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No. 82225-0-I

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

JONATHAN WESLEY EBBELER and ELIZABETH ASHLEY EBBELER, husband and wife,

Petitioners,

v.

SIDNEY S. ANDREWS, Personal Representative of the Estate of Allison S. Andrews;
ESTATE OF ALLISON S. ANDREWS,

Respondents.

PETITION FOR REVIEW

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A. INTRODUCTION

The Ebbelers ask this Court to accept review of the Court of Appeals, Division I, decision terminating review designated in Part B. This case presents significant issues for this Court on the concurrent obligations of real estate purchasers and sellers under standard real estate purchase and sale agreements ("REPSA") at closing, and the circumstances under which a party's conduct at closing may thwart the other side's performance of closing-related obligations.

The Ebblers did everything any buyer in a financed real estate transaction must do to fulfill their duties on or before the closing date. They received approval for the requisite loan amount, they completed all lender-requested documents prior to the closing date, and they deposited into escrow all required cash for the balance of the purchase price. It was only the Estate's action and inaction that prevented closing on the closing date, as will be noted *infra*. Nonetheless, Division I held that it was the Ebbelers, not the Estate, that breached the

REPSA, and that the Estate was not only entitled to escape the deal, but to keep the Ebbelers' $65,000 in earnest money, and receive hundreds of thousands of dollars in attorney fees in the process.

In reaching this unjust and erroneous result, Division I has left buyers who must obtain financing to purchase homes in Washington and who use the standard Northwest Multiple Listing Service forms in a dangerous precarious position. If Division I's opinion is allowed to stand it will provide a vehicle for sellers in lender-financed home purchases to prevent buyers from funding their loans simply by delaying the signing of critical documents on the day of closing until it is too late to transfer funds and record the conveyance documents. Division I's opinion has tilted the balance in favor of sellers, leaving buyers at their mercy in a market already favoring sellers. Such an imbalance in the relationship of real estate purchasers and sellers is bad public policy, meriting this Court's review.

B. COURT OF APPEALS DECISION

Division I filed its opinion on February 28, 2022. A copy of the opinion is in the Appendix. That court denied the Ebbelers' timely motion for reconsideration on March 9, 2022. A copy of that order is in the Appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Did the trial court err in determining that the buyer breached the parties' REPSA where that agreement and the escrow instructions made clear that the parties' performance at closing was concurrent and the seller failed to perform?

2. Did the seller's conduct, including instruction to the escrow to withhold documents from the lender necessary to loan funding, waiting to execute the deed until after the Federal Reserve wire cutoff and after the King County recording office closed, or its insistence upon the buyer paying to connect the house to the sanitary sewer when it was a seller obligation, frustrate the buyers' ability to post funds to close?

D. STATEMENT OF THE CASE

The recitation of the facts and procedures in Division I's opinion is largely correct. Op. at 1-8. Certain factual points, however, bear emphasis.

First, the opinion omits reference to the fact that Sidney Andrews was a seasoned real estate professional, CP 2268 (FF 9), who was well aware of how to manipulate real estate transactions to his advantage. RP 241-43; CP 2238.

Second, the opinion understates Sidney's cavalier, tardy appearance at the escrow's office late on May 29 that made the Estate's performance of its closing obligations *impossible*. Sidney simply refused to show up at WFG National Title Insurance ("WFG"), the escrow settlement agent, until the last minute, despite entreaties from WFG staff for a week before closing to do so. CP 2112, 2136.[1] Ultimately, he signed the deed only *after* King County's recording office had closed and he signed key documents *after* the Federal Reserve deadline for wire transfers had passed, making it impossible for the Ebbelers' lender, Washington Federal ("WaFd"), to transfer the

[1] WFG emailed Sidney at 5:56 p.m. on May 28, telling him that he needed to be at its offices no later than 11 a.m. on May 29. He was also told that WaFd needed to see an executed form of the deed. CP 2160. Sidney ignored all of these directions.

loan proceeds to WFG at closing.

Also ignored in Division I's analysis is the fact that in addition to failing to appear at WFG's offices on a timely basis to close, Sidney and the Estate's attorney Lisa Peterson specifically directed WFG not to close without their express approval. Dani Leggett testified that escrows respect such a direction from a seller and would not close without receiving the seller's approval. CP 2079. WFG's Autumn Bray agreed. CP 1910-11. Such approval was never given, CP 2024, again breaching the Estate's concurrent obligation to close.

Third, the opinion does not mention that Sidney never intended to close. When advised that the Highlands Sewer District ("District") intended to raise the amount held back on closing to address the connection of the property to the sanitary sewer, br. of appellants at 15, and after he lined up a competing offer to the Ebbelers' that agreed to assume the sewer connection costs, ex. 240; RP 228, Sidney specifically told his real estate agent, Evan Wyman, only days before the closing:

"No worries, the next buyer will have a different title/escrow anyway, *cuz I don't plan on this closing*…keep the O'Briens warm at $2.225, cuz that's where I'm goin'…" (emphasis added). Ex. 77.

Fourth, the sewer connection fees were the crux of Sidney's efforts to subvert the parties' REPSA ("Agreement") and fully explain his bad faith in thwarting the Ebbelers' performance. That fact was largely ignored in Division I's opinion. The Agreement and the District's rules made those charges the Estate's obligation, ex. 3 at 4, as Wyman, RP 659-61, and Sidney himself *admitted*. Ex. 35; RP 134.

The District even required the Estate to temporarily connect the house to the sewer before the deal would be approved by the District, exs. 23 at 2, 26 at 2, a fact conveniently forgotten by the Estate. Ex. 62. Despite acknowledging in its opinion at 2 that a sewer connection was mandatory before any sale, Division I's subsequent assertion that the District's general holdback amount was sufficient to

defray the obligation to provide for the temporary connection is not supported by the record. (op. at 17-19). Its claim that there was no contractual duty to provide a temporary sewer connection, or that there was "no evidence" that the District required such a connection (op. at 18) is belied by exhibits 23 and 26. The temporary connection itself had to occur *before* the sale could be approved by the District under the District's rules. The District's compliance certificate mandated a connection. Ex. 28. It is undisputed that as of May 29, 2019, the day of closing, no temporary sewer connection had been installed.

Despite admitting in his April 13, 2019 email to his real estate agents that the connection was the Estate's obligation, (Ex. 35), Sidney repeatedly sought to foist this obligation on the Ebbelers beginning in late April, once he had the competing offer that assumed the obligation to pay sewer connection fees. CP 2271 (FF 21). Sidney's efforts were a renegotiation of the Agreement. RP 660-61. Sidney only agreed that the sewer connection fee was an Estate obligation *on May 29*, the day of

the closing. Ex. 240; RP 313-14.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Review is merited in this case because the Division I decision conflicts with this Court's precedents on concurrent performance of real estate buyers and sellers at closing, (RAP 13.4(b)(1)), and authority on the thwarting of the other contracting party's performance in violation of the implied covenant of good faith and fair dealing in Washington (RAP 13.4(b)(1)-(2)). Division I's decision will have a profound impact on real estate closings statewide (RAP 13.4(b)(4)).

(1) Division I Failed to Apply Washington Law on Real Estate Purchaser and Seller Concurrent Obligations at Closing

Washington law has long recognized that parties to a real estate purchase and sale agreement have a concurrent obligation to perform their requisite obligations in closing the transaction. *Bendon v. Parfit*, 74 Wash. 645, 134 Pac. 185 (1913); *Jenson v. Richens*, 74 Wn.2d 41, 46, 442 P.2d 638 (1968); *Willener v.*

Sweeting, 107 Wn.2d 388, 730 P.2d 45 (1986). Since 1913 the default principle in closings has been that payment of the purchase price and the delivery of the deed in a real property transaction are *concurrent acts*. *Bendon*, 74 Wash. at 648. Because payment of the purchase price and the delivery of the deed are typically concurrent conditions, a vendor "may not put the buyer in default until *the vendor* has offered to perform." *Wallace Real Estate Inv., Inc. v. Groves*, 124 Wn.2d 881, 887, 881 P.2d 1010 (1994) (emphasis added).

In *Willener*, a case directly on point, this Court declined to enforce a real estate purchase and sale agreement where, at closing, the seller could not provide marketable title and the purchaser failed to post funds. The Court ordered the return of the earnest money to the purchaser. That is exactly what should have happened here.

The parties' Agreement and the escrow instructions manifested their intent that their obligations be concurrent. Exs. 3, 79. The Estate's own expert agreed that performance

duties were concurrent. RP 690, 702. The trial court so concluded, after noting that the parties' experts all agreed that was true. CP 2281-82 (FF 88-89). Conclusion of law number 6 states: "The duty to complete closing was concurrent." CP 2283. Nothing in either document indicated an intent that the Ebbelers' obligation to post funds to close the transaction was a condition precedent to the Estate's closing obligations.

