following week Judge Downes issued an order that did not answer the question at all but instead went in a different direction. It said that, while the contract may or may not be complete, the Parks had failed to plead the affirmative defense of Statute of Frauds, as argued by the realtor only, and were therefore foreclosed from doing so with so little time before the trial, which was scheduled for June 25, 2012. [CP 446-8] Judge Downes did not indicate whether the affirmative defense was required in the case against the realtor or against TMG. The realtor brought up the issue of affirmative defense, but TMG seized upon it, acting as if it applied to TMG. The Order itself does not give any indication. TMG had not plead lack of affirmative defense or any lack of notice of the Parks' defenses. [CP 489-501]

The Parks then brought an extensive Motion for Reconsideration. In it the Parks pointed out that there was only one question in the whole case with TMG, whether there was a complete contract. The Parks had disputed the validity of the contract at every turn, including their motion for summary judgment. The Motion for Reconsideration was summarily denied by Judge Downes. {CP 182-184] The trial was later rescheduled

for December 11, 2012 but was not heard until January 22, 2013.

Summary judgment was then brought by the realtor before Judge Ellis. Judge Ellis made an extensive order on this case but refused to consider the question of the legal description, determining, instead, to rely on Judge Downes findings. [CP 162-81]

Summary judgment was then brought by TMG, seeking a finding that the contract was valid and that the only outstanding question was damages. This matter was heard by Judge Weiss who denied summary judgment to TMG based on the confusing addendum B. Judge Weiss did not have to consider the legal description question. [CP 159-61]

The case then went to a jury trial before Judge Okrent. The Parks moved for a pretrial order from Judge Okrent determining that the purchase agreement was void due to the statute of frauds. [RP 8-14] This motion was renewed at the close of the plaintiff's case [RP 356-66] and again after the trial was complete. [RP CP 6-7] All of the Parks motions were denied.

The case proceeded to trial on all points of dispute between the parties except for the legal description. The existence of the COA was argued by both parties, as was the purchase price, [RP 97-101, 413-20] the lis pendens, [CP 651-652] and the Parks damages due to the lis pendens, as presented by the appraiser who testified for the Parks as to the loss in value of their property from the failed closing date to the removal of the lis

pendens. [RP 427-45]

There were two events that occurred during the trial that dramatically affected the outcome of the trial to the prejudice of the Parks. The first was the allowance by the trial court of evidence from two real estate transactions engaged in by the Parks, one of which had occurred over 30 years earlier on an unrelated parcel of land. [TR EXH 173, 174, RP 531-55, 525-31] The second event was the compelling, by court order, of the Parks prior counsel to testify at the behest of TMG. [RP 591-607] Both of these events were so detrimental to the Parks, and so violative of the rules of evidence, that the Parks were denied a fair trial.

In the late 1970s the Parks had attempted to purchase some property across the street from their home to use as a horse stable. They had some early negotiations with the seller and had outlined an agreement. The transaction was not completed, apparently because the Parks had wanted to include a buildability clause into the contract. When the seller refused to close the transaction due to the build ability clause the Parks sued on the contract but did not prevail.

As part of TMG's case their attorney offered evidence relative to this transaction that was over 30 years old. Objection to its relevance was made immediately. In all, the Parks objected 10 times to the presentation

of this evidence. Nonetheless, the trial court, without any testimony on the point of any kind, determined that this evidence could be brought in to show preparation, plan, or knowledge. [RP 540] Although the trial court had allowed the testimony to be presented with a specific limitation that it would have to be tied to the transaction in this case, [RP 531] no effort at any time was made to show preparation, plan, or knowledge between the current case and a 30-year-old case. The true purpose for presenting this testimony was stated by counsel for TMG when she stated:

> And the reason that's important is because Exhibit 117 relates to another case in which Dr. Park tried to insert a term in a purchase and sale agreement against a developer. And in fact in that case, Your Honor, the Washington Court of Appeals issued a published decision stating that in fact the developer on the other side of that deal did not agree to that term and that Dr. Park knew about it. That's why it's relevant. [RP. 536]

And

> It has to do with the fact, I believe, that Dr. Park intentionally did not include that lawsuit in his interrogatory answers because it's related to this case where he did the very same thing and attempted to enforce a term in a contract with a developer that that developer did not agree to, and the court of appeals agreed and there is a published decision on it. [RP 541]

With each of these statements TMG shows that it's true purpose in presenting this evidence is to present a "prior bad act" of the Parks. There was no effort to connect the purchase of the commercial property in the late 1970s to the sale of the homestead property to TMG in 2005.

