90368-9

IN THE APPELLATE COURTS OF THE STATE OF WASHINGTON

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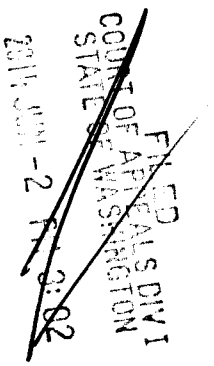
THE MCNAUGHTON GROUP, LLC, A Washington Limited Liability Company,

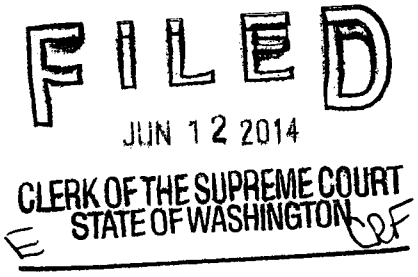
Respondent

v.

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

Petitioners

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Appeal from Washington Appellate Court
Division One
70064-2-1

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**PETITION FOR REVIEW**

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## A. IDENTITY OF PETITIONERS

Dr. Han Zin Park and Regina Kyung Park, husband and wife, ask this court to accept review of the Court of Appeals decision terminating review designated in Part B of this Petition.

## B. COURT OF APPEALS DECISION

The Parks negotiated to sell their homestead to a developer in 2005. The sale did not go through due to documentation issues and the developer sued the Parks. Through pretrial motions, and through trial, the courts found that the Parks had not pleaded an affirmative defense, that the contract, lacking a legal description, but shown through parol evidence, was still complete, that the opposing party could call the Park's former counsel to come to court and testify over their objections, and that "bad

acts" from 30 years earlier was admissible, in addition to other determinations. The Court of Appeals affirmed the trial courts.

The Parks seek review of the decision that:

1. A real estate contract that does not have a legal description, but that directs parties to a document that does not actually exist is sufficient to satisfy the Statute of Frauds;
2. Notice of an affirmative defense that comes nine months prior to trial is insufficient notice;
3. Parol evidence can be used to save a deficient contract from the Statute of Frauds;
4. Opposing counsel can subpoena former counsel and cause them to testify for the opposition and that 30 year old "bad acts" are admissible to show continuity with current actions.

The decision of the appellate court was filed on March 31, 2014. Motions for Reconsideration and for Publication were timely filed but were denied on May 2, 2014. Copies of the decisions are in the Appendix at pages A-1 through 16 and 17. A copy of the order denying petitioner's motion for reconsideration is in the Appendix at page A-18.

## C. ISSUES PRESENTED FOR REVIEW

1. The trial court erred by failing to grant summary judgment to the Parks on a real estate contract that had no legal description and no proper reference to another document that had a legal description.

This court has consistently held that a real estate contract must have a full legal description in order for the contract to satisfy the statute of frauds. There is one exception to this rule. If the contract does not have a legal description the contract can refer to another document that does have the legal description. The contract between the Parks and TMG did not have a legal description. TMG succeeded in arguing a link between the completed contract and the unexecuted negotiations for the property that had failed to create a contract six months earlier. If reference is made to another document to supply a legal description must that other document actually exist?

2. The lower courts erred by setting up a new standard for the timing of the presentation of affirmative defenses, apparently determining that affirmative defenses must be pleaded prior to the end of discovery rather than at a time which would allow the opposing party sufficient time to respond prior to trial.

The presentation of an affirmative defense, which must be pleaded prior to trial, is timely if it is presented with enough time for the opposing party to prepare for the issue prior to trial. Should that rule change now so that affirmative defenses must be pleaded prior to the end of discovery, regardless of other notice or proximity to trial?

3. The trial court erred by accepting parol evidence to link a real estate contract to another document, which then linked to another set of papers that did not create a contract, to supply the legal description to the contract, all over the objection of the Parks.

TMG needed parol evidence to link the signed contract to an Addendum B, then further parol evidence to link Addendum B to the paperwork from the prior negotiations in order to satisfy the statute of frauds. Can parol evidence now be used to satisfy the statute of frauds?

4. The appellate court erred by allowing prejudicial 30 year old character evidence that was not linked in any way to the case, in violation of Rule 404, ER, and the ordering of the Parks' former counsel to testify for TMG against the Parks' direct wishes, both over the Parks' strenuous objections.

The rules of evidence prohibit the presentation of prior bad acts to prove compliance therewith in a particular case. Here, TMG was allowed, over the objections of the Parks, to elicit testimony of an unrelated case from 30 years earlier without even attempting to prove motive, opportunity, or any other exception to the rule. TMG was also allowed to force the Parks former counsel to come and testify against the objections of the Parks. Can a party get a fair hearing when the trial judge continually allows inadmissible and prejudicial evidence to be heard by the jury?

