Supreme Court No. 100791-4
[Court of Appeals No. 82225-0-I]

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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In re the Matter of:

JONATHAN WESLEY AND
ELIZABETH ASHLEY EBBELER,

Plaintiffs/Appellants,
v.

SIDNEY S. ANDREWS, as personal representative of the Estate of Alison S. Andrews; and
ESTATE OF ALISON S. ANDREWS,

Defendants/Respondents.

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# ANSWER TO PETITION FOR REVIEW

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## I. IDENTITY OF PARTIES

This Answer is filed by Respondent Sidney S. Andrews ("Andrews"), personal representative of the Estate of his mother Alison S. Andrews ("Estate"). Andrews opposes the Petition for Review filed by Appellants Jonathan Wesley and Elizabeth Ashley Ebbeler (together, the "Ebbelers").

## II. DECISION BELOW

Division I issued its opinion on February 28, 2022. *See Ebbeler v. Andrews*, No. 8225-0-I, slip op. (Wash. Ct. App. Div. 1 February 28, 2022) ("Slip. Op."). The Court of Appeals upheld the trial court and ruled in favor of Andrews on all issues.

## III. PRELIMINARY STATEMENT

This case involves the termination of a real estate purchase and sale agreement. The appellate court found that the parties' contract terminated and that Andrews was the prevailing party on plaintiffs' claims. Its decision applied well-

settled Washington law to undisputed provisions of the contract and mostly unchallenged findings of fact.

The Ebbelers signed a Real Estate Purchase and Sale Agreement ("REPSA") obligating them to pay $2.3 million in cash on or before May 29, 2019 (the "Closing Date") to purchase the Estate's home. The Ebbelers failed to pay the full purchase price on or before closing – *indeed*, *they never tendered the purchase price*. Because the REPSA makes "time of the essence" in the performance of obligations, the contract became defunct at the end of the May 29, 2019 closing date when the Ebbelers failed to close. *See Nadeau v. Beers*, 73 Wn.2d 608, 440 P.2d 164 (1968). Nevertheless, the Ebbelers sued for specific performance and damages.

On trial and appeal, the Ebbelers refused to take any responsibility for their role in causing a rushed closing, repeated attempts to renegotiate the purchase price, badgering a local sewer district to change a holdback amount shortly before closing, their failure to timely correct errors in their own loan

documents in time for funding, their failure to make any alternate arrangements to pay the purchase price, or their approval of the wrong deed form for closing.

Instead, the Ebbelers attempted to shift blame for their own failure to close on Andrews. The Ebbelers say they could not pay the entire purchase price at closing because the Estate allegedly failed to do three things not required by the contract: sign and deliver a seller's deed first (before the Ebbelers paid their purchase price); sign closing documents by an unclear, artificial, self-imposed cutoff time suggested by the Ebbelers; and allow the delivered deed to be transmitted to their lender before payment of the purchase price. On the one hand, the Ebbelers emphatically argue that performance should be concurrent, but in the same breath they argue that the contract was modified and Andrews was required to perform first.

This was a straightforward case for Division I. Fully 81 of the trial court's 97 Findings of Fact were not challenged and

became verities on appeal.[1] The parties generally agreed that longstanding, well-settled law on concurrent performance and the application of "time of the essence" clauses guided the appellate court's decisions on the merits. While the Ebbelers argued that Andrews breached an implied duty of good faith and fair dealing, Division I rejected that argument because it was inconsistent with the duty of concurrent performance and the implied duty did not obligate Andrews to affirmatively assist the Ebbelers in their financing obligations.

The Ebbelers fail to present a RAP 13.4(b) case of interest. The alleged "decisional conflict" is not a conflict at all. The decision below was thoroughly supported by existing, well-established case law. The Ebbelers' professed conflict is mere discontent over how the trial and appellate courts applied existing law to the unchallenged facts.

[1] Of the 97 separate fact findings on the merits, CP 2266-2282, the Ebbelers challenged 16.

But equally significant – the Ebbelers have since abandoned all of their claims. There is nothing left for this Court to review. On that basis alone, review is not warranted.

## IV. ISSUES PRESENTED

The Petition does not identify any issue suitable for review in the state supreme court.

