COURT OF APPEALS
STATE OF WASHINGTON
BY
DEPUTY

NO. 37451-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

16TH STREET INVESTORS, LLC,
a Washington limited liability company;
GEORGE KILLIAN, ELAINE KILLIAN;
LANCE KILLIAN; and BERNHARDT ASSOCIATES, INC.
d/b/a COLDWELL BANKER COMMERCIAL JENKINS-
BERNHARDT ASSOCIATES, a Washington corporation,

Respondents,

v.

JOSEPH W. MORRISON,

Appellant.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

The linchpin of Morrison's argument on appeal is that the Killians somehow were not parties to the purchase and sale agreement ("PSA"). Based on this premise, Morrison argues that the Killians' intent regarding the PSA is irrelevant and should not have been considered by the trial court. All of Morrison's appellate arguments flow from the flawed premise that the Killians' agent (not the Killians) was the buyer and a party to the PSA and, as such, only the agent's intent matters.

In making this argument, Morrison ignores well-settled Washington law that an unidentified principal becomes a party to the contract between his agent and a third party. *Dana v. Boren*, 133 Wn.App. 307 (2006); Restatement (Third) of Agency § 6.02. Morrison also conveniently ignores his own extensive post-trial briefing before the trial court, in which he conceded that the Killians were indeed parties to the PSA.[1] As Morrison previously agreed, when an unidentified principal,

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[1] *Hear Morrison now:*

> The trial court erred in ordering specific performance of the Purchase and Sale Agreement Contract, based upon the supposed "intent" of someone who was not – indeed, who took care not to be – a party to the contract . . . .

—Opening Brief of Appellant, p 32 (arguing that the Killians were not parties to the PSA). *(cont. next page)*

such as the Killians, enters into a contract through an agent, it is "as if [the principal] made the contract personally." Restatement (Third) of Agency § 6.03. As Morrison also agreed below, "[t]he contract of the agent is the contract of the principal." 133 Wn.App. at 313; *see also* Defendant's [Appellant's] Post Trial Rebuttal Brief to Plaintiffs' Reply Brief re: Agency Issues, p. 2 (CP 842).

This agency principle, which Morrison now seeks to undermine on appeal, provides an essential means of conducting business in the real estate market.[2] Investors and developers, such as the Killians, often wish to remain anonymous so that sellers do not artificially inflate the price of their property upon learning that the would-be buyer may have a strong financial interest in acquiring the property. A seller who discovers that his

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Hear Morrison below:

> Plaintiffs also cite proper legal authority that an unidentified principal becomes a party to the contract between the agent and the third party. Restatement (Third) of Agency § 6.02; *Dana v. Boren*, 133 Wn.App. 307 (2006).

—Defendant's [Appellant's] Post Trial Rebuttal Brief to Plaintiffs' Reply Brief re: Agency Issues, p. 2 (acknowledging that the Killians were parties to the PSA) (CP 842).

[2] In fact RealEstateAgent.com, The Official Real Estate Agent Website, defines the term "undisclosed principal" as follows.

> A major **party** to a transaction, such as a seller or purchaser of property, remains anonymous. An example is when someone acts on behalf of a purchaser who wishes his identity not to be disclosed.

www.realestateagent.com/real-estate-glossary/Realestate/Undisclosed-principal.html (emphasis added) (Respondents' Ex. A).

potential buyer has already acquired several contiguous parcels and needs the seller's parcel to undertake a planned project can demand an exorbitant price. Morrison's argument ignores not only well-established law and his own position before the trial court, but also the practical reality that certain real estate buyers regularly conduct business in precisely the manner as the Killians did here. Indeed, real estate brokerage firms routinely advertise their ability to protect a buyer's anonymity as an undisclosed principal.[3]

After erroneously dismissing the trial court's consideration of the Killians' intent, Morrison seeks to supplant the objective evidence of the parties' intent considered by the trial court (i.e., their actions and pre-contract communications) with testimony regarding others' subjective and unexpressed understandings of the PSA. As Morrison argues in his opening brief, a party's unexpressed subjective understanding of a contract is legally irrelevant. Yet throughout his brief, Morrison relies upon his own, his agent's, and others' *ex post facto* testimony regarding what they subjectively thought the PSA meant. As the trial court recognized, these

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[3] *See, e.g.,* Respondents' Ex. B, www.kennedyadvisors.net/services.htm:

> **Property Acquisition**
> Representing an "undisclosed principal", we aggressively facilitate assemblage or acquisition of properties without identifying our principal. Developer clients have found this advantageous in situations where disclosure may intensify perceived valuation of a property or yield other negative consequences.

unexpressed interpretations, which were never communicated to the Killians, are legally irrelevant.

With Morrison's flawed premise rendered untenable, the remainder of his argument falls away. Because the Killians were indeed parties to the PSA, the Killians' intent is central to the PSA's interpretation. Under that bedrock principle of Washington contract law, cited several times by Morrison in his opening brief, the intent of the parties controls the interpretation of a contract.

Morrison's appeal is an attempt to resurrect an issue which he conceded below—and indeed properly conceded, given the weight of legal authority against him. The Killians' were parties to the PSA. Accordingly, the trial court's reliance upon the Killians' objective manifestations of intent was not error.

II. RESPONSE TO MORRISON'S ASSIGNMENTS OF ERROR

A. Morrison failed to preserve his newly minted contention that the Killians were not parties to the PSA.

RAP 2.5(a) states that "[t]he appellate court may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a) provides an exception to this rule *only* where the claimed error involves a "(1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right." *Id.*

As the Washington Supreme Court has declared, the preservation of error requirement:

> [A]rose out of solicitude for the sensibilities of the trial court that the trial court should be given an opportunity to correct errors and omissions at the trial level, and that it was the obligation of the parties to draw the trial court's attention to errors, issues, and theories, or be foreclosed from relying upon them on appeal.

In re Audett, 158 Wn.2d 712, 725-26, 147 P.3d 982 (2006). As the Washington Supreme Court further declared:

> An even more important factor, however, is the consideration that the opposing parties should have an opportunity at trial to respond to possible claims of error, and to shape their cases to issues and theories, at the trial level, rather than facing newly-asserted errors or new theories and issues for the first time on appeal.

Id. at 726 (*quoting* 2A Karl B. Teglund, Washington Practice: Rules Practice RAP 2.5(a), at 192 (6th ed.2004)).

As discussed above, Morrison did not preserve his contention that the Killians were not parties to the PSA. Indeed, Morrison *agreed* before the trial court that principals, such as the Killians, are by law parties to the contracts of their agents. Morrison's *agreement* with this well-established legal principle before the trial court demonstrates that he failed to preserve this issue for appeal.

To allow Morrison to raise this issue on appeal after conceding it without challenge at the trial level would do violence to RAP 2.5, which

was designed to prevent this very sort of *ex post facto* challenge to a trial court's rulings. The preservation of error requirement is designed to provide the trial court with an explanation of a party's objections that is specific enough to ensure that the trial court can identify its alleged error with enough clarity to permit it to consider and correct that error. This preservation of error requirement is also designed to ensure that the assigned error was fully addressed by the parties below. By *agreeing* at the trial level that the Killians were parties to the PSA, Morrison did not satisfy this requirement. Consequently, RAP 2.5 compels an affirmation of the trial court's specific performance decree.