The second transaction involved the sale of the homestead property

to a construction company. [RP 526] When the construction company was unable to complete the transaction the Parks apparently found that the market had improved and they determined that they would sell the property for a higher price. The construction company withdrew from the sale.

The court also stated that the Parks had "opened the door" to the topic. The Parks stated that they had never opened any such door. No proof of the "open door" was offered by TMG or required by the court. TMG was allowed to present evidence that the matter had gone to the appellate court and that the Parks had lost.

In this second transaction, as with the first, no effort on any kind was made to connect the construction company transaction to the TMG transaction.

The second event that violated the rules of evidence to the detriment of the Parks involved the forced testimony of their prior counsel, Greg Home. [RP 591-607] TMG had subpoenaed Mr. Home but Mr. Home had declined to appear, based on advice from the Bar Association that he should ignore the subpoena unless the court issued an order that he appear. [RP 575] Upon learning Mr. Home's position, the trial court did issue an order that Mr. Home appear. [CP 117] Strenuous and repeated objection to

the presentation of former counsel was made by the Parks but to no avail. [RP 596] Mr. Home was forced to testify, and did testify, at the request of TMG.

At the close of evidence Judge Okrent issued jury instructions, over the objections of the Parks, [RP 642, CP 96-116] which declared to the jury that the contract was unassailable regarding the legal description, that the purchase price had been determined by the court to be TMG's value of $2,425,000, and that the notice of lis pendens was justified against the Parks. The jury returned a general verdict in favor of TMG and against the Parks. [CP 94-5] In addition to awarding damages against the Parks the jury also asked for permission to award attorneys fees and an unspecified additional amount. [RP 659] Judge Okrent orally instructed them that they were to respond only to the special verdict form. Nonetheless, the jury awarded damages and attorneys fees.

ARGUMENT

The alleged agreement between the parties in this case is void for failure to satisfy the statute of frauds. The document does not contain a legal description and there is no proper reference to a correct legal description. Since the alleged agreement is void TMG cannot use it as a basis for any recovery of earnest money unless they can show that the

Parks breached TMG's version of the contract. The Parks never breached the contract and have always stood ready willing and able to execute the contract.

1. VOID CONTRACT

No Legal Description

A legal description is a way of describing real property that is a great deal more accurate than using an address, as some addresses refer to more than one parcel of land and some parcels of land have no address at all, yet still need to be described for tax and sale purposes.

For a real estate contract to be valid it must have a legal description. A real estate contract that does not include a complete legal description is a void contract.

Since the contract is in violation of the statute of frauds, it is void and cannot form the basis of an action at law to recover damages for the breach thereof, as such an action presupposes a valid contract.

Schweiter v. Halsey, 359 P.2d 821, 57 Wn.2d 707 (Wash. 1961) quoting *Martin v. Seigel*, 212 P.2d 107, 35 Wn.2d 223 (Wash. 1949); and "An agreement containing an inadequate legal description is void." *Maier v. Giske*, 223 P.3d 1265, 154 Wn.App. 6 (Wash.App. Div. 1 2010) quoting *Howell v. Inland Empire Paper Co.*, 28 Wash.App. 494, 498, 624 P.2d 739 (1981).

There is no question of fact regarding the existence of the legal description in the contract between these parties in this action. The contract has no legal description.

The plaintiff in this case, TMG, never alleged the existence of a legal description but instead attempted to fit under one of the two exceptions to the rule. The first exception allows the use of tax numbers in place of legal descriptions. The second exception allows that a contract can be held complete if the contract refers to another document that does have the legal description. Neither of these exceptions applies in this case.