The Estate claimed that the deposit of the full sale proceeds was a condition precedent to its performance. Ex. 125 at 4; resp'ts br. at 43-44. While finding that the parties' duties were concurrent, the trial court, nevertheless, reversed this agreed upon order of performance by finding that the sale proceeds had to be deposited by the Ebbelers *prior* to recording according to the closing instructions, CP 2281 (FF 85) ("It appears the Closing Agreement required that the Ebbelers deposit their funds first…"),[2] ignoring the parties' *actual*

[2] The trial court's order on summary judgment also focused entirely on the funding obligation *of the Ebbelers* to the

agreement. In effect, the trial court made the Ebbelers' funding of the transaction a condition precedent to the Estate's performance, as the Estate requested, contrary to the Agreement's actual terms for timing of performance.

Washington law disfavors the implication of conditions precedent in contracts. *Fischler v. Nicklin*, 51 Wn.2d 518, 523, 319 P.2d 1098 (1958) (conditions precedent are disfavored by courts and refusing to imply such a condition). That rule is consistent with longstanding federal practice as well. *Lockwood v. Wolf Corp.*, 629 F.2d 603, 610 (9th Cir. 1980) (noting that courts are specifically "loathe" to imply such conditions when the alleged condition is within the control of the contracting parties). Division I's analysis fundamentally departs from the specific terms of the parties' Agreement. Op. at 14-15.

Emblematic of its misperception of this Court's decision

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exclusion of any duties on the Estate's part to perform. CP 1225-26. This animated the trial court's later treatment of the issues at trial.

in *Willener* is Division I's excursion into a discussion of rescission of the Agreement, claiming that the Ebbelers never sought that remedy for the Estate's breach of the Agreement at trial. Op. at 9-11. With all due respect to the Court of Appeals, that is wrong. As Division I itself notes, op. at 7, the Ebbelers relinquished any claims of specific performance and damages at trial. They *defended* the claim of the Estate for the forfeiture of the earnest money, asking for its refund. Rescission was plainly the remedy they sought in the trial court where they specifically argued their entitlement to the return of their earnest money to the trial court in their trial brief, CP 1432, and in closing argument. RP 731, 736. The Ebbelers were not obligated to incant the word "rescission" to preserve the argument for review. Division I's analysis elevates form over substance.

But lost on Division I is the central thrust of concurrent performance as this Court articulated in *Wallace Real Estate*. To recover under the Agreement, *the Estate* had to prove its

ability to perform its end of the deal. *See, e.g.*, *Phillips v. Smith*, 12 Wn. App. 2d 1066, 2020 WL 1644350 (2020) (in concurrent performance, party claiming breach must establish its own performance; lessor/seller in lease with option to purchase home case evidenced clear intent to repudiate agreement, excusing performance by lessees/purchasers). The Estate failed to meet this obligation.

The Ebbelers performed their end of the Agreement by paying the earnest money and down payment and having the WaFd loan ready to be funded. Even if the Ebbelers failed to perform (which they deny), the relevant issue here is that the Agreement is unenforceable because the Estate breached it by failing to perform the Estate's mandatory concurrent contractual obligations at closing.

While there are multiple reasons supporting the view that the Estate failed to perform its concurrent obligations under the Agreement such as its failure to provide the correct form of

deed to WFG (br. of appellants at 36-37; reply br. at 20-21),[3] or its failure to clear the lien of Sidney's mother (br. of appellants at 37-38; reply br. at 16-20),[4] the Estate's plainest breach of the Agreement was its failure to *record* the requisite deed for the property before closing. The term "closing" is defined in the Agreement as follows: "'Closing' means the date on which all documents are *recorded* and the sale proceeds are available to

[3] Division I's discussion of the form of the deed, op. at 11-12, is superficial. The Estate *insisted* upon a personal representative deed and blamed *the Ebbelers* for signing the unexecuted, unnotarized deed form presented to them at closing. Resp'ts br. at 3, 15. The trial court, too, blamed the Ebbelers. CP 2276-77 (FF 54-59). Nothing in the Agreement calls for the Ebbelers to approve or provide the deed. Had Sidney been diligent in interacting with WFG before his tardy arrival at its offices on May 29, he or his attorney Lisa Peterson could readily have remedied the flaws in the deed they wanted. Instead, WFG did not receive final approval from attorney Peterson for the deed until 7:19 p.m. on May 29. CP 2039.

[4] Division I's treatment of the Trust lien is puzzling. Op. at 16-17. It does not explain how the $4 million unpaid Trust line of credit for Alison Andrews, Sidney's mother, became a zero balance. Ex. 66.

Seller." Ex. 3 at 6 (emphasis added).[5] The Estate admitted in closing argument that the Agreement required recording. RP 734 ("It is the contract itself [that] says the closing is the tender and *recording* [of] the deed…") (emphasis added).

While Division I's opinion acknowledges that Sidney signed the requisite deed at 3:51 p.m., 21 minutes after King County's recording office closed, making recording *impossible* on May 29, op. at 13, it attempts to justify the Estate's inability to record the deed on the day of closing by blaming WFG for the Estate's failure to close on time. Op. at 13-14. The bottom line, however, is that the Estate failed to permit the recording of any deed before closing. The inescapable fact is that King County records office closed at 3:30 p.m., CP 1908-09, 1967, and that Sidney's belated appearance at WFG on May 29 and his tardy execution of the deed rendered its recording on that

[5] The trial court erroneously concluded that the Estate could meet its obligation by Sidney's signing of the deed, contrary to the express terms of the Agreement that required recording of the deed on May 29. CP 2284 (CL 11).

day an *impossibility*.

Simply put, by the time Sidney finally chose to appear at WFG's office at 2:17 p.m. on May 29, CP 2280 (FF 76), and sign the actual deed the Estate preferred at 3:51 p.m., CP 2280 (FF 81), it was too late to perform the Estate's obligation to record on May 29.. Moreover, as noted *supra*, Sidney and his attorney specifically instructed WFG not to close without their express approval. The Estate could not, and did not, perform the requisite recording of the deed as the Agreement required, breaching the Agreement.[6]

This is not just a garden-variety individual real estate case that this Court should ignore. Division I's decision has serious ramifications that impact Washington's real estate industry when there is a scarcity of housing and sellers have more leverage, meriting review by this Court. The opinion

[6] WaFd's May 30 email indicated that the reason the loan did not fund was not because of anything the Ebberlers did, but rather because Sidney failed to timely sign. CP 926 ("Has the seller signed or is there a problem with the transaction?"); ex. 122.

distorts this Court's longstanding precedent on concurrent obligations of purchasers and sellers at closing, in effect, giving courts free rein to imply conditions precedent to performance of REPSAs. RAP 13.4(b)(1).

Moreover, because REPSAs often utilize standard language in NWMLS forms, this will allow courts *statewide* to imply such conditions despite this Court's concurrent obligation imperative. As noted *supra*, Division I's opinion creates a loophole for wily sellers bent on reneging on REPSAs, allowing them to delay closing, thereby preventing financing, and to then declare a default, retaining buyers' earnest money. In a sellers' market, as is true today, where buyers are compelled to waive protective contingencies such as inspection contingencies, that will grossly distort the relationship of buyers and sellers, and will give sellers a free "out" on the day of closing. Review is essential. RAP 13.4(b)(4).

(2) The Estate Breached the Agreement When It Thwarted the Ebbelers' Performance

Review is also merited in this case because Division I's opinion fails to properly address the fact that the Estate thwarted the Ebbelers' performance of the agreement by making their final steps to obtain the loan proceeds from WaFd impossible. RAP 13.4(b)(1), (2).

In Washington, the duties of parties to a real estate contract to perform their closing-related obligations are animated by an overarching duty of good faith and fair dealing that obligates the contractual parties to cooperate with each other so that each may obtain the full benefit of the contract. *Miller v. Othello Packers*, 67 Wn.2d 842, 844, 410 P.2d 33 (1966) ("There is an implied covenant of good faith and fair dealing in every contract, a covenant or implied obligation by each party to cooperate with the other so that he may obtain the full benefit of performance."); *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356 (1991). *Rekhter v. Dep't of Soc.*

& Health Servs., 180 Wn.2d 102, 111-12, 323 P.3d 1036, 1041 (2014); *Bill & Melinda Gates Foundation v. Pierce*, 15 Wn. App. 2d 419, 475 P.3d 1011 (2020), *review denied*, 197 Wn.2d 1006 (2021) (Foundation breached implied good faith/fair dealing covenant by unilaterally changing duties of chief development officer, preventing CDO from performing duties).