B. Morrison fails to state which portions of his argument pertain to which assignments of error.

It is unclear from Morrison's opening brief which portions of his argument relate to each of Morrison's 23 assignments of error. Morrison's opening brief contains no explanation of how his Statement of Facts, Statement of Issues, or Argument pertain to each of the separate 23 assignments of error alleged. One might infer that the entire argument portion of Morrison's brief is intended as support for each of Morrison's 23 assignments of error. However, Morrison's arguments plainly relate to at least three separate categories of rulings by the trial court: 1) the trial court's rulings regarding whether the Killians were parties to the PSA; 2)

the trial court's determination that the PSA was a final binding agreement; and 3) the trial court's award of damages to the Killians.

Rather than attempt to separately parse each assignment of error and key it to a specific portion of Morrison's monolithic argument, Respondents will address Morrison's arguments as they are set forth in Morrison's opening brief.

III. OBJECTIONS TO MORRISON'S STATEMENT OF ISSUES

1. Contract Formation. Morrison's first issue statement asks whether a trial court errs when it considers the intent of a non-party when interpreting a contract. (Opening Brief of Appellant ("Brief of Appellant"), p. 5). In so framing this issue, Morrison erroneously implies that an unidentified principal is not a party to a contract entered into by the principal's agent. As Morrison agreed below, the Killians were in fact parties to the PSA, and Morrison's framing of the contract formation issue on appeal is improper.

Morrison goes on to raise the issue of whether the PSA was an enforceable contract, or whether the parties understood that some further agreement was necessary to enforce the contract. As discussed above, Morrison's challenge to the completeness of the PSA is based primarily on his erroneous assertion that the Killians were not parties to the PSA. As such, this issue must be decided against him.

2. Specific Performance. Morrison's second issue statement asks whether a trial court errs by ordering specific performance of an incomplete contract. Morrison frames this second issue by assuming that the PSA was incomplete and that it required a further agreement of the parties. Morrison thus begs the very question he posed in his first issue statement: Was the PSA an enforceable contract, or was some further agreement necessary? As discussed in detail *infra*—and as the trial court ruled—the PSA was an enforceable contract.

IV. RESPONSE TO MORRISON'S STATEMENT OF FACTS

In response to Morrison's statement of facts, Respondents offer the following summary of relevant facts, as well as a discussion of why large portions of Morrison's statement of facts is irrelevant.

A. Morrison is approached with a purchase offer.

Before entering into the PSA, "Morrison became familiar with the various kinds of documents affecting legal title [and] the process of acquiring rights though the process of recorded option agreements[.]" (Brief of Appellant, p. 14). Morrison had 35 years of commercial real estate experience, dating back to 1971. (*Id.*)

In the late summer of 2005, Morrison was approached about the possibility of selling his property to an unidentified buyer. From the very inception of what became the PSA, Morrison was aware that he would be

selling his property to a buyer that wished to be anonymous. (*Id.* at 15). Throughout this transaction, the parties were represented by separate real estate agents. Morrison was represented by Jim Justin. The Killians were represented by Bob Bernhardt.

The Killians wished to remain unidentified so that Morrison would not artificially inflate the price of the property upon discovering the Killians' identity. Like any prudent buyer of commercial property, the Killians wished to avoid Morrison "holding-out" by artificially driving up the sales price upon learning that the Killians had a strong financial interest in acquiring the property.

> We had for some time been working on assembling properties in the area, and we have as we have on other transactions, and is not [un]typical in the real estate industry or other industries, for that matter, wanted to remain anonymous * * * .
>
> * * *
>
> [W]e are in a fairly small community and our name does appear in the paper from time to time associated with specific developments that we potentially could be held to a different value other than fair market value, higher value.

(Report of Proceedings of October 29, 2007, 9:09 am, Volume I, 41:15-42:3) (testimony by Lance Killian).

B. Morrison receives the Call memorandum, attaches it as an exhibit to a standard purchase and sale agreement, and offers it to the Killians' agent. Morrison's offer is accepted without modification.

As set forth in his opening brief, Morrison wanted the PSA to include an option to purchase a condominium if the buyer decided to develop the property into condominiums. Initially, Morrison had his agent, Jim Justin, draft an option agreement. Later, Morrison hired an attorney, Greg Call, to prepare a more formal option agreement. Mr. Call drafted what the parties referred to in the trial court as the "Call memorandum," which included the following terms:

1) The purchase price of $580,000 based on $20.00 per square foot (Ex. 4);

2) A refundable earnest money deposit of $50,000, to be paid into escrow within three days of acceptance by both parties; *Id.*

3) Instruction that the balance of the purchase price be paid in cash, pursuant to a Section 1031 exchange—a property exchange device that can result in substantial tax savings; *Id.*

4) Detailed provisions regarding Morrison's option to purchase:

a) The size and location of the residential unit that Morrison would have the option to purchase; *Id.* and

> [O]ne (1) residential unit to be located on an upper level floor and on the south side or on the southwest corner of

> the building with the square footage of the unit to be the greater of the size of the largest residential unit included in the design or twice the size of the smallest unit planned for the design, but under no circumstances less than 1,600 square feet. *Id.*

b) A formula for calculating the price of the residential unit Morrison would have the option to purchase:

> [B]ased on Seller's cost per square foot for construction of the selected unit including inside walls, ceilings, windows, plumbing, wiring, ventilation and flooring but not fixtures, appliances, molding, paint, wall paper, cabinets and floor coverings. *Id.*

As set forth in the trial court's Findings of Fact and Conclusions of Law dated February 15, 2008 ("FOF"), to which Morrison does not assign error, Morrison and his agent, Mr. Justin, proceeded to make the Call memorandum part of the PSA by attaching it as Exhibit B thereto.

> Mr. Justin attached Exhibit 4 to the PSA as Exhibit B "(Condominium Purchase Agreement)" prior to presenting the PSA to defendant for signature and prior to transmitting it to [buyer] for review and signature. Defendant agreed to the memorandum being made a part of the PSA and initialed it, along with every other page of the PSA, at the time he signed the PSA on October 22, 2005. Defendant did this without consulting his attorney. By incorporating the memorandum into the PSA, however, defendant converted the memorandum into a term of the PSA offer. The buyer accepted the PSA offer, without changes or further negotiations, including the Call memorandum, when Bernhardt [the Killians' agent] signed the PSA on November 9, 2005.

(FOF No. 2) (CP 928). Because Morrison does not challenge this finding of fact, it must be accepted as true on appeal.[4]

All parties understood and agreed that Bernhardt was signing the PSA on behalf of an unidentified principal purchaser. (Brief of Appellant pp. 22-23) ("[T]here is no dispute that Morrison expected that Bernhardt would assign his firm's interest to someone, at some point.")

