

No. 64353-3-1

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

TERCEL CORPORATION,
a Washington corporation,

Respondent,

v.

DONALD A. RASMUSSEN and KAREN RASMUSSEN,
husband and wife,

Appellants.

2010 APR 20 11:28

APPELLANTS' BRIEF

ON APPEAL FROM THE SUPERIOR COURT
FOR WHATCOM COUNTY
THE HONORABLE IRA UHRIG

CORRECTED BRIEF OF RESPONDENT TERCEL

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INTRODUCTION

Tercel entered into a contract with Don Rasmussen to purchase 15 lots in a subdivision which had received preliminary plat approval. Rasmussen tried to back out of the deal, and Tercel sued for specific performance and damages. Rasmussen pled the statute of frauds and attempted to bolster that defense by changing the name of the plat and re-numbering the lots. The trial court ordered specific performance, but Rasmussen ignored the order and delayed closing for one year. In the meantime, the market for residential property plummeted, and Tercel lost hundreds of thousands of dollars.

Rasmussen appealed the summary judgment ordering specific performance, and this Court reversed since the configuration of the lots changed in the course of the platting process. The case was remanded for trial of Tercel's damage claim. On remand, the trial court denied Rasmussen's motion to dismiss the damage claim on the basis that, while the contract could not be specifically performed, it would support an award of damages. Rasmussen then sought discretionary review, which this Court denied.

Following a bench trial, the trial court found that Rasmussen had acted in bad faith by intentionally delaying the closing and awarded Tercel \$265,000 in damages. The trial court also found that Tercel had lost over

\$245,000 on the sale of the lots and therefore denied Rasmussen's claim for restitution.

Rasmussen now returns to this Court for the third time.

ISSUES

1. Did this Court remand for trial of Tercel's damage claim?
2. Can Tercel maintain a damage action where the legal description of the lots being sold was inadequate to support specific performance?
3. Is Tercel's damage claim barred by the election of remedies doctrine?
4. Did the trial court err in denying Rasmussen restitution under RAP 12.8 where Tercel lost over \$245,000 on the sale of the lots?
5. Did the trial court err in awarding Tercel attorney's fees and expenses?
6. Is Tercel entitled to attorney's fees and expenses on appeal?

STATEMENT OF THE CASE

Preliminary Plat Approval. Don and Karen Rasmussen ("Rasmussen") developed a 21-lot plat called "Karen's Subdivision" located off Bakerview Road in Bellingham.¹ Karen's Subdivision received preliminary plat approval from the City of Bellingham on August 23, 2004.²

Contact by Rasmussen. Rasmussen mailed out a letter on Decem-

¹ RP 320-322.

² Ex 4; Finding of Fact No. 3 (CP 28).

ber 3, 2004, soliciting offers on lots in Karen's Subdivision:

We have received preliminary plat approval from the City of Bellingham, and are finalizing our engineering drawings with Public Works. We anticipate drawing approval within the next few weeks, and commence construction as weather permits. Our current objective is to install utilities in January; sidewalks, curb and gutter in February; and complete storm detention facility in March; all of which are weather dependent. We hope to have Final Plat approval by the end of April 2005...³

Onsite Meeting with Rasmussen & Offer. Tercel Corporation's president, Jason Ragsdale, responded immediately and met with Rasmussen on site. They walked the property, and Ragsdale picked out the lots he wanted to purchase. Tercel then wrote Rasmussen on December 8, 2004, and offered to purchase 15 lots. The 12/8/04 letter also offered to furnish Rasmussen whatever information he wanted from Tercel's lender, Horizon Bank, in order to assure Rasmussen that Tercel would close on time.⁴

Financing Obtained. Tercel obtained financing from Horizon Bank to purchase the 15 lots in early January 2005.⁵

Construction Permit Application. On January 5, 2005, Rasmussen signed a construction permit application with the City of Bellingham to build out the infrastructure for Karen's Subdivision. The permit required Rasmussen to start work within ten days of issuance of the permit and

³ Ex 6; Finding of Fact No. 4 (CP 28).

⁴ RP 71; Ex 7; Finding of Fact No. 5 (CP 28).

⁵ RP 72-73; Ex 9; Finding of Fact No. 6 (CP 28).

complete the project within 150 days after commencement.⁶

Drawing Approval Obtained. The plans and specifications for Karen's Subdivision were approved by the City of Bellingham Department of Public Works on January 10, 2005.⁷

Time of the Essence. Tercel was building and selling homes in a development known as "Fruitland" four blocks away from Karen's Subdivision, which was due to finish up in May or June.⁸ Ragsdale discussed this with Rasmussen, and Rasmussen visited Fruitland shortly thereafter.⁹ Ragsdale explained to Rasmussen the importance of Tercel's being able to start work on Karen's Subdivision as soon as Fruitland was completed.¹⁰

Agreement. The parties signed a Purchase and Sale Agreement ("P&SA") between January 7, 2005 and January 13, 2005.¹¹ Tercel paid \$30,000 in earnest money on January 7, 2005 to the closing agent.¹²

The P&SA gave as the legal description of the Property, "Lots 3,4,5,6,7, 8,9,10,11,12,14,15,16,17,18 of Karen's Subdivision."¹³ The contract was conditioned on the recording of a "final plat containing the

⁶ RP 378-379.

⁷ RP 73-75, 82, 204; Exs 5 & 10; Finding of Fact No. 9 (CP 29).

⁸ RP 65-66, 69.

⁹ RP 68-69.

¹⁰ RP 69-71; Finding of Fact No. 7 (CP 28-29).

¹¹ The parties signed and faxed copies back and forth between these dates. RP 69-70, 377; Ex 8.

¹² RP 72-73; Ex 8; Finding of Fact No. 8 (CP 29).

¹³ Ex 8, first page, paragraph 4.

Property.”¹⁴ The P&SA also provided that time was of the essence¹⁵ and called for closing to occur within fourteen days of final plat approval.¹⁶

Work on Project. Tercel’s plan was to build on all 15 lots in 2005. Tercel’s project designer, Clark Goff, spent from January to mid-June 2005 preparing for the development of the lots. Goff designed homes for each of the 15 lots which met the requirements of the preliminary plat approval. These were fully engineered plans and specifications ready for permitting.¹⁷ Tercel obtained appraisals on each of the 15 lots with the proposed homes designed by Goff so that buyers could readily obtain financing.¹⁸

During this same period, Tercel assisted Rasmussen in completing the work necessary for final plat approval. For example, Tercel worked with Rasmussen on the placement of driveway curb cuts (required by City Public Works) and on obtaining estimates for installation of fencing and landscaping (to fulfill conditions imposed in the preliminary plat approval).¹⁹

Double Dealing. Around mid-July 2005, Ragsdale learned that

¹⁴ Ex 8, fourth page, paragraph w.

¹⁵ Ex 8, third page, paragraph l.

¹⁶ Ex 8, first page, paragraph 10.

¹⁷ RP 78-80; Finding of Fact No. 7 (first sentence)(CP 28-29); Finding of Fact No. 12 (CP 30).

¹⁸ Finding of Fact No. 12 (CP 30).

¹⁹ RP 77, 80-81; Ex 11; Finding of Fact No. 12 (CP 30).

Rasmussen was attempting to sell Tercel's 15 lots to other parties. Tercel immediately filed suit.²⁰

Lawsuit. Tercel sued for specific performance and later amended its complaint to include a claim for damages.²¹ Relying upon the statute of frauds, Rasmussen answered by alleging that the "listed lots do not legally exist, and have never existed."²²

Altered Legal Descriptions. To bolster his statute of frauds defense, Rasmussen attempted to muddy the waters regarding the legal description of the 15 lots. In his declaration filed in opposition to Tercel's motion for summary judgment and in support of his cross-motion for summary judgment, Rasmussen threatened to reconfigure the plat:

I do not have it fixed in mind that the present configuration of the proposed subdivision is the basis on which I intend to seek final plat approval.²³

After Tercel won summary judgment, Rasmussen made good on his threat. He started by changing the name of the subdivision from "Karen's Subdivision" to "Karen's Bakerview Subdivision."²⁴ According to Kathy Bell, the planner with the City of Bellingham handling the plat,²⁵ Rasmussen's purpose in making the name change was to avoid being

²⁰ RP 82-84; Ex 12; Finding of Fact No. 13 (CP 30).

²¹ CP 313-315; Finding of Fact No. 13 (CP 30).

²² CP 327, paragraphs 10 & 13.

²³ Ex 43 (paragraph 19); RP 389-90.

²⁴ RP 53 & 55-56.

²⁵ RP 50-51.

bound by the P&SA:

Q: Did you ask Mr. Rasmussen why he wanted to do that [change the name of the subdivision]?

A: I did.

Q: And what did he tell you?

A: He wanted to change the name of the subdivision in hopes that, um, it would somehow have an implication in a Purchase and Sale Agreement that he had entered into with the property owner.²⁶

...

Q: Did he have any discussion with you about whether or not the name change had anything to do with the Purchase and Sale Agreement?

A: Yes. As I said... the purpose of the name change was to affect the validity of the Purchase and Sale Agreement.

