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COURT OF APPEALS

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No. 35046-7-II

STATE OF WASHINGTON

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CITY

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

HENRY DRAGT and JANE DRAGT, husband and wife,

Appellants,

v.

DRAGT/DETRAY, L.L.C., a Washington limited liability; E. PAUL
DETRAY and PHYLLIS DETRAY, and their marital community,

Respondents.

OPENING BRIEF OF APPELLANTS

RYAN, SWANSON & CLEVELAND, PLLC
Kevin A. Bay, WSBA No. 19821
Aaron M. Laing, WSBA No. 34453
1201 Third Avenue, Suite 3400
Seattle, Washington 98101-3034
(206) 464-4224

Attorneys for Appellants

RYAN, SWANSON & CLEVELAND
1201 Third Avenue, Suite 3400
Seattle, Washington 98101-3034
(206) 464-4224

ORIGINAL

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I. ASSIGNMENTS OF ERROR

1. The trial court erred in entering Finding of Fact No. 17.
2. The trial court erred in entering Finding of Fact No.18.
3. The trial court erred in entering Finding of Fact No. 19.
4. The trial court erred in entering Finding of Fact No. 20.
5. The trial court erred in entering Finding of Fact No. 21.
6. The trial court erred in entering Finding of Fact No. 22.
7. The trial court erred in entering Finding of Fact No. 24.
8. The trial court erred in entering Finding of Fact No. 35.
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17. The trial court erred in entering Conclusion of Law No. 5.
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19. The trial court erred in entering Conclusion of Law No. 7.
20. The trial court erred in entering Conclusion of Law No. 8.

21. The trial court erred in entering Conclusion of Law No. 12.
22. The trial court erred in entering Conclusion of Law No. 13.
23. The trial court erred in admitting Exhibit 221.
24. The trial court erred in admitting testimony from Frank Kirkbride about how to interpret the terms of the parties' agreement.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. **Issues related to whether the Dragts gave the LLC or DeTray an interest in their property other than the unenforceable option interest:**

1. Can a party who grants an option in good faith, which option is legally unenforceable, nonetheless be held liable for failing to hold the optioned property for the optionee? (Assignments of Error Nos. 4, 16, 18, 19, 20)

2. Is an oral conveyance of an interest in real property unenforceable if it has no duration, property description, price or any other definite terms? (Assignments of Error Nos. 4, 15, 16)

3. Is a husband's oral conveyance of an interest in community property unenforceable when the spouse did not consent to the conveyance? (Assignments of Error Nos. 4, 15, 16)

4. Did the trial court err in finding the Dragts agreed to "hold" their property when both parties testified that the Dragts intended to

convey no interest other than the original, unenforceable option?
(Assignments of Error Nos. 4, 7, 15, 16)

B. Issues related to the findings and conclusions that the parties modified the LLC Agreement:

5. Did the trial court err in finding the parties orally agreed to modify their LLC Agreement when the parties admitted their mutual intent was formed prior to signing the LLC Agreement and embodied therein?
(Assignments of Error Nos. 1, 4, 7, 13, 15, 16)

6. Did the trial court err in finding the parties agreed to modify the LLC Agreement when there was no evidence of a meeting of the minds? (Assignments of Error Nos. 1, 4, 7, 13, 15, 16)

7. Did the trial court err in concluding the alleged modification of the LLC Agreement was supported by new consideration when the parties admitted that their contractual obligations never changed? (Assignments of Error Nos. 1, 2, 3, 4, 5, 6, 7, 9, 16)

8. Did the trial court err in concluding extrinsic evidence could be relied upon to add terms to the parties' agreement? (Assignments of Error No. 15)

9. Did the trial court err in concluding the oral amendment and integration clauses in the parties' agreement were unenforceable as a matter of law? (Assignments of Error No. 14)

C. Other issues:

10. Did the trial court err in concluding the Dragts breached a notice provision of the LLC Agreement when no such provision exists? (Assignments of Error Nos. 18, 19, 20, 21)

11. Did the trial court err in using the implied duty of good faith to add substantive terms to the parties' agreement and resurrect the unenforceable option? (Assignments of Error No. 1, 2, 3, 4, 18)

12. Did the trial court err in imposing a fiduciary duty on the Dragts to comply with the terms of an unenforceable option? (Assignments of Error Nos. 8, 10, 11, 12, 13, 17, 18, 19, 20, 21)

13. Did the trial court err in awarding and calculating damages against the Dragts when no credit was allowed for the value of the Dragts' land? (Assignments of Error Nos. 19, 20, 21, 22)

14. Did the trial court err in admitting a witness' report and opinion testimony on how the parties' agreement should be interpreted? (Assignments of Error Nos. 13, 19, 23, 24)

III. STATEMENT OF THE CASE

A. Overview.

This case arises from the sale of Henry and Jane Dragt's dairy farm, which they owned and worked for more than 20 years. The Dragts wanted to sell their land and retire on the sale proceeds. In 1996, the

Dragts and real estate developer Paul DeTray formed the Dragt/DeTray LLC to develop and market the property. Pursuant to the LLC Agreement drafted by DeTray, the LLC was granted an option on the property at no cost. Other than the reference to the grant of the option itself, the LLC Agreement contained none of the specific terms required to be an enforceable option.

After becoming dissatisfied with the lack of progress over a period of eight years, the Dragts consulted independent counsel regarding their rights. For the first time, they learned the option was unenforceable. Thereafter, the Dragts decided to put their property on the market. They eventually sold the farm to a third party for \$3.3 million.

B. The Proceedings Below.

The Dragts filed a declaratory judgment action in Thurston County Superior Court to have the option declared void on the grounds it failed to state the essential terms required in an option and violated the statute of frauds. CP 74-79. The LLC and DeTray counterclaimed for breach of contract and unjust enrichment. CP 401-08.

The trial court granted Dragts' motion for summary judgment in part, ruling the option unenforceable as a matter of law. CP 312-13. In particular, the option failed to include any of the essential and necessary terms such as the purchase price, the duration of the option, the description

of the property, the payment schedule, security, the closing date, or the party responsible for the closing costs.¹

The Dragts also moved for summary judgment dismissing the counterclaim for breach of contract. CP 89-91. At issue was whether the LLC Agreement created any interest in the Dragts' land other than the unenforceable option provision. The trial court denied this portion of the motion on the grounds that there may have been an oral partnership. CP 312-13. The Dragts filed a second summary judgment motion to dismiss the oral partnership claim as a matter of law. CP 314-31. This motion was also denied. CP 453-54.

The defendants' counterclaims went to a three-day bench trial beginning on February 27, 2006. At trial, the LLC abandoned the oral partnership theory, and proceeded on its breach of contract and unjust enrichment claims. At the conclusion of trial, the trial court ruled the defendants had prevailed on one of their counterclaims, but left it up to the defendants to choose which one. RP 3/2/06 at 49:13-50:3. DeTray presented Findings of Fact and Conclusions of Law based upon his breach of contract theory, though the trial court had warned this theory was "filled with hidden mines" and it "was not clear how to get there without

¹ See, *Hubble v. Ward*, 40 Wn.2d 779, 785, 246 P.2d 468 (1952) and *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993) for the terms necessary for an enforceable option and cited in the Dragts' motion for partial summary judgment. CP 85-89.

creating reversible error.” *Id.* at 45:2; 51:4-6. Additional briefing was requested and filed on the damages issue. CP 581-85; 785-826; 586-784; 827-69; 523-48; 551-80; 514-22. The trial court entered Findings and Conclusions on June 9, 2006 and later entered Judgment against the Dragts in the amount of \$2,067,777.88. CP 880-92. This sum was held to represent the amount due to DeTray under the terms of the LLC Agreement from the sale proceeds of \$3.3 million. CP 888 (CL 8). No credit was given to the Dragts for their ownership of the land. *Id.*

C. Statement of Facts.

For most of their lives, Henry and Jane Dragt owned and operated a dairy farm near Yelm, Washington. RP 2/27/06 at 90:22-91:17. They closed the farm in the early 1990’s and sold their herd. *Id.* They planned to sell their 220 acres of land and thereby fund their retirement. *Id.* at 92:22-93:2. At the time, the Dragts’ mortgage was about \$280,000. RP 3/1/06 at 137:13-14.