## D. STATEMENT OF THE CASE

Han and Regina Parks (the "Parks") sold their land to The McNaughton Group, LLC ("TMG"), a real estate development firm in Edmonds, Washington, in 2005. The sale did not close and TMG brought this action.

The contract between the parties did not contain a legal description. The Parks brought a motion for summary judgment, claiming the contract was void due to the Statute of Frauds. TMG argued that the contract referenced another document that had the legal description.

The trial court determined that the Parks had not presented the affirmative defense of Statute of Frauds in a timely manner and denied summary judgment. TMG then brought a motion for summary judgment but was denied by the court that stated that its Addendum B, a document that is necessary to connect the contract to the legal description, was not a part of the contract.

The matter proceeded to trial. The Parks were not allowed to argue the Statute of Frauds or the disputed purchase price.

TMG brought in evidence that the Parks had engaged in similar conduct over 30 years earlier on another property.

TMG also obtained an order from the trial court forcing the Parks' former counsel to come to court to testify on behalf of TMG. The Parks objected. The jury verdict, in favor of TMG, was for over $900,000.00. The Parks appealed but did not prevail.

## E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

**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 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]

**Prior Decisions by the Supreme Court**

The Supreme Court has a number of pillars of law that it jealously defends in order to simplify the cases that come before it. Any time there is a deviation from one of the pillars of law the court is firm in maintaining its desired position. One of those pillars of law is a requirement that any real estate contract coming before the court must have a complete legal description. If the document is lacking a complete legal description then the the court will consider the contract to be void. A second pillar of law is a requirement that parol evidence may not be used

to save a contract from the operation of the Statute of Frauds. These pillars have existed in this state for well over 100 years.

For the most part, the lower courts will follow the pillars of law set by this court but, on occasion, the lower courts will lose focus of the pillars and will deviate from the direction provided by this court in order to achieve an unmerited, but easier to digest, result. That deviation occurred in this case. The lower court labored the facts to find a legal description where none existed.

This court has recently taken an opportunity to affirm its position on both legal descriptions and parol evidence, as it applies to the Statute of Frauds. *Kofmehl v. Baseline Lake, LLC*, 305 P.3d 230, 177 Wn.2d 584 (Wash. 2013) Nonetheless, the lower court found its own exception and diluted this court's pillars of law.

**Argument**

**1. Statute of Frauds**

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.

A legal description is a way of describing real property that is a great deal more accurate than using an address. For a real estate contract

to be valid each contract must have a legal description. A contract that does not include a legal description is void.

> 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 an exception to the rule. The exception allows that a contract can be held complete if the contract refers to another document that does have the legal description.

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. Second, 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.

Without a legal description in the contract and without a firm connection between the contract and another existing document that includes the legal description the contract fails for violation of the Statute of Frauds.

**2. Affirmative Defense**

Failing to plead an affirmative defense also 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.

*Mahoney v. Tingley*, 529 P.2d 1068, 85 Wn.2d 95 (Wash. 1975)

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.

*Supra.*

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).

The Parks pleaded the failure of the contract in their initial pleadings in this case. The Parks then brought a motion for summary judgment, pleading that the contract violated the statute of frauds. That motion was brought nearly three weeks before the end of discovery. Based on that motion, TMG argued the elements of the contract. TMG was not surprised by the Parks' pleadings.

The appellate court, however, followed the erroneous logic of the trial court which found that the Parks had scheduled their motion for summary judgment to be heard after the end of discovery. There is no rule that states that an affirmative defense must be pleaded prior to the end of discovery. This is a new clause created by the trial court, which should not become part of Washington jurisprudence. The rule is that an affirmative defense has to be pleaded with sufficient notice for the opposing party to present a defense. That was done here.

**3. Parol Evidence**

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 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 the exception to the legal description rule is not applicable here. For these reasons the contract is void and cannot be the basis for recovery by the buyer.

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 sought 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).

**5. Errors In Trial Conduct**

ERROR IN 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.

This whole scene must have been grossly confusing to a jury which had heard the Parks objection to the testimony of the former counsel.

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 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 took 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. The Parks must have a new trial to cleanse the error of TMG's counsel and of the trial court.