The final executed PSA contained the following terms, explicitly stating that the PSA and attached Call memorandum constituted the full, final, and complete agreement of the parties:

> 22a. Complete Agreement. The Agreement and addendum and any exhibits to it state the entire understanding of Buyer and Seller regarding the sale of the Property. There are no verbal or written agreements which modify or affect the Agreement. (Ex. 3, p. 7)

C. The parties proceed towards closing and the Killians perform all of their pre-closing obligations. The parties have no communications, aside from exchanging the PSA itself, regarding Morrison's option to purchase.

After executing the PSA, the parties proceeded towards closing under the terms of the PSA. On November 29, 2005, Morrison was given notice that the buyer had satisfied the PSA's "Inspection Contingency," and on December 9, 2005, Morrison was notified that no "Permitted Exceptions" would be required regarding title. (Brief of Appellant p. 24,

[4] Findings of fact not challenged on appeal are "verities" and must be treated as inviolate by the reviewing court. *Davis v. Dep't of Labor & Indus.*, 94 Wn.2d 119, 123, 615 P.2d 1279 (1980).

fn 12). The Killians also tendered a $50,000 earnest money promissory note shortly thereafter. (FOF No. 3) (CP 929).

As the trial court determined, there were no communications between the parties regarding the PSA, including the option set forth in the Call memorandum, until late May 2006, when Morrison begin demanding additional option terms. The only item that had been communicated between the parties regarding Morrison's desire for an option was the PSA itself. (FOF No. 8) (CP 929).[5]

D. Morrison breaches the PSA by refusing to close.

On May 24, 2006, six days before the PSA was set to close, Chicago Title provided Morrison with copies of the closing documents, including documents making clear that the buyer was going to participate in a Section 1031 exchange as part of the transaction. (FOF No. 9, to which Morrison does not assign error) (CP 930).

Morrison subsequently refused to close on May 30, 2006, as required under the PSA. Instead, Morrison demanded new option terms not set forth in the PSA. (Report of Proceedings of October 29, 2007, 9:09 am, Volume I, 62:16-20 (testimony by Lance Killian) ("we were presented with contrary terms and conditions * * * and also new material terms and conditions")). While the Killians initially tried to salvage the

[5] While Morrison assigns error to this finding of fact, Morrison's opening brief asserts no facts or arguments to the contrary.

transaction by discussing Morrison's option to purchase, they were not willing to expand Morrison's rights under the PSA. (*Id.* at 63:5-64:22). On June 20, 2006, Morrison refused to discuss the deal further. (Brief of Appellant, p. 29).

E. As the trial court declared, the parties post May 30, 2006 discussions are irrelevant to interpreting the PSA.

Morrison's discussion of the parties' post-May 30, 2006 "negotiations" over the option portion of the PSA is irrelevant. By the time Morrison began demanding that additional terms be included in the option provisions of the PSA, the parties had already fully executed the PSA and, as the trial court notes, the Killians had already partially performed. *16 Street Investors, LLC v. Morrison*, 2007 WL 5086078 (Trial Order) (Wash.Super. Dec 27, 2007) Ruling (NO. 06-2-04175-9) (hereinafter "Trial Court Ruling") p. 18 ("At the end of the day, May 30, 200[6], Defendant was in breach of the Purchase and Sale Agreement * * * . Everything that occurred after May 30, 200[6] is immaterial to the issue of breach.") (CP 885).

The Killians' discussion of possible language for a new option agreement was, as the trial court recognized, simply an attempt by the Killians to mitigate their damages. (Trial Court Ruling, p. 18) (CP 885) ("The fact that Plaintiffs, through Mr. Weiner, continued to negotiate the

drafting of an option agreement is of no significance other than it demonstrates an effort by Plaintiffs to mitigate damages. Plaintiffs were under no obligation to accept Mr. Call's new demands . . . .") (emphasis in original). As the trial court recognized, Morrison began demanding additional terms "very late in the process," and the Killians' continued discussions were merely an attempt to get Morrison to go along with the deal Morrison had agreed to, and which the parties had already partially performed. (*See id.*).

Also irrelevant is Morrison's lengthy discussion regarding what Morrison, his agents, and other individuals subjectively thought the PSA meant. As discussed below, such subjective intent is irrelevant because, as found by the trial court, it was not expressed to the Killians. (Trial Court Ruling, p. 3-5) (CP 870-872); *see infra*, section VI. C. 2. below.

F. The parties' agreement to perform a Section 1031 exchange.

Paragraph 4.d. of the PSA contained a provision requiring each party to cooperate if the other intended for the purchase and sale to be part of a Section 1031 like-kind exchange. (Ex. 3, p. 3)

Morrison was informed by the title company on May 24, 2006 that the buyers intended to pursue a Section 1031 exchange, as set forth in the PSA. (SOF 9) (CP 930). Morrison was even warned on June 16, 2006,

after the closing date had passed, that the Killians would suffer damages if the exchange did not occur by June 20, 2006. (SOF 14) (CP 930).

Morrison nonetheless refused to honor his obligations under the PSA. As a result, the Killians incurred an additional tax liability of $100,689, which they would not have incurred had Morrison honored his obligations under the PSA.

V. STANDARD OF REVIEW

The trial court's findings of fact are reviewed for substantial evidence, "defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true." *Sunnyside Valley Irrigation Dist. v. Dickie,* 149 Wn.2d 873, 879, 73 P.3d 369 (2003). An appellate court will not substitute its judgment for that of the trial court, even if it might have resolved the fact dispute differently. *Id.* at 879-80. "Credibility determinations are solely for the trier of fact" and cannot be reviewed on appeal. *Morse v. Antonellis,* 149 Wn.2d 572, 574, 70 P.3d 125 (2003). Unchallenged findings of fact are verities on appeal and may not be reversed by the reviewing court. *Davis v. Dep't of Labor & Indus.,* 94 Wn.2d 119, 123, 615 P.2d 1279 (1980).

VI. ARGUMENT

A. The Killians were parties to the PSA.

Contrary to Morrison's protestations on appeal, the Killians were parties to the PSA by virtue of their agent having entered into the PSA on their behalf. As explained in *Dana v. Boren*, 133 Wn.App. 307, 311, 135 P.3d 963 (2006) (emphasis added):

> [I]t is a well established general rule that, where an agent on behalf of his principal enters into a simple contract as though made for himself, and the existence of the principal is not disclosed, the contract inures to the benefit of the principal who may appear to hold the other party to the contract made by the agent. **By appearing and claiming the benefit of the contract, it thereby becomes his own to the same extent as if his name had originally appeared as a contracting party * * *** .

Courts across the country have long recognized that a principal is a party to a contract entered into by his agent acting as such, even where the existence of the principal is undisclosed to the seller. Restatement (Third) of Agency § 6.03. This rule has been recognized by the U.S. Supreme Court since at least 1859.

> The contract of the agent is the contract of the principal, and he may sue or be sued thereon, though not named therein, and notwithstanding the rule of law that an agreement reduced to writing may not be contradicted or varied by parol, it is well settled that the principal may show that the agent who made the contract in his own name was acting for him. This proof does not contradict the writing; it only explains the transaction.

