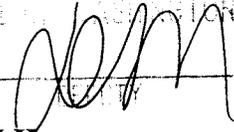


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STATE OF WASHINGTON

BY _____



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

HANS RAUTH and MELITTA L. HOLLAND, Respondents
v.
LAWRENCE H. EVANS, JULIA R. EVANS, and the marital community
thereof, Appellants.

NO. 34479-3-II

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ARGUMENT.....2

A. RESPONDENTS MAKE ALMOST NO EFFORT TO DEMONSTRATE WHY THE UNDISPUTED FACTS DO NOT COMPEL THIS COURT TO REVERSE THE TRIAL COURT.....2

 1. The Contract Provisions.....2

 2. The Evans acted in Good Faith.....3

B. TO THE BEST OF SELLERS KNOWLEDGE APPLIES TO BOTH REPRESENTATIONS AND WARRANTIES.....5

C. COMMUNICATING UNDISPUTED FACTS IN GOOD FAITH IS NOT A REPUDIATION.....8

D. PERFORMANCE ON FEBRUARY 28, 2005 WAS NOT DIFFICULT OR IMPRACTICAL- IT WAS LITERALLY IMPOSSIBLE.....10

E. BECAUSE PERFORMANCE AT CLOSING WAS IMPOSSIBLE SPECIFIC PERFORMANCE IS NOT AVAILABLE.....11

 1. Because respondents raised this issue in the trial court it is properly before this court.....11

 2. Specific performance is unavailable.....12

III. CONCLUSION.....13

TABLE OF AUTHORITIES

Washington State Cases

<i>IBEW Bldg. Ass'n v. Tomlinson Dari-Mart, Inc.</i> , 30 Wash.App. 139, 632 P.2d 911 (1981).....	12
<i>CKP, Inc. v. GRS Construction Co.</i> , 63 Wn.App. 601, 821 P.2d 63 (1991).....	9
<i>Hallauer v. Certain</i> , 19 Wash.App. 372, 379-380, 575 P.2d 732, 737 - 738 (1978).....	13
<i>Lindblad v. Boeing Co.</i> , 108 Wash.App. 198, 207, 31 P.3d 1 (2001).....	11
<i>Lovric v. Donatov</i> , 18 Wn.App. 274, 282, 567 P.2d 678 (1977).....	8
<i>Metropolitan Park Dist. of Tacoma v. Griffith</i> , 106 Wash.2d 425, 440, 723 P.2d 1093 (1986) citing to 18 S. Williston, <i>Contracts</i> § 1948 (3d ed. 1978); Restatement of Contracts § 460 (1932).....	10
<i>Seattle First National Bank v. Westlake Park Association</i> , 42 Wash App. 269, 711 P.2d 361 (1986).....	5, 7
<i>Tanner Elec. Co-op. v. Puget Sound Power & Light Co.</i> , 128 Wash.2d 656, 674, 911 P.2d 1301, 1310 (1996).....	6
<i>Wagner v. Wagner</i> , 95 Wash.2d 94, 101, 621 P.2d 1279 (1980).....	6
<i>Wallace Real Estate Investment, Inc. v. Groves</i> , 124 Wash.2d 881, 881 P.2d 1010 (1994).....	9

Statutes and Court Rules

RAP 2.5.....	11
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I. INTRODUCTION

The Evans' appeal raises several core issues to which the respondents have little response. These include whether the Evans breached their warranty that, "to the best of [their] knowledge," the property complied with all laws when they signed the contract, where there is no dispute that neither party knew anything about a septic-system problem at that time. They also include whether the Evans breached the contract at all, where they first learned about the problem two weeks prior to the scheduled closing, and no dispute exists that it was literally impossible to replace the septic system during the wet months, let alone within two weeks. The Evans offered to fix the problem at the earliest possible date, but the respondents failed to close. The trial court erred in granting summary judgment to the respondents. It should have granted summary judgment to the Evans.