Tax Numbers as Legal Descriptions

TMG knew that it had no legal descriptions and, therefore, had a void contract. To try and get around this problem TMG argued that the contract was complete since the contract had the tax numbers of the Parks' land. TMG's efforts have no support in our laws.

In the case of *Bingham v. Sherfey*, 234 P.2d 489, 38 Wn.2d 886 (Wash. 1951) the court made an exception to the *Martin* rule and held that a contract for metes and bounds property that lacks a sufficient legal description is still to be considered complete if the contract contains the tax number.

The Supreme Court had another opportunity to examine this issue

in the case of *Tenco, Inc. v. Manning*, 368 P.2d 372, 59 Wn.2d 479 (Wash. 1962) which held that the tax numbers could be used in the manner suggested by *Bingham*, which "sets forth description requirements for unplatted property." (Underline added). These cases are believed to exist because a metes and bounds description can be very long, technical, and prone to errors in copying.

The *Bingham* case addressed this concern. In that case the court held that:

> It must be assumed, for the purpose of testing the amended complaint by demurrer, that the county assessor has performed the duty imposed upon him by statute, and that a reference to this public record furnishes the legal description of the real property involved with sufficient definiteness and certainty to meet the requirements of the statute of frauds.

Here, the Parks did not have "metes and bounds" property but, rather, had platted property with a platted property "lot and block" description, not a metes and bounds description. The *Bingham* case and the *Tenco* case have no application here.

Secondly, the tax number is never taken as a legal description by itself. It is only taken as a reference to a location where a party could find the legal description. The party who is proposing to use a tax number in place of a legal description has to actually go to the assessor's office and find out whether the tax number directs you to a complete and correct

legal description.

The court had an opportunity to review this concept in a subsequent case, *Asotin County Port Dist. v. Clarkston Community Corp.*, 472 P.2d 554, 2 Wn.App. 1007 (Wash.App. Div. 3 1970). In that case the proponent of the documentation showed that the tax number was used in place of the legal description. But when they went to the assessor's office the assessor was unable to provide a complete legal description. The trial court had no choice but to find that the contract lacked a complete legal description or a way of finding the legal description. The documentation was declared void.

That is also what occurred in this case. TMG rested its case without ever presenting the court with proof that the assessor had the legal description. TMG failed to show that it had even gone to the assessor's office to inquire whether the correct legal description could be found in the records. At the close of TMG's case it was not known whether the assessor had a complete legal description, either in 2006 or on the day of trial. Without completing the connection from the real estate contract, through the tax numbers, to an adequate legal description, the contract has to be declared void. The trial court in this case should have found that the contract lacked an adequate legal description and was void.

Reference to a document that has the legal description

The second exception to the *Martin* rule regarding legal descriptions allows that a contract may fail to have a legal description but may still be valid if the contract refers to another document that does have a complete legal description. This is TMG's last, and weakest, effort to insert a legal description into the contract. It appears that TMG knew that it had no legal description and that the tax numbers were only informally listed in the agreement. TMG appears to have gone looking for a complete legal description, then searched for some way to connect that legal description to the contract.

In the earlier negotiations between the parties in 2004 the incomplete documentation included legal descriptions. TMG hoped to draw those legal descriptions from the previous incomplete negotiations into its contract by references in an Addendum B. There are a number of issues with this claim that cause it to fail. The Addendum B states that:

In the event, if there arise any dispute over the scope of the applicable clauses on Specific terms of Addendum, 1 through 14, dated 2/19/2005 Precious (previous) agreement executed on September 8, 2004, page 1 through 13, supercedes and replaces any provision on the topics contained in purchase and sale agreement proposed and executed on February 19, 2005.

Each phrase of this sentence appears to be in error.

First, the face of the contract does not reference an Addendum B.

The face of the contract references an addendum, which is presumed to be a four paged addendum. The contract also references a "counter addendum + 3 pages of prior addendum" but makes no reference to an Addendum B.

TMG alleges that their Addendum B is really the counter addendum referenced on page one. TMG's argument is that its Addendum B has the word "counteroffer" handwritten into the body of the addendum, thereby making it the "counter addendum."