## V. COUNTER-STATEMENT OF CERTAIN FACTS

Andrews agrees with the Ebbelers that "the recitation of the facts[2] and procedures in Division I's opinion is largely correct." *See* Petition, at 3. Andrews rests on the Slip Opinion but emphasizes certain facts below and responds to factual assertions by the Ebbelers.

- The Ebbelers noted that Sid was a seasoned real estate professional. Petition, at 5. Both parties were sophisticated. Jonathan Ebbeler ran a lucrative company, and

[2] The trial court's Findings of Facts are referred to herein as "FF" and Conclusions of Law as "CL." The Report of Proceedings is referred to as "RP" and Trial Exhibits as "Ex."

he and his wife earned well in excess of $1.7 million per year.[3] This enabled them to acquire six (6) properties throughout Maryland, Georgia and Florida. Ex. 245, at 47, 50.

- The Ebbelers contention that Andrews "never intended to close" (Petition, at 5) is belied by the facts. Just two weeks before closing, Mr. Andrews wrote to his realtors the Ebbelers were unhappy because of the Highland Sewer District's ("HSD") holdback position and that even though he had a back-up offer, he acknowledged "I'm still obligated to sell to Ebbeler at $2.3m on May 29 (that hasn't changed) - and chances are I won't know what they're going to do until then." Ex. 53.

- The Ebbelers were fully aware they were buying a property without an existing sewer connection. Ex. 202 (and attached Form 17). Highlands' owners did not repair or install sewer connections; rather, the work to connect the sewer would

[3] Based upon a reported monthly income of $147,752. Ex. 245, at 46.

only be done by Highlands' Sewer District ("HSD"), which was not scheduled to undertake the sewer project until later in the summer of 2019. CP 2271 (FF 22); Ex. 214.

- Mr. Andrews agreed that the estimated cost of the sewer connection repairs would be held back from his proceeds at closing. FF 22, 25; Ex. 240; *see also*, CP 2277 (FF 60).

- HSD was also prepared to allow the Estate's transaction to close with a holdback. It "notified the Parties that . . . the Property could be transferred upon a holdback to secure the HSD for its repair work." CP 2272 (FF 22, 25).

- The temporary sewer connection is a red herring. Mr. Konrady, the manager of HSD, testified as follows:

> Q: "… there are two bullet items here, one is the temporary sanitary sewer and second is the holdback. But is it your understanding that if the holdback is posted, the sale can close?"
>
> A: ". . . yeah, the holdback is exactly for that. The district releases its lien on the property, so you'll take that instead of restricting the sale."

RP 408.

- After signing, Jonathan Ebbeler repeatedly sought a larger holdback or a discounted purchase price. Ex. 212 at 11; Ex. 215.[4] When Mr. Andrews would not agree to reduce the purchase price, Mr. Ebbeler went behind Mr. Andrews' back and privately campaigned the HSD to increase the holdback amount. CP 2271 (FF 26, 27). The HSD relented to Mr. Ebbeler's pressure, increasing the holdback amount to $150,000 on May 24, 2019 -- two business days before Closing -- which caused changes to the Ebbelers' loan documents and contributed to their inability to close on time. CP 2272 (FF 30, 32); CP 2277 (FF 60); Exs. 239; 240; 285.

[4] On April 29, the Ebbelers' agent informed Mr. Andrews' agents that if Mr. Andrews did not discount the purchase price by $300,000 or connect the sewer prior to closing, the Ebbelers would sue. CP 2271 (FF 24); Ex. 222. Mr. Andrews declined and stood on the contract. He also started to look for back-up buyers in case the sale fell through, but recognized his obligation to sell to the Ebbelers if they paid the purchase price. CP 2280-81 (FF 82-83); Ex. 53.

- When the Ebbelers signed their closing documents, they approved the wrong deed form. Ex. 244; *see also* CP 2276 (FF 54-55). The Closing Agent could not have closed the transaction based upon this conflicting instruction alone. *See* CP 2151; Ex. 241, at 3; RP 699-70 (testimony of expert).

