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No. 66571-5-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

WEDGEWOOD AT RENTON, INC., a Washington Corporation,

Respondent/Plaintiff,

vs.

WESTCOTT HOLDINGS, INC., a Washington corporation, and
VERCELLO, LLC, a Washington limited liability company,

Appellants/Defendants/Cross-Claim Plaintiffs.

KOLIN TAYLOR and JANE DOE TAYLOR, husband and wife and their
marital community; and KBS DEVELOPMENT CORPORATION, a
Washington corporation,

Respondents/Cross-Claim Defendants

BRIEF OF RESPONDENT

WEDGEWOOD AT RENTON, INC.

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I. INTRODUCTION

In addition to the grounds on which the trial court entered summary judgment which dismissed the claims of Vercello and Westcott (referred to herein collectively as “Vercello”), there are other grounds supported in the record before this Court which provide alternate bases for affirming the dismissal.

In order to ultimately prevail with its claim, Vercello must prove the following:

- a) Addendum G revived the defunct Purchase and Sale Agreement (“PSA”) or Addendum G was valid and enforceable as a stand-alone agreement; and
- b) Addendum G was not void ab initio due to its being an illusory contract; and
- c) Addendum G survived after January 6, 2009 or there were “offers” made to Wedgewood prior to January 6, 2009 which Wedgewood had the obligation to present to Vercello under the right of first refusal.

The only issue which presents any issue of fact is whether there were any “offers” prior to January 6, 2009 which would trigger the right of first refusal, and the record reflects that Vercello failed in the summary judgment motions to provide any evidence of any such “offers”.

II. ISSUES PRESENTED

1. Whether Addendum G revived the PSA which had expired by its own terms.
2. Whether Addendum G was valid as a stand-alone agreement.
3. Whether Addendum G was void due to its being an illusory contract.
4. Whether the right of first refusal in Addendum G expired on January 6, 2009.
5. Whether there were any “offers” prior to January 6, 2009 which triggered Wedgewood’s obligation under the right of first refusal in Addendum G to present such offers to Vercello.

6. Whether Wedgewood is judicially estopped from asserting that Addendum G was void from its inception.

III. STATEMENT OF THE CASE

A. Supplement to the Facts as Presented by Vercello

The closing or "take-down" of the second set of lots covered by the Purchase and Sale Agreement ("PSA") between the parties was intended to include 38 lots [CP 74] and was to occur no later than 170 days after the first closing [CP 70] which would have been no later than January 17, 2008. [CP 581]. The total price for those lots in the second take-down was agreed to be \$9,246,978 [CP 72-73] for an average price of \$243,342 per lot.

Vercello had deposited earnest money of \$565,000. [CP 70]. When Vercello failed to timely close on the second set of lots, it breached its obligations under the PSA, and the earnest money it had posted was forfeited. [CP 455 (deposition of Edwards, p. 44, lines 11-20)]. Forfeiture of the earnest money was the sole and exclusive remedy for Vercello's breach of the PSA. [CP 58].

The parties executed Addendum G [CP 98] on January 30, 2008, 13 days after Vercello had failed to close on the second set of lots, breaching its obligations under the PSA, and had forfeited its earnest money.

The parties intended Addendum G to change the deal points in the PSA as follows [CP 146 (Gilroy Decl., paragraph 3)]:

- a) All earnest money was allowed to be used for part of the nominal purchase price for the lots in the second takedown;
- b) The number of lots in the second takedown was increased to 41;
- c) The purchase price for the lots in the second takedown was reduced;
- d) The closing date of the second takedown was extended;
- e) The closing date of the third takedown was extended until "on or before January 6, 2009"; and
- f) Wedgewood regained the right to market all of the lots in the third takedown subject to a right of first refusal by Vercello.

The actual average lot price for the lots in the second take-down was reduced from \$243,342 to \$203,000 [CP 448], and the forfeited earnest money was added to the actual lot prices to reflect an artificially high lot price of \$216,780 per lot. [CP 448, and CP 455 (Edwards Deposition, p. 44, lines 17-20)].

The deal point in Addendum G to allow Wedgewood to market the lots which were to be included in that third take-down, subject to a right of first refusal by Vercello to match any offer to purchase received by Wedgewood, was included due to the deteriorating market and the recognized possibility that Vercello would not close on those lots. [CP 147 (Gilroy Decl., paragraph 5)]. Significantly, there is no dispute that the parties never discussed when the right of first refusal would terminate. [CP 130 (Decl. of Taylor, paragraph 6); CP 146-147 (Decl. of Gilroy, paragraph 4); CP 244 (Decl. of Edwards, paragraph 15)].