The Dragts made several attempts to sell their land. They listed it for sale at \$2.2 million and signed a sale agreement with Venture Partners, Inc. for \$2 million. CP 785, 788, 790-91. Ultimately, that sale did not close. CP 785. The land was subsequently annexed into the City of Yelm, raising its value by allowing for denser development. CP 786, 848. The Dragts listed the land for sale again in 1994 for \$3.5 million and signed a

purchase and sale agreement with CHM Associates for \$2.85 million. CP 786, 814, 819. That sale did not close either. CP 786.

After these unsuccessful efforts to sell their land, the Dragts retained Frank Kirkbride, a development consultant, to assess their options. RP 3/1/06 at 87:2; 2/27/06 at 96:3-16. Kirkbride introduced the Dragts to respondent Paul DeTray. RP 2/27/06 at 95:25-96:2. DeTray, the Dragts were told, was an expert with nearly 40 years of experience in “bringing together the planning, management, engineering, architectural, financial and construction capabilities necessary to turn undeveloped land into high valued commercial and residential properties.” CP 168, 189.

Kirkbride recommended the Dragts go into business with DeTray to develop the land. RP 3/1/06 at 135:9-10. The Dragts were shown pro formas predicting they could earn up to \$18 million. RP 3/1/06 at 135:12-14; CP 99. They were also told they would be selling homes within three years, an important factor given Dragts’ age and financial circumstances. RP 2/27/06 at 100:8-11.

DeTray first proposed a partnership where DeTray would contribute his expertise and the Dragts would contribute their land. RP 2/27/06 at 32:12-13; 34:10-15; Ex. 179. The Dragts rejected this proposal because they did not want to “tie up” their land with an outright conveyance. RP 2/27/06 at 32:16-19; 77:20-78:1; 34:10-17; 35:2-6; 101:7-

11; 102:24-103:3. DeTray then proposed a limited liability company which would hold only an option to purchase the land. RP 2/27/06 at 32:21-24; 78:2-4. This proposal was acceptable to the Dragts. *Id.* at 35:2-6; 101:7-11; 102:24-103:3; *see also*, Ex. 178, 9-10, ¶ 8.1.

DeTray's team drafted the Operating Agreement² for the newly formed Dragt/DeTray Limited Liability Company (the "LLC"). RP 2/27/06 at 29:22-30:10; Ex. 178. As drafted, the LLC Agreement contained the following language:

The Member, Dragt, grants the Company an option to acquire the 220 +/- acres of real estate whose legal description is set forth in attached Schedule 2.³

Ex. 178, at 9-10, ¶ 8.1. As the court ruled at summary judgment, this statement did not create an enforceable option because it lacked the essential terms required of an option. CP 312-13. That decision has not been appealed and remains the law of the case. However, both Dragt and DeTray mistakenly believed the option was valid when they signed the LLC Agreement, and for more than eight years thereafter. RP 2/27/06 at 78:5-25; 104:17-25. There is no evidence anywhere in the record that the parties ever acknowledged the option was unenforceable, or negotiated another agreement to replace it.

² Hereafter the "LLC Agreement."

³ In fact, Schedule 2 was left blank. As a result, there was no legal description in the LLC Agreement. Ex. 178.

The LLC Agreement contained several provisions relating to the members' capital accounts. Their respective capital accounts were to be increased by the amount of money they contributed to the LLC and/or the value of any property they contributed. Ex. 178 at 10, ¶ 8.3.1. If the Dragts contributed their land, it was to be valued at \$18,000 per acre:

When real estate developments are owned or leased by the Company any allocation of funds based on land value shall be made based on an initial value of \$18,000 per acre.

Ex. 178 at 15, ¶ 9.7. This value was repeated in the pro formas the Dragts were shown demonstrating the money they would earn:

Land Contribution:	
Listed Cost:	\$6,364
Agreed Value:	\$90,000 [for 5 acres]
Agreed Value Per Acre:	\$18,000

Ex. 178, [addendum "Partnership Distribution Typical Development No. 1."] At trial, DeTray confirmed the parties' intent to value the Dragts' property, when contributed, at \$18,000 per acre.⁴ RP 2/27/06 at 66:23-67:6.

Throughout the term of the LLC, the Dragts continued to pay the property taxes and insurance and otherwise maintain their property. RP

⁴ The value to be given the Dragts' property appears to have been considered quite extensively. In the partnership agreement DeTray initially proposed, the Dragts were to get \$30,000 per acre of land contributed. Ex. 179 at 13. In an early draft of the LLC Agreement, the Dragts were to get \$24,000 per acre. Ex. 180 at 16, ¶ 9.7. Ultimately, the parties agreed on the \$18,000 per acre in the LLC Agreement.

2/27/06 at 104:10-16. Development expenses such as professional fees, permits and the like were paid by the LLC with capital contributed by DeTray. From 1996-2004, DeTray's capital contributions totaled \$593,462.66. Ex. 15. Among the expenses the LLC paid was the Dragts' mortgage, also with capital contributed by DeTray. RP 2/27/06 at 80:15-18; 81:18-82:17; 124:11-18. Approximately \$241,873.60 of the total expenses were for principal and interest on the Dragts' mortgage. Ex. 15.

Once the LLC Agreement was signed, the development went nowhere.⁵ The Dragts were told initially the LLC would be building houses by the summer of 1998. RP 3/1/06 at 89:21-25. Nothing happened. Then they were told it would be the summer of 2000. *Id.* at 90:2-11. Nothing happened. Then it was the summer of 2001. Still nothing. *Id.*; Ex. 187. All the while, developers regularly inquired about buying the Dragts' land, but the Dragts turned them away believing they were obligated by the option granted to the LLC. RP 2/27/06 at 104:17-25.

Frank Kirkbride, DeTray's development consultant, called the project "extremely long and frustrating" and described the lack of progress as "the most baffling series of circumstances in my 25 year professional career in this business." Ex. 187; RP 3/1/06 at 87:20-23. Four years into the project and two years after the first houses were to have been

⁵ There was no evidence that the LLC did anything to add value to the Dragts' property during its existence.

completed, Kirkbride admitted the project was at a “log jam,” that they had “made little progress,” that they were unable “to proceed to approvals at a reasonable pace” and that “this lack of action is totally unprecedented.” Ex. 191; RP 3/1/06 at 91:17-92:20. DeTray was close to abandoning the project. Ex. 191. At the same time, the Dragts observed other developments in the area proceeding swiftly. RP 2/27/06 at 110:16-21. The project was falling remarkably short of the \$18 million scenario painted by DeTray in 1996. Instead of enjoying retirement, Henry Dragt had to take work tending horses for a friend. RP 2/27/06 at 93:3-7.