Sidney and the Estate had a good faith duty to make the Ebbelers' performance of their contractual duties possible and not to thwart them. A contracting party may not hinder the other contracting party's performance. *Ward v. Coldwell Banker/San Juan Props.*, 74 Wn. App. 157, 168, 872 P.2d 69, *review denied*, 125 Wn.2d 1006 (1994) ("All contracts include an implied condition that a party will not interfere with another party's performance, but will cooperate in good faith."); *Cavell v. Hughes*, 29 Wn. App. 536, 629 P.2d 927 (1981). *See generally, Restatement (First) of Contracts* § 315.

Although time was of the essence[7] and despite significant advance notice of the closing date for this multi-million dollar transaction, Sidney dragged his feet on performance of the Estate's obligations, showed up at the last minute to sign closing documents, and refused to lift a finger to aid WaFd to issue the loan proceeds when all he had to do was to provide a copy of the executed deed and produce the seller side of the closing disclosure.[8] Unaddressed by Division I is the fact that if

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[7] The Agreement specifically provides: "Time is of the essence of this Agreement." Ex. 3 at 6. Such a clause is treated as evidence of a mutual intent that specified times of performance be strictly construed. *Mid-Town Ltd. P'ship v. Preston*, 69 Wn. App. 227, 233, 848 P.2d 1268, *review denied*, 122 Wn.2d 1006 (1993). Such a clause benefits *both* parties. *CHG Int'l, Inc. v. Robin Lee, Inc.*, 35 Wn. App. 512, 514, 667 P.2d 1127, *review denied*, 100 Wn.2d 1029 (1983) (both parties obligations discharged). Instead of applying this provision to *both* parties, the trial court applied it unilaterally to the Ebbelers, CP 2270 (FF 14), largely overlooking Sidney's last-minute shenanigans and tardy appearance at closing.

[8] WaFd's requirement that it see a copy of the signed deed before it would fund the loan is a form of adequate assurance that the Estate had performed under the Agreement. *Cf. Grant County Port Dist. No. 9 v. Wash. Tire Corp.*, 187 Wn. App. 222, 232, 349 P.3d 889 (2015).

Sidney had truly wanted the deal to proceed, providing an executed copy of the deed (the Estate would later that day be required to record the original deed in any event) to WaFd, to allow it to release the loan proceeds to escrow was a *de minimis* act. In failing to provide a copy of the executed deed to WaFd and instructing WFG not to provide such documents to anyone, contrary to the escrow instructions and general terms of the Agreement,[9] the Estate violated its duty of good faith and fair dealing. It actively thwarted the Ebbelers' performance.

Division I refused to find that the Ebbelers' lender needed to see the deed before it would issue funds. Op. at 19-22. The trial court acknowledged Leggett's email to Sidney on May 28 stating that the Ebbelers' lender needed the Estate's deed. CP 2277 (FF 62). However, it claimed that the evidence

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[9] "Buyer and seller expressly authorize all Closing Agents…and others related to this Sale, to furnish the listing Broker and/or Selling Broker, on request, any and all information and copies of documents concerning this sale." Ex. 3 at 5.

did not support such a view. CP 2278-79 (FF 64, 69). Division I acknowledged that there was evidence to that effect. Op. at 21. In fact, WaFd's Barbara Otero testified that WaFd would not find the loan without seeing a copy of the signed deed. RP 1737-38. *See also*, ex. 106; CP 2247 (lender needed to see documents). But like the trial court, Division I asserted that the Estate had no obligation to provide such documentation to WaFd, drawing on a distinction between documentation necessary for wiring funds into escrow and authorizing the disbursement of loan proceeds, *id*., that, quite frankly, makes no sense in the real world. WaFd needed to see the deed before it would agree to make the loan proceeds available to allow the Ebbelers to hold up their end of the bargain. Sidney's gamesmanship thwarted that performance.

Moreover, under the federal Truth in Lending Act, 15 U.S.C. § 1601, and regulations implementing it, 12 C.F.R. § 1026.19(f)(4)(iv), the Estate and WFG had an obligation to provide disclosure documents, a joint document of the seller

and buyer, to the Ebbelers *and WaFd*. *See* motion for reconsideration. Division I's opinion dismissing the Estate's TILA obligation was mistaken. Op. at 20. WaFd made clear that in order to send its wire, it had to see copies of the executed deed and seller disclosure documents prior to funding, in keeping with common industry underwriting standards, as WaFd's Otero testified.

Sidney thwarted the Ebbelers' performance of their obligation to provide funding because he not only failed to provide the requisite deed to the Ebbelers' lender for its review before the 2:00 p.m. cutoff, but he and attorney Peterson affirmatively commanded his agents not to provide *any* documents to the Ebbelers' lender (or anyone). Exs. 94, 95, 247. As noted *supra*, escrow agents would not close, given such a command.

Sidney's tardy appearance at closing not only made the timely recording of the deed impossible, it prejudiced the Ebbelers' ability to perform regarding their loan. Any issues

regarding the loan could not be addressed because WaFd had the 2 p.m. cutoff on May 29 previously referenced.[10] WFG had put Sidney on notice that he needed to be at its offices at 11 a.m. on May 29, a direction he disregarded, despite the fact that he was acting in a fiduciary capacity. The Estate's expert, Scott Osborne, cogently observed that "sooner is better than later" so that the vagaries of closing could be addressed. RP 692, 704-05.

The trial court and Division I equivocated on whether the Ebbelers' lender had a 2:00 p.m. cutoff time on the date of closing. CP 2278-79 (FF 65-68); op. at 22-27. The record was *clear* that the cutoff time was 2:00 p.m. That cutoff time was acknowledged by the Estate's own expert, RP 390, its real estate agent, Wyman, RP 678, and all other witnesses, CP 1734, 1740 (Otero); CP 1908 (Bray); CP 1967 (Leggett). Sidney

[10] The Ebbelers, by contrast, had signed all loan and escrow documents required of them *days* in advance of closing. CP 1547, 1706.

testified that he would not send wires after 5 p.m. Eastern Time: "Not if I want to make sure that they get there that day." RP 218. Ultimately, ignoring the reality of the Ebbelers' lender's cutoff, the trial court determined that closing could occur until 9:00 p.m. on May 29, 2019. CP 2269-70 (FF 13). Division I seemingly agreed, implying that the Ebbelers had until 9:00 p.m. on May 29 to perform, even though the Federal Reserve wire cutoff rendered that time meaninglessly theoretical. Op. at 26.

Such an interpretation of the parties' Agreement defied business reality. *Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 705, 952 P.3d 590 (1998) (contracts must be given a commercially reasonable interpretation). Just as a deed could not be recorded after 3:30 p.m. on May 29 because the applicable King County office was closed, WaFd could not wire the loan proceeds because bank wire transfers ran through the Federal Reserve in New York and it closed after 2:00 p.m. Seattle time. Such usages of trade as the Federal Reserve's

wire transfer cut off become part of a contract's proper interpretation, even if the contract term was not ambiguous on its face. *Puget Sound Financial, L.L.C. v. Unisearch, Inc.*, 146 Wn.2d 428, 434-35, 47 P.3d 940 (2002); *Bremerton Concrete Products Co. Inc. v. Miller*, 49 Wn. App. 806, 809-10, 745 P.2d 1338 (1987). *See generally*, *Restatement (Second) of Contract*s § 222 (discussing trade usage).

Division I's refusal to acknowledge such a trade usage is another reason review is merited. RAP 13.4(b)(1), (2). Because the Federal Reserve 2:00 p.m. wire deadline is a ubiquitous requirement in the funding of real estate transactions *statewide*, Division I's erroneous treatment of it will cause severe confusion for escrows throughout our State. Review is essential. RAP 13.4(b)(4).

F. CONCLUSION

The duties of buyers and sellers in closing real estate transactions are concurrent; Division I glossed over the Estate's obvious unwillingness and failure to perform its duties under

the parties' Agreement. Under the implied covenant of good faith and fair dealing, a party may not thwart another party's ability to perform its contractual obligations as the Estate did here. Review is merited. RAP 13.4(b).

This Court should reverse the trial court's judgment and vacate the Estate's fee award. Fees for trial should be awarded to the Ebbelers. Costs on appeal, including reasonable attorney fees, should be awarded to the Ebbelers.

This document contains 4,652 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 30th day of March, 2022.

Respectfully submitted,

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APPENDIX

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

JONATHAN WESLEY EBBELER AND ELIZABETH ASHLEY EBBELER, husband and wife, Appellants, v. SIDNEY S. ANDREWS, Personal Representative of the Estate of Alison S. Andrews; and ESTATE OF ALISON S. ANDREWS, Respondents.	No. 82225-0-I DIVISION ONE UNPUBLISHED OPINION

ANDRUS, A.C.J. — Jonathan and Elizabeth Ebbeler, prospective purchasers of a home under a real estate purchase and sale agreement, appeal the trial court's finding that they forfeited their earnest money deposit by failing to tender the purchase price on or before closing, as required by the agreement. Because the trial court's findings are supported by substantial evidence, we affirm.