Wedgewood did not experience any success in finding buyers for those lots, and it began to look to alternative methods to market the lots. As part of those efforts, Richard Gilroy, one of the principals of Wedgewood, had communications with Michael Gladstein, a principal of

American Classic Homes ("ACH") in the fall of 2008 regarding a possible joint venture arrangement. [CP 147-148 (Gilroy Decl., paragraph 6)]. An outline of a possible arrangement was discussed and emails were exchanged, but no agreement was reached until February 6, 2009, a month after Vercello had failed to close on the last available date on the third set of lots and the expiration date of the PSA. [CP 148 (Gilroy Decl., paragraphs 6 and 7)]. The agreement entered into between Wedgewood and ACH in February 2009 was not a sale, but was a joint venture with the following deal points:

- a) Wedgewood agreed to supply lots on which ACH would build houses;
- b) ACH would obtain construction loans and Wedgewood would grant deeds of trust against the lots to secure the construction loans;
- c) ACH would build houses on the lots; and
- d) Upon sale of each house, Wedgewood would convey title to the buyer, and the proceeds after the costs of sale were to be distributed as follows:

- i) Wedgewood was to first be paid a specific amount for the lot;
- ii) ACH then would be repaid the costs of construction plus a specific percentage of those costs for its profit;
- iii) Any remaining amounts would be split equally between Wedgewood and ACH; and
- e) ACH would never come into title of any of the lots.

[CP 148-149 (Gilroy Decl., paragraph 7)].

Vercello learned about the deal with ACH shortly thereafter and threatened to file a lawsuit and record a lis pendens [CP 6]. In response, Wedgewood filed a complaint for declaratory judgment. [CP 4-23] Vercello filed an answer and counterclaims. [CP 24-30]. It also recorded a lis pendens. [CP 32-33]. Vercello asserted that the right of first refusal was to remain in effect until all the lots which were to have been included in the third take-down had been sold. [CP 27].

B. Procedural History

On the motion of Wedgewood, the trial court (The Honorable Richard F. McDermott) entered an order cancelling Vercello's lis

pendens and reserving the issue of award of attorneys fees and damages to Wedgewood, which order was entered on April 17, 2009. [CP 126-127].

On May 29, 2009, Judge McDermott heard Wedgewood's motion for summary judgment which was based on the legal theory that the right of first refusal had expired on January 6, 2009 along with the PSA and Addendum G. That motion was denied without prejudice to bring it again after 120 days to allow Vercello to conduct additional discovery and subject to the requirement the parties mediate the issues. [RP 5/29/09, pp. 29-30 and CP 314-315].

Wedgewood renewed its motion before Judge McDermott and a hearing was held on November 12, 2009. Again, the court denied the motion as Judge McDermott apparently was concerned that there may have been some communication between Wedgewood and ACH which amounted to an "offer" that Wedgewood should have presented to Vercello. [RP 11/09/09, p. 25, CP 477-480 and CP 481].

Kolin Taylor ("Taylor") and KBS Development ("KBS"), who had been brought into the case by Vercello quite late, conducted their

own summary judgment motion, the hearing for which was conducted on October 22, 2010 before The Honorable LeRoy McCullough, who had replaced Judge McDermott after a rotation of assignments for the judges had occurred. That motion was based on an alternative legal theory that the PSA had expired prior to the execution of Addendum G, Addendum G did not revive the PSA, Addendum G was not a valid stand-alone agreement, and therefore Addendum G was void *ab initio*. That motion was granted by an order entered on October 29, 2010. [CP 700-703].

Wedgewood then brought its own motion for summary judgment of dismissal before Judge McCullough on the same legal theory as Taylor and KBS had used, which motion was granted on January 14, 2011. [CP 825-829].

Vercello filed its Notice of Appeal on January 20, 2011 [CP 830-843].

IV. ARGUMENT

This Court may affirm the trial court's dismissal of Vercello's claims on any basis supported by the record:

It is well settled that we review the record on summary judgment *de novo*, engaging in the same inquiry as the trial court. *Benjamin*

v. Wash. State Bar Ass'n, 138 Wn.2d 506, 980 P.2d 742 (1999) . Because our review is de novo, we are free to premise our holding affirming summary judgment on an issue not decided by the trial court. See *Redding v. Va. Mason Med. Ctr.*, 75 Wash.App. 424, 878 P.2d 483 (1994) (an appellate court may affirm a trial court's disposition of a summary judgment motion on any basis supported by the record); see also *LaMon v. Butler*, 112 Wash.2d 193, 770 P.2d 1027 (1989). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Clements v. Travelers Indem. Co.*, 121 Wash.2d 243, 850 P.2d 1298 (1993); CR 56(c).

International Brotherhood of Electrical Workers, Local Union No. 46 v. Trig Electric Construction Company, 142 Wn.2d 431, 13 P.3d 622 (2000).

A. Addendum G did not revive the expired PSA

There is no dispute that Vercello did not close on the second set of lots in the time required by the PSA, and that the earnest money was forfeited at that time. [CP 455 (deposition of Edwards, p. 44, lines 11-20)]. Paragraph 15 of the PSA made time of the essence to the agreement [CP 59], and paragraph 13 of the PSA is an integration clause [CP 59]. In *Mid-Town Limited Partnership v. Preston*, 69 Wash.App. 227, 848 P.2d 1268 (Div. 1, 1993), a case specifically dealing with the issue of whether a PSA survives the failure of a buyer to close the transaction, the court held as follows:

A provision in an agreement making time of the essence is generally treated as evidence of a mutual intent that specified times of performance be strictly enforced. In *Nadeau v. Beers*, 73 Wash.2d 608, 440 P.2d 164 (1968), the court held that when an agreement makes time of the essence, fixes a termination date, and there is no conduct giving rise to estoppels or waiver, the agreement becomes legally defunct upon the stated termination date if performance is not tendered. In accord is *Local 112, I.B.E.W. Bldg. Ass'n v. Tomlinson Dari-Mart*, 30 Wash.App. 139, 632 P.2d 911 (1981). See also, 6 S. Williston, *Contracts* § 852, at 208-09 (3d ed. 1962), stating as follows: [I]f time is made essential by agreement, neither the vendor nor the purchaser can enforce the contract specifically after the agreed day if it is then still wholly executory on both sides; ...
...
No declaration of the obvious [that the agreement had expired] ... was necessary. *The expiration was automatic.* (Emphasis added).

The same quotation from *Nadeau v. Beers* was cited in *Local 112, I.B.E.W. Bldg. Ass'n v. Tomlinson Dari-Mart*, 30 Wash.App. 139, 142, 632 P.2d 911 (Div. 3, 1981). In that case the court went on to state:

The only exception we find to this rule is when the failure to meet the time limit is the result of one of the parties' bad faith or lack of due diligence. *Egbert v. Way*, 15 Wash.App. 76, 546 P.2d 1246 (1976); *Hudesman v. Foley*, 4 Wash.App. 230, 480 P.2d 534 (1971).

Local 112 at 142-143.

In accord with *Local 112 v. CHG International, Inc. v. Robin Lee, Inc.*, 35 Wash. App. 512, 667 P.2d 1127 (Div. 1, 1983), in which the court held as follows:

A party may expressly condition its duty of performance upon the happening of an event by a specified day. When this occurs, the court should not set aside the limitation and enforce the promise in spite of the non-performance of the condition, unless the condition has been excused by action of the promisor or there has been such performance or change of position by the promisee that an unjust forfeiture will result. 3 A Corbin, *Contracts* § 714, p. 359 (1960). No such mitigating circumstances are present here. Robin Lee did not agree to waive the July 31 closing date nor did it engage in any conduct which would constitute an estoppel precluding it from asserting the July 31 closing date. Nor is there any evidence of detrimental reliance on the part of CHG. A condition must be exactly fulfilled or no liability arises on the promise which it qualifies. 5 Williston, *Contracts* § 675, p. 184 (3d ed. 1961). Since the condition precedent to the contract was neither performed nor excused within the time required, both parties' contractual duties were discharged. 6 Corbin, *Contracts* § 1252, p. 2 (1962).

Vercello has supplied no evidence of bad faith, lack of due diligence or any other occurrence which would act as mitigating circumstances prior to January 17, 2008, the last day to close on the second take-down.

Vercello argues that although the PSA had expired, the intent of the parties was that Addendum G revived it, and when the PSA and Addendum G are read together, they form an enforceable agreement. While it is not disputed that the parties did believe that Addendum G

modified and extended the PSA, they were mistaken. The Washington Supreme Court in *Pavey v. Collins*, 31 Wn. 2d 864, 199 P.2d 571 (1948) clearly held to the contrary:

[A] contract which by its terms has expired is legally defunct and, since the vitality which it once had has ceased, there is nothing upon which an extension may legally operate. So long as a contract remains executory, the parties thereto, acting upon sufficient consideration, may by agreement rescind, alter, modify, supplement, or replace it; but when the contract has terminated or been extinguished, it is no longer subject to extension, for extension implies an *existing* agreement. To bring the terms of an extinguished contract into renewed existence requires a new contract embodying such terms. Id. at 870.
(Emphasis the Court's).

Despite the parties' intentions, a defunct contract is simply not brought back from the dead by an addendum. Under *Pavey* there must be a new contract embodying the terms the parties have agreed upon. Therefore, for Addendum G to be enforceable, it must either have incorporated the expired PSA by reference or Addendum G must be enforceable as a stand-alone agreement.

The incorporation by reference argument has no merit because Addendum G was clearly intended to be an addendum to the existing PSA and not a separate agreement, and even if had been intended to be a

separate agreement, there was no clear and unequivocal incorporation by reference of the REPSA in Addendum G.

The incorporation by reference argument is only applicable if the parties intended Addendum G to be a new agreement. Earlier in this case, it was Vercello's position that Addendum G was a new agreement. [CP]. In opposition to Wedgewood's 2009 summary judgment motion, Vercello filed the declaration of Kerek Edwards who stated that Addendum G was a "new business deal." [CP 244 (Edwards Decl., paragraph 13, CP 439 (Edwards Decl. paragraph 13)].

However, Mark Donner, the principal of Vercello, subsequently testified in his deposition that Addendum G *was intended to be an addendum* to the Real Estate Purchase and Sale Agreement. [CP 744-745 (Deposition of Mark Donner, pp. 164-167)]. Mr. Donner is the person who signed Addendum G, and he obviously knew what he was signing because he is an owner or member of at least twelve limited liability companies in addition to Vercello and, over the years, he has personally signed over a thousand real estate purchase and sale

agreements. [CP 806 (Deposition of Donner, pp. 155, 157-158, 161-162)].