By 2004, the Dragts wanted out. Henry Dragt called a meeting with DeTray. RP 2/27/06 at 112:18-21. They met in DeTray’s office on March 6, 2004 and, as Henry Dragt tells it:

Well, I probably let my frustration hang out pretty good, and I asked him when it was going to happen. And he couldn’t give me an answer. And I believe I indicated that I would like for him to buy me out. And I might have even said if you don’t, I’ll find somebody to buy me out.

Id. at 113:8-12. DeTray asked for three or four months to show some progress. *Id.* at 113:14-16. DeTray drafted minutes of the meeting reflecting the parties’ conversation:

Henry said if progress on development wasn’t forthcoming soon, that he would want to sell or buy partner out, and that the partners weren’t getting any younger. Some discussion was held and conclusion was to wait 3 or 4 months to see if progress could be made in moving this project forward.

Ex. 186.

Later that evening, DeTray called Henry Dragt and offered to buy him out for \$770,000. RP 2/27/06 at 114:15-24. Dragt was shocked at DeTray's low offer. *Id.* at 115:7-8. The Dragts heard nothing more from DeTray during the ensuing three months and saw none of the "progress" discussed at the March, 2004 meeting. RP 2/27/06 at 123:18-24. The Dragts believed the project over. As Henry put it:

I think after the offer [DeTray] gave me I thought I was kicking a dead horse.

Id. at 124:9-10.

If the Dragts had any lingering hope, it was dashed shortly. In May, 2004, the City of Yelm informed the Dragts it would consider the LLC's proposed development abandoned unless a right-of-way for access to the property was established. Ex. 194. DeTray never established the required access. RP 3/1/06 at 106:22-107:4.

At this point, Henry Dragt decided to explore their options and "salvage what I could for myself."⁶ RP 2/27/06 at 168:5; 118:17-19. In years past, Henry Dragt dismissed developers who inquired about his land, but he now began talking to them. *Id.* at 104:17-25; 116:22-117:9. He hired an appraiser to value the property. *Id.* at 120:5-121:8. He retained an

⁶ At the same time, DeTray was also shopping for buyers. Within months of their March, 2004 meeting, DeTray had found someone to buy the Dragts' position. RP 2/27/06 at 76:9-10.

attorney to review the LLC Agreement. For the first time, he learned from a legal memo that the “option” was unenforceable and that the LLC had no interest in the Dragts’ property. Ex. 219; RP 2/27/06 at 160:17-161:22.

In July 2004, the Dragts were approached by Tahoma Terra LLC and asked what they wanted for their property.⁷ RP 2/27/06 at 121:9-15. Jane Dragt told them \$3.5 million, the price they had listed the property for in 1994. *Id.* at 121:14-18. An agreement was reached for \$3.3 million—more than \$2.5 million more than DeTray had offered for the property just five months earlier. On August 30, 2004, the parties signed a purchase and sale agreement. Ex. 176, 177A. Closing occurred a little more than a year later, on December 10, 2005. Ex. 177A.

IV. SUMMARY OF ARGUMENT

The trial court’s decision presents a curious question: when is an option not an option but still an option? After ruling that the option was unenforceable, which meant the Dragts were relieved of their obligation to hold their property, the trial court subsequently ruled the Dragts were required to hold their property for the optionee, which meant the option

⁷ The principals of Tahoma Terra LLC were Doug Bloom and Steve Chamberlain. RP 3/1/06 at 5:3-7. The Dragts had met Bloom several months before, but at that time Bloom was not interested in the Dragts’ property. *Id.* at 6:4-7:12. The Dragts first spoke to Bloom about a potential sale in July 2004. *Id.* at 7:19-9:1. This date is relevant only because at trial, the LLC claimed the Dragts negotiated with Tahoma Terra before the three months expired. The Dragts were not prohibited from negotiating with Tahoma Terra during that period, but even if they were there was no evidence that they did.

was enforceable. The result is that the option was legally unenforceable but nonetheless enforceable. It is not clear the trial court grasped the paradox.

At its core, this appeal presents a fundamental legal issue to the Court: What rights, if any, does an optionee have in real property if its option is unenforceable? The simple answer is that an unenforceable option is void *ab initio*, and the parties' rights are to be determined as if the option never existed. The trial court in this case, though it correctly held the option was unenforceable, was nonetheless determined to find an alternate theory under which the Dragts would have the same responsibilities and liabilities as they would if the option were enforceable. At summary judgment, the court relied upon a theory of oral partnership to partially deny the Dragts' motion. This theory was later abandoned by DeTray, presumably because an oral partnership cannot exist as a matter of law when the parties have entered into an LLC Agreement. Even at the conclusion of trial, the court could not articulate a legal theory which entitled DeTray to prevail, leaving it up to DeTray to choose between his breach of contract and unjust enrichment theories.

Ultimately, DeTray selected, and the trial court accepted, his breach of contract theory. Under this theory, the Dragts orally modified the LLC Agreement to include an unstated obligation to "hold the land"

for the benefit of the LLC for an indefinite period of time. The irony is that this new obligation to hold the property is even more vague and indefinite than the written option the trial court held to be invalid. As set out in Section B below, the imputed obligation to “hold the land” for the benefit of the LLC is simply an option by another name, and is invalid for all the same reasons as the original option, as well as for additional reasons such as the statute of frauds.

The trial court’s findings and conclusions that the LLC Agreement was orally modified are also in error because there is no evidence in the record supporting that theory. It is undisputed that neither the Dragts nor DeTray realized the option DeTray drafted was unenforceable until shortly before the property was sold. Since no one realized the LLC Agreement needed to be modified, there is no evidence the parties conferred and agreed on a modification, or that new consideration was given for the modification. These errors are discussed in Section C below.

The trial court’s decision regarding liability is based upon a number of additional errors of law. Section D explains that the Dragts could not breach the LLC Agreement for failing to give notice because there was no notice provision to breach. Section E addresses the trial court’s erroneous reliance on the implied duty of good faith to create a new contractual provision not found in the LLC Agreement itself. Section

F addresses the trial court's erroneous attempt to use tort law to impute a fiduciary duty to comply with the terms of an unenforceable option.

Finally, Sections G and H point out the errors in the trial court's measure and calculation of damages. In essence, the trial court credited DeTray for every dollar he invested in the LLC, but gave a credit of zero dollars to the land allegedly contributed by the Dragts. As a result, DeTray was awarded roughly two thirds of the sale proceeds, even though the land was wholly owned by the Dragts. This outcome is unsupportable under any theory of the case.

V. ARGUMENT

A. The standard of review.

Conclusions of law and all other questions of law are reviewed *de novo*. *Huff v. Budbill*, 141 Wn.2d 1, 7, 1 P.3d 1138 (2000). Findings of fact will be upheld on review if they are supported by substantial evidence. *Hewitt v. Spokane, Portland & Seattle Ry. Co.*, 66 Wn.2d 285, 286, 402 P.2d 334 (1965). "A mere scintilla of evidence will not support the findings; it requires believable evidence of a kind and quantity that will persuade an unprejudiced thinking mind of the existence of the fact to which the evidence is directed." *Id.* (citations omitted). If the burden of proof on an issue is clear and convincing, the evidence must be reviewed to determine if it is sufficiently substantial to make the proposition to be

proved “highly probable.” *In re Sego*, 82 Wn.2d 736, 739, 513 P.2d 831 (1973).

