No. 47646-1-II

COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

SANDRA J. KEATLEY,

PLAINTIFF/RESPONDENT,

vs.

DUANE BRUNER

DEFENDANT/APPELLANT.

RESPONDENT'S BRIEF

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I. STATEMENT OF THE CASE

Sandra Keatley was born in 1959 and has lived in Castle Rock, Washington, her entire life. [RP1, p38-39] Sandra's family has always had deep roots in Castle Rock, living on the same stretch of the Cowlitz River for over one hundred years. [RP1, p39] Her father was born on the family farm in 1907 and eventually gave each of his seven children their own parcel of land along the river. [RP1, p39; RP2, p4] Sandra's parcel was thirteen acres. [RP1, p40] It was bordered to the north by eighty acres that her father and mother had retained and to the south by ten acres that they had given to her sister.

Sandra first met Duane Bruner when she was ten years old, and they dated on and off through high school. [RP1, p41] They parted ways when Sandra went off to college. In 1982, Sandra returned to Castle Rock and reunited with Bruner. [RP1, p41; RP2, p87] At that time, Bruner lived across the road from the ten acres that Sandra's father had gifted to her sister. [RP1, p42] Although Sandra and Bruner did not live together, by 1986 they were to Sandra's knowledge engaged in a monogamous relationship. [RP1, p42-43]

After Sandra's sister died, Sandra suggested that Bruner buy the ten acre property that is the subject of this lawsuit. [RP1, p42] Sandra wanted the land to stay in her family and, given the fact that it abutted her

thirteen acres, Sandra and Bruner could have a total of twenty-three acres together. [RP1, p42] Bruner purchased the property.

Shortly thereafter, Sandra and Bruner built a garage on the ten acres. [RP1, p45] They collaborated on the location of the garage, deciding to place it less than a foot away from the boundary between his land and her land. [RP1, p45] Sandra was aware that the garage was right on the boundary, but she had no concerns because she believed that they would be together forever. [RP1, p45]

Bruner later moved a trailer onto the property and began residing there. Sandra continued to live at her mother's house next door in order to take care of her elderly parents. [RP1, p45] Sandra and Bruner saw each other nearly every day, often professed love for each other, and he repeatedly asked her to marry him. [RP1, p46] Sandra always said "no," seeing no need to get married given the fact that they were already in an openly committed relationship. [RP1, p46]

Bruner had long been considered part of the Keatley family. [RP1, p191; RP2, p5] Sandra's nieces and nephews referred to him as "Uncle Fun." [RP1, p191; RP2, p8 and p100] As teenagers, they had the run of the Keatley family property, including the portion that Bruner had purchased. [RP2, p5-6] They made routine use of Bruner's dirt bikes, snow mobiles, and anything else that was in his garage without asking

permission. [RP1, p190-91; RP2, p6] This included his corvette. [RP1, p190; RP2, p7] Bruner attended all major Keatley family holidays and events. [RP1, p191; RP2, p6-8 and 98] Sandra attended Christmas parties at Bruner's sister's house and Bruner's parents' house. [RP2, p47 and p121] Sandra helped with Bruner's sister's wedding. [RP2, p48 and p121-22] Sandra and Bruner vacationed together in Hawaii. [RP2, p123] They were known by the community as a "couple," [RP2, p31, p48, and p57-59] and Bruner's best friend and his sister believed that their relationship was exclusive. [RP2, p49 and p62]

In 1991, Sandra and Bruner built a barn on the property. [RP1, p46] They collaborated on the location and design of the barn. Sandra chose the colors that the barn would be painted and, when her choices were not followed by the contractor, ordered the barn re-painted. [RP1, p47] She also ordered structural changes to the tack room during construction. [RP1, p48]

Sandra immediately began using the barn to house and feed her cattle, which made regular use of Bruner's ten acres and her thirteen acres to the north. [RP1, p49] Bruner never gave her permission to use the barn, and she never paid rent. [RP1, p49] It never crossed her mind to ask permission because they had built the barn together for the purpose of utilizing both properties. [RP1, p49]

Shortly after building the barn, Sandra and Bruner purchased a three acre parcel of timberland together. Bruner made the down payment and Sandra made the monthly payments. The land was titled in Sandra's name. [RP1, p52; RP2, p96] At the time, Sandra was a store manager at Rite-Aid, where she had been working since 1982 and made significant income. [RP1, p52-53]

In 1995, Sandra and Bruner started building a house on the property, which the parties have referred to as "the Chapman House." Like the garage, the house was built on the land titled in Bruner's name, but very close to the boundary of Sandra's property. Sandra and Bruner chose the location without regard for the boundary between the properties and, as a result, the house's fenced back yard was largely located on Sandra's parcel. [RP1, p53-54; RP2, p92] Sandra chose the plans for the house out of a magazine and met with an architect three or four times to customize the plans. [RP1, p54; RP2, p92] Sandra designed the back deck, chose the kitchen layout and cabinets, and selected the flooring for the house. [RP1, p56; RP2, p92] Sandra selected the door knobs and windows. Sandra selected the interior paint colors and applied the paint herself. [RP1, p58] Sandra selected the appliances. [RP2, p129] Sandra and Bruner had the stone mason place a heart-shaped rock they had found in the fireplace façade. [RP1, p57-58]