Following Mr. Donner's deposition testimony, counsel for Vercello also clarified his client's position on oral argument before the trial court on October 22, 2010, that Addendum G was an addendum to the 2007 REPSA and not a new contract. [RP October 22, 2010, p. 28).

Not only did Mr. Donner testify that Addendum G was intended to be an addendum, but the parties titled it as an addendum and its first sentence says it "is an Addendum to the Real Estate Purchase and Sale Agreement dated January 30, 2007". [CP 98] The evidence is now unrefuted that the parties intended Addendum G to be an addendum to the PSA.

Although an extinguished contract can conceivably be renewed by a new contract that clearly expresses its terms, that issue is moot when the principal of Vercello, Vercello's attorney and all of the parties whose names appear on Addendum G all agreed that it was intended to be *an addendum, not a new contract.*

Further, even had the parties intended Addendum G to be a new contract, it does not incorporate by reference the PSA. Washington law is clear that for there to be an incorporation by reference, the parties must clearly and unequivocally incorporate by reference into their contract the terms of some other document. *Santos v. Sinclair et al, Ticor Title Insurance Company of California*, 76 Wash. App. 320, 884 P.2d. 941 (Div.2, 1994). There is nothing in Addendum G which evidences a clear and unequivocal incorporation by reference of the PSA. The language in Addendum G simply states that Addendum G is an addendum to the PSA, and in the event of any inconsistent terms between the PSA and Addendum G, the terms of Addendum G would control.

B. Addendum G cannot stand alone.

Addendum G does not contain all the necessary elements to make it an enforceable contract. Critically absent were the legal descriptions of the lots and the pricing for the lots in the third take-down. Therefore, Addendum G failed to meet the statute of frauds requirements and was void *ab initio*. RCW 64.04.010-.020; *Key Design, Inc. v. Moser*, 138

Wn.2d 875, 983 P.2d 653 (1999); *Bigelow v. Mood*, 56 Wn.2d 340, 353 P.2d 429 (1960).

The authorities cited by Vercello do not support its position that Addendum G satisfies the statute of frauds. The quotation which Vercello attributes to *Bigelow v. Mood*, does not exist in that case. That case simply held that a complete legal description was necessary to satisfy the statute of frauds in a deed. In *Bingham v. Sherfey*, 38 Wn.2d 886, 234 P.2d 489 (1951) there was a deficiency in the metes and bounds description in a deed. However, because the deed also contained the tax lot description for the parcel, the Court held that the reference to the tax parcel was sufficient to properly identify the parcel and satisfy the statute of frauds. *Knight v. American Nat. Bank*, 52 Wn. App 1, 756 P.2d 757 (Div. 3, 1988) dealt with a lease which did not contain a legal description of the leasehold interest. However, the lease did properly incorporate by reference a site plan which did contain the legal description. All of these cases are consistent with Wedgewood's position that Addendum G cannot stand alone due to its failure to satisfy the statute of frauds.

C. After the Forfeiture of the Earnest Money, the PSA became Illusory.

Another basis for upholding the trial court's dismissal of the claims of Vercello is that even if Addendum G was a valid amendment to the PSA or properly incorporated the PSA by reference, the agreement was unenforceable because it was illusory. The PSA provided that the only remedy which Wedgewood would have for the failure of Vercello to perform would be the forfeiture of the earnest money deposited by Vercello. [CP 58 (Paragraph 10 of the PSA)]. That paragraph even limited any attorneys fees which would be due to Wedgewood to the earnest money deposited by Vercello. Addendum G (paragraph 1.a.) provided that the earnest money would be applied to the second takedown. [CP 98] However, in reality, the earnest money had already been forfeited [CP 448, and CP 455 (Edwards Deposition, p. 44, lines 17-20)], and the performance by Vercello under the PSA became optional to Vercello since Wedgewood had no remedy if Vercello chose not to close on either the second or third takedowns. Once performance under a contract becomes optional for one of the parties, the contract is no longer enforceable by either party.

In *Interchange Associates v. Interchange, Inc.*, 16 Wash. App. 359, at 360-361, 557 P.2d 357 (Div. 1, 1976), which is probably the key case in Washington regarding illusory promises, the court held as follows:

An 'illusory promise' is a purported promise that actually promises nothing because it leaves to the speaker the choice of performance or nonperformance. When a 'promise' is illusory, there is no actual requirement upon the 'promisor' that anything be done because the 'promisor' has an alternative which, if taken, will render the 'promisee' nothing. When the provisions of the supposed promise leave the promisor's performance optional or entirely within the discretion, pleasure and control of the promisor, the 'promise' is illusory. As stated in Restatement of Contracts § 2, comment B (1932):

An apparent promise which according to its terms makes performance optional with the promisor whatever may happen, or whatever course of conduct in other respects he may pursue, is in fact no promise, although often called an illusory promise.

An 'illusory promise' is neither enforceable nor sufficient consideration to support enforcement of a return promise.
... (Citations omitted)

Once there was no earnest money remaining, Vercello had no "skin in the game" and could determine whether to perform or not with impunity. Therefore, its promise to perform became illusory, and because an

illusory promise is not good consideration, the PSA became unenforceable by either party.