Q: Okay. So that he would not be subject to it?

...

A: That was his intent, yes.²⁷

In addition to changing the name of the subdivision, Rasmussen attempted to re-number the lots so that lot 5 would be lot 1, lot 6 would be lot 2, and so forth.²⁸ Rasmussen testified that his purpose in changing the name of the plat and in trying to re-number the lots was not “entirely” to

²⁶ RP 55.

²⁷ RP 56-57, edited for emphasis, objection omitted.

²⁸ The lots to be sold Tercel under the P&SA were numbered in accordance with the January 2005 engineered drawings. RP 73-78; Exs 8, 10 & 11; Finding of Fact No. 10 (CP 29). The numbering on the 2005 engineered drawings (fourth page of Ex 5) was changed from the numbering on the 2004 preliminary plat sketch (fourth page of Ex 4) so the lot numbers would be in a more logical sequence. RP 328. In November 2005 – the month following entry of summary judgment against him – Rasmussen tried unsuccessfully to change the lot numbers back to the way they were on the preliminary plat sketch. Ex 42; RP 386-87.

muddy the waters,²⁹ but the trial court found that Rasmussen was intentionally obfuscating the description of the property.³⁰

Delay by Rasmussen. The trial court ordered specific performance on October 14, 2005.³¹ However, Rasmussen did not comply with this order and instead stalled. Karen's Subdivision was built out and ready for a final walk-through in the summer of 2005. Rasmussen found excuses to delay getting final plat approval from the City of Bellingham for almost ten months.³² Small items that could have been completed in the summer of 2005 were not completed until the spring of 2006.³³ Had Rasmussen acted in good faith and abided by the trial court's order, the sale would have closed no later than early fall 2005.³⁴ Tercel had to come back to court more than once and obtain two additional orders in order to get Rasmussen to close the sale.³⁵ The sale finally closed in October 2006.³⁶

Tercel's Damages. In the meantime, the market for residential real estate plummeted. Instead of building on all 15 lots (as originally

²⁹ Q:... But in November of 05, you are asking to change the name of the plat and you are asking to re-number the lots... and my question is the purpose of that was to muddy the waters so that you could get out of your contract with Tercel, was it not?

A: Um, I'm going to say no. Not entirely, no.

RP 388, Is 7-13, emphasis supplied, edited for clarity.

³⁰ See Finding of Fact No. 15, Is 13-15 (CP 31) reference to "obfuscation."

³¹ Finding of Fact No. 14 (first sentence) (CP 31).

³² RP 81; Exs 1-3; RP 41-42; 156, Is 10-14; 158, Is 1-15; 159, Is 14-20.

³³ RP 160-162.

³⁴ RP 165, Is 9-18; Finding of Fact No. 15, Is 6-8 & 13-15.

³⁵ CP 380-381, 300-301, 307-308.

³⁶ Ex 13; Finding of Fact No. 14 (second sentence) (CP 31).

planned), Tercel tried to market the unimproved lots. The lots did not move, and Tercel dropped the asking price several times. Tercel was able to sell some of the lots, but no one built on them. Tercel eventually built homes on three of the lots just to get some activity going and make it look like a going neighborhood. Even so, sales were sluggish, and Tercel lost over \$245,000 on the sale of the lots.³⁷

Appeal. Rasmussen appealed, and this Court reversed in an opinion filed July 7, 2008. The 7/7/08 Opinion held that the legal description of the 15 lots failed to satisfy the statute of frauds and that “[w]ithout a sufficient legal description, the court cannot order specific performance of the contract.”³⁸ The case was remanded for trial of Tercel’s damage claim:

Citing Rasmussen’s anticipatory breach of the contract, Tercel filed a lawsuit in July 2005 seeking specific performance of the contract, and later amended to include a request for damages.³⁹

...

We reverse the summary judgment, vacate the award of attorney’s fees, and remand to the trial court for further proceedings on the claim for damages and award of attorney’s fees...The prevailing party at both the trial court and on appeal should receive reasonable attorney’s fees and expenses at the conclusion of the litigation.⁴⁰

Vacation of Award. On remand, the trial court entered judgment in favor of Rasmussen on November 26, 2008, for \$47,295 (the amount of

³⁷ RP 289; Finding of Fact No. 17 (CP 31-32).

³⁸ 7/7/08 Opinion at 8 (CP 259).

³⁹ 7/7/08 Opinion at 2-3 (CP 253-254), emphasis supplied.

⁴⁰ 7/7/08 Opinion at 10 (CP 261), emphasis supplied.

attorney's fees previously awarded Tercel) with interest at 12% from October 20, 2006 (the date of entry of the now-vacated summary judgment ordering specific performance).⁴¹

Temporary Order. At the time the case was remanded, eight of the fifteen lots had been sold. In view of the amount owed the bank, it was not possible for Tercel to give the remaining seven lots back to Rasmussen, and neither party requested that. Of the seven lots, five were unimproved and two had homes on them built by Tercel. The list prices for the five unimproved lots were \$40,000 less than the amount Tercel paid to purchase them. The list price of the two improved lots would have netted Tercel some profit, but only if full price offers were received.⁴² The trial court allowed Tercel to continue marketing the seven lots on the condition that ten days notice be given Rasmussen prior to closing any sale and that any profits be held in escrow pending further court order.⁴³

Rasmussen's Motion to Dismiss. Rasmussen moved to dismiss Tercel's damage claim, arguing that the contracts were violative of the statute of frauds and therefore unenforceable and that Tercel had made an election of remedies.⁴⁴ The trial court denied the motion, and Rasmussen

⁴¹ CP 203-205, paragraph 1 on CP 204.

⁴² CP 349-350

⁴³ CP 346-347

⁴⁴ CP 249-250.

sought discretionary review from this Court.⁴⁵

Discretionary Review Denied. By notation ruling entered March 27, 2009, Commissioner William H. Ellis denied Rasmussen's motion for discretionary review. Rasmussen moved to modify that ruling, and this Court denied the motion to modify on June 4, 2009.⁴⁶

Trial. A 3-day bench trial was held in August 2009 on Tercel's damage claim and on Rasmussen's claim for restitution. Rasmussen's primary defense to the damage claim was the statute of frauds. Rasmussen tried to justify his attempts to change the description of the lots being sold Tercel.⁴⁷ Rasmussen also testified that the configuration of the 15 lots changed because the City placed new conditions on the plat after drawing approval was obtained in January 2005.⁴⁸ In March 2006, City Public Works required the road shown on the plat to be widened from 24 feet to 29 feet. At about the same time, City Planning imposed a 25% open space requirement.⁴⁹ This resulted in an additional 4000 square feet being put into a conservation easement, requiring changes in the sizes of the lots.⁵⁰

On cross-examination, Rasmussen admitted that the road was shown as 28 feet both in the 2004 preliminary plat sketch and in the 2005

⁴⁵ CP 372-376.

⁴⁶ CP 369-371.

⁴⁷ RP 368-369.

⁴⁸ RP 329.

⁴⁹ RP 329-330 & 333.

⁵⁰ RP 330-333; 354-355.

engineered drawings and was built to that width in the summer of 2005.⁵¹ Moreover, the 25% open space requirement was imposed in the August 2004 preliminary plat approval, so the 4,000 square foot conservation easement was required all along.⁵² Further, the parties knew from the outset the lot configurations would be altered to conform to the conditions imposed in the preliminary plat approval and agreed to that.⁵³

The trial court rejected Rasmussen's testimony and found that the parties knew which lots were being sold and knew that the lot configurations would change more or less as they did during the platting process:

10. At the time the P&SA was executed, the parties clearly understood which lots were being sold. The P&SA refers to "Lots 3-12 & 14-18 of Karen's Subdivision,"⁹ and these lots are described on the engineered scale drawings approved by the City of Bellingham.¹⁰

11. The configuration of the 15 lots changed in relatively minor respects between drawing approval and final plat approval.¹¹ These changes were of the kind which normally occur during the subdivision platting process and were contemplated in the 8/23/04 preliminary plat approval.¹² These changes were contemplated by the parties when they signed the P&SA and were acceptable to both parties.

⁹ Ex. 8, first and fifth pages.

¹⁰ Ex. 5, sheets 4 and 6.

¹¹ Compare sheet 4 of Ex. 5 with page 18 of Ex. 30.

¹² Ex. 4.⁵⁴

The trial court also found that Rasmussen acted in bad faith and in-

⁵¹ RP 381-382; Ex 5.

⁵² Ex 4, ps 1 (middle of page) & 7 (Finding 9 by Hearing Examiner); RP 380-381.

⁵³ CP 305-306.

⁵⁴ Findings of Fact Nos. 10 & 11 (CP 29-30). Rasmussen does not assign error to either finding.

tentionally delayed the closing through “obfuscation, intentional delay, and erection of false barriers to obtaining final plat approval.”⁵⁵ As a result, Tercel sustained damages in the amount of \$265,000. The trial court found that Tercel lost \$245,890.23 on the sale of the 15 lots, so that Rasmussen was not due any restitution with regard to the specific performance award.⁵⁶ Rasmussen was allowed an offset for the \$17,046.10 still owed on his 11/26/08 judgment against Tercel for the vacated award of attorney’s fees.⁵⁷ Subtracting the \$17,046.10 from the \$265,000 award, Tercel was granted judgment in the amount of \$247,953.90.⁵⁸

Appeal. Rasmussen moved for reconsideration, which was denied. From the trial court’s judgment, Rasmussen has taken this appeal.