- The Ebbelers' signed closing documents were received by WaFd the night before closing. CP 2274 (FF 39-41). WaFd discovered 13 errors and notified the Ebbelers' mortgage broker just before noon on the Closing Date. CP 2274 (FF 43); Ex. 250. At 1:40 p.m. on the Closing Date, mortgage broker Phil Mazzaferro emailed that Ebbelers' loan documents had yet to be corrected. Ex. 251; *see also* CP 2275 (FF 46). By the Ebbelers' own 2:00 p.m. cutoff, their lender had not yet confirmed that it was satisfied with their loan documents and would fund. CP 2275 (FF 48).

- Unfortunately, Mr. Ebbeler and his family were in New York on the date of closing. RP 602, 609-10. He had

made no other alternate arrangements to deposit purchase funds on May 29.

- The lender testified that "***Washington Federal would not fund until they had confirmed that the loan package was complete and the items are correct***." CP 2274 (FF 44). The trial court then found that none of the witnesses testified the corrections were made by WaFd's funding deadline. CP 2276 (FF 51).

- WFG was unclear about the lender's cut-off. CP 2278 (FF 65-66); CP 2278 (FF 67). WaFd was correspondingly vague about its own cutoff. CP 2278 (FF 68). The court found that no one on behalf of the Closing Agent or lender knew precisely when the lender's cutoff was. CP 2278 (FF 65-68).

- The Ebbelers' characterize the Estate as "cavalier, tardy appearance at escrow on May 29" that made the Estate's performance impossible. Petition, at 4-5. To the contrary, Andrews was attending to WFG's questions about closing details, including arranging for a "net to zero" payoff on the

Hannah M. Woodnut Smith Trust (the "HMWS Trust") and retrieving the original HMWS Trust note from Perkins Coie's law offices in Seattle, at WFG's request. Ex. 11; CP 2279 (FF 72); RP 194, 197, 205 and 320. Immediately after attending to these details, Mr. Andrews proceeded to WFG to sign documents. RP 320.

- Mr. Andrews arrived at WFG's offices to sign all of his paperwork at 2:17 p.m., ready, willing and able to sign loan documents. CP 2280 (FF 76).[5] He signed all of the other required seller's closing documents by 2:48 p.m. and waited for WFG to correct the deed form to sign. CP 2280 (FF 78-79). Mr. Andrews even had his attorney expedite the process by sending a Personal Representative's deed to WFG.

- The Ebbelers' lawyer threatened suit in an email sent in the middle of the Closing Date. CP 2280 (FF 77).

[5] This was the first time Mr. Andrews had ever seen, much less signed, a copy of the Closing Agreement prepared by WFG.

- The suggestion that Estate attorney Lisa Peterson directed WFG not to close is false. Petition, at 5. Mindful of the legal consequences of delivering a deed, she pointed out to WFG that mere execution of the closing documents did not constitute authorization to close (record). Ex. 252. The implication was that closing and forwarding the deed would occur once purchase funds were in escrow. *Id*.

- The expiration of the 30-day contingency period converted the earnest money into a "non-refundable" deposit owned by the Seller. Ex. 202 at 1. If the transaction failed to close for *any* reason other than Seller default, the earnest money would be retained by the Seller. *Id*.

## VI. ARGUMENT

None of the four tests set forth in RAP 13.4 for supreme court review is met here. Accordingly, the petition should be denied. *See* RAP 13.4(b) (Supreme Court will accept petition for review "only" if specified criteria are met).

### A. As a Threshold Matter, the Ebbelers Have Abandoned All of Their Claims, Leaving Nothing For This Court to Review.

The Ebbelers abandoned all of their claims at trial or on appeal and there is nothing left for this Court to review. The Ebbelers sought specific performance and damages. They abandoned their specific performance claim at trial. Slip. Op. at 3; CP 2284 (Order of the Court). Having abandoned their specific performance claim, the Ebbelers tried to pivot to a claim for damages at trial. Slip. Op. at 3; CP 1445. No evidence of damage was presented, and the Court did not award damages.

On appeal, the Ebbelers represented to Division I that "***the Ebbelers are not seeking affirmative relief under the Agreement; they are no longer seeking specific performance or damages***." Reply Br., at 12; Slip. Op. at 7.