Third, the Addendum B that is proposed by TMG states, in its title, that it is an addendum to an agreement "dated 2/19/05." There is no agreement dated 2/19/05 between these parties.

Fourth, this Addendum B requires that all disputes between the parties be settled by the language in an agreement that was executed on September 8, 2004. But there was no agreement executed on September 8, 2004 and no document has been attached to this contract to show the elements of that older document.

Parol evidence would be required to attach Addendum B to the contract to supply the legal description by reference. TMG would have to explain how the title of the document, "Addendum B", should be read to mean "counter addendum" on page one of the contract, why the dates refer

to non-existent documents, and why all disputes are to be resolved by reference to an improperly dated and unattached document.

The general prohibition in this area of law is that a contract must stand on its own terms. If parol testimony is needed to understand the contract then the contract is void.

> The rule that where a contract upon its face is incomplete resort may be had to parol evidence to supply the omitted stipulation applies only in cases unaffected by the statute of frauds. If the subject matter of the contract is within the statute of frauds and the contract or memorandum is deficient in some one or more of those essentials required by the statute, parol evidence cannot be received to supply the defects, for this would be to do the very thing prohibited by the statute.

Martin, supra, quoting 22 C.J. 1290, § 1719.

Addendum B is not a lawful part of the contract. This effort fails to provide the court with a complete legal description.

Without a proper legal description, either by including the lot and block numbers, or by allowable and proper use of the tax numbers in place of the legal description, or by proper reference to an existing document that contain the legal description, the contract in this case is void.

In summary, the contract that is the basis for this lawsuit is void as a matter of law since it has no legal description and neither of the two exceptions to the legal description rule applicable here. For these reasons the contract is void and cannot be the basis for recovery by the buyer.

The Creation of the Problem

The legal question regarding the legal description was wrongly decided by Judge Downes early in the case, then that error was carried forward by every other judge in the case. The decision by Judge Downes, finding that the Parks had failed to plead the Statute of Frauds as an affirmative defense, ignored the pleadings of the parties but especially of the Parks, who openly contested the contract even before the failed closing. Failing to plead an affirmative defense requires surprise before it can defeat a position.

> It is to avoid surprise that certain defenses are required by CR 8(c) to be pleaded affirmatively. . . . Where a failure to plead a defense affirmatively does not affect the substantial rights of the parties, the noncompliance will be considered harmless. (cites omitted)
>
> Also, objection to a failure to comply with the rule is waived where there is written and oral argument to the court without objection on the legal issues raised in connection with the defense.
>
> There is a need for such flexibility in procedural rules. In the present case, the record shows that a substantial portion of plaintiff's trial memorandum and the entire substance of the hearing on summary judgment concerned the effect of the liquidated damages clause. To conclude that defendants are precluded from relying upon that clause as a defense would be to impose a rigid and technical formality upon pleadings which is both unnecessary and contrary to the policy underlying CR 8(c), and we refuse to reach such a result.

Henderson v. Tyrrell, 910 P.2d 522, 80 Wn.App. 592 (Wash.App. Div. 3 1996).

TMG was not surprised by the Parks' pleadings and TMG argued

the elements of the contract before Judge Downes and before Judge Weiss. None of the courts should have followed Judge Downes' erroneous decision. The decision of Judge Downes was not controlling on the other courts, as it was interlocutory and non-appealable. *McLean v. Smith,* 482 P.2d 798, 4 Wn.App. 394 (Wash.App. Div. 2 1971). Judge Okrent should have undertaken a review pursuant to Rule 56 (d).

2. NO OTHER RIGHT TO RECOVER FROM SELLER

Cannot recover under void contract.

The rule of law in Washington State is that the buyer of real property who puts down earnest money on a real estate contract is barred from obtaining restitution of his payments if the contract is later found to be void due to the statute of frauds. In this case TMG put down earnest money with the Parks and expended other funds and now seeks a refund of those payments. Since the contract is void due to the statute of frauds TMG is barred from obtaining restitution in all cases except where the seller defaults.

In the very recent case of *Kofmehl v. Baseline Lake, LLC,* 87395-0, the Supreme Court held that:

> Under this Court's prior cases, a buyer in a land sale contract that is unenforceable under the statute of frauds may not recover restitution if the vender is ready willing and able to perform under the terms of the contract.