During construction, Sandra monitored the contractors to make sure that everything was perfect, at one point showing them where they had walled over a door. She also forced them to tear down and rebuild the front porch after they had surreptitiously changed the design. [RP1, p55-56] She made the tile contractor dismantle and reinstall the kitchen tile because he had failed to install it properly. [RP1, p56-57] She ordered a contractor to change out one of the light fixtures in the house. [RP2, p133]

After the Chapman House was built, Sandra planted a dogwood tree that her father had given her as a present in the yard. She purchased several other trees and flowering plants and placed them in the yard. She mowed the lawn as needed. [RP1, p59; RP2, p123] Sandra moved all of her personal belongings into the house, taking up multiple closets. She had a drawer in the master bathroom for her makeup, hairdryer, and other toiletries. She bought pots and pans, the kitchen table, and patio furniture for the house. She purchased artwork, interior furniture, and decorated the interior. [RP1, 66-67, 171-73, and 192-196; RP2, p92, p129-32, and p138] Sandra and Bruner had a dog together at the house. [RP1, 185] Sandra did all of these things because the Chapman House was her house. [RP1, p58]

In 1997, Bruner suggested that Sandra quit her job and stay home to manage their household and operate her cattle business. He was

making plenty of money in his logging business and they did not need her salary from Rite-Aid. [RP1, p61-62] Sandra agreed to do so because she and Bruner were a joint venture, a committed couple. [RP1, p63]

Bruner immediately put Sandra on the payroll of his logging business, paying her $10.00 per hour for forty hours a week of work. [RP1, p66-67; RP2, p95] He also paid her a $25,000.00 "bonus" for doing absolutely nothing. [RP1, p68; RP2, p95] Bruner paid off the remaining debt on the three acre timber property that was titled in Sandra's name. [RP1, p119]

Sandra actually worked less than five hours per week for the logging company. [RP1, p52-52; RP2, p95] The purpose of ending her career at Rite-Aid was to stay home, run the Keatley-Bruner household, and operate her cattle business. [RP1, p63] Although Sandra and Bruner had separate bank accounts, she used her account (which contained her monthly "paycheck" and $25,000.00 "bonus") to pay for the daily needs of the Bruner-Keatley household. She purchased Bruner's clothing, bought groceries, bought the bed and dresser for the master bedroom, and paid household bills with "her" money because she viewed it as "their" money. [RP1, p68-69 and p147; RP2, p123 and p133-35] For monthly bills and logging company bills, Sandra would write out the checks for Bruner to sign and then see that the checks were delivered. This practice ended in

1999 when Bruner made Sandra a signer on his personal checking account. [RP1, p69] Bruner also placed Sandra on his health insurance and his auto insurance. [RP2, p135]

While Sandra may have not done much work for Bruner's logging company, she stayed busy at the Chapman House. She did Bruner's laundry, cooked his meals, and maintained the landscaping. When the exterior of the house needed to be painted, she did it. [RP1, p71; RP2 p124-25, p132-33, and p137] When the freezer stopped working, she bought a new one. When the dryer stopped working, she did the same. [RP1, p72]

In all ways, Sandra treated the Chapman House as though it belonged to her. She ran over sixty head of cattle on the property, making use of the barn and her ten acres next door as needed. [RP1, p73] She regularly held Keatley family events at the Chapman House. Between the years 1997 and 2002, she had her extended family over to celebrate her mother's birthday. [RP1, p77 and p175-76] These parties were often attended by more than fifty people, including Bruner. [RP1, p175] Sandra received her mail at the Chapman House, both junk mail and mail from her friends. [RP1, p96; EX 43 and 44] Sandra decorated the house at

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Christmas time, including cutting down a tree and placing it in the house. [RP1, p174] Sandra's voice was on the telephone answering machine. [RP1, p99]

Members of the Castle Rock community, including Bruner's family, saw the Chapman House as Sandra's home. Sandra and Bruner received Christmas cards at the Chapman House, many of which were written to "Duane and Sandra." [RP1, p83] Bruner's own parents sent Christmas cards to "Duane and Sandra" at the Chapman House, as did Bruner's uncle. [RP1, p84; EX 4-11] When Sandra's friends and family members wanted to visit Sandra, they would go to the Chapman House. [RP1, p171, 185-86, and p195; RP2, p11] If they wanted to talk to her, they would call the Chapman House. [RP1, p171]

Sandra and Bruner also operated a cattle business together at the Chapman House, making use of the barn and both properties. [RP1, p89-92] In 1993, they traveled to a stock show in Maine and bought a cow at auction. A photo of the couple shows the cow and a sign declaring "the Bruners" as the winning bidders. [RP1, p85-86; EX 48] Sandra and Bruner also traveled to horse shows together, riding in the same car and sharing a motel room. [RP1, p180-81 and p184-85] They traveled to stock shows in Denver and Louisville. [RP2, p124] As late as 2010, long after Sandra and Bruner broke up, a sign on the barn bore Sandra's cattle

business logo and telephone number right alongside Bruner's. [RP1, p92; EX 18]

Although Sandra resided in the Chapman House, she rarely slept there. In 1995, her father died and her mother needed daily assistance. [RP1, p62] Sandra went to her mother's house every night to check on her mother and spend the night with her. [RP1, p70] Although she typically slept at her mother's house, every other aspect of her daily routine took place at the Chapman House. Seven days a week, Sandra would wake her mother in the morning and then head over to the Chapman House. She would then make breakfast, bathe, get dressed, and put on her makeup. She prepared and ate all of her meals at the Chapman House. She spent all of her free time at the Chapman House. She kept all of her possessions at the Chapman House. Other than sleeping, every aspect of her daily life occurred in the Chapman House. [RP1, p69-70 and p169-71]