To avoid the "best of the Seller's knowledge" language, respondents fail to address controlling authority that courts will not render contract language meaningless. To avoid the impossibility issue, they claim – contrary to the language of the contract – that the Evans bore the risk. Respondents go so far as to claim that an issue they admit was repeatedly raised before the trial court – specific performance – cannot be discussed here.

II. ARGUMENT

A. RESPONDENTS MAKE ALMOST NO EFFORT TO DEMONSTRATE WHY THE UNDISPUTED FACTS DO NOT COMPEL THIS COURT TO REVERSE THE TRIAL COURT.

1. The Contract Provisions

The respondents offer almost no analysis of the contract. The purchase and sale agreement contains three provisions crucial to the analysis of this case. First, the inspection contingency required respondents to give the Evans notice within 30 days of mutual acceptance of the PSA that they were satisfied with the property and waived all contingencies.¹ Respondents waived the contingencies.²

Second, the PSA contains an Operations Prior to Closing provision, under which the Evans agreed to maintain the property in the same condition after signing the PSA, through the closing.³ But this provision specifically states that the Evans “shall not be required to repair material damage from casualty except as otherwise provide [*sic*] in this Agreement.”⁴ No provision in the PSA required the Evans to repair the damage to the septic system caused by Wild Willy’s.

Third, the PSA contains a warranty that, “to the best of the [Evans’] knowledge, ... The Property and the business conducted thereon comply with all applicable laws, regulations, and ordinances;”⁵ It is

¹ CP 71.

² CP 41, 92.

³ CP 72.

⁴ CP 72.

⁵ CP 72. Appellants opening brief contained an error in omitting a comma from this provision. Counsel regrets the error. But the omission is immaterial.

undisputed that the Evans knew nothing of the septic system problems when they signed the PSA.⁶

Respondents brief does not address these provisions or show why they are inapplicable here.

2. The Evans acted in good faith

Respondents ignore the facts that show conclusively that 1) the Evans acted in good faith; 2) the Evans tried to close the transaction; and 3) the contract expired before Rauth insisted on performance.

Two weeks before closing the Evans discovered the septic had failed because their prior tenant – Wild Willy’s Southshore Smokehouse – had dumped animal fats and grease into the system.⁷ As soon as Evans found out the septic had failed they informed respondents.⁸ It is undisputed that it would be impossible to fix the septic and close within two weeks.⁹ Nevertheless, Evans contacted a septic designer/installer to hasten the repairs.¹⁰ The repairs could not be accomplished until May, 2005.¹¹ The transaction did not close on time. The parties continued to attempt to negotiate a closing date after the closing date passed.¹²

With this summary in mind, it is necessary to rebut respondents conclusions based on factual statements in their brief. Respondents state:

⁶ CP 41.

⁷ CP 41.

⁸ CP 105.

⁹ CP 17-18.

¹⁰ Id.

¹¹ CP 15.

¹² CP 15-16, 41, 109-110.

...Appellants ultimately manifested their mistaken belief that they did not nor ever had to fulfill the original contract by repairing the septic system prior to closing....¹³

For this proposition, they cite to two documents. The first is an addendum to the purchase and sale agreement offered by respondents on March 1, 2006. It stated:

...The closing date shall be on or before March 21, 2005. Provided Septic System is properly repaired/replaced as necessary by County approvals.¹⁴

Evans responded by striking the statement “properly repaired/replaced as necessary by County approvals” and replacing it with “designed and approved by 3/21/05.”¹⁵

The second document is the rescission, which was proposed and recommended by the dual agent.¹⁶

From this evidence, respondents draw the inference that the Evans changed their minds about repairing the septic. (“Appellants countered the offer for a new closing date by conspicuously leaving out the obligation to repair the septic but keeping the same closing date.”)¹⁷ But this is not supported by the record. When respondents objected to this language, the agent replied:

¹³ Respondents’ Brief at 9 – 10.

¹⁴ CP 109.