## VI CONCLUSION

The lower courts' decision cannot stand. Pleading affirmative defenses is not limited to the time before the end of discovery. A contract that has no legal description is void. Parol evidence may not be used to save a contract from the operation of the Statute of Frauds. A fair trial requires adherence to the rules of evidence. This matter should be reviewed and those parts of the decision that are not in agreement with direction from this court should be overturned.

DATED this 2nd day of June, 2014.

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By _____
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Appendix A

The following three (3) appendices are named in paragraph B. Court of Appeals Decision page five (5):

- Unpublished Opinion of the Court of Appeals filed on March 31, 2014;
- Court of Appeals Order Denying Motion for Reconsideration filed on May 2, 2014;
- Court of Appeals Order Denying Motion to Publish filed on May 2, 2014.

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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|---|---|---|
| THE MCNAUGHTON GROUP, LLC, a Washington limited liability company,<br><br>Respondent,<br><br>v.<br><br>HAN ZIN PARK and REGINA KYUNG PARK, husband and wife, and the marital community property comprised thereof,<br><br>Appellants,<br><br>WINDERMERE REAL ESTATE COMPANY, a Washington corporation; JULIE MANOLIDES and JOHN DOE MANOLIDES, husband and wife,<br><br>Third Party Defendants. | ) | No. 70064-2-I<br><br>DIVISION ONE<br><br>UNPUBLISHED OPINION<br><br>FILED: March 31, 2014 |

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APPELWICK, J. — The Parks appeal the denial of their motion for summary judgment, arguing that their real estate contract with TMG was void for lack of legal description. TMG asserts that the Parks waived this affirmative defense. The Parks also make several evidentiary assignments of error. We affirm.

## FACTS

In 2004, Han and Regina Park negotiated with The McNaughton Group LLC (TMG) over sale of the Parks' property in Edmonds, Washington. That September, the parties drew up a purchase and sale agreement (2004 PSA) with a purchase price of $2,425,000. However, the negotiations ultimately fell through.

In early 2005, the parties resumed negotiations for sale of the property. Initially, TMG offered the Parks $2,400,000. The Parks counter-offered with $2,425,000, which

TMG accepted. The parties executed the new purchase and sale agreement (2005 PSA) on or about February 28, 2005.

Before closing, however, the parties sparred over the terms of the contract, namely the purchase price. The Parks argued that, contrary to the terms of the 2005 PSA, an additional $180,000 was due. The closing date was set for September 11, 2006. Ultimately, however, the Parks did not close on the property.

TMG filed suit against the Parks for breach of contract and filed a lis pendens on the property. The Parks counterclaimed and argued that it was TMG who breached the contract. The Parks later moved for summary judgment, asserting that the 2005 PSA was void for lack of legal description. The trial court denied their motion, finding that they had waived the statute of frauds as a defense.

The case proceeded to trial on January 22, 2013. The jury ultimately found for TMG. The Parks appeal.

## DISCUSSION

### I. Motion for Summary Judgment

The Parks argue that the trial court improperly denied their motion for summary judgment. This court reviews a trial court's summary judgment order de novo. Korslund v. DynCorp Tri-Cities Servs., Inc., 156 Wn.2d 168, 177, 125 P.3d 119 (2005). Summary judgment is proper if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Id. This court construes the facts and reasonable inferences therefrom in the light most favorable to the nonmoving party. Id.

A. Waiver of Statute of Frauds Defense

The Parks first contend that the trial court erred in finding that they waived the statute of frauds defense. CR 8(c) establishes that the statute of frauds is a defense that must be affirmatively set forth by a party. Generally, affirmative defenses are waived unless (1) affirmatively pleaded; (2) asserted in a CR 12(b) motion; or (3) tried with the parties' express or implied consent. Henderson v. Tyrrell, 80 Wn. App. 592, 624, 910 P.2d 522 (1996). The policy behind this rule is to avoid surprise. Id. Where that policy is not a concern, and the failure to affirmatively plead a defense does not affect the substantial rights of the parties, we will consider noncompliance harmless. Id.

In Henderson, the trial court refused to instruct the jury on nonparty fault, an affirmative defense that the defendant failed to raise in any responsive pleading. Id. at 621-22. The appellate court found that this was not an abuse of discretion. Id. at 625. It reasoned that the defendant was aware of the issue and did not raise it during the many months before trial. Id. To allow him to raise the defense right before trial, the court stated, would require the parties to engage in substantial new discovery. Id.

By contrast, in Bickford v. City of Seattle, this court found that the trial court abused its discretion in ruling that the defendant failed to timely raise its affirmative defense of setoff. 104 Wn. App. 809, 813, 17 P.3d 1240 (2001). There, the defendant did not expressly plead the defense in its answer. Id. at 814. But, this court reasoned, the parties had impliedly consented to try the issue by discussing setoff with the court and agreeing about how it would be presented and the figures that would be used. Id.