FACTUAL BACKGROUND

In February 2018, Alison Andrews passed away, leaving a large home in the Highlands neighborhood of Shoreline, Washington. Her son, Sidney

Andrews,[1] acting as her estate's personal representative (the Estate), listed the home for sale.

All property sales in the Highlands must be approved by the Highlands Homeowner's Association (HHA). HHA contracts with the Highland Sewer District (the District) to provide a sanitary sewer and storm water drainage system for the community. Under the Highlands bylaws, all buildings must be connected to the general sewer system. The Highlands Sewer District Sanitary Sewer & Storm Water Lateral Compliance Plan makes all property owners financially responsible for repairs to or replacements of sanitary sewer and storm water lateral pipelines. Under this plan, the District is responsible for inspecting sewer lines and issuing certificates of compliance. In 2005, the District implemented a policy requiring an inspection of all sewer connections when a residence is proposed to be sold and to require "immediate arrangements to correct all deficiencies found by such inspections." The District requires any seller to obtain a "Letter of Compliance" as a condition of any sale.

In April 2018, Andrews began working with the District to bring the home into compliance by separating the home's storm water from the District's sewer lines. In mid-March 2019, the District and Andrews discovered that the home had never been connected to the District's sewer system. The District issued a non-compliance report indicating that before any sale, the District had to connect the home to its sanitary sewer system.

[1] Because Alison and Sidney Andrews share the same last name, we will refer to Alison by her first name for clarity only.

On March 28, 2019, the Ebbelers offered to purchase the property for $2 million, using the Northwest Multiple Listing Service (NWMLS) real estate purchase and sale agreement form (REPSA). On March 30, Andrews extended a counteroffer for $2.625 million, offered a personal representative's deed in lieu of a statutory warranty deed, and required that any and all contingencies, both financing and inspections, be waived within 30 days of mutual acceptance. Andrews also disclosed the defects with the sewer system and represented that the Estate was selling the house without connecting to the District's sewer system.

On March 31, 2019, the parties settled on a purchase price of $2.3 million. The REPSA contained the Estate's proposed 30-day contingency period clause:

> Buyer shall have 30 days from mutual acceptance to conduct all inspections, document reviews, financing approval, etc. . . . After 30 days, Buyer and Seller agree that all contingencies are deemed to be waived and will proceed to closing as specified in the agreement. Buyer may elect, before the 30 days has expired, to terminate the agreement with written notice and Earnest Money will be refunded to the Buyer.
>
> Upon removal of Buyer's contingencies or after thirty (30) days from mutual acceptance and delivery of the Residential Real Estate Purchase and Sale Agreement, whichever is sooner, the Earnest Money shall become a non-refundable deposit applicable toward the Purchase Price and no longer Earnest Money. If this transaction fails to close for any reason other than default by Seller, the non-refundable deposit shall remain the property of Seller.

The parties agreed on a closing date of "on or before" May 29, 2019. They also agreed to use WFG National Title (WFG) as the closing agent. Once they agreed to these final terms, the Ebbelers deposited $65,000 in earnest money with WFG.

During the 30-day contingency period, the Ebbelers sought assurances that the District would complete sewer repairs before closing and asked Andrews to

reduce the purchase price and extend the closing date until the repairs were complete. The Ebbelers initially thought the District would not allow the sale to close without the sewer connection work being completed. Andrews confirmed with the HHA and the District that because the District could not complete the work by the closing date, it would allow the transaction to close if the Estate agreed to set aside a portion of the sale proceeds to cover the costs of the repairs in a "holdback" agreement.

Discussions between the parties regarding the sewer issue became contentious with the Ebbelers continuing to seek a price reduction to reflect the lack of a connection. On May 1, 2019, the Estate's attorney, Lisa Peterson, told the Ebbelers that the Estate would not negotiate the issue further and that they could walk away from the deal if they were not happy with the sewer situation. She offered to extend the feasibility period to May 3, 2019, to give the Ebbelers additional time to decide if they wanted to proceed.

The Ebbelers allowed the contingency period to lapse and all contingencies were, at that point, waived. On May 24, 2019, the District agreed to a holdback amount at $150,000, two times the anticipated cost to finish the sewer repairs. Andrews agreed that this sum would be withheld from the proceeds to be paid to the Estate at closing.[2]

The Ebbelers, residents of Maryland, worked with a mortgage broker to obtain a $1.6 million loan from Washington Federal (WaFed) to purchase the property. WaFed prepared loan documents and forwarded them to WFG for the

[2] In October 2019, the District completed the sewer repairs on the home and issued a statement of compliance to the Estate. The Estate's allocation of the costs was approximately $74,000.

Ebbelers to execute. WFG arranged for a traveling notary to meet the Ebbelers to execute the loan and closing papers on Saturday, May 25, 2019, four days before the scheduled closing date.

WFG mistakenly provided the Ebbelers with a draft statutory warranty deed, rather than a personal representative's deed, to approve. The Ebbelers approved the deed form, signed what they believed to be all remaining documents, and returned them via overnight mail to WFG.

WFG received the Ebbelers' signed closing documents on the morning of May 28 and forwarded them to WaFed to review. The same day, the Ebbelers wired a $690,000 down payment to WFG.

Just before 6 p.m. that evening, Dani Leggett, the closing agent, emailed Andrews and asked him to arrive at WFG's Seattle offices at 11 a.m. the next day to sign closing documents so she could "send documents to the lender prior to their funding cutoff." Leggett informed Andrews that "[t]he buyer's lender requires reviewing a portion of the seller signed documents prior to funding their loan and releasing us to record." The following morning, Andrews told Leggett that he would come in to execute the closing documents but that she did not have the authority to distribute any documents to the Ebbelers' lender until he provided written authorization for her to close.

At approximately 11 a.m. on May 29, WaFed notified WFG that it had discovered at least 13 errors in the Ebbelers' signed loan documents that needed to be corrected before it would wire funds for closing.

At 1 p.m., Peterson notified Leggett that the Estate would not authorize her to send copies of signed documents to anyone unless and until all funds had been deposited. Leggett responded that the only documents she wanted to send were the signed escrow instructions, the "closing disclosure," and the statutory warranty deed. When Peterson received this email, she told Leggett that the proper deed form should be a personal representative's deed, not a statutory warranty deed, and that she would not authorize WFG to distribute a signed deed before funds were on hand to close. She also informed Leggett that Andrews would be there by 2:30 p.m. to sign the closing documents.

Leggett then sent an email notifying everyone involved in the transaction that once Andrews arrived to sign the documents and she had the "green light" to move forward with the closing, she would let everyone know. She further stated that it was her belief that the lender's cutoff to fund the loan was 2 p.m. and suggested that the parties would need to extend the REPSA. At 1:40 p.m., the Ebbelers' mortgage broker, Phil Mazzaferro, sent an email to the parties indicating that WaFed wanted more changes to the loan documents. Barbara Otero, WaFed's loan manager, testified that the bank could not and would not fund the loan until these items were corrected.

Nothing in the record indicates if or when the errors in the Ebbelers' loan documents were corrected. Neither WaFed nor the Ebbelers ever deposited the balance of the purchase price with WFG.

Andrews arrived at WFG's offices at 2:17 p.m. and learned that WFG had prepared, and the Ebbelers had approved, the incorrect deed form. He

immediately notified his attorney of the error and she sent WFG a personal representative's deed for WFG to finalize. WFG asked its lawyer to approve the revised deed. Andrews signed all the closing documents, except the deed, by 2:48 p.m. He signed the correct deed form at 3:51 p.m. Because the King County Recorder's Office closes at 3:30 p.m., WFG would have been unable to record the deed that day.

When the Ebbelers realized the transaction would not close, they asked Andrews to extend the closing date. Andrews refused because the Ebbelers had failed to tender the purchase proceeds.

The next day, the Ebbelers filed a lis pendens against the property and brought suit against the Estate seeking specific performance and damages. They alleged the Estate breached the contract by failing to execute and deliver a deed in a timely manner and breached the duty of good faith and fair dealing by thwarting the Ebbelers' ability to fund the loan. They did not seek a rescission of the REPSA.

The Estate filed a counterclaim, alleging the Ebbelers had defaulted under the REPSA. It sought a forfeiture of the earnest money deposit and damages for the Ebbelers' wrongful filing of a lis pendens.

At trial, the Ebbelers abandoned their specific performance claim and released the lis pendens. In their opening statement, they indicated an intent to seek damages, but at trial, they presented no evidence that they had sustained any monetary damages. In closing, they asked the court to refund their $65,000 earnest money deposit plus interest. Once again, they did not ask the trial court to rescind the REPSA.

The trial court found the Estate did not breach the REPSA or violate any duty of good faith and fair dealing. The court found instead that the Ebbelers failed to perform by failing to pay the purchase price on or before the closing date. It deemed the Ebbelers' earnest money forfeited to the Estate and awarded it attorney fees of $264,372 based on a prevailing party clause in the REPSA. The Ebbelers appeal.