¹⁵ CP 110.

¹⁶ CP 111-113.

¹⁷ Respondents’ Brief at 10.

Their counter was "Closing date shall be on or before March 21, 2005, provided septic system is designed & approved by 3.21.05" I have faxed you a copy. It was my understanding from conversations with [Ms. Holland] and yourself that this was unacceptable and that you will not close before the septic is installed. *The alternative addendum would say...*

*"closing to be 15 day after installation of the septic system, in any event, by May 31, 2005."*¹⁸

Respondents completely ignore this undisputed evidence, which rebuts the premise of their inference that the Evans did not agree to repair the system. They simply would not agree to do something that was impossible. They could not agree to have a repaired system in place by March 21, 2005.

B. "TO THE BEST OF SELLER'S KNOWLEDGE" APPLIES TO BOTH REPRESENTATIONS AND WARRANTIES

A contract must be read in a manner which gives meaning to all its words, not in a manner which causes some language to be meaningless.¹⁹

Respondents wish to limit use of the phrase "to the best of sellers knowledge" to representations and not apply it to warranties. At Section 12, the contract reads:

Seller represents and warrants to Buyer that, to the best of Seller's knowledge, each of the following is true and shall be true as of closing:...(c) The Property and the business conducted thereon comply with all applicable laws, regulations, and ordinances....²⁰

¹⁸ CP 15. (Emphasis added).

¹⁹ *Seattle First National Bank v. Westlake Park Association*, 42 Wash.App. 269, 711 P.2d 361 (1986).

²⁰ *Id.*

In interpreting this language, the contract must be read as a whole:

[T]he intent of the parties to a particular agreement may be discovered not only from the actual language of the agreement but also from “ ‘viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.’ ”²¹

Reading the contract as a whole it is evident that the warranty’s limiting language “to the best of Seller’s knowledge” had meaning. It limited the scope of sellers’ warranties to their actual knowledge. The other contract provisions cited above show that the sellers did not intend to obligate themselves to make *any* repairs. Here, the facts are undisputed that the Evans had no knowledge regarding problems with the septic until after the contract was formed – two weeks before closing. The warranty as to their knowledge was therefore not breached.

Respondents would have this Court ignore the operative language.

Washington law prohibits courts from disregarding contract language:

“Courts can neither disregard contract language which the parties have employed nor revise the contract under a theory of construing it.” *Wagner v. Wagner*, 95 Wash.2d 94, 101, 621 P.2d 1279 (1980). An interpretation which gives effect to all of the words in a contract provision is favored over one which renders some of the language

²¹ *Tanner Elec. Co-op. v. Puget Sound Power & Light Co.*, 128 Wash.2d 656, 674, 911 P.2d 1301, 1310 (1996). (Internal citations omitted.)

meaningless or infective. *Wagner*, at 101, 621 P.2d 1279.²²

Employing the above rules the contract should be analyzed as follows. Sellers are warranting that there are no *known* defects when the agreement was formed. It is undisputed that they had no knowledge of defects (so, no breach there). Buyer assumes the obligation to find unknown defects and then assumes the risk by approving the inspection contingency once they are satisfied. If there is an unexpected loss due to casualty (Wild Willy's putting grease down the drain) the Seller is not obligated to fix it.

Seller also warrants that there will be no *known* defects at closing. Because the transaction never closed this warranty never took effect. And even if it did, buyers had equal knowledge (the Evans informed them almost immediately about the problem) and could not rely on the warranty. There was no effort by the sellers to hide the problem and close.

Even though the Evans had no obligation to fix the septic system under the contract, they nonetheless tried to do the right thing by offering to repair it at the earliest possible date. The respondents insisted on a complete repair by March 21, 2006, which was no more possible than by the original closing date. Yet though the respondents then failed to close the deal, they now insist that the Evans "anticipatorily breached." There is simply no basis for this claim.