Here, the court made the following findings:

1. This case was filed on September 28, 2006;
2. The Parks never mentioned or ple[a]d[ed] the Statute of Frauds in their answer, counterclaims, or third party claims;
3. The discovery cut-off date was May 21, 2012,
4. This motion was noted for May 30, 2012, a date after the discovery cut-off; and
5. The Parks raised the Statute of Frauds as a defense for the first time in this motion.

To permit the Parks to raise the Statute of Frauds at this late date would be unduly prejudicial and unfair to Plaintiff.

The Parks argue that these findings ignored their pleadings and that they had openly contested the contract.

It is true that the Parks challenged the 2005 PSA in their answer to TMG's complaint, but their arguments involved the purchase price. There was no mention of the statute of frauds or concern about the legal description of the property. Nor was there mention of those issues in any of their many subsequent pleadings.

Like the defendant in Henderson, the Parks failed to raise their affirmative defense in their responsive pleadings. They were able to raise the statute of frauds defense earlier, having had access to the 2005 PSA since the beginning of the lawsuit. But, for six years, the Parks did not raise an issue about the legal description of the property. And, when they did raise the issue, it was not until discovery had concluded. There is no evidence that, as in Bickford, the parties had consented to try the issue. The policy concerns behind the affirmative pleading rule thus apply here.

The trial court did not err in finding that the Parks waived the statute of frauds defense.

B. Statute of Frauds: Adequate Legal Description

Even if the statute of frauds defense had not been waived, denial of summary judgment motion was proper. Under the statute of frauds, a contract for the sale or conveyance of real property must include a legal description of the property. Pardee v. Jolly, 163 Wn.2d 558, 566-67, 182 P.3d 967 (2008). An inadequate legal description renders a contract void. Maier v. Giske, 154 Wn. App. 6, 15, 223 P.3d 1265 (2010). A valid legal description for platted property must include the lot number, block number, addition, city, county, and state. Martin v. Seigel, 35 Wn.2d 223, 229, 212 P.2d 107 (1949). The description may appear in the contract itself, or the contract may reference another instrument that contains a sufficient description. Bigelow v. Mood, 56 Wn.2d 340, 341, 353 P.2d 429 (1960).

Here, the legal description reads:

> The real property ("Property") located at 7704 Olympic View Dr., 18314 Olympic Vw Dr., 18408 79th AV W, 18325 80th AV W, Edmonds Wa, ("homes and land"), Tax Parcel ID #'s 00370800301000, 00370800100900, 00370800101100, 00370800101200 and Tract 106, Edmonds Sea View Tracts as per plat recorded in volume 3 of plats page 76, records of Snohomish County, 00434600010601.

The description includes the city, county, and state where the property sits.

TMG argues that this legal description is sufficient and cites to Bingham v. Sherfey, where the court approved a legal description that identified a property using its tax parcel number. 38 Wn.2d 886, 889, 234 P.2d 489 (1951). The Parks counter that Bingham does not apply, because it establishes requirements for only unplatted property.

The Parks are correct: it is not Bingham, but Martin that establishes legal description requirements for platted property. See 35 Wn.2d at 229. The legal

description here meets three of Martin's requirements—city, county, and state—but does not include the property's lot number, block number, and addition. This is an insufficient legal description on the four corners of the document.

However, TMG also argues that the 2005 PSA referred to another instrument with a sufficient description. If parties to a contract clearly and unequivocally incorporate by reference another document, that document becomes part of the parties' contract. Satomi Owners Ass'n v. Satomi, LLC, 167 Wn.2d 781, 801, 225 P.3d 213 (2009). This allows the parties to incorporate terms by reference to a separate agreement, including an agreement that is not physically attached. Knight v. Am. Nat'l Bank, 52 Wn. App. 1, 4-6, 756 P.2d 757 (1988). It must be clear that the parties knew of and assented to the incorporated terms. W. Wash. Corp. of Seventh-Day Adventists v. Ferrellgas, Inc., 102 Wn. App. 488, 494-95, 7 P.3d 861 (2000). The provisions referenced must have a reasonably clear and ascertainable meaning. Id. at 494.