D. PSA, Even if Revived, Expired on January 6, 2009 and the Right of First Refusal Expired With It.

Assuming *arguendo* that the PSA was revived by Addendum G or that Addendum G was a new agreement, it expired on January 6, 2009. For all the reasons set forth in Section IV.1., above, the PSA died when Vercello failed to close on the third set of lots.

There is no indication in Addendum G that the parties intended the right of first refusal to survive January 6, 2009. There is no ambiguity in Paragraph 3.a. of Addendum G. What was written said absolutely nothing about the right of first refusal surviving the termination of the PSA, and the legal principal as set forth in *Mid-Town v. Preston, supra*, is that where time is of the essence, there is a fixed termination date and performance is not tendered by that date, the agreement becomes legally defunct unless there is conduct giving rise to estoppel or waiver. Here the defendants can show no such conduct.

Vercello is claiming that the parties intended that the right of first refusal would continue until all the lots included in the third takedown

were sold. [CP 244 (Edwards Decl., paragraph 16)], CP 223, (paragraph B. 14)]. However, as pointed out on page 5, above, the parties all agree that there were no discussions regarding when the right of first refusal should terminate. Therefore, the declarations of Vercello principals that they intended the right of first refusal to survive January 6, 2009 is at best a statement of the unexpressed subjective intent of Vercello and not even admissible under the parol evidence rule. In *Hearst Communications v. Seattle Times Co.*, 154 Wn.2d 493, 115 P.3d 262 (2005), the Washington Supreme Court went to some lengths to clarify the state of the parol evidence rule in Washington:

In *Hollis*, we sought to clarify the meaning of *Berg v. Hudesman*, 115 Wash.2d 657, 801 P.2d 222 (1990):

Initially *Berg* was viewed by some as authorizing unrestricted use of extrinsic evidence in contract analysis, thus creating unpredictability in contract interpretation. During the past eight years, the rule announced in *Berg* has been explained and refined by this court, resulting in a more consistent, predictable approach to contract interpretation in this state.

Hollis v. Garwall, Inc., 137 Wash.2d 683, 974 P.2d 836 (1999) (citations omitted). Since *Berg*, we have explained that surrounding circumstances and other extrinsic evidence are to be used “to determine the meaning of *specific words and terms used*” and not to “show an

intention independent of the instrument” or to “vary, contradict or modify the written word.” *Id.* at 695-96, 974 P.2d 836 (emphasis added). *See also U.S. Life Credit Life Ins. Co. v. Williams*, 129 Wash.2d 565, 919 P.2d 594 (1996) (court's intention in adopting the “context rule” was not “to allow such evidence to be employed to emasculate the written expression of” the meaning of the contract's terms); *In re Marriage of Schweitzer*, 132 Wash.2d 318, 937 P.2d 1062 (1997) (“context rule” cannot be used to show intention independent of the instrument); *Go2Net, Inc. v. C I Host, Inc.*, 115 Wash.App. 73, 60 P.3d 1245 (2003) (admissible extrinsic evidence does *not* include evidence of a party's unilateral or subjective intent as to contract's meaning).

Our holding in *Berg* may have been misunderstood as it implicates the admission of parol and extrinsic evidence. We take this opportunity to acknowledge that Washington continues to follow the objective manifestation theory of contracts. Under this approach, we attempt to determine the parties' intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties. ... (Citation omitted) We impute an intention corresponding to the reasonable meaning of the words used. ... (Citation omitted) Thus, when interpreting contracts, the subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used. ... (Citation omitted) We generally give words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent. ... (Citation omitted) We do not interpret what was intended to be written but what was written. ... (Citation omitted)

In absence of a clear intent by the parties to the contrary, the rule of law as expressed in *Mid-Town* would lead to the inescapable conclusion that the right of first refusal expired along with the PSA on January 6, 2009.

In addition, the position of Vercello that the right of first refusal was to continue until all the lots which were to be part of the third take-down were sold would violate the rule against perpetuities. The rule against perpetuities provides that "no interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." The purpose of the rule is to prevent the fettering of the marketability of property over long periods of time by indirect restraints upon its alienation. *Washington State Grange v. Brandt*, 136 Wash. App. 138, 148 P.3d 1069 (Div. 1, 2006).

Because it could take longer to sell the lots than twenty-one years after some life in being at the time of the execution of Addendum G, the right of first refusal until all those lots were sold would violate the rule against perpetuities and be unenforceable.

Vercello argues that there is a line of cases in Washington which hold that a right of first refusal is not an interest in land and therefore is not a restraint on alienation and not subject to the rules against perpetuities. See *Robroy Land Co. v. Prather*, 95 Wn.2d 66, 622 P.2d 367 (1980), and *Feider v. Feider*, 40 Wash. App. 589, 699 P.2d 801 (Div. 3, 1985). However, the Washington Supreme Court clearly held that a right of first refusal is an interest in land in *Manufactured Housing Communities v. State*, 142 Wn.2d 347, 13 P.3d 183 (2000), which was decided twenty years after *Robroy*. The Washington Court of Appeals in *South Kitsap Family Worship Center v. Weir*, 135 Wash.App. 900, 146 P.3d 935 (Div.2,2006), set forth in some detail the holding in *Manufactured Housing* and clarified that a right of first refusal would be subject to the rule against perpetuities.