Ford v. Williams, 62 U.S. 287, 289 (1859).

Commentators have recognized the important economic basis for this "undisclosed principal" rule.

> [E]nforcing contracts made on behalf of undisclosed principals provides important economic benefits. Permitting principals to conceal their existence is one way to overcome strategic behavior-or so-called 'hold-out' problems that can impair the formation of mutually beneficial contracts. Many buyers seek to avoid having to pay more for a particular item solely because the seller knows of the buyer's deep pocket.

Squaring Undisclosed Agency Law with Contract Theory, 75 Cal. L. Rev. 1969, 1976-77 (1986) (Respondents' Ex. C).

> For example, in *Senor v. Bangor Mills, Inc.*, [211 F.2d 685 (3d Cir. 1954)], the defendant, a prodigious user of nylon yarn, had to make frequent and substantial purchases in the 'secondary' market in order to maintain its production levels. Because its needs and economic position were well known, it was asked to pay prices that were very high even for that market. Accordingly, it sought to buy yarn more cheaply through an intermediary.

Id. Without this doctrine, which makes principals parties to the contracts entered into by their agents, buyers would be unable to remain anonymous and would be subject to the very hold-out problem that this doctrine was developed to overcome.

As Lance Killian testified before the trial court, this was precisely the problem the Killians wished to avoid by remaining anonymous in the present case. (Report of Proceedings of October 29, 2007, 9:09 am, Volume I, 41:15-42:3) (testimony by Lance Killian) As Mr. Killian

testified, the Killians were attempting to assemble several contiguous parcels of property. (*Id.*) A seller, such as Morrison, would have a strong incentive to artificially inflate the price of his property upon learning that the buyer had already bought several nearby parcels and desired the seller's parcel.

As set forth above, the law, the facts, and even Morrison's own briefing before the trial court, incontrovertibly show that the Killians were parties to the PSA by virtue of their agent having signed the PSA on their behalf.

B. The trial court properly looked to the objective manifestations of the Killians' intent when interpreting the PSA.

Morrison devotes a substantial portion of his appellate argument to the proposition that "the touchstone of contract interpretation is the intent *of the parties*"—and in this, Morrison is absolutely correct. (Brief of Appellant, p. 34) (emphasis in original) (quoting *Scott Galvanizing, Inc. v. Northwest EnviroServices, Inc.*, 120 Wn.2d 573, 580, 844 P.2d 428 (1993)). However, as discussed above, the remainder of Morrison's argument—that, "[b]ecause the trial court erroneously treated the Killians' intent as controlling, the court failed to determine what the *parties* to the Purchase and Sale Agreement contract intended"—is wrong. (Brief of Appellant, p. 35.) (Emphasis in original.)

The trial court properly sought to discern the Killians' intent in regard to the PSA because the Killians were parties to that agreement. As stated in Morrison's own opening brief:

> Morrison does not dispute that the trial court was entitled to find, as a matter of substantial evidence, that the Killians understood the PSA to be a final and complete agreement, and particularly that the Call memorandum's discussion of Morrison's option constituted a final and complete resolution of the scope of Morrison's option rights.

(Brief of Appellant, p. 33). By Morrison's own admission, the trial court properly determined that the Killians intended the PSA and attached Call memorandum to be a full and enforceable contract. As parties to the PSA, the Killians' intent lies at the very heart of how a court must interpret the PSA.

Because, as demonstrated by the quoted portion of Morrison's opening brief above, Morrison does not challenge the trial court's findings as to the Killians' intent regarding the PSA, those findings may not be overturned on appeal, and the trial court's reliance on the Killians' intent was not error. *Davis v. Dep't of Labor & Indus.*, 94 Wn.2d 119, 123, 615 P.2d 1279 (1980) ("Unchallenged findings of fact become verities on appeal").

C. The PSA was an enforceable agreement—not a mere agreement to agree.

Contrary to Morrison's assertions, the PSA—including the

attached Call memorandum—constituted an enforceable contract and not, as Morrison argues, an unenforceable agreement to agree.

1. Morrison improperly confines the legal test for enforceability to the Call memorandum in isolation, instead of the PSA as a whole.

Morrison suggests that the trial court should have determined whether the Call memorandum *standing alone* constituted a specifically enforceable option contract.

> Here, the only thing *not* "left in doubt" by the relevant record is [that] the parties had agreed that they needed to reach a further agreement on an option (in order to have an enforceable agreement) * * *.

(Brief of Appellant, p. 43).

The separate enforceability of the option terms of the PSA, however, is not the issue here. Rather, as the trial court properly explained, the issue is whether the PSA, *taken as a whole*, constituted a specifically enforceable contract.

> The question is <u>not</u> whether the Call memorandum, standing alone, constitutes some specific legal entity called an option. Rather, the issue is whether or not the Purchase and Sale Agreement, which included the Call memorandum, created a legal obligation in Defendant to sell the property[.]

(Trial Court Ruling, p. 13) (CP 880).

As Washington courts have long held, the essential elements of a contract for real property are the subject matter, the consideration, and the

terms of payment. *Hubbell v. Ward*, 40 Wn.2d 779, 787, 246 P.2d 468 (1952). When these elements are set forth in the contract, a party not in breach is entitled to equitable relief in the form of specific performance. *Id.* at 787.

Here, Morrison does not dispute that the PSA contained the essential terms of a real estate purchase and sale agreement. He does not dispute that the PSA properly described the property being sold, the sales price, the time for closing, or any of the other requirements of a specifically enforceable real estate contract, as set forth in *Hubbell*. In fact, Morrison's appellate brief focuses solely upon the option terms set forth in the Call memorandum. Indeed, Morrison takes no issue with the remainder of the PSA.

Instead, Morrison argues that the Call memorandum, standing alone, does not constitute an enforceable option agreement. However, as the trial court recognized, this case is not simply about the separate enforceability of Morrison's option. (Trial Court Ruling, p. 13) (CP 880). The trial court properly viewed the PSA as a whole and determined that it met the requirements of an enforceable contract for the sale of real estate. The trial court properly refused to render the PSA unenforceable by analyzing just one component of the PSA, the Call memorandum, in isolation. Because the PSA *taken as a whole* included terms of payment,

price, and a legal description, the PSA was specifically enforceable.

2. The PSA, including the option terms, meets the requirements for a specifically enforceable contract.

As discussed above, the trial court's determination that the entire PSA was specifically enforceable was both well founded and sufficient to support its ruling in Respondents' favor.

While unnecessary to the trial court's ultimate decision in Respondents' favor, the trial court went even one step further and properly determined that the PSA's option provisions were themselves definite and enforceable. As the trial court recognized, the only necessary terms for an option to purchase in a land sale agreement are 1) a legal description and 2) a method for determining the purchase price. (Trial Court Ruling, p. 15) (CP 882) (citing *Valley Garage, Inc. v. Nyseth*, 4 Wn.App. 316, 481 P.2d 17 (1971)); *see also Varacalli v. Williams*, 8 Wn.App. 129, 131-32, 504 P.2d 790 (1972) (applying the court's holding in *Valley*).