Washington courts have held that "we do 'not consider issues apparently abandoned at trial and clearly abandoned' " on appeal. *Seattle First–Nat'l Bank v. Shoreline Concrete Co.*,

91 Wn.2d 230, 243, 588 P.2d 1308 (1978); *Holder v. City of Vancouver*, 136 Wn. App. 104, 147 P.3d 641 (Div. 2 2006); *State v. Clark*, 124 Wn.2d 90, 875 P.2d 613 (1994) (overruled on other grounds by, *State v. Catlett*, 133 Wn.2d 355, 945 P.2d 700 (1997)).

The Ebbelers failed to assign error to CL 13-14 of the trial court's findings of facts and conclusions of law awarding the $65,000 earnest money to Andrews. CP 2284. Neither did they argue that they were entitled to the earnest money in their appellate brief.

A party abandons an issue by failing to pursue it on appeal by explicitly abandoning the claim or failing to brief the claim. *State v. Wood*, 89 Wn.2d 97, 99, 569 P.2d 1148 (1977); *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 961 P.2d 350 (1998).

Having abandoned all of their claims for relief, the Ebbelers' naked arguments of liability cannot stand alone. *See Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC*, 139 Wn.

App. 743, 754, 162 P.3d 1153 (2007). Even if Andrews breached the contract (which he did not), mere proof of breach without more is insufficient to support a claim. *Ketchum v. Albertson Bulb Gardens, Inc*., 142 Wash. 134, 139, 252 P. 523 (1927). A party must establish damage.

As is demonstrated below, there are several reasons why the Ebbelers cannot prove that Mr. Andrews' breached the REPSA contract. However, the Court need not consider those arguments. The Ebbelers' Petition may be disposed of on the basis that there are no longer any viable claims for this Court to review.

### B. Under the Law of Concurrent Obligations at Closing, the Ebbelers Lose.

The Ebbelers argue that Division I failed to apply the rule that the parties to a real estate purchase and sale agreement have a concurrent obligation to perform their duties. Petition, at 7-8. To the contrary, the appellate court found that because the parties' duties were concurrent, the Ebbelers could not hold Andrews in breach. The Ebbelers' case dies on the same

battleground on which they attack because they failed to prove their own performance.

There is no disagreement about the law on concurrent duties. Both parties cited *Willener v. Sweeting*, 107 Wn.2d 388, 730 P.2d 45 (1986). For the same reason, there is no conflict in that law requiring resolution by this Court under RAP 13.4. The Ebbelers simply disagree with the facts.

There are four reasons why the Ebbelers lose under the doctrine of concurrent performance. ***First***, as a factual matter, the Estate *did* prove its ability to perform – and *indeed did perform*. ***Second***, even though concurrent performance was due under the REPSA, the Ebbelers signed Closing Instructions on May 25, 2019 requiring them to deposit their purchase price first, effectively supplementing or modifying the common law duty of concurrent performance. The law on concurrent obligations applies to the extent the parties' obligations have not modified it, as the Ebbelers did in the Closing Instructions. They breached that provision. ***Third***, the Ebbelers have <u>never</u>

proven that they either did perform or could have performed their concurrent duty on May 29, 2019. They cannot hold Andrews in breach unless and until they meet that critical element of their case. The fact that they never fully performed is fatal to their case. ***Fourth***, all of this academic argument is ultimately moot because Andrews is the "prevailing party" under any application of the law. Andrews did not need to prove the Ebbelers' breach to be determined to be the prevailing party. He need only defeat the Ebbelers' claims to prevail, as is discussed at the end of this Petition.

On the first point, the Estate performed as required by the contract. It is undisputed that Mr. Andrews signed all of his closing documents and the deed on the Closing Date. CP 2280-82 (FF 78-81). He arrived at the offices of the parties' common closing agent, WFG Title, at 2:17 p.m. on the May 29, 2019 Closing Date, ready, willing and able to execute all of his documents and deed. *Id*. WFG Title was open for business when he arrived, even though it delayed signing because it had

prepared the wrong deed form. The REPSA is clear that any performance rendered under the agreement must be by 9:00 p.m. on the date the performance is to be rendered. If the Ebbelers had wanted to change the order or time of performance, they should have negotiated that term in the contract. They cannot expect this court to re-write it for them. Both the trial and appellate courts declined the invitation to impose a new order of performance or artificial intra-day deadline not expressed in the contract. This Court should as well.