STANDARD OF REVIEW

Findings. Appellate review of findings of fact is limited to determining whether the trial court’s findings are supported by substantial evidence. A finding of fact erroneously described as a conclusion of law is reviewed as a finding. *Willener v. Sweeting*, 107 Wn.2d 388, 393-4, 730 P.2d 45 (1986). Individual findings of fact must be read in the context of other findings of fact and of the conclusions of law. *In re Hews*, 108

⁵⁵ Finding of Fact 15, CP 31.

⁵⁶ Finding of Fact 17, CP 31-32; Conclusion of Law No. 2 (CP 32).

⁵⁷ Tercel paid Rasmussen a total of \$44,646.89 on the judgment in 2009. Conclusion of Law No. 5 (CP 34).

⁵⁸ Judgment (paragraph 3) entered 10/19/09 (CP 25).

Wn.2d 579, 595, 741 P.2d 983 (1987).

Unchallenged findings are verities on appeal. Nearing v. Golden State Foods Corp., 114 Wn.2d 817, 792 P.2d 500 (1990).

Conclusions. Appellate review of a conclusion of law, based upon findings of fact, is limited to determining whether the findings are supported by substantial evidence, and if so, whether those findings support the conclusion. American Nursery Prods., Inc. v. Indian Wells Orchards, 115 Wn.2d 217, 222, 797 P.2d 477 (1990).

Restitution. Restitution under RAP 12.8 is an equitable remedy, and “trial courts have broad discretionary power to fashion equitable remedies. A trial court’s determination whether to award restitution under RAP 12.8 is reviewed for abuse of discretion.” Ehsani v McCullough Family Partnership, 160 Wn.2d 586, 589, 159 P.3d 407 (2007).

ARGUMENT

Issue No. 1. Did this Court remand for trial of Tercel’s damage claim?

Discussion. Rasmussen argues that this Court in its earlier opinion held that the failure of the P&SA to include an accurate legal description “rendered the agreement unenforceable under the statute of frauds.”⁵⁹ Ignoring this mandate and the law of the case, the trial court “nevertheless

⁵⁹ Brief of Appellants at 1 & 15.

adhered to its earlier decision on remand” and awarded Tercel damages.⁶⁰

Rasmussen is mistaken.

Contrary to Rasmussen’s contention, the 7/7/08 Opinion does not hold that the P&SA is void and unenforceable. Rather, this Court rather carefully framed its opinion to deal only with the issue of whether the P&SA could be specifically performed:

The Rasmussens argue that because the sale of lots in a preliminary plat is clearly conditioned on final plat approval, there is no final contract, no breach and nothing to specifically perform. Rasmussens further assert that the statute of frauds precludes specific performance of this VLPSA. We reject the assertion that breach is impossible... We also reject the notion that specific performance is never available to cure such a breach... Assuming the renunciation constituted an anticipatory breach as alleged, the question is whether on these facts it may be cured by specific performance.⁶¹

The subdivision had received preliminary plat approval at the time the Rasmussens offered the lots for sale. The approval of the plat was based on findings which required changes from the application and altered the dimensions and numbering of the lots. The plat had to be reengineered to provide a corrected description of the lots as approved. The city had not approved the reengineered drawings when the offer of sale was made...⁶²

But, as the VLPSA stands, the reference to Karen’s Subdivision and the VLPSA does not identify, with sufficient specificity, existing documents that contain a complete legal description without resort to parol evidence. Therefore, the legal description violates the statute of frauds.

⁶⁰ Brief of Appellants at 1 & 10.

⁶¹ 7/7/08 Opinion at 4 (CP 255), emphasis supplied.

⁶² 7/7/08 Opinion at 7 (CP258).

Without a sufficient legal description, the court cannot order specific performance of the contract. The trial court erred in granting specific performance.⁶³

We reverse the summary judgment, vacate the award of attorney's fees, and remand to the trial court for further proceedings on a claim for damages and award of attorney's fees. Both parties request fees on appeal under AP 18.1 and the VLSPSA. The prevailing party at both the trial court and on appeal should receive attorney's fees and expenses at the conclusion of the litigation.⁶⁴

For the reasons discussed below, the 7/7/08 Opinion can only be read as having ruled on specific performance, not damages.

First, the 7/7/08 Opinion remanded “for further proceedings on the claim for damages and award of attorney’s fees.”⁶⁵ The only reference in the 7/7/08 Opinion to a damage claim is to Tercel’s damage claim.⁶⁶ The damage claim this Court refers to at the end of its opinion must therefore be the same one—Tercel’s damage claim.

Second, if this Court intended to remand for dismissal of Tercel’s damage claim, the 7/7/08 Opinion would not have said that the “prevailing party at both the trial court and on appeal should receive reasonable attorney’s fees...” Rather, this Court would have awarded Rasmussen his attorney’s fees on appeal outright.

Third, Rasmussen assigned error to the trial court’s denial of his

⁶³ 7/7/08 Opinion at 8 (CP 259), emphasis supplied.

⁶⁴ 7/7/08 Opinion at 10 (CP 261), emphasis supplied.

⁶⁵ 7/7/09 Opinion at 10.

⁶⁶ 7/7/08 Opinion at 2-3 (CP 253-254), quoted above on page 8.

cross-motion for summary judgment and asked not only for reversal of summary judgment in Tercel's favor, but also for judgment to be entered in his favor on remand.⁶⁷ An appellate court's reversal of a summary judgment may entitle the opposing party to summary judgment if the parties' motions took diametrically opposite positions on the dispositive legal issue. *Estate of Spahi v Hughes Northwest*, 107 Wn.App. 763, 776-77, 23 P.3d 1233 (2001). The 7/7/08 Opinion acknowledged that Rasmussen was seeking summary judgment in his own right, but failed to grant him that relief.⁶⁸

Fourth, as Commissioner Ellis observed:

The Rasmussens contend that "further proceedings" means dismissal of the breach of contract claim. But this hardly seems to be the intent of the opinion. If this Court had meant to hold that the lack of a valid legal description made the contract invalid, it could have very simply said so and remanded for dismissal of the contract claim.⁶⁹

Thus, the trial court correctly followed this Court's instructions by proceeding to trial on Tercel's damage claim. In the trial court's words:

The Court of Appeals determined that specific performance was not available. And, having so decided, it remanded this case for further proceedings and specifically left open the issue of damages, though given clear opportunity to dismiss the damage claim.⁷⁰

The damage claim is not barred by the 7/7/08 Opinion or the law of case

⁶⁷ 6/28/07 Brief of Appellants at 3 & 19.

⁶⁸ 7/7/08 Opinion at 3 & 10 (CP 254 & 261).

⁶⁹ 3/27/09 Notation Ruling at 2 (CP 134), emphasis supplied.

⁷⁰ CP 63.

doctrine.

Issue No. 2. Can Tercel maintain a damage action where the legal description of the lots being sold was inadequate to support specific performance?

Discussion. Alternatively—and acknowledging that RAP 2.5(c)(2) restricts the law of the case doctrine—Rasmussen argues that the P&SA will not support a damage award.⁷¹ Since the P&SA fails to satisfy the statute of frauds, it is unenforceable, and the trial court’s conclusion to the contrary is error.⁷² Rasmussen is mistaken, as discussed below.

Extraordinary Remedy. Specific performance is an extraordinary remedy and requires a higher degree of proof than actions for damages.

As the supreme court said in *Powers v Hastings*, 93 Wn.2d 709, 612 P.2d 391 (1980):

[A] distinction exists in the degree of proof required to establish a contract when the action is one to recover in damages for a breach of the contract and when it is one to enforce a specific performance of the contract. In the one case the plaintiff may recover if he shows the existence of the contract by a preponderance of the evidence... while in the other he must satisfy the court of the existence of the contract by clear and convincing evidence.⁷³

The *Powers* court explained the basis for the distinction:

⁷¹ Brief of Appellant at 21-23.

⁷² Brief of Appellant at 17-23.

⁷³ 93 Wn.2d at 716, quoting *Cahalan Inv. Co. v Yakima Cent. Heating Co.*, 113 Wash. 70, 74, 193 P. 210 (1920).