B. The Dragts did not give the LLC or DeTray an interest in their property other than the unenforceable option interest.

Although the trial court correctly ruled that the one sentence option provision in the LLC Agreement was unenforceable, it erroneously held in Conclusion of Law No. 4 that Henry Dragt “undertook to hold the Property for development by DeTray...” CP 888 (CL 4). This is a distinction without a difference. An agreement to hold property for development by another is simply an option by another name. As such, it must comply with all the requirements of an option and contain the essential elements which were already found to be lacking. The “agreement to hold” found by the trial court does not contain the essential elements. Moreover, it fails to satisfy the statute of frauds and a number of other legal requirements. Finally, it is entirely unsupported by any evidence in the record; all the testimony at trial directly refuted the trial court’s finding.

1. A party who grants an unenforceable option is not obligated to “hold” the optioned property for the optionee.

As the trial court acknowledged at summary judgment, an option agreement must include certain required terms – duration, price, property description, closing date, security, etc. – to be enforceable. *Hubble v.*

Ward, 40 Wn.2d 779, 785, 246 P.2d 468 (1952); *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993). Based on this principle, the trial court declared the written option provision in the LLC Agreement unenforceable. CP 312-13.

At trial, however, the court deviated from this principle and ruled that an alleged oral agreement to “hold” the property was enforceable. The court thereby foisted upon the Dragts the same option obligation it had previously ruled was unenforceable. This ruling constitutes reversible error. The alleged oral agreement “to hold the property” is even more vague than the written option it allegedly replaced. There are no written findings or conclusions which set forth any of the essential terms of an option. *See*, CP 884, 888 (FF 24; CL 4). Most significantly, there is no finding as to the duration of the obligation, the price to be paid to the Dragts when the option was exercised, how the option was to be exercised, or when the holding period terminated. The alleged oral agreement to hold suffers from the same fatal deficiencies as the defective written option. Indeed, if an optioner was required to hold their property for the optionee despite the unenforceability of the option, it would render the requirements of an option meaningless. Accordingly, the Dragts’ alleged agreement to “hold” their property is, like the written option, unenforceable as a matter of law.

2. The Dragts' alleged oral conveyance of an interest in their property violates the statute of frauds, the rule against perpetuities, is an unreasonable restraint on alienation and is void for vagueness.

There are at least four other reasons why Henry Dragt's alleged oral agreement to "hold" his property for the LLC was unenforceable as a matter of law. CP 888 (CL 4).

First, the alleged oral conveyance violates the statute of frauds. The obligation to hold one's property is a property interest. *McFerran v. Heroux*, 44 Wn.2d 631, 638-39, 269 P.2d 815 (1954) (an option is recognized as a property right); *Alby v. Banc One Fin.*, 156 Wn.2d 367, 372, 128 P.3d 81 (2006) (a restraint on alienation conveys an interest in real property). A transfer of an interest in real property must be in writing and acknowledged as a deed to be valid and enforceable. RCW 64.04.010 & .020. The Dragts' oral agreement does not satisfy the statute of frauds and is therefore unenforceable as a matter of law.

Second, since there is no termination date by which the obligation to hold the land must vest, the alleged oral conveyance violates the rule against perpetuities.

The rule against perpetuities prohibits the creation of future estates which, by possibility, may not become vested within a life or lives in being at the time of the testator's death and twenty-one years thereafter. Any limitation of a future interest which violates this rule is void. 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.

Betchard v. Iverson, 35 Wn.2d 344, 348, 212 P.2d 783 (1949). Since the Dragts' obligation to hold their property has no termination date, the alleged conveyance of that interest is unenforceable.

Third, the obligation imposed on the Dragts is an unreasonable restraint on alienation. Conditions operating as unreasonable restraints on alienation are void as against public policy. *Richardson v. Danson*, 44 Wn.2d 760, 766, 270 P.2d 802 (1954). Prohibiting the Dragts from selling their property for an indefinite period of time unreasonably restrains the alienability of the Dragts' property.

Fourth, the alleged oral agreement is too indefinite to be enforced. The terms of any contract must be sufficiently definite to allow a court to determine the legal liabilities of the parties, or the agreement will not be enforced. *Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 178, 94 P.3d 945 (2004). As discussed above, the Dragts' alleged agreement to "hold" their property has no terms, so a court could not fix the legal liabilities of the parties. The alleged oral agreement is therefore unenforceable.

The likely retort to these legal obstacles is that the LLC Agreement, which the oral agreement allegedly modified, supplies the necessary writing. This argument fails. The statute of frauds requires a

conveyance of an interest in real property to be in the form of a deed which requires a legal description and an acknowledgement. RCW 64.04.020; *see also, Howell v. Inland Empire Paper Co.*, 28 Wn. App. 494, 495, 624 P.2d 739 (1981). Neither the LLC Agreement, nor any other writing, satisfies these requirements. Moreover, incorporating the written LLC Agreement does not remedy the deficiencies in the original option. As pointed out above, the original option lacked the terms necessary to make it enforceable. Since the alleged modification supplies none of the missing terms, the trial court's new option is no more enforceable than the original unenforceable option.

For any or all of reasons above, Conclusions of Law Nos. 3 and 4 are in error and the alleged oral agreement to hold the land indefinitely for DeTray to develop is unenforceable as a matter of law. CP 888.

3. Henry Dragt's alleged oral conveyance of an interest in community property was unenforceable because Jane Dragt did not consent to it.

The trial court's Conclusions 3 and 4 (CP 888) are also contrary to community property law. A spouse cannot convey real property owned by the marital community without the consent of the other spouse. RCW 26.16.030(3); *In re the Marriage of Wallace*, 111 Wn. App. 697, 706, 45 P.3d 1131 (2002), *review denied*, 148 Wn.2d 1011 (2003). There was no evidence in the record that Jane Dragt agreed to the alleged oral

conveyance of an interest in their property. Her consent to the original option does not extend to her husband's subsequent grant of another option on their property. There is not even evidence that Jane Dragt knew her husband granted another option on their property. Henry Dragt's alleged agreement to hold their property is therefore unenforceable.

4. The trial court erred in finding that the Dragts agreed to hold their property since both parties agreed the Dragts intended to convey no interest in their property other than the unenforceable option.

Even if the Dragts' alleged agreement to hold their property could somehow satisfy all the legal requirements outlined above, it nonetheless fails factually. The trial court's Finding 20 that the Dragts agreed to "hold" their property is not only unsupported by the evidence, it was directly refuted by DeTray himself.

DeTray testified repeatedly that Henry Dragt refused to give the LLC any interest except the original option because he did not want to "tie up" his property. To accommodate this desire, the parties expressly rejected the idea of forming a partnership to own the property because that would have required the Dragts to convey their property to the partnership. Instead, they formed a limited liability company with an option. As DeTray freely admitted, the Dragts' desire not to tie up their property never changed:

Q: Did Mr. Smith make a recommendation in this instance that you should form a limited liability company rather than a partnership in your dealings with Mr. Dragt?

A: You know, I believe that originally we were looking at a partnership, and I believe that at that time because of some tax implications that – and also that Henry Dragt had mentioned that he had had a previous sale that tied up his property, and he didn't want his property tied up, and we had reviewed a partnership, and it didn't appear like it was going to be able to be worked. I believe it was Henry that suggested that we not use a partnership.

RP 2/27/06 at 32:9-19 (emphasis added).

Q: And if that took 40 years, you did not have to pay anything to the Dragts during that time, correct?

A: They were using their property, and that was one of the reasons that the Dragts did not want their property tied up so they could continue to lease the property to an outside beef company so they could continue to have the income from those – that lease.