In 2000, Bruner set up a meeting with an estate planning attorney for Sandra and him. [RP1, p77] The attorney prepared wills and durable powers of attorney for both of them. [RP1, p160-65] Sandra's draft will left her estate to Bruner. Bruner's draft will left his estate to Sandra. Bruner's draft healthcare power of attorney named Sandra as attorney-in-fact, and his durable power of attorney named Sandra as alternate attorney-in-fact. The attorney mailed the original estate planning

documents to Sandra and Bruner at the Chapman Road house, but neither party executed and returned the documents. [RP1, p160-67] Bruner also purchased a life insurance policy that named Sandra as the primary beneficiary. [RP1, p99; RP2, p120]

In 2002, Sandra discovered that Bruner had been cheating on her with another woman. At first, Mr. Bruner denied the affair. In October of 2002, Sandra again asked Bruner if their relationship was over. He turned to the dog and said, "Ask the dog." [RP1, p100-01]

Although their romantic relationship was finished at that point, Sandra continued to live in the Chapman House. Her daily routine of using the house as her residence and the barn for her cattle did not change. Bruner continued to pay her a forty hour per week salary through 2005. [RP2, p97] Sandra lived in the Chapman House during the days and evenings, returning to her mother's house to sleep just as she had done before. [RP1, p145] Her voice remained on the answering machine until 2005. [RP2, p97-98] She continued to keep all of her belongings in the Chapman House and use it as her own for the next three years, never knocking on the door before entering, never asking permission. [RP1, p101-02; RP2, p29-35]

In 2004, nearly two years after they had broken up, Sandra and Bruner logged the three acres of timber land that they had purchased

together. Mr. Bruner gave all of the logging proceeds to Sandra, even though he had paid for the land. [RP1, p104]

In March of 2005, Bruner came into the kitchen at the Chapman House while Sandra was preparing herself a meal. [RP1, p105] Bruner sat down at the kitchen table and took off his boots. He said, "You buy this place from me, or I am selling it." Sandra dropped what she was doing and went to her office in the house. She typed up a document that she entitled "Earnest Money Receipt and Agreement." [EX 20] Sandra left the purchase price blank. She handed it to him and told him to name his price. The next day, she found the contract signed, sitting on her desk in the Chapman House, with the purchase price of $295,000.00 filled in. She immediately signed the contract and returned it to Bruner with a $1,000.00 earnest money check. [RP1, p104-07]

Sandra did not put a closing date on the contract. She needed some time to marshal her assets and purchase the property. She had given up her career at Rite-Aid years before and was not in the financial position to purchase the property in 2005. [RP1, p107]

That same year, Sandra noticed signs that another woman had been spending time in the house with Bruner. Wanting to avoid a confrontation, Sandra stopped using the house every day but continued to come and go as she pleased. All of her belongings remained in the house,

right where she had placed them when she had moved in. Sandra did, however, continue to make daily use of the barn and pasture land for her cattle business. [RP1, p102]

When Bruner informed his good friend Greg Cromwell that he and Sandra were breaking up, Cromwell asked how they were going to divide up their property. Bruner's response was simple: "There is no common law marriage in Washington." [RP1, p182]

In 2007, five years after they had broken up, Bruner transferred to Sandra a pickup truck and stock trailer that they had purchased in 2002. [RP1, p103]

Between the years 2005 and 2010, Sandra often bumped into Bruner as she made daily use of the Chapman Road property. She repeatedly questioned Bruner with regard to whether she needed to close on the purchase of the property. Each time Bruner told her that he was in no hurry and she could wait. [RP1, p108] These conversations occurred at least once every three months between 2005 and 2010. Sandra would also leave notes for Bruner at the Chapman House asking when he wanted to close on the sale. [RP1, p148-49; EX 55] Bruner never told Sandra that the contract had expired, that he needed the money, that he wanted to close the sale, or that he would not sell her the land. [RP1, p109] Sandra relied on Bruner's repeated assurances that she could close on the

purchase of property at a later date. Had he demanded closing, she would have done so. [RP1, p112]

In October of 2010, Sandra found that one of Bruner's girlfriends had loaded the barn with new livestock. Sandra immediately went to Bruner and told him that she was ready to buy the property. He refused to sell it to her. [RP1, p110; RP2, p89-90]

Sandra's attorney wrote Bruner a letter demanding the purchase of the property. Bruner responded by demanding that Sandra remove her livestock and possessions. [RP1, p110] It took Sandra at least four pickup truck loads to remove all of her belongings from the Chapman House. [RP1, p111] Shortly thereafter, Sandra filed suit seeking specific performance of the March 2005 contract.

Sandra prevailed at trial. The trial court ordered Bruner to sell her the Chapman House under the terms described in the March 2005 contract. In August of 2015, Sandra closed on the purchase of the property and now resides in the Chapman House once again. [CP 448]

II. STANDARD OF REVIEW

Bruner's Opening Brief takes issue with a number of the trial court's decisions, but fails to specifically identify which are questions of law and which are questions of fact. Review of Bruner's arguments, however, reveals that nearly all relate to questions of fact or legal

questions raised for the first time on appeal. Indeed, there are many questions of fact that are raised for the first time on appeal, such as Bruner's unreasonable restraint of alienation argument.