An action at law is founded upon the mere nonperformance by the defendant, and this negative conclusion can often be established without determining all the terms of the agreement with exactness. The suit in equity is wholly an affirmative proceeding. The mere fact of non-performance is not enough; its object is to procure a performance by the defendant, and this demands a clear, definite, and precise understanding of all the terms; they must be exactly ascertained before their performance can be enforced.⁷⁴

Thus, a contract which cannot be specifically enforced may nevertheless support an award of damages. *Hedges v. Hurd*, 47 Wn.2d 683, 688, 289 P.2d 706 (1955) (“But even though an agreement may be too indefinite in its terms to be specifically enforced, it may be certain enough to constitute a valid contract for breach of which damages may be recovered.”) For this reason, *Powers* held that the standard of proof for removing an oral contract from the statute of frauds by showing part performance is a preponderance of the evidence:

Under the facts of the instant case, even if the evidence is not “clear and unequivocal”, it sufficiently establishes the agreement to remove the danger of fraud arising from uncertainty, thereby excusing application of the statute [of frauds]. Because legal damages—rather than specific performance—are sought, less than “clear and unequivocal” evidence suffices.⁷⁵

That having been said, Rasmussen is correct in arguing that a number of Washington cases hold that an agreement which fails to satisfy

⁷⁴ 93 Wn.2d at 716, quoting *Stanton v Singleton*, 126 Cal. 657, 664, 59 P. 146, 148 (1899), emphasis supplied.

⁷⁵ 93 Wn.2d at 717, emphasis supplied.

the statute of frauds will support neither an action for specific performance nor an action for damages.⁷⁶ *Schweiter v Halsey*, 57 Wn.2d 707, 359 P.2d 821 (1961); *Trimble v Donahey*, 96 Wash. 677, 165 Pacific 1051 (1917); and *Chamberlin v Abrams*, 36 Wash. 587, 79 Pacific 204 (1905) *overruled on other grounds by Miller v McCamish*, 78 Wn.2d 821, 479 P.2d 919 (1971). However, none of these cases involved RCW 58.17.205.

RCW 58.17.205.⁷⁷ RCW 58.17.205 reads:

RCW 58.17.205

Agreements to transfer land conditioned on final plat approval -- Authorized.

If performance of an offer or agreement to sell, lease, or otherwise transfer a lot, tract, or parcel of land following preliminary plat approval is expressly conditioned on the recording of the final plat containing the lot, tract, or parcel under this chapter, the offer or agreement is not subject to RCW 58.17.200 or 58.17.300 and does not violate any provision of this chapter. All payments on account of an offer or agreement conditioned as provided in this section shall be deposited in an escrow or other regulated trust account and no disbursement to sellers shall be permitted until the final plat is recorded.

58.17.205 was enacted in 1981⁷⁸ as part of a number of amend-

⁷⁶ Brief of Appellants at 17-19.

⁷⁷ Rasmussen argues that, "This court (sic lower case c) discussed RCW 58.17.205 in rejecting Tercel's argument and holding that the contract violated the statute of frauds and was unenforceable." Brief of Appellants at 27. This is wrong in two respects. First, the only mention of RCW 58.17.205 in the 7/7/08 Opinion is in a footnote in the "Facts" section. 7/7/08 Opinion, page 1, footnote 2 (CP 253). The 7/7/08 Opinion does not discuss 58.17.205 at all, much less whether the statute affects Tercel's claim for damages. Second, nowhere does the 7/7/08 Opinion hold that the P&SA is unenforceable (though Rasmussen says so throughout his brief).

⁷⁸ 1981 Laws c 293 §12.

ments to the subdivision act (“Plats—Subdivisions—Dedications,” chapter 58.17 RCW). Prior to the 1981 amendments, it was illegal to sell lots in an unrecorded subdivision.⁷⁹ 58.17.205 allows sales of lots in plats granted preliminary plat approval conditioned upon recording a final plat containing the lots being sold.

It is important to understand the context of the 1981 amendments. Among other things, the 1981 amendments prevent municipalities from imposing additional conditions upon a plat following preliminary plat approval:

When the legislative body of the city, town or county finds that the subdivision proposed for final plat approval conforms to all terms of the preliminary plat approval and that said subdivision meets the requirements of this chapter, other applicable state laws, and any local ordinances adopted under this chapter which were in effect at the time of preliminary plat approval, it shall suitably inscribe and execute its written approval on the face of the plat. The original of said final plat shall be filed for record with the county auditor.⁸⁰

Since a final plat will conform to the terms of the preliminary plat approval, allowing sales of lots in plats following preliminary plat approval becomes feasible. Thus, 58.17.205.

⁷⁹ The subdivision act was originally enacted in 1969. 1969 Laws 1st Ex Sess c 271. Among other provisions in the 1969 act were 58.17.200, which authorizes prosecuting attorneys to commence actions to restrain the sale or advertising of lots in plats not having final plat approval, and 58.17.300, which makes it a gross misdemeanor to sell lots in unrecorded plats.

⁸⁰ 1981 Laws c 293 § 10, codified as RCW 58.17.170.

Rasmussen ignores this context in arguing that the legislative purpose behind 58.17.205 is to “require conveyancing by accurate legal description.”⁸¹ This is one of the legislative purposes listed in the 1969 act (under 58.17.010) and applies to several provisions in the 1969 act requiring final plats to be approved prior to filing.⁸² But 58.17.205 was not part of the 1969 act. The 1981 act added additional legislative purposes to 58.17.010, including “to adequately provide for the housing and commercial needs of the citizens of the state.” It is this legislative purpose which 58.17.205 was enacted to serve.

In any event, both legislative purposes are served by interpreting 58.17.205 as allowing the sale of lots following preliminary plat approval conditioned upon recording a final plat containing such lots. Such sales cannot close until a final plat is recorded, which serves the legislative purpose of requiring accurate legal descriptions of land being conveyed.⁸³ And allowing such sales to occur prior to final plat approval also serves the legislative purpose of adequately providing for the housing and commercial needs of the citizenry.

P&SA Authorized by 58.17.205. The trial court found that the legal description of the 15 lots contained in the P&SA satisfied 58.17.205:

⁸¹ Brief of Appellants at 31.

⁸² 1969 Laws c 271 §17, 19 & 20.

⁸³ 58.17.160 requires plats to be surveyed, and 58.17.190 prevents plats from being recorded prior to final approval.

RCW 58.17.205 authorizes “performance of an...agreement to sell...a lot...following preliminary plat approval.” This statutory language contemplates the sale of part, but not all, of the property in a plat, which cannot be done without referring to the numbered lots within the plat. The statute therefore contemplates exactly the kind of legal description contained in the P&SA and authorizes performance of such an agreement.⁸⁴

Rasmussen claims that this amounts to allowing parties to enter into contracts which “describe real property as ‘Lot 2 of ABC Subdivision’ and wait until closing to verify the final configuration of the individual lots.”⁸⁵ In other words, this allows contracts for the sale of future lots and therefore violates the statute of frauds.

Rasmussen’s argument was rejected by this Court in *Geonerco v Grand Ridge Props. IV*, 146 Wn.App. 459, 191 P.3d 76 (2008). There, a real estate purchase and sale agreement (“REPSA”) called for the sale of a tract of property which had not yet obtained preliminary plat approval. The REPSA required the seller to provide the buyer with a complete legal description of the property and to obtain title insurance. Various amendments to the REPSA followed, including an addendum which provided that 21 lots were to be provided as shown on an attached plat map. The plat map did not contain a legal description, but the REPSA provided that the parties’ escrow agent could insert a legal description at a later date.

⁸⁴ Conclusion of Law No. 3 (CP 33).

⁸⁵ Brief of Appellants at 21-22.

The title company did so, thereby satisfying the statute of frauds' requirement of a legal description.⁸⁶

The seller also argued that the REPSA violated the statute of frauds since it called for the sale of "future parcels."⁸⁷ This Court rejected this argument since 58.17.205 contemplates the sale of such future lots conditioned upon plat approval. The REPSA was held to be enforceable.⁸⁸

The P&SA—like the REPSA in *Geonero*—is authorized by 58.17.205 since it calls for the sale of lots in a subdivision following preliminary plat approval conditioned upon final plat approval. The P&SA describes the lots as "Lots 3-12 & 14-18 of Karen's Subdivision," and such a description is adequate under 58.17.205 even though the lots were not in final form at the time the P&SA was signed.

P&SA Enforceable in Damages. Further, in ignoring the context surrounding the enactment of 58.17.205, Rasmussen misses the trial court's point as to why the P&SA will support a damage action. The trial court concluded:

The P&SA is an enforceable contract. The fifteen numbered lots conveyed to Tercel on October 6, 2006, are the same numbered lots identified in the P&SA. While the configuration of these lots underwent minor changes between drawing approval and final plat approval,¹⁶ the parties at all times understood what property was to be con-

⁸⁶ 146 Wn.App. at 468-69.

⁸⁷ 146 Wn.App. at 469.

⁸⁸ 146 Wn.App. at 469-470.

veyed under the P&SA.

¹⁶ As discussed in Finding 11 below. ⁸⁹

Rasmussen argues that the fact that the parties knew what property was to be conveyed “does not take the parties’ agreement outside the statute of frauds.”⁹⁰ That is not the point.

The point is that the 1981 amendment to 58.17.170 requires final plats to conform to the terms of preliminary plat approval. 58.17.205 then authorizes the sale of lots following preliminary plat approval, even though the parties to such sales know that the lots will undergo some (relatively minor) changes prior to final plat approval. Moreover, the P&SA here was entered into after drawing approval was obtained for Karen’s Subdivision, and the lots referred to in the P&SA were described on the engineered scale drawings approved by the City.⁹¹ The trial court entered unchallenged findings that the 15 lots changed “in relatively minor respects between drawing approval and final plat approval” and that these changes were the kind “which normally occur during the subdivision platting process.”⁹² The trial court also found that these changes were contemplated in the preliminary plat approval and were understood and ac-

⁸⁹ Conclusion of Law No. 3 (CP 32).