At issue here are two documents: the 2005 PSA and the 2004 PSA. The 2005 PSA has a typed date of February 18, 2005. TMG signed the 2005 PSA on February 19, 2005, and the Parks signed it on February 20, 2005. The 2005 PSA states that it includes the following: "Addendum," "Promissory Note" and "counter addendum + 3 pages of prior addendum." Attached to the PSA are the following: a four-page document entitled "Addendum to Purchase and Sale Agreement"; a promissory note; a document called "Addendum B to Purchase and Sale Agreement Date 2/19/05"; and three additional pages of terms.

Addendum B contains a handwritten note designating it as a "counteroffer." The addendum states that:

> In the event, if there arise any dispute over the scope of the applicable clause(s) on Specific terms of Addendum 1 through 14, (dated 2/19/05)., [sic] Precious [sic] agreement executed on September 8, 2004, page 1 through 13, supercedes [sic] and replaces any provision on the topics contained in purchase and sale agreement proposed and executed on February 19, 2005.

(Emphasis added.)

The 2004 PSA has a typed date of September 2, 2004. TMG signed the 2004 PSA on September 2, 2004, and the Parks signed it on September 8, 2004. The 2004 PSA includes an addendum listing the full legal description of the properties.

TMG argues that, by virtue of Addendum B, the 2005 PSA incorporates the 2004 PSA. The language of Addendum B clearly and unequivocally incorporates a previous agreement executed on September 8, 2004. The parties signed Addendum B, demonstrating that they knew of and assented to its terms. The Parks contend, however, that a September 8, 2004, agreement does not exist. While September 8 does not correspond with the typed date of the 2004 PSA, it does correspond to the date upon which the Parks signed the PSA. The record does not contain any other document with that date, nor do the Parks allege that Addendum B refers to another particular document. The agreement referenced thus had a reasonably clear and ascertainable meaning.

The Parks further contend that Addendum B is not a lawful part of the 2005 PSA. This is so, they maintain, because the 2005 PSA does not on its face refer to an "Addendum B." The Parks are correct that the 2005 PSA does not specifically refer to Addendum B, but to a "counter addendum." But, Addendum B is identified as a

"counter offer." It was stamped and initialed by the parties on February 28, 2005, the same date that the 2005 PSA was stamped and initialed. And, the documents that the 2005 PSA lists as attachments correspond in number and type to the documents attached to the executed 2005 PSA. This includes Addendum B.

In their briefs, the Parks do not argue that "counter addendum" refers to another document in particular. Before trial, they asserted that it referred to a document increasing the purchase price. TMG disputed this, noting that the document bore only the Parks' initials and that TMG never saw the document until the closing date had passed.

The Parks also argue that Addendum B refers to a February 19, 2005, agreement that does not exist. Again, this date does not correspond with the typed date of the 2005 PSA, but with the date upon which the 2005 PSA was signed by TMG. Neither the record nor the Parks provide another document to which Addendum B might refer. This is insufficient to demonstrate that the 2005 PSA did not include Addendum B.

The trial court properly concluded as a matter of law that the 2005 PSA complied with the statute of frauds. Therefore, the trial court did not abuse its discretion in denying the Parks' motion for summary judgment.

II. Former Counsel Testimony

The Parks argue that the trial court improperly compelled their former attorney, [1] Gregory Home, to testify in response to questions from the jury. They contend that the

[1] Home represented the Parks during the 2004 negotiations, but not during the 2005 transaction. Home became their attorney again after the 2005 transaction closing

court exacerbated this error by refusing to admit evidence that the Parks offered regarding one of the questions. This court reviews the trial court's decision to admit or exclude evidence for an abuse of discretion. State v. Gresham, 173 Wn.2d 405, 419, 269 P.3d 207 (2012).

On direct examination, Han Park testified about advice that Home gave them about the purchase price of the property. Park also testified that TMG paid Home to represent the Parks. As a result of this testimony, the jury sought to ask Home two questions. Despite the Parks' objections regarding the protections of the attorney-client privilege, the court ordered Home to testify as to the two limited questions. The questions are as follows:

> Did you as an attorney provide a letter to Mr. Park stating a legal opinion that the $180,000 was in addition to the purchase price and was indeed part of the contract? And did this event, this opinion, occur in 2004, 2005 or 2006?
>
> . . . .
>
> [M]r. Park testified that TMG, the McNaughton Group, retained you as their attorney, as the Parks [sic] attorney, on his behalf against his wishes. Did that occur?

Home responded to the first question by saying, "I don't recall." He responded, "No" to the second question.

The Parks then offered as an exhibit an e-mail containing Home's opinions about the purchase price of the property. TMG objected, arguing that the e-mail was sent

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failed. He continued to represent the Parks through the early phases of the TMG lawsuit.

postclosing and was therefore irrelevant.[2] The trial court excluded the evidence on relevancy grounds.