The appellate court reviews de novo questions of law and a trial court's conclusions of law. *Sunnyside Valley Irrigation Dist v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

The trial court's factual findings are reviewed under the substantial evidence standard. *In re Marriage of Greene*, 97 Wn.App. 708, 714, 986 P.2d 144 (1999). "Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *Bering v. Share*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986). The appellate court will interpret the trial court's findings to support the judgment whenever possible. *Smith v. Shannon*, 100 Wn.2d 26, 35, 666 P.2d 351 (1983). Failure to make a finding of fact where one is required is presumed equivalent to a finding against the party with the burden of proof. *In re Welfare of A.B.*, 168 Wn.2d 908, 927, 232 P.3d 1104 (2010). Unchallenged findings are verities on appeal. *In re Marriage of Kim*, 179 Wn.App. 232, 246, 317 P.3d 555, *review denied*, 180 Wn.2d 1012 (2014).

In determining whether substantial evidence exists to support a trial court's finding of fact, the appellate court will review the record in

the light most favorable to the party in whose favor the findings were entered. *In re Marriage of Gillespie*, 89 Wn.App. 390, 404, 948 P.2d 1338 (1997). The appellate court will not substitute its judgment for that of the trial court. The appellate court will defer to the trial court on issues of conflicting testimony and witness credibility. *In re Marriage of Burrill*, 113 Wn.App. 863, 868, 56 P.3d 993 (2002); *Greene*, 97 Wn.App. at 714. The appellate court will not disturb findings that substantial evidence supports even if conflicting evidence exists. *In re Marriage of Lutz*, 74 Wn.App. 356, 370, 873 P.2d 566 (1994).

III. ARGUMENT

A. Delivery of the $1,000.00 earnest money occurred when Sandra tendered her draft to Bruner.

Sandra testified that she handed the $1,000.00 earnest money check to Bruner. [RP2, p157-58] Bruner denied receiving the $1,000.00 check. The court specifically found that Sandra was a credible witness and Bruner was an incredible witness:

> First, where I'm coming from in weighing the evidence, in hearing the testimony, the testimony that lined up consistently was that [of] the plaintiff and her witnesses, the witnesses of the defendant contradicted in large part the very testimony of the defendant. This court also had great trouble believing the defendant and his testimony, given

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several times he testified one way only to have it brought out that he had testified otherwise during his deposition.

RP2, p199.

The trial court's finding that the $1,000.00 check was tendered to Bruner by Keatley is supported by substantial evidence. Bruner argues that the $295,000.00 purchase price ordered by the court is an admission that the $1,000.00 was never tendered because, if it was, the price would have only been $294,000.00. However, the court's findings and conclusions specifically state that the $1,000.00 earnest money was paid to Bruner. The failure to subtract this $1,000.00 from the ultimate purchase price was a scrivener's error. In August of 2015, Sandra purchased the Chapman House for $295,000.00. Bruner received a $1,000.00 windfall due to this error.

The question of whether the $1,000.00 check was ever deposited by Bruner is irrelevant. Sandra tendered the earnest money as required by the contract. Bruner cannot nullify Sandra's contract rights by failing to deposit the check.

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B. The contract contained an exchange of promises and, therefore, was supported by consideration regardless of whether the earnest money check was delivered.

Sandra and Bruner entered into a bilateral contract and, therefore, the exchange of promises is the consideration that makes it binding. The Division III Court of Appeals summarized Washington law on this point in *Flower v. T.R.A. Industries, Inc.*, 127 Wn.App. 13, 27, 111 P.3d 1192 (2005):

> "The law recognizes, as a matter of classification, two kinds of contracts—bilateral and unilateral." *Cook v. Johnson*, 37 Wash.2d 19, 23, 221 P.2d 525 (1950). "A unilateral contract consists of a promise on the part of the offeror and performance of the requisite terms by the offeree." *Multicare Med. Ctr. v. Dep't of Soc. & Health Servs.*, 114 Wash.2d 572, 583, 790 P.2d 124 (1990). A bilateral contract is an exchange of promises. *Govier v. N. Sound Bank*, 91 Wash.App. 493, 499, 957 P.2d 811 (1998). The fundamental difference between a unilateral contract and a bilateral contract is the method of acceptance. *Multicare Med. Ctr.*, 114 Wash.2d at 584, 790 P.2d 124. In a unilateral contract "'the offer or promise of the one party does not become binding or enforcible [sic] until there is performance by the other party.'" *Id.* (quoting *Higgins v. Egbert*, 28 Wash.2d 313, 317–18, 182 P.2d 58 (1947)). However, in a bilateral contract, "'it is not performance which makes the contract binding, but rather the giving of a promise by the one party for the promise of the other.'" *Id.* (quoting *Higgins*, 28 Wash.2d at 318, 182 P.2d 58).

In the case at bar, the undisputed evidence is that Sandra promised to pay Bruner $295,000.00 and Bruner promised to convey to her the Chapman House. This is a bilateral contract and, therefore, the exchanged

promises are the consideration that makes it binding. The only dispute at trial was whether Sandra demanded closing within a reasonable amount of time.

C. Substantial evidence supports the trial court's finding that Sandra demanded closing within a reasonable amount of time.