²² *Seattle First National Bank v. Westlake Park Association*, 42 Wash.App. 269, 711 P.2d 361 (1986).

C. COMMUNICATING UNDISPUTED FACTS IN GOOD FAITH IS NOT A REPUDIATION.

About two weeks before closing the parties learned the septic had failed. On February 18, 2005, Mr. Rauth wrote the real estate agent who was representing both parties:

...[W]hat's the status on...the septic system repairs? I need to get my permit application in place with the county so I need that documentation. We're quickly approaching the closing date that the Evans wanted.²³

That same day, the agent replied:

...The Evans are working on getting a new design done. It will then need County approval and the new system will need to be installed. This is not going to be completed by the closing date of Feb 28 so we will need to extend until the end of March sometime...I have spoken with [Ms. Holland], who informs me she will be back from her trip on March 19th, I'm thinking we should be ready to close more or less on her return....

I will keep you up to date as things go along & will have an extension addendum drawn up as soon as possible.²⁴

An anticipatory breach is a "positive statement or action by the promisor indicating distinctly and unequivocally that he either will not or cannot perform any of his contractual obligations."²⁵ A party's intent to not perform their obligations may not be implied from "doubtful and indefinite statements that the performance may or may not take place."

²³ CP 105.

²⁴ Id.

²⁵ *Lovric v. Donatov*, 18 Wn.App. 274, 282, 567 P.2d 678 (1977).

“Repudiation of a contract by one party *may* be treated by the other as a breach which will excuse the other’s performance.”²⁶

The buyers did not treat the statements made by the agent as a repudiation. They proposed terms, based on that information, to close the transaction. But because they could not agree on terms, the transaction died.

*Wallace Real Estate Investment, Inc. v. Groves*²⁷ does not support the respondents’ arguments. In that case, the buyer chose not to close the transaction on time because he would have had to pay more money than he had anticipated.²⁸ Here, the Evans would have been happy to close the transaction with the septic damaged. But the buyers (understandably) would not close without the septic repaired and requested to extend closing.²⁹ The reality of the situation was that it was going to take several months to accomplish the repairs. The septic needed to be designed, approved by the County, and then be installed (in dry weather). Respondent cannot claim that they did not tender performance because it would be a “useless act.” The only evidence is that they did not tender performance because they did not wish to close with a damaged septic.³⁰

Based on the evidence in the record the agent’s remarks were not a repudiation as a matter of law. Taking the facts and inferences most

²⁶ *CKP, Inc. v. GRS Construction Co.*, 63 Wn.App. 601, 821 P.2d 63 (1991). Emphasis added.

²⁷ 124 Wash.2d 881, 881 P.2d 1010 (1994).

²⁸ *Id* at 898.

²⁹ CP 15.

³⁰ CP 15.

favorably to the non-moving party, the email from the agent was not a repudiation.

D. PERFORMANCE ON FEBRUARY 28, 2005 WAS NOT DIFFICULT OR IMPRACTICAL – IT WAS LITERALLY IMPOSSIBLE.

Respondents main contention is that the Evans breached the agreement by not closing with a working septic system on February 28, 2005. The only evidence in the record is that this was impossible.³¹ And their only counter to this argument is that the Evans bore the risk.

Under the impossibility doctrine, “when the existence of the specific thing is necessary for the performance of the contract, the fortuitous destruction of that thing excuses the promisor unless he has *clearly assumed the risk of its continued existence.*”³²

Here is it undisputed that both parties assumed the septic was functioning properly when the contract was formed. The question is whether the seller clearly assumed the risk of the unexpected occurrence.

The contract allocated the risk of making repairs to the respondents.³³ The Evans were not required to make repairs for damages arising from casualty or identified in an inspection.³⁴ Wild Willy’s negligence in flushing fat into the septic system was plainly a previously unknown damage from casualty. The Evans did not clearly, nor even ambiguously,

³¹ CP 17-18.