At the same time, the Ebbelers completely ignore their own obligations. As the Court of Appeals correctly concluded, the Ebbelers signed a Closing Agreement on May 25, 2019 with the following language:

> ***Before the closing date, each party shall deposit with the closing agent all funds*** required to be paid by such party to close the transaction.

(boldface added). CP 2281 (FF 85); Ex. 125 at 4; Resp. Br. at 43-44. The Closing Agreement also provided that it

supplemented the parties' contract.[6] This provision was undoubtedly for the convenience of the closing agent and was intended to avoid the very problem the Ebbelers found themselves in – trying to resolve last minute loan documentation errors. The Ebbelers never deposited the full purchase price, before, during or after closing. CP 2282 (FF 90).

The Ebbelers failed to prove that they could have funded the purchase on the Closing Date. This was also fatal to their case. "If the contract requires performance by both parties, the party claiming nonperformance of the other must establish as a matter of fact the party's own performance." *Wallace Real Estate Inv., Inc. v. Groves*, 124 Wn.2d 881, 897, 881 P.2d 1010 (1994) (emphasis added). They could not declare Andrews in breach because they never performed.

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[6] Despite the Ebbelers' attempt to use Mr. Andrews' closing instructions against him, he did not see or sign these instructions in WFG's office until after 2:00 p.m., when the Ebbelers say it was already too late for their lender to fund.

### C. Andrews Had No Obligation to Affirmatively Assist the Ebbelers.

The second argument tendered by the Ebbelers is that Andrews "thwarted the Ebbelers' performance . . . by making their final steps to obtain the loan proceeds from WaFd impossible." Petition, at 18. The Ebbelers undoubtedly recognize that they had no claim for breach if they did not perform. But rather than establish their own performance as is required by law, they try to shift the blame for their inability to fund the purchase on the Closing Date on to Andrews. The Court of Appeals correctly and consistently applied Washington law. The Ebbelers' dissatisfaction with Division I's conclusions does not warrant this Court's review.

The Ebbelers' "thwarting" argument is unavailing for several reasons. ***First***, the facts establish that the Ebbelers simply failed on their own to have their financing documents correctly completed and in place as of the Closing Date. ***Second***, the Ebbelers' reliance on financing was to their prejudice. The Ebbelers' financing contingency had been

irrevocably waived and the Ebbelers' obligation was to pay in cash on or before May 29, 2019 notwithstanding any financing. ***Third***, it was not Mr. Andrews' job to help the Ebbelers close their loan. ***Fourth***, the essence of the Ebbelers' argument is that Andrews was obligated under the implied duty of good faith and fair dealing to help the Ebbelers' lender by altering the time and order of performance and releasing a deed before the purchase funds were paid. But the law on the implied duty of good faith and fair dealing in Washington has never gone so far as to require a party to affirmatively assist another party in the performance of the other party's duty (and this would not have helped the Ebbelers, who failed to perform).

Jonathan Ebbeler refuses to take responsibility for his own last-minute funding flurry. Mr. Ebbeler could have taken action to sign his loan documents earlier but failed to do so. He could have made arrangements to have the purchase price paid in cash (as he claimed he could do.) He failed to take any

precautions in the event there was a last-minute problem Washington State and he was in New York.

As mentioned above, "[i]f the contract requires performance by both parties, the party claiming nonperformance of the other ***must establish as a matter of fact the party's own performance***." *Wallace Real Estate Inv., Inc. v. Groves*, 124 Wn.2d 881, 897, 881 P.2d 1010 (1994) (emphasis added) ("the payment of the purchase price and the delivering of the deed are concurrent acts").