Citing *Schweiter v. Halsey*, 359 P.2d 821, 57 Wn.2d 707 (Wash. 1961).

The only remaining question, then, would be whether the sellers, the Parks, stood ready willing and able to perform under the terms of the contract. The burden is on TMG to prove that the Parks were not prepared to execute the agreement. Since the Parks have always stood ready, willing, and able to execute the agreement, both in 2006 and, without interruption, to the date TMG file bankruptcy, this proof cannot be made.

TMG must prove that the Parks "reputiated" the contract.

What is necessary to show that a party has repudiated a contract, that they no longer stand ready, willing, and able to perform that contract? Can repudiation be done passively or must there be a higher showing that the repudiating party has taken some overt action to avoid the contract? TMG argues that the Parks repudiated the contract because the Parks did not attend a hastily prepared closing on September 11, 2006. The Parks say they did not know about TMG's closing. The question for the court is whether the appearance of a single instantaneous event is sufficient repudiation for TMG's purposes in the context of the efforts that the Parks took to keep the transaction together, both before and after the failed closing. The Parks would argue that the court should take the totality of the evidence to see whether the Parks ever repudiated the contract.

Additionally, the Parks would argue that any parties to a contract that is void due to the statute of frauds are going to need at least a short amount of time to figure out which version of the contract is correct. Even the *Kofmehl* case talks about reforming a contract for purposes other than its complete enforcement. *Kofmehl* at ___ .

TMG had long planned to hold the closing with the Parks on September 12, 2006, as is evidenced by numerous letters to the Parks. The Parks pointed out that that date was one day too late and that the contract would be void on September 12th. It appears that TMG did not comprehend this concept until the Friday before the closing. It then appears that TMG hastily prepared a closing for Monday, September 11, a closing that was unknown to the Parks and which was not attended by the Parks. It is this single event of not appearing at the unknown closing that TMG argues is proof of repudiation by the Parks. The Parks argue that they never repudiated the contract and all the remaining evidence indicates that the Parks made significant effort to see the transaction completed.

The rule of law here, as cited in the Kofmehl case, is that

> Whenever a contract is invalidated by force of statute, the restitution analysis must be keyed to the policy goals of that statute. *Restatement (Third) of Restitution And Unjust Enrichment* § 32 (2011). In Washington, the policy goal of the statute of frauds is to protect the vendor—that is,

Baseline. *Home Realty Lynnwood, Inc. v. Walsh,* 146 Wn.App. 231, 240, 189 P.3d 253 (2008) (quoting 73 *Am. Jur. 2d* Statute of Frauds § 450 (2001)).

Kofmehl, supra at ___.

It would appear, from the reading of the recent cases, that repudiation of a contract requires something more than missing an undisclosed closing date. TMG would have to prove that the Parks refused to close a valid contract, or that, in some fashion, the Parks rendered the property unavailable through a sale to another party or other similar event

For their part, the Parks were faced with a very poorly written and very poorly executed contract that included a counteroffer addendum that appeared to raise the price by $180,000 but which was allegedly unknown to TMG. The Parks discovered the discrepancy with TMG in June, 2006 and wrote several letters and made numerous telephone calls to the realtor and to TMG in order to make sure that the contract was completed. These efforts by the Parks were not fruitful.

The Parks were also faced with a number of requests by TMG to continue the contract for several more months, a request that was agreeable to the Parks.

In the middle of this effort by the Parks, TMG contacted the parties

dual agent realtor, Julie Manolides, and instructed her not to contact the Parks any further. Ms. Manolides accepted that direction from TMG and refused any contact with the Parks. By taking that action, TMG removed the only professional working with the Parks.

Even after the failed closing date the Parks continued to keep the property available for TMG. They took no action to alienate the property or to retain another realtor. The Parks continue to live on the property today and continue to maintain ownership of the property.