⁹⁰ Brief of Appellants at 22.

⁹¹ Finding of Fact No. 10 (CP 29).

⁹² Finding of Fact No. 11 (CP 30).

cepted by both parties when they signed the P&SA.⁹³

Nevertheless, since the configuration of the 15 lots changed between drawing and final plat approval, the 7/7/08 Opinion held that specific performance could not be granted.⁹⁴ But the fact that specific performance is unavailable does not mean that Tercel is without a remedy. In fact, that is what the 7/7/08 Opinion ordered in remanding for trial of Tercel's damage claim.

Moreover, Rasmussen had the benefit of RCW 58.17.205 when he advertised the lots in Karen's Subdivision for sale in December 2004 and when he sold 15 of those lots to Tercel in January 2005. Without 58.17.205, such conduct would have been criminal under 58.17.200 and 58.17.300. Having had the benefit of 58.17.205, Rasmussen wants to escape its burdens – enforcement of an agreement authorized by 58.17.205.

Fraud. If 58.17.205 does not allow a damage suit in a case such as this one, then someone like Rasmussen can break his contract, act in bad faith, muddy the waters regarding the legal description of lots and intentionally delay closing without incurring any consequences. Such an interpretation of 58.17.205 flies in the face of the purpose underlying the statute of frauds. As the supreme court said in *Miller vs. McCamish*, 78 Wn.2d 821, 479 P.2d 919 (1971)(Damage action may be maintained for

⁹³ Finding of Fact No. 11 (CP 29-30).

⁹⁴ 7/7/08 Opinion at 7-8 (CP 258-259).

breach of oral contract for sale of land taken out of the statute of frauds by part performance):

As we have previously noted, there can be little question as to the intent of the legislature in the enactment of RCW 19.36.010 and RCW 64.04.010. The clear purpose and intent behind these statutes of frauds is the prevention of fraud. To apply these statutes in such a manner as to promote and encourage fraud would be to *defeat the clear and unambiguous intent of the legislature in their enactment.*⁹⁵

It is one thing to say that Tercel is not entitled to the extraordinary remedy of specific performance.⁹⁶ It is quite another to say that the P&SA cannot support a damage action where the alternative is to allow Rasmussen to profit from his wrongdoing. In the words of the trial court:

“[T]he real question turns not so much on [the contract’s] enforceability but upon whether a damage claim can survive when a contract is determined by an appellate court to be insufficient to support specific performance. But to say that there is no contract would result in a horrible inequity and would also ignore the behavior of both parties, who I find each clearly believed that there was a contract and acted in reliance upon that belief.”⁹⁷

Issue No. 3. Is Tercel’s damage claim barred by the election of remedies doctrine?

Discussion. Rasmussen argues that “the trial court’s decision al-

⁹⁵ 78 Wn.2d at 828, italics by court.

⁹⁶ Indeed, the 7/7/08 Opinion points out that Tercel would have had been entitled to specific performance if (for example) one of the engineered scale drawings showing the 15 lots had been attached to the P&SA. 7/7/08 Opinion at 8 (CP 259).

⁹⁷ CP 63.

lowing Tercel to obtain both the benefit of the bargain and specific performance must be reversed under the doctrine of election of remedies.”⁹⁸ Rasmussen claims that Tercel pursued specific performance “to final judgment” and therefore cannot elect damages as a remedy.⁹⁹

But Tercel never obtained specific performance since Rasmussen successfully appealed the trial court’s summary judgment. On remand, Rasmussen was granted judgment against Tercel for the attorney’s fees awarded on summary judgment and pursued restitution at trial, restoring him (insofar as possible) to the position he would have been in had Tercel not purchased the lots.¹⁰⁰ This unwound specific performance so Tercel did not have the benefit of that remedy.

Rasmussen confuses the issue by claiming that Tercel “definitively chose its remedy by insist[ing] that Rasmussen perform by closing in 2006, one year after the contract was first entered into and after the market peaked.”¹⁰¹ That is not the point. The point is that Tercel did not obtain final judgment on specific performance since Rasmussen successfully appealed.¹⁰² As Commissioner Ellis said in rejecting Rasmussen’s election

⁹⁸ Brief of Appellants at 23.

⁹⁹ Brief of Appellants at 24.

¹⁰⁰ Actually, Rasmussen ended up in a better position since he did not lose the \$245,000 Tercel lost.

¹⁰¹ Brief of Appellants at 24.

¹⁰² In this regard, note Rasmussen’s testimony:

Q: And, um, after the closing of this transaction, you appealed?

A: Yes.

of remedies argument in the motion for discretionary review, “The remedy of specific performance, as it turns out, was not an available remedy and was not pursued to final judgment.”¹⁰³

The case at bar is analogous to the situation presented in *O’Donoghue v Riggs*, 73 Wn.2d 814, 440 P.2d 823 (1968) (Prior action against the state for failure to file a claim did not bar subsequent action against individual), where the supreme court said:

If a party believes he has a claim, but subsequent events prove the claim to be nonexistent, his attempt to assert such claim in court does not constitute an election... In such a case, it is immaterial whether the remedy be nonexistent because it develops that the facts are different from what the plaintiff supposed them to be, or whether the law applicable to the facts is found to be other than the claimant supposed. As we said in *In re Pulver*, 146 Wash. 597, 604, 264 P. 406, 409 (1928):

Invoking a claimed remedy, which is not in law available, is not an election of a remedy precluding thereafter the invoking of a remedy which is in law available.¹⁰⁴

As in *O’Donoghue*, the 7/7/09 Opinion held that the remedy of specific performance was not available to Tercel, so there was no election.

The sole purpose of the election of remedies doctrine is to prevent

Q: And you didn't have to do that, did you?

A: Um, I mean, no...

Q: And if you thought in October of 06, gee, I just don't think the lots are worth as much any more, you didn't have to go forward with that appeal, correct?

A: We wouldn't have had to proceed if we thought they weren't undervalued when they closed, correct.

RP 388-89.

¹⁰³ 3/27/09 Notation Ruling at 2 (CP 134).

¹⁰⁴ 73 Wn.2d at 816-817, citations omitted, emphasis supplied.

a double recovery. *CHD, Inc. v. Boyles*, 138 Wn.App. 131, 157 P.3d 415

(2007):

The election of remedies rule has a narrow scope, its sole purpose being the prevention of double redress from a single wrong.¹⁰⁵

Here, this Court held that specific performance was unavailable and remanded for trial on the sole remedy left Tercel – its damage claim. There was no double recovery, and the doctrine of election of remedies does not apply.

Issue No. 4. Did the trial court err in denying Rasmussen restitution under RAP 12.8 where Tercel lost \$245,000 on the sale of the lots?

Discussion. The trial court found that Tercel lost over \$245,000 on the sale of the 15 lots and that Rasmussen was therefore not entitled to restitution. Rasmussen argues that Tercel should not have been allowed to deduct from the gross sales price of the lots the amounts paid to obtain those sales, particularly overhead. Rasmussen’s argument is based upon an incorrect understanding of both the facts and the law applicable to restitution. In effect, Rasmussen is asking for a windfall for having failed to supersede the judgment.

Facts. Tercel made every effort to sell the lots as soon as the sale closed. Tercel marketed the lots through Jon Rockwood of The Muljat

¹⁰⁵ 138 Wn.App at 140, citation omitted.

Group. Tercel had used Rockwood with great success in the past to sell lots in other subdivisions where Tercel built homes designed by Goff.¹⁰⁶

Rockwood aggressively marketed the lots, but they did not sell.¹⁰⁷ The problem was that Tercel was chasing a declining market. Even though Tercel dropped the prices on the lots numerous times, the market kept falling even lower.¹⁰⁸ In spite of running advertisements, doing virtual tours and conducting open houses, Rockwood could not move the lots.¹⁰⁹

Tercel eventually built homes on some of the lots to stimulate activity in the neighborhood, but these were difficult to sell as well. In spite of dropping the prices on these improved lots, it took months to sell the first one and the better part of a year to sell the other two.¹¹⁰ In 2009, Tercel built homes on some of the remaining lots to take advantage of federal incentives.¹¹¹ This resulted in some sales, but Tercel had to give up any profit in the form of concessions in order to close the sales.¹¹²

The trial court found that Tercel's marketing efforts were commercially reasonable:

¹⁰⁶ RP 88-89; RP 189-190.

¹⁰⁷ RP 93.

¹⁰⁸ RP 94-95.

¹⁰⁹ RP 94-97.

¹¹⁰ RP 98-100.

¹¹¹ RP 101-102.

¹¹² RP 101-106.

Following the 10/6/06 closing, Tercel marketed and sold the 15 lots in a commercially reasonable manner. Tercel took all steps necessary to maximize profits, including building on some of the lots in order to stimulate interest in potential purchasers. Nevertheless, Tercel has incurred, and will incur as a result of the sale of the remaining lots, losses totaling \$245,890.23 on Karen's Subdivision.¹¹³

Rasmussen has assigned error to this finding, but has made no effort to show that it is unsupported by substantial evidence. In fact, as discussed above, the finding is supported by overwhelming, undisputed evidence.