A. Home's Testimony

The Parks argue that the trial court erred in requiring Home to testify. They rely on RCW 5.60.060(2)(a), which prohibits an attorney from testifying about professional advice given to a client without the client's consent. But, a client waives the privilege as to an entire confidential communication by testifying about part of that communication. State v. Vandenberg, 19 Wn. App. 182, 186, 575 P.2d 254 (1978).

Here, Han Park testified on direct examination that Home advised him that the Parks were entitled to an increased purchase price and that TMG had paid Home to represent the Parks. In doing so, he waived privilege as to Home's testimony on the same subjects.

B. Exclusion of E-mail

The Parks argue that the trial court further erred in excluding as irrelevant the e-mail containing Home's opinion. Relevant evidence is that having any tendency to prove or disprove a fact that is material to the determination of the action. ER 401. The court concluded that, in order for the e-mail to be relevant, the Parks would have needed to rely on Home's opinion in deciding not to close on September 11—the date of their alleged breach. Because the e-mail was dated September 13, the court reasoned, it was not relevant to the Parks' decision. The Parks' motive for refusing to close on the sale was in dispute, and their breach was the central issue in the case. An

[2] While the e-mail is not provided in the record, based on the exhibit list it appears to be dated September 13, 2006, two days after the closing date.

e-mail sent after they refused to close would not necessarily prove or disprove the Parks' motives or be relevant to breach. Without the e-mail in the record, the panel cannot review it further.

The trial court did not abuse its discretion in admitting Home's testimony or excluding the e-mail containing his opinion.

III. Evidence of Previous Real Estate Transactions

The Parks argue that the trial court erred in admitting two pieces of evidence regarding their prior real estate transactions. A trial court has broad discretion in ruling on evidentiary matters and will not be overturned absent manifest abuse of discretion. Cox v. Spangler, 141 Wn. 2d 431, 439, 5 P.3d 1265, 22 P.3d 791 (2000).

A. Purchase and Sale Agreement

The Parks first contest the admission of a contract involving their Edmonds property, which the Parks attempted to sell to Michelle Construction, Inc. in 2001. The Parks characterize the contract as evidence of "other acts" or "character traits" and contend that it was inadmissible under ER 404(b).

However, TMG offered the contract for impeachment purposes. ER 607 governs the use of impeachment evidence and provides that the credibility of a witness may be attacked by any party. If a plaintiff's testimony places his credibility at issue, the defendant may admit evidence to impeach the plaintiff's testimony. See, e.g., Tamburello v. Dep't of Labor & Indus., 14 Wn. App. 827, 828, 545 P.2d 570 (1976).

Here, Han Park testified that he did not have a prior sales contract with Michelle Construction. The trial court found that, Park thus opened the door for TMG to introduce the 2001 contract as impeachment evidence. The court also found that the

probative value outweighed the prejudicial effect. The trial court did not abuse its discretion in admitting this evidence.

B. Appellate Opinion

The Parks further challenge the admission of an appellate opinion demonstrating that the Parks had tried to purchase a piece of property in 1979, but that the deal had fallen through because of a dispute over contract terms. The Parks argue that this too was inadmissible evidence of "other acts" or "character traits" under ER 404.

Although evidence of prior acts are inadmissible to prove propensity on a particular occasion, they may be admissible for other purposes, including proof of motive, intent, modus operandi, or a common scheme or plan. Saldivar v. Momah, 145 Wn. App. 365, 395, 186 P.3d 1117 (2008). For example, a plaintiff may establish a common plan or scheme using evidence that a defendant committed similar acts of misconduct against similar victims under similar circumstances. Id. at 395.

In Saldivar, the trial court excluded evidence that the defendants, two brothers, used their similar appearances to impersonate each other in their professional lives. See id. at 394. The appellate court found that the exclusion was improper. Id. at 396. The court acknowledged that the proffered testimony would prove that the past impersonation took place at a different location during a different time period. Id. However, it found that the evidence's importance was the fact that the brothers engaged in professional impersonation—not when or where they did, or what harm ultimately resulted. Id.

Here, TMG offered the appellate opinion as evidence of the Parks' common scheme or plan. TMG's theory was that, in both the present case and in 1979, the

Parks attempted to enforce a contract term to which the other party had not initially agreed. Ultimately, the trial court admitted the opinion as evidence of a common scheme or plan under ER 404(b).