Open ended option contracts and earnest money agreements are enforceable in Washington. However, the court will examine the circumstances of the transaction and place a reasonable time limit on the execution of the contract. *Foelkner v. Perkins*, 197 Wash. 462, 85 P.2d 1095 (1938) ("The agreement is also not rendered fatally defective because no definite time limit is fixed within which the property must be sold; under these circumstances the law implies a reasonable time for performance . . ."); *Merchents' Bank of Canada v. Sims*, 122 Wash. 106, 209 P. 1112 (1922) ("The general rule is that, where a thing is to be done, and no time is fixed, it will be presumed that a reasonable time was intended.").

The primary issue the parties placed before the trial judge was whether Sandra's demand to close in October of 2010 fell within a "reasonable amount of time" as inferred from the surrounding circumstances. Bruner argued that six months was a reasonable amount of time. Sandra argued that five and half years was a reasonable amount of

time. The court found in favor of Sandra and substantial evidence supports the verdict.

The trial court referenced *Thompson v. Thompson*, 1 Wn. App. 196, 460 P.2d 679 (1969), throughout the trial. In *Thompson*, the court of appeals affirmed a trial court ruling that twelve years was not an unreasonable amount of time in a real estate option case.

In *Thompson*, a father sold property to his son that included an option to purchase additional adjoining land for a fixed price. The contract fixed no definite time limit by which the son was required to exercise the option. The son attempted to purchase the property twelve years later and the father refused to sell, claiming that the option had expired. The trial court found in favor of the father and dismissed the son's claim for specific performance. The court of appeals *reversed*, stating:

> If we were to construe this option as fixing no definite time we would be subject to the rule that it must be exercised within a reasonable time. Restatement of Contracts s 46 (1932). See also 91 C.J.S. Vendor and Purchaser s 4 (1955); and 17A C.J.S. Contracts s 632 (1963). What is a reasonable time is to be determined by the circumstances of the case. Considering the familial relationship, the apparent purpose of the parties that the parents live on the property as long as they desired and for the son and his wife to eventually take it and the "estate" language in the

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> option, we do not believe that the 12-year interval between the granting and the exercise of the option was excessive.
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> *Id.* at 201, 400 P.2d 679.

Sandra also cited *Lawson v. Redmoor Corp.*, 37 Wn. App. 351, 679 P.2d 972 (1984), wherein the court of appeals affirmed a trial court decision finding that eight years was a reasonable amount of time to exercise an open ended real estate purchase option.

In the case at bar, it was undisputed that Sandra had a deep connection to the land that was the subject of the contract. She had suggested that Bruner buy the land after her sister died so that it would "stay in the family." Sandra and Bruner enjoyed a twenty year committed relationship. They developed the property together and made joint use of adjoining land that Sandra owned. Sandra designed, decorated, maintained, and resided in that house. Sandra believed that she and Bruner had a monogamous relationship and she, as well as others in the Castle Rock community, saw Bruner as part of the Keatley family. While the bonds of blood or marriage may be missing from this case, substantial evidence supports the trial court's finding that a deep familial relationship existed between Sandra and Bruner.

Counsel for Bruner complains that the trial resembled a "soap box [sic] opera," but the semi-lurid nature of some of the testimony at trial was

Bruner's own doing. Bruner attempted to erase his twenty year history with Sandra by reducing her to a lovesick neighbor girl that, for twenty years, hung around as one of many women that he entertained. She cooked, cleaned, bought his clothing, ran his household, all without any expectations other than the occasional sexual encounter. This demeaning tactic took an ugly turn when Bruner admitted, for the first time in depositions, that he had slept with five other women over the twenty year period that he and Sandra were together. This, according to Bruner, showed that he and Sandra were nothing more than on-again/off-again paramours and, therefore, no familial relationship existed.

Alas, Bruner's testimony on this point only strengthened Sandra's case because his relationships with these five other women resembled secret affairs that bared no resemblance to his relationship with Sandra. He admitted to lying to Sandra about the other women, that all of the other relationships lasted less than a year, and that most of these women were married. He could only name one time that he had been seen in public with any of these women and that these trysts comprised entirely of meeting at a private location to have sex. [RP2, p101-13] In the end, Bruner looked more like a cheating husband than the Don Juan of Castle Rock, Washington.

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The undisputed evidence at trial also established that Sandra and Bruner were of the same mind with regard to leaving the closing date open. Both testified that the purpose of doing so was to allow Sandra time to marshal the assets necessary to make the purpose. It is also undisputed that, at one point in time, Bruner wanted Sandra to have the house. He contracted to sell it to her for $205,000.00, below market price, and gave her an open ended closing date. The only dispute at trial was whether a "reasonable time under the circumstances" was six months or five and a half years. Given the conduct of the parties before and after the execution of the contract, substantial evidence supports the trial court's finding that five and half years was a reasonable amount of time.

D. Substantial evidence supports the trial court's alternative finding that Bruner is equitably estopped from claiming that Sandra waited too long to demand closing.

Sandra also asked the trial court to find that Bruner was equitably estopped from refusing to sell her the property in October 2010. Sandra's testimony established that she repeatedly checked in with Bruner, both in writing and verbally, regarding the need to close on the sale of the property. Not once did Bruner tell her that she was running out of time, that the deal was off, or that he would not sell her the property. Bruner admitted this at trial. [RP2, p143-45] Bruner's response was always the same: "I'm in no hurry. I don't need the money." Sandra also testified

that had Bruner responded differently, she would have done what was needed to close on the purchase.