Had Rasmussen not sold the fifteen lots to Tercel, his plan was to develop them personally or through his construction business, Razz Construction.¹¹⁴ Presumably, that is what Rasmussen did with the other six lots in the plat which he did not sell to Tercel.¹¹⁵ Razz would have incurred overhead in the course of developing and marketing lots similar to overhead expenses incurred by Tercel.

The trial court found that the damages Tercel sustained would have been sustained by Rasmussen himself, or by Razz Construction, had Rasmussen retained the lots:

Tercel's loss on these 15 lots would have been sustained by any buyer or by the Rasmussens themselves had they chosen to market the lots. All the expenditures and expenses incurred by Tercel in marketing and selling the lots would have been incurred by any buyer or by the Rasmus-

¹¹³ Finding of Fact No. 17 (second paragraph)(CP 31).

¹¹⁴ Ex 43 (paragraph 21); Ex 22 (first page).

¹¹⁵ RP 390-392, 322.

sens themselves.¹¹⁶

Again, Rasmussen has assigned error to this finding, but has made no effort to show that it is unsupported by substantial evidence. However, Rasmussen does point out expenditures which he claims are unnecessary or excessive, and Tercel will address those points below.

Rasmussen claims that: (1) Tercel never intended to build homes on the lots;¹¹⁷ (2) Tercel began building on the lots in early 2008;¹¹⁸ (3) Tercel was earning profits prior to issuance of the 7/7/08 Opinion and only incurred losses in 2009;¹¹⁹ and (4) the trial court allowed Tercel overhead expenses which Tercel would have incurred anyway, such as Ragsdale's annual salary.¹²⁰ All of this is wrong.

(1) Tercel Planned to Build. Tercel planned from the outset to build homes on all 15 lots,¹²¹ and the trial court entered unchallenged findings of fact to that effect.¹²² It was only when the market failed in 2006—after the bad faith delay caused by Rasmussen—that Tercel changed its plans and sold bare lots.¹²³

Tercel sold several lots at a profit in early 2007. However, these

¹¹⁶ Finding of Fact No. 17 (third paragraph)(CP 32).

¹¹⁷ Brief of Appellants at 6 & 34.

¹¹⁸ Brief of Appellants at 34.

¹¹⁹ Brief of Appellants at 34-35.

¹²⁰ Brief of Appellants at 36.

¹²¹ RP 77, 82, 87 & 204.

¹²² Finding of Fact 7 (CP 28-29) & Finding of Fact 12 (CP 30).

¹²³ RP 87-88.

were the most desirable lots. Meanwhile, the market continued plummeting. In spite of dropping the asking price numerous times, the other lots failed to move.¹²⁴

(2) Tercel Built on Lots in 2007, 2008 & 2009. When the lots did not sell, Tercel decided to build homes on three of the lots in order to make the development look like a going neighborhood.¹²⁵ Tercel took out building permits for three of the lots in December 2007 and completed them in April 2008.¹²⁶ One sold in July 2008, but the other two took until December 2008 and early 2009 to move, even though the asking prices were lowered a number of times.¹²⁷

In order to move the last five lots, Tercel had to build homes on them in 2008-2009 in order to make marketable packages.¹²⁸ In this way, potential buyers could take advantage of federal tax incentives.¹²⁹ Asking prices were lowered several times and concessions given to buyers in order to move these lots.¹³⁰

(3) Entire Project Lost Money. Tercel reported profits on Karen's subdivision of \$97,355.86 in 2007, a loss of \$2,229.44 in 2008,

¹²⁴ RP 121-122, 133-134.

¹²⁵ RP 289, 98.

¹²⁶ RP 117, 288-289, 298.

¹²⁷ RP 117, 118-119, 125-126, & 230-231.

¹²⁸ RP 234-235, 98, 101-102, 239.

¹²⁹ RP 101-103, 232-233

¹³⁰ RP 125, 128-129, 198, 201, 264-265, 236-240.

and a loss of \$36,388.52 in 2009 (through July).¹³¹ These numbers are misleading since Tercel is an accrual basis taxpayer. An accrual basis taxpayer cannot deduct all the interest and expenses incurred in the year in which they are incurred; rather, the expenses are accrued and cannot be deducted until the time of sales.¹³² Tercel did not even recoup the \$1.2 million purchase price through sales until well into 2009, leaving aside the hundreds of thousands of dollars paid the bank in interest and the hundreds of thousands spent on construction.¹³³

After the case was remanded following the 7/7/08 Opinion, Rasmussen never offered to pay off the loans and take over the remaining seven lots (which were underwater). Tercel had no choice but to continue developing and marketing the lots.¹³⁴ This meant building out some lots so they would sell. Moreover, several lots remained unsold at the time of trial, and undisputed testimony showed that significant losses would be incurred on the sale of these last lots.¹³⁵

(4) Overhead Pro-Rated. The trial court did not allow Tercel all of its overhead. Rather, Tercel's overhead was pro-rated between

¹³¹ Ex 29, sheet 1.

¹³² RP 256-258, 262-264,

¹³³ Ex 13, p 1 & Ex 29, sheet 1.

¹³⁴ RP 287-288.

¹³⁵ RP 232-238, 266-267, 288; Ex 29, sheet 1.

gross sales on other projects and gross sales in Karen's subdivision.¹³⁶

Undisputed accounting testimony established that this approach to allocating overhead was a reasonable method to calculate profits (or losses) from Tercel's sale of the 15 lots.¹³⁷ Moreover, no 2009 overhead and no 2009 interest were included in the calculations.¹³⁸

With regard to Rasmussen's claim that the trial court allowed a deduction for interest on loans Tercel took out on projects other than Karen's Subdivision,¹³⁹ Rasmussen is mistaken. The accounting testimony was that only interest on loans related to Karen's Subdivision was deducted as a direct cost.¹⁴⁰

With regard to Ragsdale's \$35,000 salary, the accountant pro-rated it and subtracted the portion attributable to Karen's Subdivision from gross sales. This was justified for a number of reasons. First, presumably Rasmussen would have paid himself a salary had he developed Karen's

¹³⁶ RP 259-260.

¹³⁷ RP 284-286

¹³⁸ The only reason the accountant did not include overhead and interest for 2009 was that there were no figures available for his review. The accountant testified that pro-rated overhead and interest should be allowed for all years—including 2009—and that the \$245,000 figure therefore understated Tercel's loss. RP 267-268.

¹³⁹ Brief of Appellants at 35.

¹⁴⁰ The accountant testified that the interest shown on sheet 2 of Ex 29 as a direct cost is interest on "the loan to buy these 15 lots." RP262-263. The accountant's testimony later on about "the entire interest paid by Tercel that year for all purposes" refers to interest on the entire loan for all lots (not just the ones allocated interest at the time of sale). RP 274-275. It does not refer to interest on unrelated loans. RP 276-277. However, "interest for running a business"—operational loans, not loans on other projects—was included in indirect costs (i.e. overhead, which was then prorated). RP 277-278

Subdivision through Razz Construction. Second, Ragsdale (who was a realtor prior to becoming a builder) marketed several of the lots himself in 2007 and thereby saved Tercel real estate commissions of over \$20,000.¹⁴¹ Third, Ragsdale built homes on 3 of the lots in late 2007 and the first part of 2008 and built more homes in 2008 and 2009. If Ragsdale had not supervised the building of these homes, Tercel (or Razz Construction) would have had to pay someone to do so. The lots were not going to move without homes on them, and did eventually sell once the lots were built out.

Moreover, Rasmussen made no attempt at trial to show that he (or anyone else) could have developed and marketed the 15 lots for any less than Tercel.¹⁴² In fact, Rasmussen never testified at all regarding how much he and/or Razz Construction made (or lost) from the sale of the six lots in Karen's Subdivision that Rasmussen retained.

Finally, Rasmussen has not shown how he was harmed by the claimed error. The trial court found that Tercel lost \$245,890.23 on the sale of the lots. Rasmussen must therefore show that the trial court erroneously subtracted expenses exceeding \$245,890.23 to be entitled to restitution. Rasmussen has not even attempted to do so.

¹⁴¹ Ex 29, sheet 1; RP 93-94, RP 190, 194 ls 20-23 (4% commission), 199, 203.

¹⁴² In the trial court's words:

"Had the defendant retained the lots, he would have almost certainly invested similar amounts of time and incurred similar expenses. In fact, given the parties' relative expertise, it is likely that the defendant would have incurred a greater expenditure of both time and money." (CP 62)

Law. In addition to misunderstanding the facts, Rasmussen misunderstands the law applicable to restitution. First, Rasmussen challenges expenses Tercel incurred after this Court's 7/7/08 Opinion came down, claiming that any expenditures Tercel made after that date were as a "volunteer."¹⁴³ Second, Rasmussen argues that "only those expenditures made in good faith as necessary to preserve [the] value of property executed upon is [sic] allowed by law."¹⁴⁴ Third, Rasmussen claims that "no authority" supports the deduction of Tercel's business overhead expenses.¹⁴⁵ Again, all of this is wrong.