Like the evidence in Saldivar, the 1979 transaction is removed in time from the present case. See 145 Wn. App. at 396. But, it demonstrates that the Parks had engaged in similar behavior with a similar victim, suggesting that they had a common scheme or plan in approaching real estate deals with developers. The trial court also determined that the 1979 transaction had probative value that outweighed its prejudicial effect. This evidence was properly admitted.[3]

The trial court did not abuse its discretion in admitting evidence of the Parks' previous real estate transactions.

IV. Factual Issues Conclusively Determined

The Parks contend that the trial court erroneously instructed the jury that three factual issues were conclusively determined.[4]

A proper jury instruction informs the jury about the applicable law and does not mislead the jury. State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). Where no disputed facts exist about an issue, the court may decide that issue as a matter of

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[3] Even if the trial court had erred in admitting this evidence, the error would be harmless. An error in admitting evidence of bad acts is harmless if the improperly admitted evidence is of little significance in light of the evidence as a whole. State v. Fuller, 169 Wn. App. 797, 831, 282 P.3d 126 (2012), review denied, 176 Wn.2d 1006, 297 P.3d 68 (2013). Here, the appellate opinion was only one of many pieces of evidence that TMG offered to support its allegations of breach of contract. Based on this other evidence, the jury could have reasonably concluded that the Parks breached the contract, even without evidence of the 1979 transaction.

[4] The Parks do not offer legal authority for their assignment of error. We infer that they are asserting a constitutional right to have these issues decided by the jury.

law. City of Seattle v. Davis, 174 Wn. App. 240, 245, 306 P.3d 961 (2012). This court reviews the superior court's conclusions of law de novo for whether they are supported by the findings of fact. In re Washington Builders Benefit Trust, 173 Wn. App. 34, 65, 293 P.3d 1206, review denied, 177 Wn.2d 1018, 304 P.3d 114 (2013).

The Parks challenge the instruction's statement that the 2005 PSA's description of the property was satisfactory. Whether an agreement violates the statute of frauds is a question of law. Maier, 154 Wn. App. at 15. As discussed above, the 2005 PSA contained a valid legal description of the property. The trial court was entitled to make this determination and so instruct the jury.

The Parks challenge the statement that substantial justification existed for TMG to file a lis pendens. A lis pendens may be filed in an action affecting the title to real property. RCW 4.28.320. A lis pendens is not proper where filed in anticipation of a money judgment. Bramall v. Wales, 29 Wn. App. 390, 395, 628 P.2d 511 (1981). Substantial justification for a lis pendens exists where a claimant has a reasonable basis in fact or in law to file the lis pendens. Udall v. T.D. Escrow Servs., Inc., 132 Wn. App. 290, 303, 130 P.3d 908 (2006), reversed on other grounds, 159 Wn.2d 903, 154 P.3d 882 (2007).

Here, TMG filed the lis pendens in its action seeking specific performance of the 2005 PSA. TMG released the lis pendens upon amending its complaint to include money damages. The trial court determined a contract existed and it was not disputed that the Parks had not participated in closing. The trial court noted that TMG believed that the Parks anticipatorily repudiated the 2005 PSA and breached by failing to close

on the property. The court thus properly found that substantial justification existed to file the lis pendens.

The Parks challenge the jury instruction's statement that the purchase price of the Parks' property was $2,425,000. TMG attached to its complaint a copy of the 2005 PSA, which demonstrates that the agreed purchase price for the property was $2,425,000. In their answer, the Parks attached their own copy of the 2005 PSA, which included an addendum reflecting that the parties agreed to raise the price to $2,580,000. This addendum bears only the Parks' initials. TMG disputed the addendum. In a pretrial order, the court found that the Parks failed to establish through competent evidence that TMG agreed to increase the sale price. It therefore ruled as a matter of law that the established contract price was $2,425,000. The Parks again attempted to introduce evidence concerning the sale price through the e-mail containing Home's opinion. The court excluded that evidence. The challenged jury instruction reflects the court's finding and the evidence presented about the purchase price of the Parks' home.

The court did not err in instructing the jury that these factual issues were conclusively determined.

V. Attorney Fees

The Parks request attorney fees and costs both at the trial level and on appeal. RAP 18.1(a) permits an attorney fee request if "applicable law grants to a party the right to recover" those fees. A party seeking fees under RAP 18.1 must support its request with argument and citation to authority. Phillips Bldg. Co. v. An, 81 Wn. App. 696, 705, 915 P.2d 1146 (1996). The Parks do not do so. We deny their request for fees.