The Center and the Developers rely on dicta from *Robroy Land Co., Inc. v. Prather*, 95 Wash.2d 66, 68-69, 622 P.2d 367 (1980), for the proposition that survival of the Center's repurchase option is consistent with conveying title to Weir with a statutory warranty deed. In *Robroy*, the Court considered whether a right of first refusal constitutes an interest in land for purposes of the rule against perpetuities or the rules against restraints on alienation. ... Noting that the policy of these rules is to promote the marketability of land, the Court held that a

right of first refusal gives the holder no power to restrain alienation, rather, the holder can exercise the right as a “preferred purchaser” once the property owner has decided to sell. ... (citation omitted). While the Court distinguished a right of first refusal from an ordinary option, which gives the holder the power to compel an unwilling owner to sell, it stated that even “in an ordinary option contract, until the option is exercised, the optionee acquires no equitable estate or interest in the optioned land.” ... (citation omitted).

The notion that the power to compel an unwilling sale is not an interest in land is paradoxical and, in any event, was not essential to the *Robroy* decision dealing with rights of first refusal. Furthermore, the continuing viability of the Court's holding in *Robroy* is questionable after our Supreme Court's decision in *Manufactured Housing Communities v. State*, 142 Wash.2d 347, 13 P.3d 183 (2000).

In *Manufactured Housing*, the Supreme Court analyzed the right of first refusal in the context of a takings claim and concluded that a law giving mobile home park tenants the right of first refusal over a sale of their park constituted an unconstitutional taking by the legislative body enacting the law. ... In holding that a right of first refusal in the hands of the property owner is a valuable property right, the court distinguished *Robroy* on the ground that the earlier case focused on the right in the hands of the grantee. ... In other words, *Robroy* held that the right of first refusal gave the grantee no interest in the land, but in *Manufactured Housing* the Court held that the State deprived the mobile home park owners of a property interest when it gave the right of first refusal to the tenants. Because the park owners could have, as the grantor did in *Robroy*, given a right of first refusal to

another individual for consideration, this was part of the “bundle of sticks” that comprised their rights of ownership. ... Thus, the freedom to grant a right of first refusal is an interest in land, and a title reserving this right in another lacks a fundamental attribute of ownership. ...

Therefore, since a right of first refusal is an interest in real property, the rule against perpetuities would apply, making Vercello's claim that the right of first refusal survived the termination of the PSA unenforceable.

Vercello has gone on to argue that part performance under Addendum G takes it out of the statute of frauds. However, that argument is only relevant if Addendum G is a stand-alone agreement, which the parties all acknowledge was not intended. But for the sake of argument assuming Addendum G is construed to be a stand-alone agreement, part performance would not take it out of the statute of frauds as to anything other than the purchase and sale of the lots in the second takedown. According to *Pardee v. Jolly*, 163 Wn.2d 558, 182 P.3d 967 (2008), a party must show the following in order for part performance to remove a contract from the statute of frauds:

1. Delivery and assumption of actual and exclusive possession;
2. Payment or tender of consideration; and

3. The making of permanent, substantial and valuable improvements.

Vercello is attempting to blur the distinction between the lots in the second and third takedowns. Although Addendum G was void and unenforceable as to both sets of lots, when the lots in the second takedown were conveyed by deed from Wedgewood to Vercello and paid for by Vercello, the enforceability of Addendum G as to those lots became moot. However, the closing of the sale of the second set of lots did not cure the deficiencies of Addendum G under the statute of frauds as to the lots in the third takedown. There was no legal description, there was no purchase price, and there was nothing that incorporated the PSA by reference to cure those deficiencies.

E. There was no bona fide offer to purchase from ACH to Wedgewood prior to January 6, 2009.

The key issue which concerned Judge McDermott and caused him to decline to grant the renewed summary judgment motion he heard on November 9, 2009 was whether there was some event between Wedgewood and ACH prior to January 6, 2009 which triggered the right

of first refusal. [RP 11/9/09, p. 25, l. 4-8, and CP 478]. However, the reasons for his concern are not easily discernable.

The right of first refusal contained in Addendum G [CP 98 (paragraph 3)] requires a *signed bona fide offer to purchase* one or more of the remaining lots being presented to Wedgewood as a precondition to Wedgewood's having any obligation to give notice to Vercello of the offer and giving Vercello the opportunity to match it. No signed bona fide offer to purchase was ever presented to Vercello prior to January 6, 2009.

The Defendants are relying on a series of emails [CP 415, 417, and 419] as proof that there was an offer from ACH which Wedgewood had the obligation to present to Vercello. Those emails consist of two emails from Mr. Taylor to Mr. Gladstein setting forth proposed deal points. At the bottom of each, Mr. Taylor states the intention of sometime later having a formal agreement drafted by an attorney. The only expression from Mr. Gladstein is an email sent while he was on vacation in response to Mr. Taylor's second email in which he states: "this sounds right. can we finish this once I get home?"