The Ebbelers failed to show "*as a matter of fact*" their own performance in funding the purchase. CP 2282 (FF 90). Their own actions hindered performance. CP 2281 (FF 86). It is undisputed that WaFd was not satisfied by the Ebbelers' 2:00 p.m. wire transfer deadline that all conditions and loan documents had been properly executed and that WaFd would fund on the Closing Date. *See* CP 2273 (FF 34, 36, 42-44, 48). The Ebbelers' own errors in the loan documents and their approval of an incorrect deed prevented their loan funds from

being deposited in escrow by the alleged deadline to fund. *See* CP 2274 (FF 42, 43, 44, 48). In unchallenged finding nos. 29 and 48, the trial court found clear admissions by the Ebbelers' own loan broker just before 2 p.m. that the deal would not close as a result. The Ebbelers' failure to ensure a complete and correct loan closing signing prevented closing. CP 2274 (FF 42, 43, 44). None of that was Mr. Andrews' fault.

The parties' inconsistent directions regarding the proper form of deed also prevented closing. That was not Andrews' fault. In fact, he held the Ebbelers and WFG to the contract term that called for a "personal representative's deed," not a statutory warranty deed.

More fundamentally, the Ebbelers agreed to waive contingencies and forfeit the Earnest money after 30 days from mutual acceptance and delivery of the REPSA. CP 2270 (FF 15). Absent any contract obligations to the contrary, a seller does not have any duties to help the buyer obtain or close a loan. Under the REPSA in this case it was the buyer's

obligation to pay the sale price at closing. Ex. 202 at 1,4. This they failed to do.

On May 1, 2019, Mr. Andrews' attorney had offered to give the Ebbelers a three-day extension on the contingency waiver period but reminded them they were expected to deposit $2.3 million on the May 29, 2019 Closing Date. CP 2271 (FF 18). The Ebbelers chose to proceed, and they chose to waive all contingencies – including the financing contingencies – on May 3, 2019. *Id.* (FF 19).

There are no obligations in the contract that require the Estate to help the Ebbelers apply for, obtain or close on financing.

The Ebbelers' argument regarding the implied duty of good faith and fair dealing is largely a red herring. The argument is directly inconsistent with the Ebbelers' admission that the parties' duties were concurrent. The Ebbelers argue that Mr. Andrews breached his duty of good faith and fair dealing when he did not consent to change the order of performance,

sign his deed first before the Ebbelers deposited their purchase funds, and then deliver the deed to escrow to be sent to the lender. The parties' contract did not require that, and it flies in the face of the concurrent duties rule.

Nevertheless, Andrews addresses that argument on its merits. Washington courts have never expanded the duty of good faith to encompass unwritten, non-contractual, failures to act. For example, it has been held that when a party actively and intentionally prevents a sale from moving forward through an overt action like misrepresenting facts to an owner's association board and voting against a new purchaser, the party violates the duty of good faith. *Cavell v. Hughes*, 29 Wn. App. 536, 539-40, 629 P.2d 927 (1981). In other cases, such as in *Allied Sheet Metal Fabricators, Inc. v. Peoples Nat. Bank of Washington*, 10 Wn. App. 530, 518 P.2d 734, 737 (1974), courts have declined to extend the duty of good faith and fair dealing so far as to impose a new duty on a party. *See also, Betchard-Clayton, Inc. v. King, 41 Wn. App. 887, 707 P.2d 1361, 1363-64*

*(1985)* (duty of good faith and fair dealing does not extend so far as to require the buyer to accept a new term). There is no duty to cooperate in efforts to restructure an agreement. *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 574, 807 P.2d 356 (1991). Any such duty would have either been a material change or injected substantive changes to their agreement. This is permissible "only in connection with terms agreed to by the parties." No party is required to accept "any material change." *Estate of Carter v. Carden*, 11 Wn. App. 2d 573, 581 455 P.3d 197 (2019).

While a contracting party may not *hinder* the other contracting party's performance, there is correspondingly "***no duty on either party to affirmatively assist in the other party's performance***." *State v. Trask*, 91 Wn. App. 253, 273, 957 P.2d 781 (1991). Defendant's expert Scott Osborne provided a useful illustration of the distinction between these two concepts in this case.