(1) Post-7/7/08 Expenses. Rasmussen argues that Tercel was put on notice by the 7/7/08 Opinion that any money spent thereafter on Karen's Subdivision was at its own risk. This argument was not made to the trial court, and should not be considered for that reason alone.¹⁴⁶ That aside, the only Washington cases Rasmussen cites for this proposition are Malo v. Anderson, 76 Wn.2d 1, 454 P.2d 828 (1969) and Ellensburg v. Larson Fruit Co., 66 Wn.App. 246, 835 P.2d 225 rev den 120 Wn.2d 1011 (1992). Neither case supports Rasmussen's position.

Malo was a divorce action in which the husband failed to make monthly payments called for under the decree. The wife obtained a writ of

¹⁴³ Brief of Appellants at 32, 34 and 35 ("volunteer" quote on page 35).

¹⁴⁴ Brief of Appellants at 33-34.

¹⁴⁵ Brief of Appellants at 35-37.

¹⁴⁶ RAP 2.5(a).

execution and levied on a house belonging to the husband. The husband appealed, but did not supersede the judgment. The wife went into possession of the house pending appeal. She paid to have encumbrances removed from the property and rebuilt the house. The judgment was subsequently reversed, and on remand the trial court refused to allow the wife credit for her expenditures. The wife appealed and the supreme court reversed, saying:

A supersedeas bond does not operate against a judgment but against its enforcement...If [wife's] knowledge of the pending appeal prevented her from doing anything with the property, except at her own risk, the appeal itself would act as a supersedeas. No prevailing party would expend any money on property awarded in an un-superseded judgment for fear of losing the investment...

Of course, [wife] did not have to rebuild the house on the property, but the evidence indicates that she did if she wanted to occupy the house, which she had the right to do...

Contrary to [husband's] contention, [wife] was not a mere volunteer in this regard, for she acted under color of title... It would be unjust to allow [husband]... to reap the entire benefit of the expenditures made in good faith by [wife]...

Therefore, we remand this case with instructions to the superior court to receive evidence regarding: (1) the amount of money expended by [wife] to remove encumbrances from the property; (2) the enhanced value of the property due to expenditures made by [wife] which were necessary to make the house inhabitable, but restricted to the period of time between the 1962 judgment and its reversal by this court...¹⁴⁷

Malo limited the wife's recovery to expenditures made prior to re-

¹⁴⁷ 76 Wn.2d at 5-6.

versal of the underlying judgment since she had no business improving the house once she knew she had to give back to her ex-husband. But in the case at bar, Tercel had no choice. Rasmussen was not about to take back seven lots that were underwater. Tercel therefore had to keep marketing the lots and, in order to do so, had to build homes on them. Tercel was by no stretch of the imagination a “volunteer,” and *Malo* does not hold otherwise.

In *Larson Fruit*, Larson Fruit Company foreclosed a crop lien against an orchard owner. The orchard owner was in litigation with a management company, and the orchard owner’s lawyer told Larson Fruit not to advance any money to the management company without a court order. In spite of this, Larson Fruit gave the management company \$100,000 to harvest the crop without a court order. The management company misappropriated all but \$15,000 before filing bankruptcy, but Larson Fruit included the entire \$100,000 in its lien claim. This Court held that Larson Fruit was a volunteer and entitled to recover only the \$15,000 which benefited the orchard owner.

Here, unlike *Larsen Fruit*, Tercel did not ignore the pending litigation or act unilaterally after the 7/7/08 Opinion was issued. On August 12, 2008, Rasmussen filed a motion to prohibit Tercel from distributing funds

received from the sales of the remaining seven lots.¹⁴⁸ Rasmussen did not ask for the lots back or for Tercel to stop selling them or for Tercel to stop building on them.¹⁴⁹ Rather, Rasmussen asked that Tercel not disburse “any funds that may be held from the sale of the affected property.”¹⁵⁰ The trial court entered an order on August 22, 2008, requiring Tercel to give Rasmussen 10 days notice of any proposed sale and to escrow any profits from such sales.¹⁵¹ Tercel was able to sell some of the lots and Rasmussen released his judgment lien on those lots so the sales could go through.¹⁵² As a result, Tercel was able to pay Rasmussen almost \$45,000 on the 11/26/08 judgment prior to trial in July 2009.¹⁵³ Having benefitted from Tercel’s development and marketing of the lots in 2008-2009, Rasmussen nevertheless wants Tercel to eat the expenses incurred in obtaining those sales and be treated—like Larsen Fruit—as a volunteer. That is hardly what the *Larsen Fruit* court had in mind.

Moreover, neither *Malo* nor *Larson Fruit* involved RAP 12.8, which reads:

RULE 12.8 EFFECT OF REVERSAL ON INTERVENING RIGHTS

If a party has voluntarily or involuntarily partially or whol-

¹⁴⁸ CP 268-270.

¹⁴⁹ CP 266-267, 263.

¹⁵⁰ CP 269.

¹⁵¹ CP 206-207.

¹⁵² CP 191 (lot 4), CP 194-195 (lots 6&7).

¹⁵³ CP 198-199, 196-197, 34 (Conclusion of Law No. 5.)

ly satisfied a trial court decision which is modified by the appellate court, the trial court shall enter orders and authorize the issuance of process appropriate to restore to the party any property taken from that party, the value of the property, or in appropriate circumstances, provide restitution.

An interest in property acquired by a purchaser in good faith, under a decision subsequently reversed or modified, shall not be affected by the reversal or modification of that decision.¹⁵⁴

A trial court has broad discretion in fashioning an equitable remedy to implement restitution under RAP 12.8. *Ehsani v McCullough Family Partnership*, supra. The purpose of requiring restitution under RAP 12.8 is to prevent unjust enrichment. Where the purpose of remedying unjust enrichment is not served, restitution is not required. As the *Ehsani* court said, quoting Justice Cardozo:

A cause of action for restitution is a type of the broader cause of action for money had and received, a remedy which is equitable in origin and function. The claimant to prevail must show that the money was received in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it.¹⁵⁵

Here, Rasmussen has failed to show how equity and good conscience would be offended by allowing Tercel to offset expenses incurred after the 7/7/08 Opinion came down. Tercel acted in good faith and tried to maximize proceeds from sales, which were paid to Rasmussen under

¹⁵⁴ Emphasis supplied.

¹⁵⁵ 160 Wn. 2d at 592, quoting *Atl. Coast Line R.R. v. Florida*, 295 U.S. 301, 309-10, 55 S. Ct. 713, 79 L. Ed. 1451 (1935) (citations omitted).

court supervision.¹⁵⁶ The trial court did not abuse its discretion.

(2) Expenditures to Preserve Value. Rasmussen also argues that Tercel should only be allowed to offset expenditures necessary to preserve the value of the lots, and that only property taxes and interest needed to be paid to do so.¹⁵⁷ Rasmussen cites *Malo v Anderson*, supra, *Ellensburg v Larsen Fruit*, supra, and *Cooley v Fredinburg*, 146 Or.App 436, 934 P.2d 505 (1997) as authority for this proposition. None of these cases involved property which had to be built out and sold to keep loan payments current.

Here, the remaining seven lots were encumbered by a bank loan, and, to preserve the value of these lots and to keep them from going further underwater, Tercel had few options. The more desirable lots had already sold, and these last lots were never going to sell unless they had homes on them so as to qualify for federal incentives. If Tercel had just stood by and paid property taxes (as Rasmussen suggests), most of these lots would still be on the market, and Tercel would have long since run out of money to make payments to the bank.

Moreover, none of the three cases involved RAP 12.8. The lead case construing RAP 12.8 is *State v. A.N.W. Seed Corporation*, 116 Wn.2d 39, 802 P.2d 1353 (1991). In that case, the state of Washington obtained a default judgment against defendant and sold defendant's assets at a she-

¹⁵⁶ CP 194-195.

¹⁵⁷ Brief of Appellants at 34 (bottom of page).

riff's sale. The default judgment was later vacated and the trial court ordered the state to reimburse the defendant for the fair market value of the assets sold. This Court affirmed the fair market value measure of restitution, and the supreme court reversed, holding that the state was required to reimburse defendant only for the proceeds actually received from the sale. In doing so, the *A.N.W. Seed* court said:

Likewise in summarizing the measure of recovery, it is said:

If the value of what was received and what was lost were always equal, there would be no substantial problem as to the amount of recovery, since actions of restitution are not punitive. In fact, however, the plaintiff [here judgment debtor] frequently has lost more than the defendant [here judgment creditor] has gained, and sometimes the defendant has gained more than the plaintiff has lost.