Id. at 54:12-18 (emphasis added).

Q:What was your understanding had the joint venture agreement been executed Dragt would have had to do regarding his property?

A: Well, he would have had to put the property into – and become part of the LLC by transferring title. And in so doing then the LLC – or the joint venture would have become a – leasing the property back to the Dragts, and also we would have become landlords and leasing property to a cattle company. And that's something that didn't seem like it would work very well.

Q: What did Mr. Dragt tell you was his response to the idea of conveying the property outright to the joint venture?

A: He had problems with a sale, previous sale, and they didn't want to tie up their property in a situation like that.

Id. at 77:9-24 (emphasis added).

Q: Did either Mr. or Mrs. Dragt ever express to you a different understanding that that?

A: They never did.

Id. at 78:23-25 (emphasis added).

Henry Dragts' testimony was consistent with DeTray's; he gave the LLC an option, nothing else. *Id.* at 102:21-103:3.

Consequently, there is no evidence the Dragts intended or agreed to give the LLC or DeTray any interest in their property other than the original option. Indeed, since the parties believed the option in the LLC Agreement was valid when DeTray started making the mortgage payments, there was no reason the parties would have even considered amending the LLC Agreement, nor can an inference be drawn that the payments must have been in consideration for a new agreement.

C. The trial court erroneously found that the LLC Agreement was modified.

The trial court erroneously found that the Dragts and DeTray agreed to orally modify the LLC Agreement to require the Dragts to hold the land for development by DeTray and/or the LLC in exchange for the payment of the Dragts' mortgage. *See* CP 883-88 (FF 17, 18, 19, 20, 21,

22, 23, 24; CL 3, 4, 5). In so concluding, the trial court erred in at least six respects.

First, DeTray admitted he formed his understanding about the Dragts' obligation to hold their property prior to, not after, signing the LLC Agreement. Second, there was no meeting of the minds to modify the LLC Agreement. Third, there was no consideration to support the alleged modification. Fourth, the court wrongly concluded that extrinsic evidence could be used to add terms to the parties' integrated contract. Fifth, the LLC Agreement, by its terms, could not be orally modified without an express agreement to do so, and there was no such agreement. And sixth, the trial court's conclusion is simply illogical.

1. The trial court erred in finding that the parties orally modified the LLC Agreement since the parties admitted their understanding about the mortgage payments and the Dragts' obligation to hold their property was formed prior to signing the LLC Agreement and embodied therein.

An oral modification of a written agreement must be proven by clear and convincing evidence. *Tonseth v. Serwold*, 22 Wn.2d 629, 644, 157 P.2d 333 (1945); *Dinsmore Sawmill Co. v. Falls City Lumber Co.*, 70 Wn.2d 42, 44, 126 P.2d 72 (1912). On appeal, the evidence supporting a finding under the clear and convincing standard must be sufficient to show the fact is "highly probable." *In re Sego*, 82 Wn.2d at 739.

The trial court concluded the parties modified the LLC Agreement after its execution by “their subsequent oral agreements and course of conduct.” CP 888 (CL 3).

In exchange for Paul DeTray’s ongoing payments of the Dragts’ mortgage, and for his personal guarantee of the Venture Bank Loan, Henry Draft undertook to hold the Property for development by DeTray and to recompense DeTray for his capital contributions out of the proceeds from the sale of the Property.

CP 888 (CL 4). For the trial court’s findings and conclusions regarding the oral modification to withstand scrutiny, there must be substantial evidence in the record adequate to demonstrate to the “highly probable” standard, that the parties agreed to modify the LLC Agreement, and that Henry Draft specifically agreed to take on a new obligation to hold the property for DeTray in exchange for DeTray’s agreement to pay his mortgage payments. The evidence in the record not only falls short of this requirement, it is to the contrary.

DeTray testified four times that he understood and believed *from the time he executed the LLC Agreement* that the Dragts were obligated to hold their property for development:

Q: I believe your position in this case is that the Dragts made an agreement to commit their property to development with you. Do you agree with that?

A: Yes.

Q: And that commitment was made when the Dragts signed the LLC agreement?

A: That's correct.

Q:Is it also your position that the Dragts were required to hold their property while the LLC determined whether or not to develop it?

A: That was understood.

Q: And again, that understanding you arrived at prior to signing the LLC agreement in July 8th, 1996?

A: That's correct.

RP 2/27/06 at 43:8-25 (emphasis added).

Q: You've also said before that you thought the Dragts' property was tied up in the LLC; is that correct?

A: That's correct.

Q: And again you thought that from the minute you signed the LLC agreement in July of 1996, correct?

A: Yes.

Id. at 45:22-46:9 (emphasis added).

Q: As we know, there is an option in the LLC which has been found to be unenforceable. Nevertheless, what was your understanding regarding the status of the Dragt property during these eight years that the LLC proceeded?

...

A: That the property would be retained in Henry Dragt's name and he would hold it for us to use for the LLC when the permits and so on was available to build the property.

Q: Did either Mr. or Mrs. Dragt ever express to you a different understanding that that?

A: They never did.

Id. at 78:5-25 (emphasis added).

Thus, the parties agreed when they negotiated the terms of the LLC Agreement that the Dragts would hold the property for the LLC. That agreement was embodied in the option provision. Although the option was later deemed unenforceable, the parties believed it was enforceable for eight years and acted in accordance with that belief.⁸ As a result, the evidence only establishes that the parties believed the Dragts would hold their property for the LLC based upon an invalid option when they entered into the LLC Agreement. There is no evidence that this belief ever changed or was the subject of an oral agreement to modify the LLC Agreement. Findings 17-21, 22 and 24 cannot be sustained and Conclusions 3 and 4 should be reversed.

2. The trial court erred in finding the parties agreed to modify the LLC Agreement since there was no evidence of a meeting of the minds.

A modification of a contract requires a meeting of the minds separate from and subsequent to that of the original contract. *Wagner v. Wagner*, 95 Wn.2d 94, 103, 621 P.2d 1279 (1980). *A fortiori*, a meeting

⁸ An example of this is the fact that the Dragts regularly turned away developers who were interested in their property because the Dragts believed they were bound by the option. RP 2/17/06 at 104:17-25.

of the minds requires a *meeting* – a discussion, conversation or communication of some sort – about the alleged new term or terms.

There is no evidence in the record of a single conversation, discussion or communication between the Dragts and DeTray to discuss modifying the LLC Agreement. To the contrary, both parties testified there were no such discussions. Henry Dragt testified that he and DeTray never had a discussion about changing the terms of the LLC Agreement. RP 2/7/06 at 103:8-104:3. DeTray confirmed that the Dragts never expressed an understanding different than the parties' original agreement. *Id.* at 78:18-25. Moreover, there is not a single exhibit in the record which memorializes a modification or which even claims a modification was made. Therefore, the trial court erred in concluding that there was an “oral agreement” between the parties (FF 17-20, 24 and CL 3, 4).

3. The trial court erred in concluding that the alleged modification of the LLC Agreement was supported by consideration since the parties admitted their contractual obligations never changed.

A modification of a contract requires new consideration, separate from that supporting the original contract. *Wagner v. Wagner*, 95 Wn.2d at 103.

The trial court concluded the new consideration exchanged between the parties consisted of DeTray's agreement to guarantee the

Dragts' mortgage and to make the monthly payments, and the Dragts' alleged commitment to hold their property for development and to repay DeTray's capital contributions out of the sale proceeds. CP 888 (FF 17-20, 24, CL 3, 4). These obligations, however, were not new, and there is no evidence that one was given in exchange for the other.