Mr. Osborne gave this example: Assume Andrews and Ebbeler were neighbors. If Ebbeler had walked over to Andrews' house and said "can you give me a ride to the closing?" and Andrews declined, there is no breach. However, if Andrews had gone over to Ebbeler's house the night before closing and slashed his tires, that clearly would be a breach. RP 711-12. In Mr. Osborne's example, the former involves providing assistance to the counterparty; while the latter is an example of bad faith in the exercise of one's obligations.

Here, Andrews was entitled to stand on his rights to require performance of the REPSA according to its terms. *Badgett*, 116 Wn.2d at 570; *see also 134th St. Lofts, LLC v. iCap Nw. Opportunity Fund, LLC*, 15 Wn. App. 2d 549, 564, 479 P.3d 367 (2020) (no breach of the duty of good faith when a party simply stands on its rights to require performance of a contract according to its terms.)

### D. Re-Writing the Contract to Re-Order Performance or Impose an Artificial, Early-in-the-Day Deadline Would be Bad Policy.

The outcome urged by the Ebbelers would create bad policy. The Ebbelers contend that Andrews breached the contract by 11:00 a.m. or 2:00 p.m. on May 29, 2019 because he didn't come in to sign when *they say* he should have signed. If that were the rule, what would prevent an unscrupulous buyer from announcing an arbitrarily early time by which a seller must sign and then declaring a breach when the unsuspecting seller is unable to meet the buyer's new demand?

Parties to a contract rely on the contract language. The Ebbelers suggest that Mr. Andrews was subject to the whims and dictates of a buyer, its closing agent and even its lender. That is not supported by the contract, and sellers may have little advance warning when they will be declared in default. Current Washington law is the better policy.

### E. Andrews is the Prevailing Party Whether He Performed or Not Because the Ebbelers Could Not Prevail on Their Claims.

Andrews is also the prevailing party under the REPSA. RCW 4.84.330. "Prevailing party" means the party in whose favor final judgment is rendered. *Crest, Inc. v. Costco Wholesale Corp*., 128 Wn. App. 760, 772, 115 P.3d 349 (2005); 14A Tegland, *Wash. Prac., Judgments, Costs & Attorney Fees* § 36.3 (2d ed. 2017). A prevailing party need not succeed on its entire claim; the party need only *substantially* prevail. *Crest*, 128 Wn. App. 760.

The contract terminated, and Andrews is the prevailing party because the Ebbelers walked away from their claims of specific performance and damages and failed to establish their own performance. Andrews properly received a judgment in his favor. CP 2285 (Order of the Court, at 8).

Pursuant to RAP 18.1, Mr. Andrews asks that this Court award it attorneys' fees and costs for this Petition, as set forth in the REPSA. Ex. 202 at 6, General Term "p."

## VII. CONCLUSION

Andrews asks that this Court deny the Petition for Review.

Respectfully submitted this 13th day of May, 2022.

*The undersigned attorney certifies that this brief contains 4,866 words in compliance with RAP 18.17(b).*

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PROOF OF SERVICE

I, Brith Croghan, the undersigned, hereby certify and declare under penalty of perjury under the laws of the State of Washington that the following statements are true and correct:

On this date, I caused to be served a true copy of the document entitled MOTION FOR 30-DAY EXTENSION TO FILE RESPONDENT'S BRIEF to which this is attached, by First Class U.S. Mail and electronic mail on the following:

| | |
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| Catherine C. Clark, WSBA #21231<br>LAW OFFICE OF CATHERINE C. CLARK, PLLC<br>2200 Sixth Avenue, Suite 1250<br>Seattle, WA 98122<br>Email: cat@loccc.com<br>*Attorneys for Appellants* | ☐ Messenger<br>☐ U.S. Mail, postage prepaid<br>☐ Federal Express<br>☐ Facsimile<br>☒ Email<br>☒ ECF |
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Executed at Bellevue, Washington this 13th day of May, 2022.

*s/Brith Croghan*
Brith Croghan

## DAVIS WRIGHT TREMAINE LLP

## May 13, 2022 - 4:45 PM

## Transmittal Information

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| **Appellate Court Case Number:** | 100,791-4 |
| **Appellate Court Case Title:** | Jonathan and Ashley Ebbeler v. Sidney S. Andrews |

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