ANALYSIS

The Ebbelers argue that the trial court erred in not rescinding the REPSA and refunding their earnest money. The Ebbelers also contend the trial court erred in finding that the Estate tendered performance, that they did not do so, and that the Estate did not interfere with their ability to tender the money needed to purchase the home.

Because the Ebbelers did not seek rescission of the REPSA at trial, they did not preserve that claim for appeal. And because there is substantial evidence to support the trial court's findings, we reject the Ebbelers' appeal.

Standard of Review

We review a trial court's decision after a bench trial to determine whether any challenged findings of fact are supported by substantial evidence and whether those findings, in turn, support the conclusions of law. Sunnyside Valley Irrig. Dist. v. Dickie, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). We accept as true any unchallenged findings on appeal. Real Carriage Door Co. v. Rees, 17 Wn. App. 2d 449, 457, 486 P.3d 955 (2021). We view all reasonable inferences from the evidence in the light most favorable to the prevailing party. Korst v. McMahon, 136

Wn. App. 202, 206, 148 P.3d 1081 (2006). We do not review credibility determinations. Morse v. Antonellis, 149 Wn.2d 572, 574, 70 P.3d 125 (2003).

Rescission

The parties agree that under the REPSA, their obligations to perform were concurrent in nature. It is well-established that a buyer's duty to tender the purchase price and the seller's duty to tender the deed are concurrent duties. Wallace Real Estate Inv., Inc. v. Groves, 124 Wn.2d 881, 897, 881 P.2d 1010 (1994). The Ebbelers argue that under Willener v. Sweeting, 107 Wn.2d 388, 730 P.2d 45 (1986), when both parties fail to perform concurrent duties, the trial court should rescind the REPSA. Contract rescission is an equitable remedy in which a court may restore the parties to the positions they would have occupied had they not entered into the contract. Bloor v. Fritz, 143 Wn. App. 718, 739, 180 P.3d 805 (2008). We review a trial court's decision on rescission for abuse of discretion. Id.

In Willener, the buyer failed to tender the purchase price and the seller failed to deposit into escrow a lease amendment needed for the seller to convey marketable title to the buyer. 107 Wn.2d at 396. Because the buyer failed to tender the purchase price, the Supreme Court determined that the buyer could not recover damages from the seller. Id. But it also concluded that because the seller did not perform, it was not entitled to the liquidated damages specified in the agreement. Id.

The Supreme Court noted that "[a]lthough both parties withdrew from their agreement declaring the contracting documents to be null and void, the court in essence appeared to rescind the contract." Id. at 397. Given that neither party

performed their obligations under the agreement, the court found no abuse of discretion in the trial court's decision to rescind the agreement and refund the earnest money to the buyer. Id.

The Ebbelers rely on Willener to argue that the trial court here should have returned their earnest money to them. But the Ebbelers did not ask the trial court to rescind the REPSA based on both parties' mutual non-performance. The Ebbelers have consistently argued that they did not breach any obligation under the REPSA.

The REPSA contemplated what would occur in the event of a default by the buyer or seller. Paragraph 8 of the Agreement's "Specific Terms" selected "Forfeiture of Earnest Money" as the remedy for default by the buyer. Paragraph o of the Agreement's "General Terms" provided:

> Default. In the event Buyer fails, without legal excuse, to complete the purchase of the Property, then the following provision, as identified in Specific Term No. 8, shall apply:
>
> i. Forfeiture of Earnest Money. That portion of the Earnest Money that does not exceed five percent (5%) of the Purchase Price shall be forfeited to the Seller as the sole and exclusive remedy to Seller for such failure.

It further provided that "If this transaction fails to close for any reason other than default by Seller, the non-refundable deposit shall remain the property of the Seller." (emphasis added). Both the Ebbelers and the Estate sought to enforce the REPSA to take advantage of these provisions; neither party sought rescission.

Under RAP 2.5(a), we will not consider arguments raised for the first time on appeal. LK Operating LLC v. Collection Grp. LLC, 181 Wn.2d 117, 126, 330

P.3d 190 (2014). Because the Ebbelers did not pursue rescission of the REPSA, the trial court did not abuse its discretion in denying this relief to them.

Breach of Contract

The Ebbelers next contend the trial court erred in finding that they, and not the Estate, failed to tender performance under the REPSA. They argue that the Estate breached a duty to provide the correct form of deed and to record that deed on May 29, 2019. They also maintain the Estate breached the obligation to provide marketable title by failing to remove the HWMS Trust's lien and to provide a temporary sewer connection from the District's system to the house before closing.

We reject each argument. First, the parties agreed that the closing agent, not the Estate, would prepare any necessary deed. It was not the Estate that failed to provide the appropriate form of deed at closing. Second, the evidence supports the finding that the Estate was ready, willing and able to execute a personal representative's deed in time for conveyance documents to be recorded on May 29, 2019, and the delay in executing the personal representative's deed did not cause this transaction to fail. Third, the evidence does not support the Ebbelers' contention that the Estate did not take steps needed to discharge the HWMS Trust lien. Finally, the Estate had no contractual obligation to provide a temporary sewer connection to the home before closing.

1. Duty to Provide and Record Personal Representative's Deed

The Ebbelers contend that the Estate was required to provide, execute, and record the appropriate deed and the Estate failed to do so.

Whether a party had a contractual duty to take an action at a particular time is a question of law. Badgett v. Security State Bank, 116 Wn.2d 563, 568, 807 P.2d 356 (1991). Whether a party breached a contractual duty is a question of fact. Frank Coluccio Constr. Co. v. King County, 136 Wn. App. 751, 762, 150 P.3d 1147 (2007).

Here, the REPSA did not require the Estate to prepare the personal representative's deed. The REPSA stated that the "[d]eed to convey interest shall be substantially as herein." The Estate attached an exemplar personal representative's deed to the REPSA. In their respective "Closing Agreement and Escrow Instructions," both the Ebbelers and the Estate agreed to delegate to the closing agent the responsibility of preparing and recording all necessary conveyance documents. These closing agreements explicitly stated that "[t]he closing agent is instructed to select, prepare, complete, correct, receive, hold, record and deliver documents as necessary to close the transaction." It was thus WFG's responsibility, and not that of the Estate, to prepare the correct form of deed, to make it available to Andrews to execute, and to record it once it had sufficient proceeds from the Ebbelers to close. The Estate had no contractual duty to prepare or record the deed.

2. Seller's Tender of Performance

The Ebbelers next argue that the Estate breached the duty to execute the deed before the King County Recorder's Office closed at 3:30 pm on the day of closing.

The trial court found:

> Defendant tendered his performance by executing, before a notary, a Personal Representative's Deed[.] Any delay in executing the PR deed was not because Mr. Andrews was late to escrow on May 29, 2019, but rather because escrow and the Ebbelers had provided the incorrect deed, which needed to be fixed before he could sign.[3]

There is substantial evidence supporting these findings.

The Ebbelers do not challenge the finding that Andrews was delayed in signing the personal representative's deed until 3:51 p.m. because WFG mistakenly prepared the incorrect form of deed. Leggett testified she erred in choosing a statutory warranty deed and in including that form deed in the packet she sent to the Ebbelers to approve.

While the Ebbelers contend Andrews acted in a dilatory manner in reviewing the closing documents, the trial court did not find this accusation to be credible. On May 24, Andrews sent an email to Leggett requesting to review the closing documents prepared by WFG. This request was repeated by his attorney, Lisa Peterson, on May 29. Both requests went unanswered. One can infer from this evidence that had Leggett provided a draft of the deed to Andrews and Peterson when they asked her to do so, they would have discovered the error sooner. The trial court was free to decide that the failure to discover WFG's error before the afternoon of May 29 did not constitute a breach of contract by the Estate.

The evidence also supports the trial court's finding that the delay in executing the deed did not cause this transaction to fail. Andrews arrived at the WFG office ready to sign all documents at 2:17 p.m. on May 29. He signed the

[3] The trial court identified these findings as conclusions of law. Because performance is a question of fact, we review these conclusions of law as findings of fact. See Willener, 107 Wn.2d at 394 (reviewing trial court's conclusion of law that parties did not perform as a finding of fact).

closing documents, save the deed, by 2:48 p.m. Leggett testified that the deadline for recording documents with the King County Recorder's Office is 3:30 p.m. The recording process, however, is done electronically. According to WFG's junior closer, Autumn Bray, it takes 5 to 10 minutes to process and record signed conveyance documents. Had WFG prepared the correct form of deed for the Ebbelers to approve and for Andrews to sign, he would have executed it no later than 3 p.m., and WFG would have had ample time to record the deed before the 3:30 p.m. recording cutoff.