The Parks' argument would be that the term "repudiate" requires something overt on their part, that lack of action is not enough to show repudiation. "See Black's Law Dictionary 1418 (9th ed. 2009) (defining "repudiate" as "[t]o reject or renounce (a duty or obligation); esp., to indicate an intention not to perform (a contract)")." *Kofmehl*, at __. The Parks would argue that, to succeed, TMG would have to show that the Parks had declared an intention to avoid the contract in its entirety or that the Parks had sold the property to another party, thereby making it unavailable for sale. Since neither of these events have occurred TMG will not be able to make these proofs. The Parks did not repudiate the contract but have always stood ready willing and able, not to mention enthusiastic, to complete the contract.

Issue of Lis Pendens

Although the Parks argue that they did not repudiate the contract but instead stood ready, willing, and able to complete the contract, the Parks also argue that that question may be moot. TMG may have forced them, even against their will, to stand ready willing and able by filing a notice of lis pendens.

This presents an issue for this court that may be an issue of first impression. Does the filing of the notice of lis pendens force the property seller to stand ready, willing, and able to sell their property to the claiming party as a general rule and, if not a general rule, does it apply to the facts of this case?

When a party files a lawsuit claiming that they are entitled to a certain parcel of real estate, and a lawsuit is filed, the party may also file a notice of lis pendens with the County Auditor which tells the world that the plaintiff is claiming ownership of the subject real estate. RCW 4.28.328. Thereafter, any potential purchaser of the property is on notice that he could be dispossessed of the property at any time by the plaintiff if the plaintiff prevails at trial. A notice of lis pendens is not a bar to the sale of a property but, as a practical matter, no reasonable person would attempt to purchase a property that has a lis pendens.

The purpose of a lis pendens is to give notice of pending litigation affecting the title to real property, and to give notice that anyone who subsequently deals with the affected property will be bound by the outcome of the action to the same extent as if he or she were a party to the action.

United Savings and Loan Bank v. Pallis, 27 P.3d 629, 107 Wn.App. 398 (Wash.App. Div. 1 2001)

Two weeks after the failed closing TMG filed suit against the Parks. TMG then filed a notice of lis pendens with the County Auditor making a claim that they were entitled to the entire Park property. With this cloud on title the Parks were unable to even attempt to sell the property to another buyer.

TMG left the lis pendens on the property for the next 31 months with little or no action in the lawsuit and without any extension payments being made to the Parks. TMG used this time to continue to plat the property and, presumably, to attempt to find an investor or a buyer. Only when the market had declined to its lowest point, April, 2009, did TMG release the lis pendens.

By these facts, the Parks stood ready, willing, and able to sell the property to TMG. They could do little else without significant legal expense, which would have culminated in a sale to TMG, an event that was sought by the Parks all during this time.

TMG has argued that a notice of lis pendens does not prohibit the sale of property. Further, TMG also argues that the Parks never asked TMG to lift the notice of lis pendens. Both of these arguments ignore reality. No party is going to purchase land that is in litigation. And TMG would never have released its lis pendens. These are frivolous arguments by TMG.

The Parks stood ready, willing, and able to sell their property but even if they did not TMG forced them into that posture by filing the notice of lis pendens.

3. ERRORS IN TRIAL CONDUCT

Ordering former counsel to testify.

TMG sought to subpoena the former counsel for the Parks to testify about the case. The testimony of the former counsel was objected to by the Parks. Rule 1.6 RPC

In response to a subpoena from TMG, the former counsel to the Parks, Gregory Home (Home) contacted the Washington State Bar Association and was informed that he should ignore the subpoena unless the court issued a direct order requiring him to testify. Over the objections of the Parks, Judge Okrent did in fact issue such an order, requiring said former counsel to testify before the jury, as requested by TMG.

The testimony to be elicited from the former counsel was an answer to two questions presented by the jury. First, the jury wanted to know whether TMG had paid said attorney to represent the Parks. Secondly, the jury wanted to know whether said former counsel issued a written opinion as to the duty of the Parks to close the transaction. Upon taking the stand, and being questioned by Judge Okrent, the former counsel indicated that he had not been paid by TMG to represent the Parks. When asked to respond to the second question Mr. Home indicated that he did not believe that he had rendered such an opinion and if he did it had been oral.