Basic hornbook law requires that an offer must be a proposal which gives the offeree the power to accept it and create a binding contract. The Restatement, 2d, Contracts §24 states as follows:

An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.

The communications between Wedgewood, including Kolin Taylor, its broker, and ACH were merely negotiations and both parties intended any deal to be reduced to writing and to include all necessary details. [CP 345-346 (Decl. of Taylor, paragraph 8) and CP 350 (Decl. of Gladstein, paragraph 4)]. Washington law is in accord. *Pacific Cascade Corporation v. Nimmer*, 25 Wash.App. 552, 608 P.2d 266 (Div. 3, 1980) is an oft-cited case regarding the distinction between negotiations and offers.

An offer consists of a promise to render a stated performance in exchange for a return promise being given. Restatement of Contracts § 24 (1932) .

“But an intention to do a thing is not a promise to do it.” *Meissner v. Simpson Timber Co.*, 69 Wash.2d 949, 957, 421 P.2d 674, (1966). It is evidence of a future contractual intent, not the present contractual intent essential to an operative offer. ... (Citations omitted) “An agreement to negotiate a contract in the future is nothing more than negotiations.”; ... (Citations omitted).

It is often difficult to draw an exact line between offers and preliminary negotiations.

“(G)reat care should . . . be taken not to construe the conduct, declarations, or letters of a party as proposals when they are intended only as preliminary negotiations. The question in such cases is, did the offerer mean to submit a proposition, or was he only settling the terms of an agreement on which he proposed to enter, after all its particulars are adjusted? If it is intended merely to start negotiations which may subsequently result in a contract, or is intended to call forth an offer from the one to whom it is addressed, its acceptance does not consummate a contract. The fact that the parties do intend a subsequent agreement to be made is strong evidence to show that they do not intend the previous negotiations to amount to any proposal or acceptance. An agreement, to be finally settled, must comprise all the terms which the parties intended to introduce into the agreement and until the terms of a proposal are settled, the proposer is at liberty to retire from the bargain.”

... (Citations omitted).

If from a promise, or manifestation of intention, or from the circumstances existing at the time, the person to whom the promise or manifestation is addressed knows or has reason to know that the person making it does not intend it as an expression of his fixed purpose until he has given a *further expression of assent*, he has not made an offer.

(Italics ours.) Restatement of Contracts § 25 (1932).

Id at pp. 556-557.

Furthermore, none of the communications from ACH were signed, and the right of first refusal in Addendum G requires that any

offer must be signed before it is presented to Vercello. The lack of signatures also means that the real property statute of frauds, RCW §§ 64.04.010-.020, was not satisfied, so neither party could enforce the terms set forth in the informal communications, assuming *arguendo* the terms were otherwise legally sufficient to constitute an enforceable agreement.

Therefore, it is clear since no offer ever existed prior to January 6, 2009, there was nothing to present to Vercello.

F. Judicial Estoppel is not Applicable

In its growing desperation to avoid a dismissal of its claims, Vercello has asserted that Wedgewood is estopped from arguing that the PSA was void after January 17, 2008 because Wedgewood had in prior summary judgment motions argued that the PSA expired on January 6, 2009. That argument has no merit. The concept of judicial estoppel is based on a party taking inconsistent factual positions, not arguing alternative legal theories. The gravamen of judicial estoppel is the intentional assertion of an inconsistent position that erodes respect for the

judicial process and the courts. *Ashmore v. Estate of Duff*, 165 Wn.2d 948, 205 P.3d 111 (2009).

When the parties executed Addendum G, both sides believed that Addendum G was an amendment to the PSA. Neither party was aware that the applicable law made it void and unenforceable since it was executed after the PSA had expired. Wedgewood's motions for summary judgment were based on the expiration of the PSA, including Addendum G, on January 6, 2009, and the legal conclusion that the right of first refusal included in Addendum G also expired on the same date. This legal argument is in the alternative to the argument later made by the other respondents and subsequently by Wedgewood that Addendum G was void from its inception because the PSA had expired before Addendum G was executed.¹

¹ The irony is that where judicial estoppel probably has occurred is by Vercello in defending against the summary judgment motions. Vercello's principals initially asserted that Addendum G was intended to be a new agreement, a stand-alone contract. The argument was crafted to fit the case within *Robroy Land Co. v. Prather, supra*, and allow the argument that the parties intended the right of first refusal to survive January 6, 2009. If Addendum G were part of the PSA, and assuming the PSA as amended was valid, the amended PSA would have terminated on January 6, 2009. Only by arguing that it was a new agreement could Vercello assert the right of first refusal was intended to survive January 6, 2009. After Mark Donner, the principal of Vercello, testified in his deposition on September 20, 2010 that he intended Addendum G to be an amendment to the PSA [CP 744-745 (underlined passages of transcript)], the attorneys

Rushlight v. McLain, 28 Wn. 2d 189, 182 P.2d 62 (1947), has been cited by Vercello for the proposition that a litigant cannot take inconsistent positions as to the validity of a contract. However, a full reading of *Rushlight* shows that Vercello's argument is misplaced. The *Rushlight* court cited 31 C.J.S., *Estoppel*, §117:

Estoppel against inconsistency in judicial proceedings is generally treated as a phase of equitable estoppel or estoppel in pais, and under this view its operation has been made to depend on the presence or absence of elements essential to equitable estoppel. Thus, as a general rule it is essential, or at least an important factor, that the position first assumed should have resulted in advantage to one party or disadvantage to the other. The party invoking the estoppel must have been misled by the assumption of the first position, must have relied on it, and, so relying, have acted, or refrained from acting, or have changed his position, to his prejudice, or have put himself in such a position that his rights would be injuriously affected if his opponent were permitted to change his position.