TMG requests attorney fees under the fee shifting provision in the 2005 PSA. Under RCW 4.84.330, the prevailing party in an action to enforce or defend a contract is entitled to attorney fees and costs as provided by the contract. Reeves v. McClain, 56 Wn. App. 301, 311, 783 P.2d 606 (1989). The 2005 PSA provides that "[i]f Buyer or Seller institutes suit against the other concerning this Agreement, the prevailing party is entitled to reasonable attorneys' fees and expenses." TMG is the prevailing party here. It is entitled to fees and costs on appeal.

We affirm.

Appelwick, J.

WE CONCUR:

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

| | | |
|---|---|---|
| THE MCNAUGHTON GROUP, LLC, a Washington limited liability company,<br><br>Respondent,<br><br>v.<br><br>HAN ZIN PARK and REGINA KYUNG PARK, husband and wife, and the marital community property comprised thereof,<br><br>Appellants,<br><br>WINDERMERE REAL ESTATE COMPANY, a Washington corporation; JULIE MANOLIDES and JOHN DOE MANOLIDES, husband and wife,<br><br>Third Party Defendants. | ) | No. 70064-2-I<br><br>ORDER DENYING MOTION FOR RECONSIDERATION |

The appellants, Han and Regina Park, having filed their motion for reconsideration herein, and a panel of the court having determined that the motion should be denied; now, therefore it is hereby

ORDERED that the motion for reconsideration is denied.

DATED this 2nd day of May, 2014.

Judge

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 MAY -2 AM 10: 17

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

| | | |
|---|---|---|
| THE MCNAUGHTON GROUP, LLC, a Washington limited liability company,<br><br>Respondent,<br><br>v.<br><br>HAN ZIN PARK and REGINA KYUNG PARK, husband and wife, and the marital community property comprised thereof,<br><br>Appellants,<br><br>WINDERMERE REAL ESTATE COMPANY, a Washington corporation; JULIE MANOLIDES and JOHN DOE MANOLIDES, husband and wife,<br><br>Third Party Defendants. | ) | No. 70064-2-I<br><br>ORDER DENYING MOTION TO PUBLISH |

The appellants, Han and Regina Park, having filed their motion to publish, and a panel of the court having considered its prior determination and finding that the opinion will not be of precedential value; now, therefore it is hereby

ORDERED, that the unpublished opinion filed March, 31, 2014 shall remain unpublished.

DATED this 2nd day of May, 2014.

Judge

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 MAY -2 AM 10: 17

NO. 70064-2
WASHINGTON COURT OF APPEALS, DIVISION 1

| | | |
|---|---|---|
| HAN ZIN PARK, et.ux.<br>Appellants | ) | |
| vs. | ) | DECLARATION OF |
| THE MCNAUGHTON GROUP, LLC,<br>Respondent, | ) | SERVICE |

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1. I declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

2. I am a citizen of the United States of America, a resident of the State of Washington, over the age of twenty-one years of age.

3. That on the **3rd** day of **June, 2014**, I mailed, to the parties named below, the **signature page** of the Petition for Review, by way of US Postal Service, postage paid. (The original was delivered to their office on the 2nd day of June, 2014 by Seattle Legal Messenger Service.)

Adrienne McEntee, WSBA #34061
Tousley Brain Stephens, PLLC
1700 7th Ave., Ste. 2200
Seattle, WA 98101

Washington State Court of Appeals
Attention: Lori Moore, Case Manager
One Union Square
600 University Street
Seattle, WA 98101-1176

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 JUN -4 AM 11:

Signed the **3rd** day of **June, 2014.**

MUKILTEO LAW OFFICE

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6.5.14

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

**Han Zin Park and Regina Kyung Park**

Petitioner(s),

vs.

**The McNaughton Group, LLC**

Respondent(s).

_____/

**Case No.: 70064-2-1**

**DECLARATION OF DELIVERY**

State of Washington
County of King ss.

The undersigned, being first duly sworn on oath deposes and says: That he/she is now and at all times herein mentioned was a citizen of the United States, over the age of eighteen years, not a party to or interested in the above entitled action and competent to be a witness therein.

That on **06/02/2014** at **3:58 PM**, at the address of **1700 7th Avenue, #2200, Seattle**, within **King** County, **WA**, the undersigned duly delivered the following document(s): **Petition for Review** in the above entitled action to **Adrienne D. McEntee, Tousley Brian Stephens, PLLC**, by then and there personally delivering 1 true and correct set(s) of the above documents into the hands of and leaving same with **Emily Kasberg, Receptionist for Tousley Brian Stephens, PLLC**.

**I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.**

Date: 6/3/14

X _____

**A. Stinson**
Registered Process Server
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Seattle, WA 98103
206.443.0885

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