The court then turned the questioning over to the Parks, who established that, yes, TMG had paid Mr. Home $1,000 to represent the Parks. However, when Mr. Home was asked to identify his written opinion, TMG's counsel objected on the grounds of relevance and that objection was sustained on the contention that the opinion was created after the closing and was therefore irrelevant. This left the Parks in a difficult position. The jury knew enough about the opinion to ask a question about its existence. The court had questioned Mr. Home without any limitation as to time but now that the Parks were asking the questions the court refused the cross examination. This left an impression that the

court favored TMG and disfavored the Parks.

This whole scene must have been grossly confusing to a jury which had heard the Parks objection to the testimony of the former counsel. Then, once he was in the witness stand, Mr. Home was refused an opportunity to answer the jury's question. The refusal was based on relevance and not on the protection of the attorney-client relationship.

The jury also saw the Parks had a document that they were appearing to offer into evidence regarding said counsel's written opinion. The jury had asked the question regarding a written opinion and it appeared that the question was about to be answered with the exhibit. The series of events would have shown that TMG did not want to have the opinion document presented to the jury, that Parks did want the exhibit shown to the jury, and that the court aided TMG on that point.

The rule in this matter is RCW 5.60.060(2)(a) which states:

> An attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment.

See also *Dietz v. Doe*, 935 P.2d 611, 131 Wn.2d 835 (Wash. 1997), *Pappas v. Holloway*, 787 P.2d 30, 114 Wn.2d 198 (Wash. 1990) .

In this case the court clearly violated the Parks' rights by ordering the former counsel to testify. It then doubled its injury to the Parks by

prohibiting the witness from testifying when it became clear that the Parks were ready to present advantageous evidence.

The next question is what to do with this situation. The Parks believe that the actions of the trial court amount to reversible error since the court applied an erroneous view of the law to the disadvantage of the Parks. Clearly, the actions of the trial court were prejudicial to the Parks and so confusing to the jury as to give the appearance of favoritism of the court to TMG and against the Parks. This situation is reviewed de novo but may also be viewed as an abuse of discretion by the trial court.

> Thus, the abuse of discretion standard gives deference to a trial court's fact-specific determination . . . while permitting reversal where an incorrect legal standard is applied. If, however, a pure question of law is presented . . . a de novo standard of review should be applied as to that question.

Dix v. ICT Group, Inc., 161 P.3d 1016, 160 Wn.2d 826 (Wash. 2007).

Error in admitting irrelevant evidence

During the trial in this case the plaintiff offered evidence from two other real estate transactions involving the Parks, plus disclosure that the Parks had been involved in seven or more other lawsuits. The two transactions and the other law suits had nothing to do with this transaction with TMG. They were admittedly offered to show that Dr. Park had difficulty on two other unrelated transactions. These should not have

been allowed as evidence.

The first transaction was from 2001 regarding the same Park property. The Parks had entered into negotiations to sell to an unrelated party. That buyer was unable to perform. The deal was never completed. The basis for the transaction is unknown because TMG made no effort to clarify the transaction. However, during cross examination TMG suggested that the failure was due to the Parks' demanding more money. No proof of this suggestion was offered.

The second case was unrelated to the Park property. The Parks tried to purchase commercial property in 1979, 34 years earlier. During cross examination TMG offered an appellate court opinion into evidence to show that that transaction failed because the Parks had wanted to add a clause for buildability. No other proof was offered.

The Parks objected strenuously to the offer of this evidence but it was allowed by the court. This evidence should have been excluded and a limiting instruction should have been offered.

The rules of evidence state that:

Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity there with on a particular occasion." Rule 404 (a) ER.

The rules also state that:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of the person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.Rule 404(b) ER.

The two pieces of evidence involved real estate transactions where the Parks had disputes with the other parties to the contract. Evidence of other acts or character traits is inadmissible. Yet that is the sole reason for TMG's offer of the evidence. TMG's counsel stated, in response to the objection by the Parks;

And the reason that's important is because Exhibit 117 relates to another case in which Dr. Park tried to insert a term in a purchase and sale agreement against a developer. And in fact in that case, Your Honor, the Washington Court of Appeals issued a published decision stating that in fact the developer on the other side of that deal did not agree to that term and that Dr. Park knew about it. That's why it's relevant.