The parties do not dispute that the description of the property in the PSA was legally sufficient. Moreover, the PSA contained a detailed description of the residential unit that Morrison would have an option to purchase.

> [O]ne (1) residential unit to be located on an upper level floor and on the south side or on the southwest corner of the building with the square footage of the unit to be the

> greater of the size of the largest residential unit included in the design or twice the size of the smallest unit planned for the design, but under no circumstances less than 1,600 square feet.

(PSA, Exhibit B) (Ex. 3).

The PSA also contained a detailed formula for calculating the price of the residential unit Morrison would have the option to purchase:

> [B]ased on Seller's cost per square foot for construction of the selected unit including inside walls, ceilings, windows, plumbing, wiring, ventilation and flooring but not fixtures, appliances, molding, paint, wall paper, cabinets and floor coverings.

(PSA Exhibit B) (Ex. 3).

In *Valley Garage, Inc. v. Nyseth*, the Washington Court of Appeals held the following option language, which is far less detailed and certain than that in the PSA, was sufficient to support a claim for specific performance:

> The Lessors do hereby grant to Robert L. Couture, and his wife or Lessees an option to purchase property herein mentioned on the following terms and conditions:
>
> Robert L. Couture and his wife, or Lessees, shall give written notice to the Lessors on or before August 31, 1973, of their desire to exercise their option. The price shall be a reasonable price representing the fair market value of the property as agreed by the parties hereto. If they cannot agree, then each party hereto agrees to select a representative or appraiser and the two representatives or appraisers so selected shall appoint a third, the said three representatives to agree on a reasonable price and the parties hereto covenant and agree to be bound by this determination.

Valley Garage, Inc., 4 Wn.App. at 18. As the trial court recognized here, Washington law does not require anything more than a legal description and a method for determining the purchase price. The PSA satisfies these requirements. (Trial Court Ruling, p. 15) (CP 882).

Even though the issue here is the enforceability of the entire PSA, the trial court's decision was also correct because the PSA's option terms were themselves definite and enforceable.

3. The language of the PSA itself shows that the PSA was a full and enforceable contract.

The language of the PSA itself also establishes that the PSA, including the Call memorandum, attached as Exhibit B, was a full and enforceable agreement. As the trial court noted, the PSA contained unambiguous language declaring that the PSA (and all its attachments and exhibits) constituted the final agreement of the parties, and that no further agreement of the parties was necessary.

> 22a. Complete Agreement. The Agreement and addendum and any exhibits to it **state the entire understanding of Buyer and Seller regarding the sale of the Property**. There are no verbal or written agreements which modify or affect the Agreement.

(emphasis added).

Even if Morrison was ignorant of these terms, under well-established Washington law, he was bound by them. As Washington courts have routinely held, "[a]bsent fraud, deceit or coercion, a voluntary

signatory is bound to a signed contract *even if ignorant of its terms.*" *Max L. Wells Trust by Horning v. Grand Cent. Sauna and Hot Tub Co. of Seattle*, 62 Wn.App. 593, 604, 815 P.2d 284 (1991) (citing *Sherman v. Lunsford,* 44 Wn.App. 858, 861, 723 P.2d 1176 (1986)).

Morrison's only reference to language of the PSA itself is to argue that the words "would like" in the Call memorandum are future-oriented and evince an intent to seek a further agreement. (Brief of Appellant p. 36). With the overwhelming totality of the PSA's language arrayed against him, Morrison is left to grasp at these two words. As the trial court aptly points out, the phrase "would like" is often used to indicate a present intent and not a desire that something be done in the future.

> [I]f Mr. Morrison went to a restaurant and said to the waiter "I would like to order a steak," that language imparts a current, present desire to order a steak, not an intention to order one sometime in the future.

(Trial Court Ruling, p. 6) (CP 874). In the context of the PSA as a whole, including the language stating that "[t]he agreement and addendum **and any exhibits to it** state the entire understanding of the buyer and seller regarding the sale of the property", the trial court properly interpreted the words "would like" as a statement of present intent. (Ex. 3, p. 7) (Emphasis added.)

4. The actions of and communications between the parties manifest an objective intent that the PSA be a full and enforceable agreement.

In arguing that the trial court improperly considered the Killians' "secret interpretation" of the PSA, Morrison states the correct rule but applies it to the wrong party. Here, Morrison invokes the well-established principle of Washington contract law that only objective expressions of intent, i.e., actions and statements made known to the other party, are relevant to the court's interpretation of a contract. *See American Agency Life Ins. Co. v. Russell*, 37 Wn.App. 110, 116, 678 P.2d 1303 (1984) (holding that a party's internal actions and communications are irrelevant under the objective theory of contract adopted in Washington.) As the trial court noted:

> [T]he context rule of [*Berg v. Hudesman*], which allows the court to consider the discussions between the parties, to interpret terminology in a contract, has no applicability, absent evidence of such discussions being had with the Buyer.

(Trial Court Ruling, p. 4) (CP 871). As the Washington Supreme Court held in *Barclay v. City of Spokane*, 83 Wn.2d 698, 699-700, 521 P.2d 937 (1974):

> In interpreting a contract our purpose is to ascertain the intent of the parties, but that does not mean that we are to be guided by the unexpressed subjective intent of a party.

Applying this rule, the court in *Barclay* refused to consider testimony by negotiators for one of the parties regarding what those negotiators intended the contract to mean. *Id.*

In plain contravention of this rule, Morrison relies heavily upon discussions between himself, his agent, and his attorney to support his view of the PSA. However, none of those conversations were made known to the Killians. Morrison also relies upon after-the-fact testimony by himself and his agent regarding what they thought the PSA meant. (Brief of Appellant, pp. 22-23). It is undisputed that this unexpressed intent was not communicated to the Killians.

Morrison also cites testimony by the Killians' agent (Bernhardt) that, at most, evinces an unexpressed subjective belief that the Call memorandum may not, by itself, have constituted a final contract (and which, of course, does not speak to whether the PSA and attached Call memorandum *together* constituted a final and enforceable contract). (Brief of Appellant, p. 22). As discussed above, such unexpressed subjective opinions are irrelevant under Washington law.

As the trial court correctly found, Morrison's only communication with the Killians regarding the PSA consisted of transmitting the PSA to the Killians' agent. (Trial Court Ruling, p. 4) (CP 871). Morrison's act of signing the PSA and initialing each page, including the Call memorandum,

is Morrison's only objective manifestation of intent regarding the PSA. Put simply, Morrison, an individual with 35 years of real estate experience, drafted the PSA with the help of an attorney and a real estate agent, and presented the PSA to the Killians. The Killians signed the PSA without modification and then proceed to perform their obligations thereunder. *These* are the parties' objective manifestations of intent.

It was not until six days before the PSA was set to close—and well after the PSA had been executed by the parties—that Morrison began demanding that his option to purchase under the PSA be expanded. (Brief of Appellant, p. 25). By that time, the parties' obligations under the PSA had long been fixed.