DeTray received no new consideration. He believed and understood from the time he signed the LLC Agreement that the Dragts were committed to hold their property for him. RP 2/27/06 at 43:8-25; 45:22-46:9; 78:5-25. Similarly, the LLC Agreement provided all along that both members would be entitled to be reimbursed for their capital contributions. Ex. 178 at 14-15, ¶ 9.7 and 10.1. As such, there is no evidence that DeTray bargained for, or received, any new consideration.

Likewise, there was no new consideration flowing to the Dragts as part of the alleged modification. DeTray admitted at trial that he contributed the capital to make the mortgage payments because he thought he was obligated to do so by the LLC Agreement, not because of a new agreement he had reached with the Dragts:

Q: And Mr. Bay asked you why you made the mortgage payments, and I believe you stated generally to the effect that you thought there was something within the agreement which necessitated you doing so.

A: Yes.

Q: What were you referring to?

A: I was looking at the page 7, 5.4, that fiduciary responsibility.

RP 2/27/06 at 81:18-25. DeTray's testified further that he relied on the terms of the LLC Agreement, not any modification thereto, when contributing the capital to pay the mortgage. *Id.* at 84:10-25. DeTray's contribution of funds to pay the Dragts' mortgage was not new consideration since DeTray believed all along that he was required to contribute those funds by the LLC Agreement. *See, Rosellini v. Banchemo*, 83 Wn.2d 268, 273, 517 P.2d 955 (1974) (a modification is not supported by consideration when one party simply performs that which he promised to perform in the original contract).

The same goes for DeTray's commitment to guarantee the Dragts' mortgage. There no evidence that such commitment was given in exchange for a new obligation by Dragt. To the contrary, the testimony at trial was that the guarantee was part of the reciprocal promises contained in the original LLC Agreement. RP 3/1/06 at 155:15-25.

Finally, DeTray's obligation to contribute capital to fund the Dragts' mortgage was not enforceable by the Dragts. CP 883 (FF 17). An unenforceable promise does not constitute consideration. *Interchange Assoc. v. Interchange, Inc.*, 16 Wn. App. 359, 361, 557 P.2d 357 (1976).

There was no consideration to support a modification of the LLC Agreement. There was no clear and convincing evidence that DeTray's capital contributions were a "new promise" by DeTray or that they were made "in exchange for" a new obligation by Dragt to hold his land for development. Without that evidentiary link, the trial court's Findings 17-20 and 24 and Conclusions 3 and 4 fail.

4. The trial court erred in concluding that extrinsic evidence could be used to add terms to the parties' agreement.

The trial court concluded it could add terms to the LLC Agreement based on the parties' alleged course of conduct. CP 888 (CL 3). This was error.

The law in Washington is that extrinsic evidence such as the parties' course of conduct cannot be used to add terms to or otherwise rewrite the parties' contract.

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.

Hearst Comm., Inc. v. Seattle Times Co., 154 Wn.2d 493, 503, 115 P.3d 262 (2005); *see also Badgett v. Security State Bank*, 116 Wn.2d 563, 572, 807 P.2d 356 (1991) ("a course of dealing does not override express terms

in a contract or add additional obligations”). The trial court acknowledged this restriction:

Clearly the court cannot rewrite the contract for the parties, and extrinsic evidence can only be used in context for interpretation, not to modify any contract term, particularly where I don't think there's any ambiguity in any particular term....⁹

RP 3/2/06 at 45:4-8. Nonetheless, the court rejected established precedent and relied upon course of conduct evidence in Conclusion of Law No. 3 to hold that the LLC Agreement had been amended. This was error. There is no evidence that the parties acted inconsistently with their original understanding of their agreement at any time. This being the case, there is no “conduct evidence,” even if it were admissible, which supports the court’s finding that the LLC Agreement was modified.

5. The trial court erred in concluding that the oral amendment and integration clauses in the LLC Agreement were unenforceable as a matter of law.

DeTray included two provisions in the LLC Agreement limiting amendments thereto. Paragraph 15.3 provided that the LLC Agreement could not be amended “except by unanimous written agreement of all of the Members and the Manager.” Ex. 178 at 24. Paragraph 15.13 was an integration clause:

⁹ The parties, in fact, agreed there were no ambiguities in the LLC Agreement. RP 2/27/06 at 36:15-21.

Complete Agreement. This agreement constitutes the complete and final agreement of the parties relating to the transactions contemplated by this agreement, and supersedes all previous representations, contracts, agreements and understandings of the parties, either oral or written relating to the same.

Ex. 178 at 25.

The trial court summarily concluded that the provision prohibiting oral amendments was “legally invalid and unenforceable” and completely ignored the integration clause. CP 888 (CL 2). The trial court erred.

With regard to oral amendments, it is true that the parties to a contract may agree orally to waive a clause prohibiting oral modifications. *See, Pacific N.W. Group A v. Pizza Blends, Inc.*, 90 Wn. App. 273, 277-78, 951 P.2d 826 (1998). However, such clauses are still enforceable until the parties agree to waive them. *Id.* at 281. There is no evidence of any agreement by the parties to waive or modify paragraph 15.3 of the LLC Agreement, nor was a finding entered to that effect. To the contrary, Henry Dragt testified he had no conversations with DeTray about changing any of the terms of the LLC Agreement. RP 2/27/06 at 103:8-104:3. Since the parties did not modify paragraph 15.3 of the LLC Agreement, it is enforceable and prohibits any oral modification of the LLC Agreement. The trial court erred in concluding that paragraph 15.3 was unenforceable as a matter of law.

The trial court also erred in ignoring the integration clause. “If the writing is a complete integration, any terms or agreements that are not contained in it are disregarded.” *Lopez v. Reynoso*, 129 Wn. App. 165, 171, 118 P.3d 398 (2005), *review denied*, 157 Wn.2d 1003 (2006). While a party may overcome an integration clause by proving that the parties did not intend the writing to be the complete expression of their agreement, they must do so by a preponderance of the evidence. *Id.* DeTray offered no evidence to overcome the integration clause. Thus, the LLC Agreement was completely integrated and all other alleged agreements are disregarded. By ignoring the integration clause and concluding, without evidence, that the LLC Agreement did not contain the complete expression of the parties’ agreement, the trial court committed reversible error. Conclusion No. 2 should be reversed.

6. The alleged oral modification leads to an illogical and absurd result.

Not only is the alleged modification unsupported in the record and legally insufficient, it is also illogical. The trial court concluded Henry Dragt agreed to “hold the Property for development by DeTray...” by modifying the LLC Agreement.¹⁰ CP 883 (FF 20). However, the court

¹⁰ This make little sense in itself. According to the court, the Dragts gave the LLC an option on their property and then, while the Dragts and DeTray still believed the option was valid, the Dragts agreed to hold their

also found that Dragts understood they were holding the land for the LLC as a result of the same modification agreement. CP 884 (FF 24). To make matters worse, the court held that Dragt and DeTray were “partners for development of the Property,” even though the parties had expressly rejected the idea of forming a partnership. CP 888 (CL 5); RP 2/27/06 at 32:9-19. Accordingly, under the court’s findings and conclusions, three separate entities – the LLC, DeTray and a partnership – had the right to simultaneously develop the Dragts’ land, all apparently as a result of the same modification agreement. Needless to say, there is no evidence in the record for any of this, so Findings 17-20 and 24 cannot be upheld.