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TMG's counsel is attempting to take the exact course of action that is prohibited by the rules of evidence, trying to link other unrelated cases to this case to show that the Parks have a reputation for this type of conduct and that they must have been acting in conformity therewith. The exact wording of the rule says that it is not admissible to show conformity.

This testimony was particularly damaging to the Parks. Up until that point the Parks were seen as having one transaction in real estate. This testimony, even from 34 years earlier, and openly found to be

admissible by the court, caused the Parks to be held in a very different light by the jury. Yet, it was not probative of any point. It has no bearing on the elements of this case. This inadmissible testimony prejudiced the jury against the Parks and caused the eventual result. The Parks must have a new trial to cleanse the error of TMG's counsel and of the trial court.

Errors in Court's Instructions to the Jury

The court also erred in granting TMG's motions in limine and in issuing damaging jury instructions. Specifically, the court issued the following instruction, to the detriment of the Parks:

Instruction number 15.

Certain factual issues have already been conclusively determined in this matter. You are instructed that it has already been determined that the purchase price the parties agreed upon is $2,425,000, it has also been determined that the description of the real property in the contract satisfies the description required in contracts for the purchase of real estate.

Plaintiff is only liable for damages to defendants if plaintiffs lacked substantial justification for filing a lis pendens. You are instructed that the court has found substantial justification existed for plaintiff to file a lis pendens.

Based on these instructions the jury was prohibited from finding that there was a dispute regarding the purchase price. Yet, despite this instruction, the Parks argued, without objection, the terms of the counter offer addendum and why they felt that the price had been raised. Since it was an item that was presented, argued, and contested by the opposing

party it became an issue for the jury. The Parks contested the jury instruction but were overruled.

The court then said that the Parks may only obtain damages if the lis pendens lacked sufficient justification. The court then concluded that it had sufficient justification. This instruction was the first time that the Parks learned that the court had found sufficient justification.

The contract was void for violation of the statute of frauds. The notice of lis pendens was an extension of the void contract and therefore had no justification. The Parks should have been able to argue their damages and to be awarded those damages. The Parks are entitled to a new trial with directions from this court that damages are available to the Parks.

ATTORNEY'S FEES

The Parks believe that the trial on this matter, and this appeal, were unnecessary and were not supported by good law or fact. The Parks are entitled to attorney's fees and costs both from the trial court and for this appeal.

CONCLUSION

The contract that is the basis for this case is void since it does not have a legal description. The document itself does not show a legal

description. The county tax assessor's numbers cannot be used for this contract since the subject property is platted property and not a metes and bounds property. There is no proper reference to another document that contains the correct legal descriptions. Since the contract is void it cannot be the basis for any recovery.

A void contract cannot be the basis for recovery by a buyer unless the seller has been shown to have repudiated the contract. The defendants in this case never repudiated the contract but, additionally, they were held to the contract by a notice of lis pendens filed by the plaintiff. Since the defendants did not repudiate the contract there can be no recovery against them by the plaintiff.

The trial on this matter had so many errors that the results of the trial must be overturned. A new trial granted to the Parks but only if the court finds that there are sufficient elements of the contract that would allow a jury to reconstruct the contract in any meaningful manner. Rather, the Parks have argued from the start that the contract is so false that, as a matter of law, it cannot be the basis of any claim.

The Parks also believe that TMG should be held to a very high standard of care due to the nature of their business, the number of real estate professionals working for TMG, including two real estate attorneys,

and the amount of money in question. The Parks, for their part, were elderly medical professionals who were selling the only real estate they owned, their homestead. TMG attempted the use its size and superior real estate knowledge to take advantage of the Parks. If this case is not overturned then TMG will have been successful.

The defendants pray for an order of the court overturning the judgment of the trial court and dismissing plaintiff's action for failure to state a claim upon which relief can be granted and for other bases stated in this brief and as are just and equitable.

DATED this 9th day of August, 2013.

MUKILTEO LAW OFFICE, PLLC

By: _____
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