Contrary to Morrison's argument on appeal, the trial court based its conclusions upon the Killians' *objective* manifestations of intent, not any "secret interpretation." As the trial court stated—and Morrison does not dispute—the Killians directed their agent "to accept the offer, without modifications, by signing it." (Trial Court Ruling, p. 7) (CP 874). Furthermore, "[t]he Killians thereafter conducted their due diligence procedures, <u>and</u> tendered the earnest money promissory note in the amount of $50,000 shortly thereafter." *Id.* (emphasis in original). Rather than look to the Killians' subjective intent, the trial court properly analyzed the Killians' actions, all of which Morrison was fully aware.

> Had the buyers anticipated, expected, or intended that further agreements were required, it is doubtful they would have tendered the earnest money note. The tender is evidence of their intent that the signing of the Purchase and Sale Agreement constitute the final agreement of the parties.
>
> The Killians have testified that they interpreted the Purchase and Sale Agreement as constituting the entire agreement, and that no further option document was required by the agreement. **Their actions following acceptance of the offer are consistent with and corroborate that testimony.**

(Trial Court Ruling, pp. 7-8) (CP 874-875) (emphasis added).

The only communications between the Killians and Morrison regarding the PSA occurred *after* the parties had fully executed the agreement, after the Killians had partially performed by conducting their due diligence and putting down earnest money, and—critically—after Morrison had already breached the PSA by failing to close on May 30. It is only at this point, after Morrison had repudiated the PSA and breached his obligations, that Morrison began demanding additional terms. The Killians' attempt to negotiate after Morrison had already breached was merely as the trial court saw it: an attempt to salvage the deal before the Killians incurred a loss caused by their inability to go through with the Section 1031 exchange—a loss which they ultimately suffered as a result of Morrison's continued repudiation of his obligations under the PSA.

5. Morrison impermissibly asks this Court to re-weigh the credibility of fact witness testimony.

In attempting to argue that the PSA was not enforceable, Morrison asks this Court to reject as "spin" deposition testimony from the Killians stating that they believed that the Call memorandum was itself a final option agreement because it was initialed and attached to a standard purchase and sale agreement form. (Brief of Appellant, pp. 36-37).

As set forth above, this Court on appeal may not reweigh credibility determinations made by the finder of fact. *Morse v. Antonellis*, 149 Wn.2d 572, 574 70 P.3d 125 (2003). In determining that the PSA was a full and enforceable contract, the trial court determined that the Killians' testimony was credible. This Court should reject Morrison's invitation to re-weigh the trial court's credibility determinations.

6. The authorities cited by Morrison are inapposite.

In arguing that the PSA did not constitute a final and enforceable agreement, Morrison relies heavily upon *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 94 P.3d 945 (2004). The *Xerox* case is inapplicable because it involved a very different factual scenario and a completely different question of law from the one before this Court.

In *Xerox*, the parties exchanged several letters of intent and purchase price offers without ever drafting, much less executing, a formal purchase and sale agreement. *Xerox Corp.*, 152 Wn.2d at 175. In

contrast, the parties here executed a single purchase and sale agreement, which Morrison delivered to the Killians through their agent, and which the Killians signed without modification. Morrison then signed and initialed every page of the PSA, including the attached Call memorandum.

Most fundamentally, in *Xerox*, the issue of whether the parties had reached a final and enforceable agreement was not even before the court. Rather, Keystone (the buyer in that case) contended that "Xerox [the seller] was obligated to prepare a purchase and sale agreement"—not that the parties had in fact executed a final purchase and sale agreement. *Xerox Corp.*, 152 Wn.2d at 175. This is a key distinction. As the court noted, whether the agreement in *Xerox* constituted a binding contract had already been decided in separate litigation. *Id.* at 176 n. 9. The only issue before the court was whether the parties had an enforceable agreement *to further negotiate*. *Id.* at 177. While not even an issue in *Xerox*, whether the parties here entered into a final and enforceable purchase and sale agreement is a core issue.

Morrison merely asserts, without reference to the language of the PSA itself or communications between the parties, that the parties "had agreed on the terms of the overall purchase and sale agreement, while recognizing that further negotiations would be required to come to an agreement on the form of Morrison's option[.]" (Brief of Appellant, p.

42). Morrison's reliance upon *Xerox* for this otherwise unsupported proposition amounts to pure question-begging. The court in *Xerox* laid out three categories of forward-looking contracts, including agreements to agree, agreements with open terms, and contracts to negotiate. *Xerox Corp.*, 152 Wn.2d at 176. Notably, Morrison fails to explain why, on the facts of *this* case, the PSA was a mere agreement to agree, as opposed to an enforceable contract as the trial court determined. Morrison's unsupported assertion that the PSA was an agreement to agree is not enough, and he fails to show how *Xerox* is somehow relevant.

Morrison's reliance upon *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993) is equally misplaced. The court in *Kruse* refused to specifically enforce an option to purchase because the parties had failed to execute an underlying land sale agreement to which the option agreement was supposed to attach. *Id.* at 723. Plainly, this is not what occurred here. On November 9, 2005, the parties executed the underlying land sale agreement (the PSA), which contained all of the terms necessary to render the entire agreement enforceable.

Moreover, in *Kruse*, the plaintiff sought specific performance of the option agreement itself, as opposed to the underlying land sale agreement which the Killians sought to enforce here. As the trial court noted:

> It is important to remember, however, that this case is not before the court to order specific performance of Mr. Morrison's option. The court is asked to order specific performance of the contract to convey the property to the buyer.

(Trial Court Ruling, p. 13) (CP 880). The crux of the court's opinion in *Kruse* was that the option agreement, which was supposed to be part of an underlying land sale agreement, could not be specifically enforced on its own without an underlying land sale agreement. Here, the issue is whether the PSA *taken as a whole* was specifically enforceable. Given that the parties here fully executed the PSA, *Kruse* simply is not relevant.

D. The trial court correctly held Morrison liable for the damages he caused by not going through with the Section 1031 exchange contemplated in the PSA.

Morrison does not dispute that, as a result of the PSA failing to close, the Killians incurred increased tax liability in the amount of $100,689. Morrison has not assigned error to the trial court's 16th finding of fact, which states that "[t]he Killians' tax liability as the result of the 1031 exchange failing to timely close totaled $100,689." (FOF No. 16) (CP 931). Instead, Morrison argues that he was somehow not aware that the Killians intended to pursue a Section 1031 exchange until shortly before closing, and therefore should not be held liable for any resulting damages. (Brief of Appellant, p. 44).

Morrison does not dispute that he was informed of the Killians' intent to pursue the Section 1031 exchange when the title company sent him closing documents in late May 2006. (FOF No. 9, to which Morrison does not assign error) (CP 930). The PSA itself explicitly provides for the Section 1031 exchange, and Morrison himself was planning on performing his own Section 1031 exchange. (PSA, ¶ 4.d.) (Ex. 3, p. 3). Morrison also acknowledges that he was later told by the Killians' attorney that, if he refused to close by June 20, 2006, the Killians would suffer increased tax liability. (Brief of Appellant, p. 30).