Equitable estoppel is based on the view that "a party should be held to a representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon." *Lybbert v. Grant County*, 141 Wn.2d 29, 35, 1 P.3d 1124 (2000). Equitable estoppel requires the proof of the following three elements:

> 1. An admission, statement or act inconsistent with a claim afterwards asserted;
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> 2. Action by another in reasonable reliance upon that act, statement or admission, and
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> 3. Injury to the relying party from allowing the first party to contradict or repudiate the prior act, statement, or admission.
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> *Lybbert*, 141 Wn.2d at 35, 1 P.3d 1124.

Substantial evidence supports the trial court's finding that Bruner lulled Sandra by assuring her that she could wait to purchase the property at a later date. After inducing Sandra to wait five years, Bruner reversed course and told her it was too late. This is exactly the sort of harm that equitable estoppel is meant to prevent.

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E. Bruner failed to argue that the contract was unenforceable at trial and, therefore, is precluded from doing so on appeal.

At trial, Bruner did not challenge the enforceability of the March 2005 contract. The sole issue presented to the court was whether Sandra demanded closing within a reasonable amount of time under *Thompson v. Thompson*. In his opening statement, counsel for Bruner teed up the issue for the trial court as such:

> And then [sic] contract just fails because it lacks an essential term, the time allowed for execution of the so-called contract. And again the earnest money agreement lacked that deadline, and case law will imply a reasonable time for exercise of the agreement. A reasonable time is not years but months. The plaintiff failed to act within a reasonable time.
>
> [RP1, p35]

The first sentence of the above quote was the only reference at trial to the contract "fail[ing] because it lacks an essential term." The next statement by counsel concedes away the argument, and the case moved forward to trial on the issue of when was "reasonable closing date" under the circumstances.

For the first time, Bruner now seeks to attack the enforceability of the contract on the basis of (1) failure to include essential contract terms, (2) violation of the statute of frauds, and (3) unreasonable restraint on alienation/violation of the rule against perpetuities. The court should

refuse to consider these new theories and defenses. The Washington Supreme Court in *Washburn v. Beatt Equipment Co.*, 120 Wash.2d 246, 290-91, 840 P.2d 860 (1992) stated:

> The appellate court may refuse to review any claim of error which was not raised in the trial court. RAP 2.5(a). Arguments or theories not presented to the trial court will generally not be considered on appeal. *Hansen v. Friend*, 118 Wash.2d 476, 485, 824 P.2d 483 (1992); *In re Marriage of Tang*, 57 Wash.App. 648, 655, 789 P.2d 118 (1990).
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> * * *
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> While new arguments are generally not considered on appeal, the purpose of RAP 2.5(a) is met where the issue is advanced below and the trial court has an opportunity to consider and rule on relevant authority. *Bennett v. Hardy*, 113 Wash.2d 912, 917, 784 P.2d 1258 (1990).

In the case at bar, neither of these three issues were advanced below and the trial court had no opportunity to consider and rule on the relevant authorities.

(i) Statute of Frauds

Bruner never mentioned the words "statute of frauds" in his answer, pre-trial briefing, opening statement, mid-trial motion to dismiss, or closing argument. [RP1, p33-37; RP2, p16-26 and p181-88; CP 422 and 441] The court of appeals should refuse to consider this argument.

Furthermore, the statute of frauds is an affirmative defense that must be raised by an affirmative pleading. CR 8(C). The purpose of this

rule is to give the plaintiff an opportunity to raise and try all factual issues related to the defense. 1 Kelly Kunsch, Washington Practice: Methods of Practice, sec. 5.4, at 72 (1997); see also *Mahoney v. Tingley*, 85 Wn.2d 95, 100, 529 P.2d 1068 (1975) (certain defenses are required to be pleaded affirmatively in order to avoid surprise). In general, affirmative defenses are waived unless they are (1) affirmatively pleaded, (2) asserted in a motion under CR 12(b), or (3) tried by the express or implied consent of the parties. *Henderson v. Tyrrell,* 80 Wn.App. 592, 624, 910 P.2d 522 (1996). Bruner did not plead the statute of frauds as an affirmative defense in his answer. [CP 422] Bruner did not assert this defense in a 12(b)(6) motion nor was the matter discussed at trial, let alone tried with express or implied consent of the parties. Bruner has waived this defense.

(ii) Unreasonable Restraint of Alienation/Rule Against Perpetuities

Bruner never mentioned the words "restraint on alienation" or "rule against perpetuities" in his answer, pre-trial briefing, opening statement, mid-trial motion to dismiss, or closing argument. [RP1, p33-37; RP2, p16-26 and p181-88; CP 422 and 441] The court of appeals should refuse to hear this argument.

CR 8(c) specifically names neither unreasonable restraint of alienation nor the rule of perpetuities as affirmative defenses that must be

pleaded. However, CR 8(c) contains the following catch-all at the end of the list: "any other matter constituting an avoidance or affirmative defense."

Counsel for Sandra is aware of no Washington cases that specifically define unreasonable restraint of alienation and the rule against perpetuities as affirmative defenses. The courts in *Fieder v. Fieder*, 40 Wn.App. 589, 591, 699 P.2d 801 (1985) and *O'Leary v. Bennett*, 190 Wn. 115, 118, 66 P.2d 875 (1943) made reference to the fact that these arguments had been raised as affirmative defenses in those cases, but did not make a specific ruling on the matter.