D. The trial court erred in concluding the Dragts breached the notice provision in the LLC Agreement since no such provision exists.

The trial court wrongly concluded the Dragts breached the LLC Agreement by selling their property to Tahoma Terra without prior notice to DeTray. CP 888 (CL 7). There is no provision in the LLC Agreement that required the Dragts to notify DeTray before they sold their property,¹¹

property for DeTray, thereby immediately giving the LLC and DeTray conflicting interests in their property.

¹¹ The only provision in the LLC Agreement that calls for any type of notice is Article 12.2, which requires a member of the LLC to give the other member 10 days written notice before he sells his membership units in the LLC. Ex. 178 at 18. The Dragts have never attempted to sell their membership interest in the LLC, a fact which DeTray conceded at trial. RP 2/27/06 at 57:14-20. The trial court apparently concluded that Article 12.2 also applied to the sale of the members’ real property. There is no basis for this conclusion.

and there was no evidence or finding that the parties orally agreed to a notice provision. The trial court simply invented the term and imposed on the Dragts its personal view of how business should be conducted:

[The court speaking to Mr. Dragt]: [T]he right answer was to be a man, go to Mr. DeTray and say this contract has a way to be terminated. I no longer want to be bound by it.

RP 3/2/06 at 47:7-10. This was error. “Courts are not at liberty, under the guise of reformation, to rewrite the parties’ agreement and ‘foist upon the parties a contract they never made.’” *Seattle Prof’l Eng’g Employees Ass’n v. Boeing Co.*, 139 Wn.2d 824, 833, 991 P.2d 1126 (2000).

The irony in Conclusions 6 and 7 is the Dragts *did* give DeTray notice – more than 21 months notice – before selling their land. They told DeTray in March 2004 they were going to sell and told him in October 2004 they had signed a contract to sell. The sale did not close until December 2005, 21 months after the original notice.¹² Be that as it may, a party cannot breach a notice provision which does not exist, and it was error for the trial court to impute a notice requirement into the parties’ agreement. Conclusions 6 and 7 should be reversed.

¹² The frustrating thing about this was the trial court’s intense criticism of Henry Dragt for not doing exactly what the evidence showed he did do. The court said that because the project had labored on so long with no results, “it was not wrong for Henry Dragt to say enough.” RP 3/2/06 at 47:1-5. The court went on to say that the “right way” for Henry Dragt to end the project was for him to tell DeTray it was over and that he was going to sell his property. *Id.* at 47:5-19. But that is precisely what Henry Dragt did do. RP 2/27/06 at 113:8-12; Ex. 186. The trial court simply refused to acknowledge this fact.

E. The trial court erred in using the implied duty of good faith to add terms to the parties' agreement and resurrect the unenforceable option.

The trial court also concluded the Dragts “breached their duty of good faith to DeTray by selling the Property ... without prior notice to DeTray.” CP 888 (CL 6). This was clear error and should be reversed.

The implied duty of good faith cannot be used to add a term to the parties' contract. Nor can it be used to revive a term that was previously struck down.

[T]he duty of good faith does not extend to obligate a party to accept a material change in the terms of its contract. Nor does it ‘inject substantive terms into the parties’ contract’. Rather, it requires only that the parties perform in good faith the obligations imposed by their agreement...The duty to cooperate exists only in relation to performance of a specific contract term. As a matter of law, there cannot be a breach of the duty of good faith when a party simply stands on its rights to require performance of a contract according to its terms.

Badgett v. Security State Bank, 116 Wn.2d at 569-70 (citations omitted).

There is no contractual provision requiring the Dragts to give notice of their intent to sell their property, nor is there a term requiring the Dragts to hold their property. The trial court misused and misapplied the duty of good faith to inject substantive terms into the parties' LLC Agreement and resurrect the unenforceable option.¹³

¹³ Another irony is that DeTray was trying to sell the Dragts' position at the same time the Dragts were and, in fact, had found a buyer within

F. The trial court erred in imposing on the Dragts a fiduciary duty to comply with the terms of an unenforceable option.

The trial court also erred in concluding the Dragts breached their fiduciary duties arising out of a partnership for development of the property. CP 888 (CL 5, 8). As set forth previously, the parties specifically rejected the idea of a partnership for the property and elected instead to form an LLC. It was error to infer that a partnership existed, when the parties expressly chose another form for conducting business over a partnership. *Seattle Prof'l Eng'g Employees Ass'n v. Boeing Co.*, 139 Wn.2d 824, 833 (courts cannot impose upon the parties a contract they never made). Accordingly, fiduciary duties could not have arisen as a matter of law out of a nonexistent partnership.

Moreover, DeTray was the sole manager of the LLC. The LLC Agreement specifically placed fiduciary duties on DeTray, but it did not impose such duties on Henry Dragt, who was merely a member. Ex. 178 at 7, ¶ 5.4.

Although not fully articulated, the court's theory appears to have been that Henry Dragt had a fiduciary duty to act as if the option were enforceable, notwithstanding the fact that it was not. This is supported by Conclusion of Law No. 8, which purports to arrive at a damage calculation

months of the March 2004 meeting. RP 2/27/06 at 76:9-10. It is perplexing why the trial court feigned offense at the Dragts' efforts to sell while silently excusing DeTray's.

which “equals the amount due to DeTray under the terms of the LLC Agreement” out of the sale proceeds from the land. There is no authority for the proposition that a party has a fiduciary duty to comply with an unenforceable option. Conclusions 5 and 8 should be reversed.

G. The trial court erred in awarding and calculating damages because it gave no value to the Dragts for the property they allegedly contributed and elevated DeTray’s capital contributions over the Dragts’.

The trial court erroneously used paragraph 9.7 of the LLC Agreement to arrive at its damage award for breach of fiduciary duty and breach of contract. CP 888 (CL 7, 8, 12). While the Dragts firmly maintain that no damages were warranted – since there was no duty and no breach – the court nonetheless erred in its calculation.

First, the trial court used the wrong measure of damages. Since the trial court concluded the Dragts breached their contract by failing to “hold” the property, the only damages the LLC could have incurred was the loss of its “option” rights. The damages recoverable for the breach of an option is the excess of the market value of the land over the option price. *McFerran v. Heroux*, 44 Wn.2d at 642-43. Since the market value of the Dragts’ land (the sale price of \$3.3 million) was less than the parties’ agreed price of \$18,000 per acre set in 1996 in the LLC

Agreement (\$3,960,000 for 220 acres), the LLC suffered no compensable damages.¹⁴

Second, whatever measure of damages is used, paragraph 9.7 of the LLC Agreement does not apply. That paragraph dictates how to allocate “profits” of the LLC. The proceeds from the sale of the Dragts’ land are not LLC profits. The sale proceeds would constitute LLC profits only if the LLC had some interest in the Dragts’ land. The LLC had no such interest as determined at summary judgment.

Third, even if paragraph 9.7 were applicable, the court misinterpreted it. To make 9.7 applicable, the trial court treated the Dragts’ property as an asset of the LLC. The property could be an LLC asset only if the Dragts contributed it to the LLC. If the Dragts contributed their property to the LLC, their capital account was to be increased by the value of the property. Ex. 178 at 10, ¶ 8.3.1 and 13, ¶ 9.5.2(a). The parties agreed that the value of the Dragts’ property, for purposes of calculating capital accounts, was \$18,000 per acre for a total of \$3,960,000:

¹⁴ The trial court awarded DeTray his expectation damages, based on the LLC Agreement. It is clear that DeTray and the LLC did not fully perform as the Dragts’ property was never developed. The correct measure of damages for part performance is restitution. *See, Dravo Corp. v. L.W. Moses Co.*, 6 Wn. App. 74, 90-91, 492 P.2d 1058 (1971). Thus, at best, DeTray should have been awarded his capital contributions.