Substantial evidence also supports the trial court's finding that it was the Ebbelers' failure to tender the full purchase price that caused this transaction to fail. The parties agree that the REPSA required concurrent performance by both the buyer and the seller. If a contract requires concurrent performance, the party claiming nonperformance of the other must establish, as a matter of fact, the party's own performance. Wallace Real Estate, 124 Wn.2d at 897. This the Ebbelers failed to do.

The Agreement required the Ebbelers to pay the purchase price "in cash at Closing." "Closing" was identified as "on or before" May 29, 2019. In finding of fact 90, the trial court found that "[t]he Ebbelers did not deposit the balance of the purchase price with WFG on or before May 29, 2019." The Ebbelers do not challenge this finding of fact on appeal.

In conclusion of law 98,[4] the court stated:

> The Ebbelers failed to show that they could or would have funded the transaction. The Ebbelers failed to provide sufficient evidence that they complied with or could have complied with their obligations.

[4] Due to a typographical error, the paragraph was numbered 98 rather than 8.

> The simple fact is that they waived their financing contingencies and the money was not there on the day of closing. The Ebbelers' failure to perform caused the closing to fail.

Although the Ebbelers assign error to this conclusion, their failure to assign error to finding of fact 90 precludes them from challenging on appeal that they complied with their obligation to pay the purchase price at closing.

The Estate's real estate expert, Scott Osborne, testified that the Estate tendered performance when required to do so, but the Ebbelers' failure to deposit the purchase funds on the day of closing precluded the closing agent from recording any deed that day. Both Osborne and the Ebbelers' escrow expert, Jordan Hecker, agreed that an escrow agent will not record a deed before the purchase money has been deposited with them.

The experts' testimony is consistent with the REPSA and the closing instructions. Under the REPSA, "'[c]losing' means the date on which all documents are recorded and the sale proceeds are available to Seller." (emphasis added). The Closing Agreement stated:

> The closing agent is instructed to perform its customary closing duties under these instructions, to deliver and record documents according to these instructions, and to disburse the funds according to the settlement statement . . . when the closing agent has the documents required to close the transaction in its possession and has . . :
>
> 1. Sale proceeds for the seller's account to be disbursed according to the settlement statement.
> 2. Loan proceeds for the buyer's account in the amount of $1,610,000.00 to be disbursed according to the settlement statement.

The Ebbelers do not dispute that WFG lacked sufficient sale proceeds to close this transaction. Because WFG had no sale proceeds to disburse to the Estate, it

follows that WFG would have had no authority to record any deed had Andrews signed it prior to 3:30 p.m. Substantial evidence supports the trial court's findings that the Ebbelers, and not Andrews, caused this transaction to fail.

3. HWMS Trust's Lien

The Ebbelers next contend the Estate breached the REPSA by failing to resolve the HWMS Trust's lien on the property. The evidence does not support this argument.

The REPSA required the Estate to transfer "marketable title" to the Ebbelers at closing. Paragraph "d" of the General Terms provided:

> Unless otherwise specified in this Agreement, title to the Property shall be marketable at Closing. . . . Monetary encumbrances or liens not assumed by Buyer, shall be paid or discharged by Seller on or before Closing.

At the time of the REPSA, the sole mortgage on the property was held by the HWMS Trust, a trust created by Sidney Andrews' grandmother. This trust loaned funds to Alison to cover her living expenses and secured the loan with a deed of trust on the property. On Alison's death, the Trust's advances exceeded $4 million.

WFG asked the Estate to provide a payoff amount from the HWMS Trust to ensure that its lien was released at closing. Initially, Andrews identified the payoff amount as the $4 million balance on the loan. Because this total exceeded the purchase price, WFG's Dani Leggett informed Andrews that the Estate would need to bring cash to closing to pay off the HMWS debt. Andrews testified that, because it "seemed ridiculous" to take money out of "[one] pocket" to pay off a loan the proceeds of which would simply be returned to the "[other] pocket" at closing, he and his siblings, the co-trustees, agreed to reduce the HMWS loan payoff to equal

the net of the seller's proceeds from the sale. At WFG's request, Andrews provided the original promissory note and deed of trust and a revised loan payoff amount to ensure that the Trust's lien would be released at closing.

WFG's settlement statement identified this payoff to the Trust. It also included a $250 "reconveyance fee." Had the Ebbelers tendered the purchase funds, as they were required by the REPSA to do, WFG would have been in the position to disburse $1,995,491.39 to the HMWA Trust to pay off the loan and file the documentation needed to release its lien on the property. There is no evidence to suggest that had the Ebbelers tendered the purchase price, and the loan to the Trust was paid off, that its lien would have continued to encumber the property.

4. Temporary Sewer Connection

Finally, the Ebbelers contend the Estate breached the REPSA by failing to install a temporary sewer connection before closing. We reject this contention, however, because the Estate had no obligation to establish this connection once the District agreed to approve the sale without this connection in place.

The REPSA indicated the property was not connected to a public sewer main. Andrews testified that before the parties finalized the REPSA, he made it clear that the Estate was selling the home without a sewer connection in place. Under the REPSA, the Ebbelers had 25 days to inspect the property, including the sewer system, and to terminate the REPSA if they were not satisfied with the property's condition. They had the ability to ask the Estate to make repairs, but the parties had to negotiate any such request, with the Estate retaining the right to reject any repairs the Ebbelers requested. The Estate had no obligation to agree

to make any repairs to the sewer system and, if the Ebbelers were dissatisfied with the Estate's refusal, they had time to terminate the REPSA within the inspection period.

Although the Ebbelers attempted to negotiate changes to the REPSA to reflect the lack of a sewer connection, the parties did not reach agreement on any repairs. We conclude the Estate had no contractual duty to provide a temporary sewer connection before closing.

The Ebbelers alternatively contend that the Estate failed to satisfy a lien that the District had placed against the property for its noncompliant sewer system. The evidence does not support this contention. Paul Konrady, the District's General Manager, testified at trial that the holdback was intended to cover the cost of the District providing any temporary sanitary sewer connection. He further testified that the District was willing to consent to the sale when the Estate agreed to this holdback amount. At closing, Andrews executed a "Seller's Sewer Declaration" in which he confirmed that the Highlands had the right to request the holdback of funds from the sale to cover the expense of sewer repairs.

The trial court entered an unchallenged finding of fact that the Ebbelers and the District both agreed that the sale could go through with the $150,000 holdback. There is no evidence that the District required that the Estate install a temporary sewer connection before closing and no evidence that the District had any lien against the property.

Because there is substantial evidence supporting the trial court's findings that the Ebbelers breached the REPSA by failing to tender the sale proceeds on

or before May 29, and that the Estate tendered full performance when required to do so, we affirm the dismissal of the Ebbelers' breach of contract claim.

Duty of Good Faith and Fair Dealing

The Ebbelers alternatively argue that the Estate breached a duty of good faith and fair dealing by refusing to provide a copy of the signed deed to WaFed before WaFed wired funds to escrow and by failing to arrive at WFG's offices until after WaFed's 2 p.m. wire cutoff. They contend that these actions thwarted their ability to pay the purchase price at closing and violated an implied duty of good faith and fair dealing.

There is an implied duty of good faith and fair dealing in every contract. Badgett v. Sec. State Bank, 116 Wn.2d 563, 569, 807 P.2d 356 (1991). This duty obligates the parties to cooperate with each other so that each may obtain the full benefit of performance. Id. The duty of good faith, however, does not extend to obligate a party to accept a material change in the terms of its contract. Id. Nor does it inject any substantive terms into the parties' contract. Id. Rather, it requires only that the parties perform in good faith the obligations imposed by their agreement. Id. Thus, the duty arises only in connection with terms agreed to by the parties. Id. A party does not breach the duty of good faith when it "simply stands on its rights to require performance of a contract according to its terms." Id. at 570.

1. Estate's Refusal to Provide Executed Deed to Buyer's Lender

The Ebbelers first maintain that the Estate breached a duty of good faith and fair dealing by refusing to allow WFG to transmit a copy of the executed and

notarized deed to WaFed. We reject this argument because there was no provision in the REPSA requiring the Estate to provide a copy of the executed deed to the Ebbelers' lender as a precondition to the Ebbelers tendering the purchase price.

In their reply brief, the Ebbelers argue that Regulation Z of the Truth in Lending Act[5] "unambiguously required the Estate to fully disclose to WaFd its REPSA settlement statement where, as here, the settlement statement of the buyer and seller differ." We can find no such requirement in any of the federal regulations cited by the Ebbelers.[6] Because the Estate had no contractual obligation to provide WaFed with a copy of its executed deed, it did not breach any duty of good faith and fair dealing to refuse to do so.

More importantly, the trial court found that the Ebbelers failed to establish—as a factual matter—that WaFed refused to wire funds into escrow because the Estate would not allow it to review its executed deed. It found that both the Closing Agreement and the WaFed loan documents were silent on any precondition that required receiving a signed, notarized copy of an acknowledged deed before the bank would fund the loan. Although the Ebbelers assign error to this finding, we can find nothing in these documents that references any such requirement.