Id at 194.

The Washington Supreme Court discussed estoppel in judicial proceedings in *Markley v. Markley*, 31 Wn.2d 605, at 613-615, 198 P.2d 486 (1948):

Under the title, *Estoppel*, 19 Am.Jur. 650, § 50, it is said:

....

for Vercello were forced to change their argument, and Mr. Fleming acknowledged in oral argument in open court on October 22, 2010 that Addendum G was an amendment to the PSA. [RP 10/22/10, p.28, ll.10-15 and p.30, ll.6-7].

The rule that a party will not be allowed to maintain inconsistent positions is applied in respect of positions in judicial proceedings. As thus applied it may be regarded not strictly as a question of estoppel, but as a matter in the nature of a positive rule of procedure based in manifest justice and, to a greater or less degree, on considerations of orderliness, regularity, and expedition in litigation. Certainly the elements of reliance and injury, while often considered, do not enter into such so-called estoppel to the same extent that they do in equitable estoppel proper. The principle requiring consistency in judicial proceedings is, however, customarily considered a form of equitable estoppel, and, therefore, it seems proper to discuss it here in a general way

The doctrine of estoppel, by having assumed a certain position in a judicial proceeding, is to be distinguished from what is known as election of remedies. Both are bottomed upon estoppel, but an election of remedies upon a given state of facts is quite different from an estoppel growing out of the assertion at one time of a given state of facts and, when unsuccessful, an assertion at a subsequent time of another and entirely different and inconsistent state of facts. There may be an election of rights as distinguished from an election of remedies.

....

19 Am.Jur., Estoppel, 704, § 72.

A number of limitations upon, or qualifications of, the rule against assuming inconsistent positions in judicial proceedings have been laid down. Thus, the following have been enumerated as essentials to the establishment of an estoppel under the rule that a position taken in an earlier action estops the one taking such position from assuming an inconsistent position in a later action: (1) the inconsistent position first asserted must have been successfully maintained; (2) a judgment must have been rendered; (3) the positions must be clearly inconsistent; (4) the parties and

questions must be the same; (5) the party claiming estoppel must have been misled and have changed his position; (6) it must appear unjust to one party to permit the other to change. The courts are not altogether agreed, however, as to the application of some of these limitations. Clearly, to give rise to an estoppel, the positions must be not merely different, but so inconsistent that one necessarily excludes the other. ...
19 Am.Jur. 709 Estoppel, § 73

In addition, other recent case law is consistent:

Three core factors guide a trial court's determination of whether to apply the judicial estoppel doctrine: (1) whether "a party's later position" is "clearly inconsistent" with its earlier position"; (2) whether "judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled' "; and (3) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *New Hampshire v. Maine*, 532 U.S. 742, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001) (quoting *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, (6th Cir.1982)

Arkison v. Allen, 160 Wn.2d 535, 160 P.3d 13 (2007).

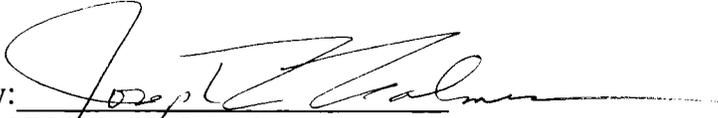
The facts of this case do not fit judicial estoppel. Vercello has not been misled, has not relied on Wedgewood's assertion, has not acted or refrained from acting, and its rights have not been affected. Neither has this Court or the trial court been misled.

V. CONCLUSION

The trial court correctly applied the facts to the law in granting the two summary judgment motions dismissing the claims of Vercello, which orders were based on the undisputed fact that the underlying PSA had expired before Addendum G was executed. In addition, the trial court could have also based its decision on a finding that Addendum G was an illusory contract as well as on a finding that the PSA and Addendum G, including the right of first refusal, expired on January 6, 2009 and that there were no "offers" prior to that time which Wedgewood should have presented to Vercello.

RESPECTFULLY SUBMITTED this 9th day of May, 2011.

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CERTIFICATE OF SERVICE

The undersigned certifies that on this day he/she caused to be served in the manner noted below, a copy of the document to which this certificate is attached, on the following counsel of record:

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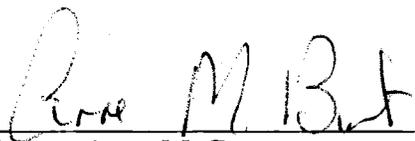
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct this 9th day of May, 2011.



Print Name: Anne M. Burt
Signed at Bellevue, Washington