When real estate developments are owned or leased by the Company any allocation of funds based on land value shall be made based on an initial value of \$18,000 per acre.

Ex. 178 at 15, ¶ 9.7. This value was used in the pro formas prepared by DeTray and DeTray confirmed the parties' intent at trial. Ex. 178 [addendum entitled "Partnership Distribution Typical Development No. 1"]; RP 2/27/06 at 66:23-67:6.

In calculating damages, however, the trial court failed to account for the value of the Dragts' contribution to the LLC. It ignored the parties' agreed value of \$18,000 per acre and DeTray's testimony confirming that agreement. The court interpreted Article 9.7 such that DeTray was repaid his capital contributions in full but the Dragts were paid nothing. It is as if the Dragts contributed their land to the LLC for free.

If the LLC Agreement was used appropriately to calculate damages, the Dragts' contribution of their land should have been recognized and their capital account adjusted accordingly. The first money into the LLC should then have been allocated to repay the parties' respective capital accounts, with the remainder shared between the members.¹⁵ Since the sale proceeds were less than the parties' collective

¹⁵ The trial court interpreted paragraph 9.7 right the first time. After trial, the court said that from the sale proceeds, DeTray should be repaid for his capital contributions and the Dragts should be paid for the equity in their

capital accounts, the proceeds should have been divided proportionally based on the parties' contributions. Based on DeTray's contributions of \$593,000 and the Dragts' contributions of \$3,960,000, the proceeds should have been shared 13% to DeTray and 87% to the Dragts. Instead, DeTray contributed capital of \$593,000 and received \$2.1 million of the sale proceeds in return while the Dragts contributed property worth \$3,960,000 and received \$1.1 million.¹⁶ This result also violates paragraph 6.5 of the LLC Agreement, which requires both members be treated equally with regard to repayment of their contributions to the LLC. Ex. 178 at 8, ¶ 6.5. Accordingly, the trial court's award of damages set forth in Finding 45 and Conclusions 8 and 12 are in error and should be reversed.

H. The court erred in admitting a witness' report and opinion testimony on how the LLC Agreement should be interpreted.

It is the duty of the court to interpret the terms of a contract. *State Farm Gen. Ins. v. Emerson*, 102 Wn.2d 477, 480, 687 P.2d 1139 (1984). Expert testimony as to the meaning of a contract's terms is not admissible because it is irrelevant and because it is a legal opinion. *Id.*; *Spratt v.*

property – the Dragts' contribution – and any remaining sale proceeds split equally. RP 3/2/06 at 48:13-49:12. The court said several times that this was a "just" result. *Id.* at 48:15; 49:13. After realizing the actual value of the Dragts' property, however, the court abruptly abandoned this "just" result and adopted its erroneous interpretation of the parties' agreement which ignores the value of the Dragts' property.

¹⁶ After subtracting the trial court's award of attorneys' fees (CP 891), the Dragts were left with only about \$900,000 of the \$3.3 million in sale proceeds.

Crusader Ins. Co., 109 Wn. App. 944, 37 P.3d 1269 (2002), *review denied*, 147 Wn.2d 1003; *King County Fire Prot. Dist. No. 16 v. Housing Auth. of King County*, 123 Wn.2d 819, 826, 872 P.2d 516 (1994) (legal opinions of experts are inadmissible); 5A Teglund, *Washington Practice*, Evidence § 704.5 (no witness is permitted to express an opinion that is a conclusion of law).

The only evidence that supports the trial court's faulty interpretation of paragraph 9.7 (*see*, FF 45 and CL 8, 12) is Exhibit 221, a summary prepared mid-trial by Frank Kirkbride, and his corresponding testimony. RP 3/1/06 at 144:21-146:15. Kirkbride, DeTray's consultant, was called to rebut DeTray's own testimony regarding the parties' intent to value the Dragts' land at \$18,000 per acre. Kirkbride was not a party to and did not participate in drafting the LLC Agreement and therefore offered no personal knowledge of contractual intent. RP 3/1/06 at 145:21-22. Rather, he offered inadmissible opinion testimony about how paragraph 9.7 should be interpreted. *Id.* at 142:14-15;145:18-20.

Kirkbride's opinion and summary of how the LLC Agreement should be interpreted was irrelevant and an improper legal conclusion. It is the role of the trial court, not Mr. Kirkbride, to interpret the parties' agreement. Despite objection, the trial court admitted Kirkbride's testimony and his summary report, both of which should have been

excluded. RP 3/1/06 at 140:5-17; 141:17-19; 142:17-143:3; 144:21-146:3. The effect on the court of this inadmissible evidence was not negligible as Kirkbride's testimony and summary were the only evidence that supported the trial court's Finding 45 and Conclusions 8 and 12. The court erred in admitting such evidence and in the resulting findings and conclusions.

I. The Dragts request an award of their attorneys' fees incurred at trial below and in this appeal.

The LLC Agreement provides that the prevailing party in this litigation is entitled to an award of attorneys' fees. Ex. 178 at 25, ¶ 15.14. To the extent the Dragts' appeal is granted, they will be the prevailing party and entitled to attorneys' fees. *West Coast Stationary v. Kennewick*, 39 Wn. App. 466, 477, 694 P.2d 1101 (1988) (a contractual provision for attorneys' fees at trial supports an award of fees on appeal under RAP 18.1). In that event, the Dragts request, pursuant to RAP 18.1, that this Court vacate the trial court's award of attorneys' fees to DeTray (CP 889, CL 13), direct the trial court to award attorneys' fees below to the Dragts and award attorneys' fees on this appeal to the Dragts.

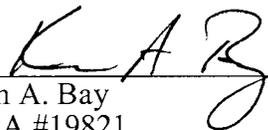
VI. CONCLUSION

There is no authority for the proposition that a party who in good faith grants an unenforceable option is nonetheless obligated to hold the property for the optionee. The trial court erred in so concluding. The trial court also erred in concluding that the LLC Agreement was modified and

in entering many of its other findings and conclusions. The Dragts respectfully request that this Court reverse the trial court, vacate the judgment and attorneys' fees award and award attorneys' fees to the Dragts.

DATED this 14th day of September, 2006.

RYAN, SWANSON & CLEVELAND, PLLC

By  _____
Kevin A. Bay
WSBA #19821
Aaron M. Laing
WSBA # 34453
Attorneys for Appellants

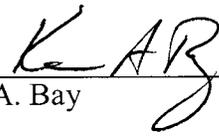
1201 Third Avenue, Suite 3400
Seattle, Washington 98101-3034
Telephone: (206) 464-4224
Facsimile: (206) 583-0359
bay@ryanlaw.com

DECLARATION OF SERVICE

I declare that on the 15th day of Sept., 2006, I caused to be served the foregoing document on counsel for Appellant, as noted, at the following addresses:

R. Alan Swanson, Esq.
R. Alan Swanson, PLLC
908 5th Avenue SE
Olympia, WA 98501

Robert G. Casey, Esq.
Eisenhower & Carlson, PLLC
1201 Pacific Avenue, Suite 1200
Tacoma, WA 98402



Kevin A. Bay

Dated: September 15, 2006

Place: Seattle, WA

STATE OF WASHINGTON
BY 

Clerk

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