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[5] Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*; Regulation Z, 12 C.F.R. § 1026.

[6] The Ebbelers cited to 12 C.F.R. §1026.19(f)(i), 12 C.F.R. §1026.19(f)(iv), and 12 C.F.R. §1026.38. The first two code provisions do not exist. If the Ebbelers intended to refer to 12 C.F.R. §1026.19(f)(1)(i), that provision requires a lender to provide its borrower with certain disclosures reflecting the actual terms of the loan. 12 C.F.R. §1026.19(f)(1)(iv) relates to the borrower's waiver of a waiting period in the event of a financial emergency. Neither provision imposes a duty on a seller to disclose anything to a buyer's lender in a real estate transaction. Finally, the Ebbelers cite to 12 C.F.R. §1026.38, but this provision, like §1026.19, relates only to lender disclosures to borrowers. It does not require a seller to provide a buyer's lender with a copy of an executed deed as a precondition to the lender being allowed to wire loan funds into an escrow account.

There was some evidence to support the Ebbelers' contention that WaFed would not authorize the transaction to close without having the opportunity to review the executed deed. Leggett testified that "[m]ost lenders require a copy of the . . . signed deed by the seller." Autumn Bray, another WFG agent, testified that lenders require a copy of seller documents before "fund[ing] the file," and indicated that lenders often deposit funds in escrow until they have a chance to see the signed documents, including the deed. When asked if WaFed would "fund a loan" without seeing a copy of the signed deed from the seller, WaFed loan manager Barbara Otero testified "To my knowledge, I don't think so. But I could be wrong." Otero stated that the decision whether to fund a loan is made by WaFed's closing department and she did not have a part in that process.

But there is a difference between wiring funds into escrow and authorizing the disbursement of loan proceeds. The Ebbelers' evidence arguably establishes that WaFed would not authorize WFG to pay loan proceeds to the Estate without first seeing its executed deed; it does not prove that WaFed would not wire funds into escrow until it had done so. Both Leggett and Bray testified that lenders often pre-wire the funds to escrow with instructions not to release them until the signed deed is approved.

No member of the WaFed closing department testified that WaFed refused to wire loan funds into escrow until it received and reviewed a copy of an executed seller's deed. Nor is there any evidence in any direct communication from WaFed to WFG, to the Ebbelers, or to Andrews, stating that it needed to see the seller's signed deed before it could wire the funds into escrow.

Even more compelling was the fact that no one from WaFed testified that Andrews caused the bank to withhold funds on May 29. The trial court found that "WaFed would not fund a loan for over two million dollars without accurate Loan Documents." The evidence at trial established that the Ebbelers did not complete the loan documents to WaFed's satisfaction. Otero identified a list of corrections that the bank needed the Ebbelers to make to the closing documents before WaFed would wire the loan funds. Otero testified that the loan closing package errors needed to be corrected and WaFed would not fund the loan until they had confirmed that the loan package was complete and the items corrected. The Ebbelers failed to present any evidence that they corrected these errors and WaFed approved the final closing documents that day.

The Estate had no contractual duty to transmit its executed deed to the Ebbelers' lender as a condition of funding the sale. And the evidence supports the trial court's finding that WaFed did not fund the Ebbelers' loan because their loan paperwork was incomplete, and not because of anything Andrews did or did not do. The trial court did not err in concluding that the Estate did not breach a duty of good faith and fair dealing.

2. Duty to Execute Conveyance Documents Before 2 p.m. on Closing Day

The Ebbelers next argue that the Estate breached an implied duty to execute the seller's closing documents before 2 p.m., the deadline for any wire transfers. They maintain that this wire cutoff time constitutes a "usage of trade" term that supplemented or qualified Andrews' performance obligations under the REPSA:

> WaFd could not wire the loan proceeds because bank wire transfers ran through the Federal Reserve in New York and it closed after 2:00 p.m. Seattle time.
>
> Such usages of trade as the Federal Reserve's wire transfer cut off become part of a contract's proper interpretation, even if the contract term was not ambiguous on its face.

By waiting to execute documents until after 2 p.m., the Ebbelers contend, Andrews effectively prevented WaFed from wiring the loan proceeds into escrow on the day of closing.

We reject this argument for two reasons. First, the existence of any usage of trade is a question of fact and the Ebbelers failed to prove any such usage of trade existed or that Andrews was aware of any such implied term. Second, the purported implied term conflicts with the explicit language of the REPSA.

Washington courts have recognized that trade usage may be relevant to interpreting a contract and determining a contract's terms. Puget Sound Fin., L.L.C. v. Unisearch, Inc., 146 Wn.2d 428, 434-35, 47 P.3d 940 (2002); Bremerton Concrete Prods. Co. v. Miller, 49 Wn. App. 806, 809-10, 745 P.2d 1338 (1987). The Restatement (Second) of Contracts (Am. Law Inst. 1979) § 222 defines "usage of trade":

> A usage of trade is a usage having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to a particular agreement. . . .
>
> . . . .
>
> Unless otherwise agreed, a usage of trade in the vocation or trade in which the parties are engaged or a usage of trade of which they know or have reason to know gives meaning to or supplements or qualifies their agreement.

But Section 222 also provides that "[t]he existence and scope of a usage of trade are to be determined as questions of fact." And under the Restatement (Second) of Contracts § 221 (Am. Law Inst. 1979):

> An agreement is supplemented or qualified by a reasonable usage with respect to agreements of the same type if each party knows or has reason to know of the usage and neither party knows or has reason to know that the other party has an intention inconsistent with the usage (emphasis added).

To prevail under these provisions of the Restatement, the Ebbelers had to prove (1) the existence of a trade usage requiring a seller to sign all of the seller's documents no later than 2 p.m. on the day of closing to facilitate a wire transfer from the buyer's lender, (2) that this requirement is regularly observed by lenders, sellers, buyers and closing agents in residential real estate transactions in Washington; (3) that both the Ebbelers and Andrews knew of or had reason to know of this usage of trade; and (4) neither the Ebbelers nor Andrews knew or had reason to know that the other party had an intention inconsistent with this usage.

The Ebbelers simply failed to meet this burden of proof. The Ebbelers' expert, Jordan Heckler, testified that "if a party is using a lender to do a transaction," then the cutoff for a wire transfer of money is 2 p.m. and that this wire cutoff time was "widely known" in his industry. But this evidence related to the lender's ability to transmit funds to escrow on any particular day. It did not relate to whether the seller has a contractual obligation to sign closing documents before 2 p.m. on the day of closing. The court explicitly asked Heckler why, if this deadline was so well-established, parties did not make it a part of their agreements:

> Court: . . . [W]hy aren't those timeframes memorialized or put in standard closing instructions if they're so well known and

> immutable? And why instead [do] PSAs and closing instructions have 9 p.m. as sort of the end of day for -- in terms of considering when a day ends for purposes of contracts?
>
> [Heckler]: . . . With respect to escrow, escrow, again, is not really in a position to [write] the part[ies'] agreement. All they can do is request cooperation. . . . [B]ecause I've been involved in these types of things so I get to write my own instructions, we put in there, please understand despite your closing date is X and people consider close of business 5 p.m., that you will need to come in well before that to ensure the time needed for your closing. We don't set an absolute cutoff, we don't identify why it's got to happen, but we definitely give people a head's up that it's got to happen (emphasis added).

Heckler conceded that the legal community had not modified the NWMLS form contract to incorporate a 2 p.m. signing deadline.

Moreover, the trial court found the evidence of any particular wire cutoff time was less than clear. It referenced emails from Leggett in which she asked Mazzarro to confirm WaFed's cutoff time and told Andrews at one point that she needed him to sign the closing documents no later than 3 p.m. Otero from WaFed indicated on May 30 that the deadline was actually 1 p.m. Given this evidence, the trial court concluded that the Ebbelers simply failed to prove the existence of any specific trade usage.

Moreover, usage of trade does not displace explicit terms in any contract. Section 203 of the Restatement (Second) of Contracts (Am. Law Inst. 1979) provides that in interpreting agreements, "express terms are given greater weight" than usage of trade. Here, the trial court found that the REPSA contained an express term addressing the time for performance on the day of closing:

> 13. In addition, the parties' Northwest Multiple Listing Service ("NWMLS") form contract also contains a provision that when

performance is due on a certain date, it must be performed no later than 9:00 p.m. the final day:

> Computation of Time: Unless otherwise specified in this Agreement, any period of time measured in days and stated in this Agreement shall start on the day following the event commencing the period and shall expire at 9:00 p.m. of the last calendar day of the specified period of time. . . . If the parties agree that an event will occur on a specific calendar date, the event shall occur on that date, except for the Closing Date, which, if it falls on a Saturday, Sunday, legal holiday . . . , or day when the county recording office is closed, shall occur on the next day that is not a Saturday, Sunday, legal holiday, or day when the county recording office is closed.