However, unreasonable restraint of alienation and the rule against perpetuities fall within the definition of an "avoidance or affirmative defense." The Division III Court of Appeals in *Harting v. Barton*, 101 Wn.App. 954, 961, 6 P.3d 91 (2000), defined an "avoidance or affirmative defense" as "[a]ny matter that does not tend to controvert the opposing party's prima facie case." (quoting *Shinn Irrigation Equip., Inc. v. Marchand*, 1 Wash.App. 428, 430–31, 462 P.2d 571 (1969)).

Harting was a contract case wherein the defendant alleged that the plaintiff failed to provide a notice of default and failed to submit to mediation as required by the contract. Neither of these allegations was contained in the defendant's answer. The *Harting* court found that both of

these arguments were covered by CR 8(c) and, therefore, were waived by defendant's failure to plead them.

In the case at bar, Bruner does not claim that the parties never had an agreement, nor does he claim, for the purposes of this defense, that he did not breach the agreement. Bruner alleges, for the first time on appeal, that the contract is void as a restraint on alienation and, therefore, it does not matter whether he breached it. Bruner's unreasonable restraint on alienation/rule against perpetuities arguments, therefore, constitute "avoidances." Since he has not pleaded these defenses in his answer, raised them in a CR 12(b)(6) motion, nor tried them to the court by consent, Bruner has waived these defenses.

The harm caused by Bruner's failure to plead or otherwise raise these arguments at trial is especially high with regard to the unreasonable restraint on alienation defense. A trial court's inquiry into whether a restraint on alienation is highly factual. Bruner's failure to raise this defense severely prejudices Sandra in that she was robbed of the opportunity to develop a factual record directed at this allegation. The trial court is also prejudiced in that it was deprived of the opportunity to make factual rulings with regard to this defense.

The court of appeals should refuse to consider Bruner's unreasonable restraint on alienation/rule against perpetuities arguments.

(iii) Lack of Essential Contract Terms

Counsel for Bruner never presented any lack of essential terms arguments or authorities to the trial court. Not in his opening statement, mid-trial motion to dismiss, or closing argument. While this defense was half-heartedly raised in Bruner's pre-trial memoranda [CP 441], this argument was not significantly brought to the court's attention at trial. In fact, a review of the record shows that the parties were in agreement regarding the critical question of this trial, *i.e.*, what was the reasonable amount of time for closing that the court should infer. This is the issue that was tried to the court, and this is the issue that the court ruled upon.

Bruner failed to argue that the contract lacked essential terms at trial and, therefore, the court of appeals should refuse to consider his arguments now.

F. The contract contains a legal description by incorporation as allowed by *Bingham v. Sherfey.*

The court should not consider Bruner's statute of frauds argument. This affirmative defense was never presented in Bruner's pleadings nor was it argued to the trial court.

Nonetheless, Bruner's arguments fail. The contract in question properly included a legal description by reference under *Bingham v. Sherfey*, 38 Wn.2d 886, 234 P.2d 489 (1962). In *Bingham*, a purchase

option did not contain a legal description, but rather made reference to the tax records of the county in which the land was situated. Finding that the statute of frauds had been satisfied, the Court of Appeals stated:

> Oral testimony is not necessary to determine the exact legal description of the land upon which the minds of the parties met, the one to sell, the other to buy. It must be assumed, for the purposes 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 the sufficient definiteness and certainty to meet the requirements of the statute for frauds.
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> *Id.* at 889, 234 P.2d 489.

The rule from *Bingham* was later discussed in *Asotin County Port Dist. v. Clarkston Community Corp.*, 2 Wn.App. 1007, 472 P.2d 554 (1970), wherein the parties attempted to use reference to county tax records to describe real property. The court in *Asotin* declined to apply the rule, stating:

> We do not dispute this rule; in the cited cases it could be applied. However, in the instant case it cannot be applied because the inadequate descriptions cannot be made specific. Even though the description of property set for in the summons was prefaced by a remark that the legal descriptions could be ascertained from the tax records of the county treasurer, there is nothing in the present record to reflect that said legal descriptions did in fact exist on the tax roles in the treasurer's office at the time of the foreclosure action.
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> *Id.* at 1011, 472 P.2d 554.

In the case at bar, the trial record contains the tax assessor's records for the subject properties and the abbreviated legal descriptions contained therein. [EX 66 and 67]

Bruner has taken the position in his opening brief that this rule only applies to unplatted lands. However, the *Bingham* court cited *City of Centralia v. Miller*, 31 Wn.2d 417, 197 P.2d 244 (1948) in support of its decision, stating: "[W]e held property was sufficiently described for the purpose of an action to quiet title when it was described at 'Tax Lot 21' in a specific section, township, and range in Lewis County." Thus, it would seem that *Bingham* applies to both platted and unplatted lands. While the Washington Supreme Court in *Tenco, Inc. v. Manning*, 259 Wash.2d 479, 485, 368 P.2d 372 (1962), did make reference to *Bingham* and unplatted lands, it in no way limited the application of the rule to unplatted lands.

The contract satisfies the statute of frauds.