In any event, because the Section 1031 exchange was expressly contemplated by the parties at the time of contracting, the Killians are entitled to recover their increased tax liability as a result of Morrison's breach. In fact, Morrison admits that the PSA reflected his own intent to pursue a Section 1031 exchange. (Brief of Appellant, p. 18) (stating that the PSA contained terms "consistent with Morrison's intent to do a '1031 Exchange.'")

Once a court has established that a party has breached a contract, there are only two questions that the court must answer in regard to damages: 1) were those damages caused by the breach, and 2) were those damages foreseeable? *Floor Exp., Inc. v. Daly*, 138 Wn.App. 750, 158 P.3d 619 (2007). Damages resulting from a breach of contract are

foreseeable where they either arise naturally from the breach, or where the damages were contemplated by the parties at the time of contracting. *Id.* ("[A] non-breaching party may recover damages that are reasonably within the parties' contemplation at the time they made the contract as the probable result of the breach of that contract.") (citing *Crest Inc. v. Costco Wholesale Corp.*, 128 Wn.App. 760, 764, 115 P.3d 349 (2005)).

As stated above, Morrison does not dispute that the Killians suffered $100,689 in damages as a result of the PSA failing to close. Thus, the only question this Court must answer is whether the damages suffered by the Killians were foreseeable. Here, the Killians' damages both arose naturally from Morrison's breach and were contemplated by the parties in the PSA itself. It follows naturally that, if Morrison refused to close the PSA, the Killians would be denied the tax advantages of the Section 1031 exchange.

The language of the PSA itself demonstrates that the parties wished to take advantage of the tax savings provided by a Section 1031 exchange and that both parties were contemplating such an exchange. Section 4.d. of the PSA created a contractual obligation on the part of both parties to "cooperate in the completion of a like-kind exchange." (Ex. 3, p. 3). Frankly, given the PSA's language and the pre-closing communications, it is hard to imagine how the increased tax liability

resulting directly from Morrison's refusal to close was not both foreseeable and contemplated by the parties.

E. Request for attorneys' fees under RAP 18.1

The trial court awarded the Killians their attorney's fees and costs, pursuant to the prevailing party provision of the PSA. (FOF No. 13) (CP 934). On this same basis, the Killians request their attorney's fees and costs on appeal.

VII. CONCLUSION

Morrison summarizes his argument on appeal as follows:

> Here, the Killians authorized their agent, Bernhardt Associates, to enter into the Purchase and Sale Agreement contract with Morrison, based on their secret interpretation of the Call memorandum's discussion of Morison's [sic] option rights. The Killians should not have the benefit of that interpretation.

(Brief of Appellant, p. 46).

Morrison's summary is telling. It shows that Morrison's argument on appeal contravenes Washington law on at least two levels. First, it ignores the "undisclosed principal" rule that, when an agent enters into a contract for a principal, the principal is a party to that contract. Second, it ignores the objective theory of contracts, which requires that a court consider only the parties' objective expressions of intent, as opposed to a party's unexpressed subjective understanding and internal communications.

Contrary to Morrison's unsupported assertion, the trial court did not rely upon any unexpressed understanding of the PSA held by the Killians. Rather, the trial court relied upon both the Killians' and Morrison's actions and the communications between the two in determining the parties' intent.

> Defendant manifested his intention that the Call memorandum serve as a material term of the PSA offer when he initialed the memorandum after it had been attached to the PSA by Mr. Justin. 16 Street [The Killians] manifested its intent to accept all terms of the PSA offer when it directed Bernhardt to sign the PSA offer without modifications, by agreeing to the immediate assignment of the PSA from Bernhardt to Killian Pacific, LLC, by conducting due diligence, and by tendering the earnest money promissory note of $50,000. This conduct evidences 16 Street's [the Killians'] intent that the signing of the PSA constitute the final agreement of the parties.[6]

(FOF No. 3) (CP 929).

Indeed, the trial court *refused* to look to Morrison's unexpressed subjective intention that the parties enter into a further option agreement. It is Morrison who held a "secret interpretation of the Call memorandum," and the trial court correctly refused to look to communications that were not disclosed to the Killians.

> [What was said between Morrison and others] is of no significance unless those conversations were

[6] Morrison correctly points out that the trial court's third Finding of Fact erroneously refers to 16 Street as the principal/buyer when it in fact was the Killians. While this provides a nit at which Morrison may pick, it does not in any way undermine the trial court's analysis.

> communicated to the Buyer. They are the sound of one hand clapping[.]
>
> * * *
>
> [The PSA] contains the totality of the communication between Defendant and Plaintiffs.
>
> * * *
>
> It certainly is clear, from Mr. Call's and Mr. Morrison's testimony that subjectively they desired, at some point, clarification of the term "residential unit", and that they desired that the option would survive a transfer or "flip" of the property by the original buyer.
>
> The written offer, with exhibits, however, fails to convey these desires.

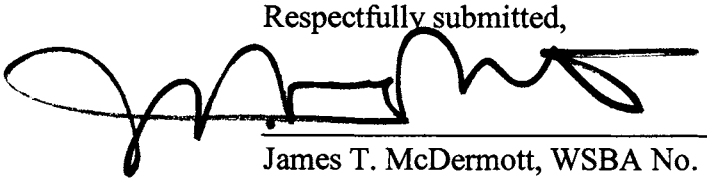
(Trial Court Ruling, pp. 3-5) (CP 870-872).

By Morrison's own standard, the trial court properly ignored his and others' unexpressed intent regarding the meaning of the PSA, while looking instead to the language of the PSA and the parties' objective expressions of intent. The trial court's consequent Findings of Fact and Conclusions of Law were not error.

Accordingly, Respondents respectfully request that this Court affirm the trial court's ruling in all respects and award Respondents their reasonable attorneys' fees and costs incurred on appeal.

DATED this 7th day of November, 2008.

Respectfully submitted,



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APPENDIX

LIST OF EXHIBITS

Exhibit A	webpage from www.realestateagent.com/real-estate-glossary/Realestate/Undisclosed-principal.html
Exhibit B	webpage from www.kennedyadvisors.net/services.html
Exhibit C	*Squaring Undisclosed Agency Law with Contract Theory,* 75 Cal. L. Rev. 1969, 1976-77 (1986) (excerpt)
Exhibit D	*Ford v. Williams,* 62 U.S. 287 (1859)

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Undisclosed principal

1. A major party to a transaction, such as a seller or purchaser of property, remains anonymous. An example is when someone acts on behalf of a purchaser who wishes his identity not to be disclosed.
2. Person is not informed by an agent that there is a principal. In this case, the agent has legal ability under the contract.