Under this paragraph, the provision that Closing shall occur "on or before May 29, 2019" means that the time for performance ends at 9:00 p.m. on the Closing Date.

The Ebbelers challenge this finding, arguing that the 9 p.m. performance deadline applies only to deadlines measured in multiple days, and does not apply to the time of performance on the day of closing.

But when more than one interpretation of a contract term is reasonable, which meaning reflects the parties' intent is a question of fact. Healy v. Seattle Rugby, LLC, 15 Wn. App. 2d 539, 545, 476 P.3d 583 (2020). Andrews testified he understood the REPSA required that closing occur by 9 p.m. on May 29. He further testified that, in his experience, he had never been asked to sign closing documents earlier than at the end of the escrow office's business day. Andrews' real estate expert, Scott Osborne, testified that it is not unusual for parties to a real estate transaction to come into the escrow agent's office to sign documents in the afternoon on the day of closing. Based on this evidence, the trial court had a factual basis for adopting Andrews' interpretation of the REPSA and for rejecting

the Ebbelers' argument that usage of trade is needed to fill in a missing deadline in the parties' agreement.

The trial court's findings that Andrews did not thwart the Ebbelers' performance and did not violate his duty of good faith and fair dealing are supported by the evidence at trial. The trial court did not err in dismissing the Ebbelers' claim.

Attorney Fee Award

Because we affirm the judgment for the Estate, we also conclude that the trial court did not err in awarding attorney fees to the Estate. The REPSA provided that "if Buyer or Seller institutes suit against the other concerning this Agreement the prevailing party is entitled to reasonable attorneys' fees and expenses." The Estate prevailed against the Ebbelers at trial and was entitled to an award of fees.

The Ebbelers argue that the $264,372 fee award was unreasonable and the trial court abused its discretion in calculating this fee. We disagree and conclude there are reasonable bases in the record for the award.

This court reviews the reasonableness of the attorney fee award for abuse of discretion. Bangerter v. Hat Island Cmty. Ass'n, 14 Wn. App. 2d 718, 744, 472 P.3d 998 (2020), review granted, 196 Wn.2d 1037 (2021). Washington courts utilize the lodestar method for calculating a reasonable attorney fee under a contractual fee-shifting provision. Cuong Van Pham v. City of Seattle, 159 Wn.2d 527, 538 151 P.3d 976 (2007). To calculate a lodestar amount, a court multiplies the number of hours reasonably expended by the reasonable hourly rate. Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 581, 597, 675 P.2d 193 (1983). The

hours reasonably expended must be spent on claims having a "common core of facts and related legal theories." Martinez v. City of Tacoma, 81 Wn. App. 228, 242-43, 914 P.2d 86 (1996). The court should discount hours spent on unsuccessful claims, duplicated or wasted effort, or otherwise unproductive time. Bowers, 100 Wn. 2d at 597. A court abuses its discretion in awarding fees for certain work only if the decision is manifestly unreasonable or based on untenable grounds. Southwest Suburban Sewer Dist. v. Fish, 17 Wn. App. 2d 833, 838, 488 P.3d 839 (2021).

1. Unsuccessful Motions

The Ebbelers first challenge the trial court's inclusion of $80,000 in fees for time the Estate's attorneys spent on unsuccessful motions, including a motion to cancel the Ebbelers' lis pendens, a motion to exclude witnesses, motions in limine, and a motion for summary judgment.

The trial court did not abuse its discretion here. First, the Estate explicitly excluded from its fee request all time relating to the motion to cancel the lis pendens, and the trial court excluded these fees from the final award.

Second, as to the motion to exclude witnesses, the Estate argued below that the motion was a necessary alternative to its motion for a trial continuance. According to the Estate, the Ebbelers agreed to continue the trial date only because the Estate filed these motions. The record indicates a reasonable basis for the trial court to conclude that the legal work performed on the motion to exclude witnesses was necessary for the Estate to prevail on its request for a trial continuance.

Third, the Estate included the fees associated with its summary judgment motion because the motion "at a minimum narrowed the issues and nearly resolved the case." The trial court's order on summary judgment did narrow the issues for trial by identifying several undisputed facts,[7] including the fact that "buyer did not post sufficient funds for the purchase of the Cherry Loop Lane residence." In this sense, the trial court could have concluded that the Estate's summary judgment motion was not actually unsuccessful. There was a tenable basis for including these fees in the award to the Estate.

Fourth, as to the Estate's motions in limine, it moved to exclude testimony of the Ebbelers' expert, Jordan Hecker, evidence of any alleged WaFed instructions requiring Andrews to provide a signed deed before disbursing funds, evidence from a "crashed" computer that the Ebbelers produced in an untimely manner, and any evidence to dispute what were undisputed factual findings made at the summary judgment stage.

The court denied the motion to exclude testimony from Hecker and refused to limit the Ebbelers' ability to present evidence that might contradict the court's summary judgment findings. It reserved ruling on the motion to exclude evidence of the lender's instructions about the deed, but the Ebbelers did not subsequently offer this evidence. As to the Ebbelers' computer production, the court found that the parties had "essentially reached agreement on the destroyed documents issue"

[7] The Ebbelers contend that these findings of fact were superfluous and should be ignored by this court on appeal, citing Hamilton v. Huggins, 70 Wn. App. 842, 848, 855 P.2d 1216 (1993). But CR 56(d) explicitly permits a trial court to "ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted." Unlike the trial court in Hamilton, the trial court complied with this rule.

with the Ebbelers agreeing not to elicit testimony about documents not in the record.

Based on this record, the Estate prevailed in part on some of its evidentiary motions. The Estate argued that "while certain motions in limine were unsuccessful, others were pending before the Court throughout the duration of trial." It insisted that the fees incurred in preparing these evidentiary motions were necessarily incurred in defending against the Ebbelers' claims. The trial court appears to have agreed with the Estate as it explicitly found that the work performed for "[p]repar[ing] a motion in limine on trial witnesses and evidentiary issues" was reasonable. The Ebbelers cite no authority for the proposition that a court abuses its discretion in awarding attorney fees for work performed on a partially successful motion in limine when the court ultimately concludes that the evidentiary arguments proved helpful to it at trial.

2. Hourly Rates

The Ebbelers also challenge the reasonableness of the hourly rate charged by the Estate's attorneys and paralegals. They specifically contend that the hourly rates charged by the Estate's law firm were excessive when compared to average rates in the King County area.

Our Supreme Court has stated that a legal professional's established rate for billing clients is likely a reasonable rate for lodestar purposes. Bowers, 100 Wn.2d at 597. But the court may evaluate the fees customarily charged in the locality for similar legal services in determining the proper rate. Mahler v. Szucs, 135 Wn.2d 398, 433 n.20, 957 P.2d 632 (1998). A trial court may also consider

"the level of skill required by the litigation, time limitations imposed on the litigation, the amount of the potential recovery, the attorney's reputation, and the undesirability of the case." Bowers, 100 Wn.2d at 597. If the court finds the hourly rate is "too high" or excessive, the court may reduce the hourly charge. Boeing Co. v. Sierracin Corp., 108 Wn.2d 38, 65, 738 P.2d 665 (1987).

The trial court found that the awarded rates were "objectively reasonable in light of the experience of counsel representing Defendant in this locale." This finding is supported by evidence in the record. Brian Fanning, the Director of Practice Economics at Davis Wright Tremaine, testified that the billing rates for the law firm are set based on annual survey data compiled by national accounting firms. The rates that this firm charged the Estate were generally at the midpoint range of rates of 21 other large law firms with offices in Seattle and are reflective of rates that are localized to the Puget Sound area legal market. Attorney Rhys Farren, who tried this case with an associate, Rebecca Shelton, testified that his hourly rate had been approved by several local courts in the Seattle area. The trial court thus had a tenable basis for concluding that the hourly rates charged for this case were not excessive.

Moreover, the record demonstrates the trial court played an active role in assessing the reasonableness of the overall fee award. Acknowledging the relative lack of litigation experience of associate Shelton, the court reduced her total charges by half. The court similarly reduced the fees awarded for work performed by paralegals, recognizing that some of that work was administrative in nature. The trial court did not abuse its discretion in its fee award to the Estate.

We award attorney fees to the Estate on appeal under RAP 18.1 contingent upon the Estate's compliance with RAP 18.1(d).

Affirmed.

Andrus, A.C.J.

WE CONCUR:

DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of the ***Petition for Review*** in Court of Appeals, Division I Cause No. 82225-0-I to the following:

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

DATED: March 30, 2022, at Seattle, Washington.

/s/ Will Cummins
Will Cummins, Legal Assistant
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TALMADGE/FITZPATRICK

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