G. The contract is not an unreasonable restraint of trade nor does it violate the rule against perpetuities.

Again, this affirmative defense was never presented in Bruner's pleadings nor was it argued to the trial court. Nonetheless, Bruner's arguments fail. Real estate purchase options are not unreasonable restraints of trade, nor do they violate the rule against perpetuities if they can be limited to a reasonable duration by the court. *See Lawson*, 37

Wn.App. at 354-55 and fn.1, 679 P.2d 972; *Fieder*, 40 Wn.App. at 592, 699 P.2d 801; *Robroy Land Company, Inc v. Prather*, 95 Wn.2d 66, 74, 622 P.2d 367 (1988). The above cited cases are the same authorities from which Bruner plucks the snippets that comprise his cobbled-together argument.

Furthermore, as demonstrated by the authorities cited by counsel for Bruner, a trial court's unreasonable restraint of alienation analysis is a factual one which, based on the trial record, could only be resolved in favor of Sandra. Under Bruner's reasoning, any option to purchase would be unreasonable because it vests in a single person, to the exclusion of all others, the right to purchase land. This result would be absurd.

H. The contract contains all essential terms.

Sandra and Bruner agreed that the trial court had the authority to infer a reasonable period of time for the closing date on this transaction. Bruner advocated for six months. Sandra advocated for five and a half years. The trial court ruled against Bruner, and now he wants to argue that the entire contract is too vague to be enforced. Trial is over and the contract has been executed upon. Sandra owns the land. The time for making that argument has long passed. Furthermore, the argument fails.

The "Earnest Money Receipt and Agreement" at the heart of this dispute identifies the buyer and seller, identifies the land to be sold by

reference to tax parcel number, identifies a purchase price, and sets forth the condition of title to be transferred. Although the parties drafted the contract without the help of attorneys, this is not a hastily thrown together napkin agreement. Bruner complains that the contract is missing essential terms, but he cannot deny that the property was transferred to Keatley in August of 2015 without confusion.

In arguing that essential terms were missing, counsel for Bruner ignores the distinction between a real estate purchase and sale agreement (REPSA) and a real estate contract (REK). An REPSA binds a seller to sell and a buyer to buy a piece of property. An REK is a financing device that binds the seller to accept payments over a long period of time while continuing to hold title until the purchase price is fully paid. Bruner cites two REK cases in support of his argument that essential terms are missing. While *Hubbell v. Ward* and *Sea-Van Investments v. Hamilton* say what they say with regard to REKs, they are silent when it comes to real estate purchase and sale agreements. The "essential terms" identified in Bruner's argument are all very important for a long term financing contract but make little sense in a simple purchase and sale agreement or purchase option case.

To grasp the importance of this distinction, the court need look no further than the two cases cited by Bruner. In *Hubbell v. Ward*, 40 Wn.2d

779, 787-89, 246 P.2d 468 (1952), the Washington Supreme Court found that essential terms were missing with regard to the creation of an REK, but the contract was fully enforceable as an REPSA:

> The agreement contains within itself the essential elements of a binding contract for the purchase and sale of the real estate and personal property described therein. Respondents are given an option to pay the entire consideration at any time. The subject matter of the agreement, the consideration and terms of payment are all set forth and it is evident from a consideration of all the terms of the agreement that it was not intended merely as a preliminary negotiation. It was intended as, and is, a valid contract, enforcible [sic] except insofar as it involves the make of a future [financing] contract.

As in *Hubbell*, the contract in question would not be sufficient to create an REK, but it contains all the essential terms necessary to create a binding REPSA.

The second case cited by Bruner, *Sea-Van Investments v. Hamilton*, 125 Wn.2d 120, 129, 882 P.2d 173 (1994), also involved a contract for seller-financed purchase and sale of land. In *Sea-Van Investments*, the parties had entered into an informal agreement wherein the seller would finance the sale by way of note and deed of trust. At page twelve, second paragraph, counsel for Bruner states, with regard to the requirements of *Hubbell*, that "[t]hese requirements are not specific to real estate contracts." This is a half-truth. The appellate court in *Sea-Van Investments* actually stated: "Although Sea-Van attempts to distinguish

these cases as specific to conveyances involving real estate contracts, this court has never recognized such a distinction, and indeed has specifically relied on *Hubbell* in the deed of trust context." *Id.* at 128-29, 881 P.2d 1035. Although the *Sea-Van Investments* court did not limit *Hubbell* to REK cases, it did limit *Hubbell* to seller-financed real estate transactions.

In fact, the *Sea-Van Investments* court defined a "real estate contract" as "a specific form of financing which leaves legal title to the real property in the seller to secure repayment of the purchase obligation." *Id.* at 128 fn.4, 881 P.2d 1035. The court rightfully saw no reason to apply different rules to real estate transactions financed by REKs and those financed by seller-held notes and deeds of trust.

The case at bar, however, does not involve seller financing at all. Thus, the holdings in *Hubbell* and *Sea-Van Investments* are irrelevant.

IV. CONCLUSION

The Court of Appeals should affirm the trial court and award Sandra costs as provided by RAP Title 14.

DATED: December 15, 2015.

Respectfully submitted,

MATTHEW J. ANDERSEN, WSBA #30052
Of Attorneys for Plaintiff

CERTIFICATE

I certify that on this day I caused a copy of the foregoing Statement of Facts to be mailed, postage prepaid, to Defendant's attorney, addressed as follows:

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DATED this 16th day of December 2015, at Longview, Washington.

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