³² *Metropolitan Park Dist. of Tacoma v. Griffith*, 106 Wash.2d 425, 440, 723 P.2d 1093 (1986) citing to 18 S. Williston, *Contracts* § 1948 (3d ed. 1978); Restatement of Contracts § 460 (1932).

³³ CP 71.

³⁴ *Id.*

assume that risk. Fixing the septic system prior to either the original February closing, or the respondents' proposed mid-March extension, was impossible. The Evans were thus excused from performing, and the trial court erred in granting summary judgment to the respondents, and in denying summary judgment to the Evans.

E. BECAUSE PERFORMANCE AT CLOSING WAS IMPOSSIBLE SPECIFIC PERFORMANCE IS NOT AVAILABLE

1. Because respondent raised this issue in the trial court it is properly before this Court.

Respondent correctly notes that issues not raised or presented in the trial court are not generally subject to review.³⁵ Respondent then concedes that specific performance was raised in pleadings in the trial court.³⁶ By respondents own recitation of the law and the record the issue of specific performance is properly before the court on review.

The case cited by respondent, *Lindblad v. Boeing Co.*, is inapposite. In that case, at the trial court plaintiff only brought a disability accommodation claim. He did not raise a disparate treatment argument and his counsel specifically denied making such a claim to opposing counsel. On appeal, for the first time, plaintiff raised the disparate treatment claim. Because the disparate treatment argument was not raised in the trial court, the Court found this improper.

³⁵ Brief of respondents at 11. *Citing* RAP 2.5; *Lindblad v. Boeing Co.*, 108 Wash.App. 198, 207, 31 P.3d 1 (2001).

³⁶ Brief of Respondents at 11.

Here, respondents admit that the issue of specific performance was raised in the trial court. While the Evans primarily addressed the breach issue, they argued that specific performance is not available here. While the argument is couched in slightly different manner on appeal, the issue was raised, so it is properly before the court.

2. Specific Performance is Unavailable.

Specific performance is unavailable for many reasons. First, there was no breach, as discussed above. Second, specific performance is not available where time is of the essence and performance cannot occur because a condition precedent has not been met (through no bad faith of the seller), and there is no agreement to the extend the closing date.³⁷ Here, there is no dispute that the septic being fixed was required to close, but it was impossible. Further, there is no allegation of bad faith of the seller.

Third, where performance is impossible, specific performance is not available:

[Specific performance] must be exercised in accordance with general principles of equity jurisprudence, and the party seeking such relief must have acted in good faith, come into equity with clean hands and do what is just and equitable to the defendant. ***It will be denied where there is an adequate remedy at law, where performance is impossible and where, under the facts and***

³⁷ *Local 112 IBEW Bldg. Ass'n v. Tomlinson Dari-Mart, Inc.*, 30 Wash.App. 139, 632 P.2d 911 (1981).

*circumstances, it would be inequitable to compel the defendant to perform....*³⁸

The parties were obligated by the contract to close on February 28, 2005. Performance was impossible for both parties. Specific performance is not available.

III. CONCLUSION

Contrary to respondents' assertions, this case is not simple. It involves complex issues relating to contract interpretation, performance, and breach. These issues are presented in the context of a rich and interesting fact pattern.

Once the casualty was discovered the Evans' had no duty to perform. But they continued to negotiate in good faith to close the transaction. They moved forward with getting a new septic designed. Unfortunately, the buyers wanted the impossible. They wanted the property delivered with a new septic system by a certain date, when the septic could not have been installed that fast. They then claimed breach.

The trial court should be reversed, the respondents claims dismissed and the Evans' awarded their attorneys fees under the contract.

Dated this 2ND day of November, 2006.

LAW OFFICE OF
DAVID P. HORTON, INC. P.S.



David P. Horton, WSBA 27123
Attorney for Appellants

³⁸ *Hallauer v. Certain*, 19 Wash.App. 372, 379-380, 575 P.2d 732, 737 - 738 (1978). (Emphasis added). (Internal citations omitted).