In such cases the measure of restitution is determined with reference to the tortiousness of the defendant's conduct or the negligence or other fault of one or both of the parties in creating the situation giving rise to the right to restitution. If the defendant was tortious in his acquisition of the benefit he is required to pay for what the other has lost although that is more than the recipient benefited. If he was consciously tortious in acquiring the benefit, he is also deprived of any profit derived from his subsequent dealing with it. *If he [judgment creditor] was no more at fault than the claimant, he is not required to pay for losses in excess of benefit received by him and he is permitted to retain gains which result from his dealing with the property.*

(Italics ours.) Restatement of Restitution § 149, at 596 (1937).¹⁵⁸

Text authority also supports our holding. “[T]he general and better opinion” is that “the judgment defendant is only entitled to so much as the plaintiff has realized upon the execution.” 2 J. Sutherland, *Damages* § 469, at 1544 (4th ed. 1916); *accord*, 2 R.C.L. *Appeal and Error* § 254, at 299 (1914).¹⁵⁹

In the case at bar, Rasmussen was at fault in attempting to renege on his contract, in intentionally delaying closing, in trying to disguise the identity of the lots being sold, and in acting in bad faith.¹⁶⁰ Tercel did nothing wrong. Under these circumstances, the trial court did not abuse its discretion in holding that the measure of restitution to be repaid Rasmussen was the profit realized by Tercel on the sale of the lots.

In calculating those profits (or losses), the trial court did not have to limit allowable expenses solely to property taxes and interest payments (as Rasmussen would have it). Rather, the trial court correctly offset from gross sales all reasonable expenses incurred since Rasmussen (or any other

¹⁵⁸ 116 Wn.2d at 46-47.

¹⁵⁹ 116 Wn.2d at 47.

¹⁶⁰ In the trial court's words:

“This lawsuit arose for one reason and one reason only: the defendant—most probably due to what was then a real estate market with rapidly rising values—decided that he wanted more money for the property, and did so after the contract had been signed. Though this is an understandable and normal response from a financial perspective, it is unacceptable from a contract perspective, and must be deemed, as between these parties, to be action in bad faith...

The evidence is clear that defendant's deliberate actions are the reason that the sale of these lots did not close in 2005. He made multiple efforts to delay, to obfuscate, and to prevent the transaction from closing, and the reason was simply that he believed he had sold them for too little...” (CP 63-64).

builder/developer) would have incurred such expenses. To do otherwise would result in a windfall to Rasmussen and a penalty to Tercel.

(3) Overhead Allowable. Rasmussen also argues that Tercel's business overhead cannot be deducted from the sales prices of the lots, citing three out-of-state cases.¹⁶¹ These cases are scant authority for such a proposition,¹⁶² but the larger point is that denying Tercel its overhead at-

¹⁶¹ *In Re Lloyd*, 369 BR 549 (Bankr.N.D.Cal. 2007 aff'd 2008 WL 298820 (N.D.Cal. 2008) aff'd 572 F.3d 999 (9th Cir. 2009); *Yugoslav-American Cultural Center v. Parkway Bank and Trust Co.*, 327 Ill.App.3d 143, 763 NE.2d 360 (2001); and *Cooley v. Fredinburg*, supra.

¹⁶² *In re Lloyd* involved a homeowner facing foreclosure who sold his home to an equity investor who then leased it back to the homeowner with an option to purchase. The contract violated California's Home Equity Sales Contract Act and was subsequently rescinded. Prior to rescission, the parties changed their positions so that it was not possible to make them both whole. The Bankruptcy Court held that the equity investor should bear the loss since he "created the circumstances that prevent both parties from being restored to the *status quo ante*." (369 B.R. at 563). The court went on to hold that the value provided the homeowner "is more than offset by the increased debt that [equity investor] placed on the residence that [homeowner] will likely have to pay." (369 B.R. at 562). The amounts the equity investor claimed, including \$45,000 in management fees payable to himself for leasing the residence, were not allowed. The decision was fact-intensive and did not lay down any general rule regarding overhead in restitution cases.

Yugoslav-American involved a buyer who took advantage of a fraudulent conveyance. The trial court upheld the transaction, but was reversed on appeal. On remand, the trial court refused to offset the buyer's expenditures since the buyer had unclean hands. The case was appealed again and, after *de novo* review, remanded "for the limited purpose of giving [buyer] the opportunity to purge himself of any alleged wrongdoing in connection with the initial transaction and prove up his claimed offsets." (763 NE 2d at 367). Again, the decision was fact-intensive and did not announce any general rule disallowing overhead in restitution cases.

Cooley involved a foreclosure sale where a junior lienholder redeemed the property and went into possession. The decision was reversed, and on remand the trial court dismissed the restitution claim on the ground that the improvements made by the redeeming lienholder exceeded the amount of rents received. On *de novo* review, the Oregon Court of Appeals reversed and held that the equities favored disallowing the costs of improvements and limiting the lienholder's offsets to expenses necessary for the protection of the property. The rationale

tributable to Karen's Subdivision would put Rasmussen in a better position than he would have been in had he superseded the judgment. Such a result directly conflicts with the reasoning of A.N.W. Seed:

There are compelling principles of policy which warrant our holding. RAP 7.2(c) permits a judgment creditor to execute on a judgment. The court rule decrees also that "[a]ny person may take action premised on the validity of a trial court judgment or decision until enforcement of the judgment or decision is stayed as provided in rules 8.1 or 8.3." RAP 7.2(c). This authority to act upon a presumptively valid judgment would be essentially negated if the judgment creditor risked liability for the uncertain and perhaps then unascertainable market value of the property executed upon.¹⁶³

Equally important is RAP 8.1(a) which "provides a means of delaying the enforcement of a trial court decision in a civil case", *i.e.*, by supersedeas. RAP 8.1(b). If defendants' theory prevails, the judgment debtor need not post a supersedeas bond or other security. The debtor would know that he would get the most favorable of either the sale proceeds or market value plus interest. In effect the notice of appeal would be a substitute for supersedeas. That is not the purpose or intent of RAP 7.2(c) and RAP 8.1.¹⁶⁴

Tercel had the authority to act on its judgment and had a right to develop and market the 15 lots. This resulted in increased overhead. Had Rasmussen superseded the judgment and developed the 15 lots himself (or through Razz Construction), he would have incurred overhead as well.

was that since "there was potential for defeat on appeal... [the redeeming lienholder] assumed the risk that it might lose ownership of the property." (934 P.2d at 511). This reasoning directly conflicts with Ehsani (160 Wn.2d at 601), A.N.W. Seed (see below), and Malo (76 Wn.2d at 5).

¹⁶³ 116 Wn.2d at 47-48, emphasis supplied.

¹⁶⁴ 116 Wn.2d at 48

Under these circumstances, the trial court correctly deducted overhead from the gross sales prices since to do otherwise would reward Rasmussen for having failed to supersede the judgment. The trial court did not abuse its discretion in denying Rasmussen restitution.

Issue No. 5. Did the trial court err in awarding Tercel attorney's fees and expenses?

Discussion. The instructions given by this Court on remand included:

We reverse the summary judgment, vacate the award of attorney's fees, and remand to the trial court for further proceedings on the claim for damages and award of attorney's fees... The prevailing party at both the trial court and on appeal should receive reasonable attorney's fees and expenses at the conclusion of the litigation.¹⁶⁵

In accordance with these instructions, the trial court awarded Rasmussen his attorney's fees and expenses incurred both at the trial court level and on appeal in defending against specific performance, totaling \$36,782.69. Tercel was awarded its attorney's fees and expenses incurred following remand—both in prosecuting its damage claim and in defending against Rasmussen's claim for restitution—totaling \$62,445.50. The trial court offset these amounts and awarded Tercel \$25,762.81 in attorney's

¹⁶⁵ 7/7/08 Opinion at 10 (CP 261), emphasis supplied.

fees and expenses.¹⁶⁶

Rasmussen is not challenging this approach, but argues that if Ter-
cel's damage award is reversed, Rasmussen should be "deemed the pre-
vailing party at trial."¹⁶⁷ This is incorrect. Only if Rasmussen is success-
ful both in reversing Tercel's damage award and in prevailing on his resti-
tution claim would he be the prevailing party at trial or on appeal. Such
an outcome could occur only after a re-trial, and the trial court would have
to make such a determination. In any event, the trial court's entire judg-
ment should stand, including the award of attorney's fees and expenses to
Tercel.

Issue No. 6. Is Tercel entitled to attorney's fees and expenses on
appeal?

Discussion. The P&SA reads in part:

If Buyer or Seller institutes suit against the other concern-
ing this Agreement the prevailing party is entitled to rea-
sonable attorney's fees and expenses.¹⁶⁸

Such a provision entitles the prevailing party to recover its attorney's fees
and expenses both at the trial court level and on appeal. *Tacoma North
Park v. NW*, 123 Wn.App. 73, 96 P.3d 454 (2004).

If the trial court is affirmed, Tercel requests an award of attorney's

¹⁶⁶ CP 38-40

¹⁶⁷ Brief of Appellants at 37.

¹⁶⁸ P&SA, paragraph q, emphasis supplied, Ex 8.

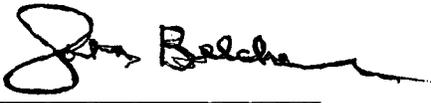
fees and expenses on appeal. Tercel will comply with RAP 18.1(d) should such an award be made.

CONCLUSION

The trial court should be affirmed, with an award to Tercel of attorney's fees and expenses on appeal.

Respectfully submitted this 26TH day of April, 2010.

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