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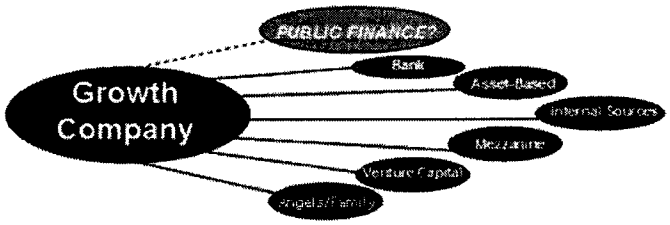

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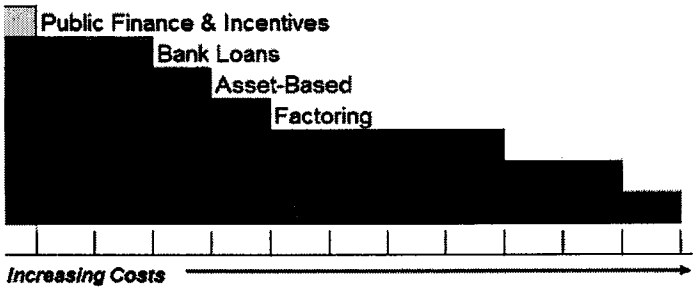

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top

Site Selection Services

Site Selection
Loren Kennedy has conducted site selection advisory services in twenty states and Mexico. Projects have involved customer service centers, manufacturing plants, headquarter offices and distribution centers. All have also involved public finance and incentive negotiations. The overall scope of these services as largely customized to the clients situation. However, recurring elements of analysis in this service line include workforce cost, profile and availability; tax structures; Locations of competitors; incentive policies; public assistance level for recruiting, training and permitting; real estate availability and cost; infrastructure issues, transportation situation and more.

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Representing an "undisclosed principal", we aggressively facilitate assemblage or acquisition of properties without identifying our principle. Developer clients have found this advantageous in situations where disclosure may intensify perceived valuation of a property or yield other negative consequences. Often this process entails an exceptionally detailed search and evaluation process to generate the most beneficial results.

Marketing Strategy/Leasing
Though assisting owners to market or lease their properties is not our core focus; we do relish assignments that other firms might consider too difficult. That can include a property that is entering a new market, a turn-around situation or one involving an economic development project.

and/or federal grants and other incentives.

Team Assemblage
We assist developers in assembling the resources for their projects. That has included core team members such as architects, appraisers, contractors and attorneys and others such as project managers, environmental consultants and subcontractors. We also help in evaluating candidates and negotiating their service contracts.

Sale/Leaseback Brokerage
For property owners seeking to unlock capital tied up in facilities, a sale/leaseback can create a cash infusion or other company needs. Kennedy Advisors helps structure the offering package and sets up a competitive situation among national investors to maximize our client's asset value.

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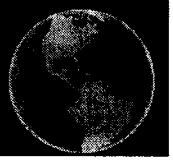
Global Reach



Loren Kennedy has been a member of The Counselors of Real Estate ("CRE") for eleven years and is Past President of the Carolinas chapter.

CRE, The Counselors of Real Estate is a 1,100 member by invitation only U.S. Based professional organization. There are over 100 CRE disciplines represented. Practice areas include site selection, Real Estate Tax Appeals, M&A Due Diligence, 1031 Exchanges and Highest & Best Use Analysis.

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Fees

Kennedy Advisors offers clients an uncommon range of fee structures. Optional categories are:

Market Commissions
Like other brokerages, we will accept local market commissions that are paid by building owners.

Consulting with Success Fees
On public finance, incentive negotiations or other engagements not connected to a commission on a real estate transaction we will work with hourly, monthly or project fees when coupled with project success fees.

Client Partnering
In situations where clients have the wherewithal and time to perform some aspects of a given project, Kennedy Advisors commissions and fees can be reduced appropriately.

Guarantee
Regardless of the size of the transaction, the client may determine if less than a market commission has been earned.

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C

California Law Review
December, 1987

*1969 SQUARING UNDISCLOSED AGENCY LAW WITH CONTRACT THEORY

Randy E. Barnett [FNp][FNp]

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The law of undisclosed agency has long been considered an anomaly of contract theory. While few disapprove of its content, this body of law does not appear to square with our theoretical understanding of contractual obligation. In this Article, Professor Barnett applies a 'consent theory of contract' to explain and critically evaluate the law of undisclosed agency. After showing why standard contract theories have been unable to explain the established doctrine in this area, he analyzes the nexus of obligations arising from the consensual 'triangular flow of rights' among the three parties to the paradigm undisclosed agency relationship. He then extends this analysis to treat several 'hard cases.' Professor Barnett concludes that the bulk of this spontaneously evolved body of law is theoretically sound; that the source of the long-standing apparent anomaly is the predominance of the promise-based theory underlying the action of assumpsit; and that judges' ability to develop good law in spite of the deficiencies in the prevailing contract theories provides an insight into the appropriate roles of tradition and reason in generating law.

INTRODUCTION

The law of undisclosed agency concerns the following situation: *UP*'s agent *A* makes an agreement with *T*, but *UP*'s existence and identity are unknown to *T*. *UP* is called the 'undisclosed principal.' [FN1][FN1] What are the legal relations among these three actors? Do *A* and *T* have a valid contract? Can *T* sue *UP* for breach? Can *T* refuse to perform when she discovers the identity of *UP*? Nearly every legal theorist who has considered the law of undisclosed agency from the point of view of contract theory has concluded that the established rules are anomalous. [FN2][FN2] This has ***1970** caused at least one commentator to deprecate the value of legal theory itself. [FN3][FN3] Unfortunately, very few, if any, contemporary contract theorists have considered the issue of undisclosed agency at all. [FN4][FN4]

In this Article, I explain the apparent anomaly of the present law of undisclosed agency by applying modern entitlement theory and a 'consent theory of contract.' [FN5][FN5] In Part I, I show why the law of undisclosed agency is considered to be anomalous by sketching four illustrative cases that conventional theories of contractual obligation cannot explain. To help correct the current dearth of American agency law scholarship, I also provide citations to the most recent state cases on the basic principles of undisclosed agency. [FN6][FN6] In Part II, I summarize a consent theory of contract and apply it, first to the paradigm case of undisclosed agency described above, and then to several 'hard cases.' My conclusion is that most current undisclosed agency doctrine is supported by sound modern ***1971** entitlements theory and a consent theory of contract. Moreover, where doctrinal conflict exists among American courts or between American and English courts, a consent theory of contract can be used to determine which stance is preferable. In Part III, I identify the doctrine of assump-

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tracting party. [FN23][FN23]

The second traditional contract theory, the reliance theory, which looks to the existence of 'reasonable' and detrimental reliance, [FN24][FN24] fares little better. If *T* does not know of *UP*'s existence, she can never rely on *UP*'s commitment. Therefore, a reliance theory cannot explain why *T* may hold *UP* liable as a party to the contract. Frederick Pollock, an early and persistent critic of the doctrine of undisclosed agency, made a similar observation:

> *A* enters into the service of *X*, he does not know of the existence of *Y* and *Z*, *X*'s dormant partners. It therefore follows that he was induced to enter into the contract by his trust in the promise of *X* to remunerate him; and if he afterwards discovered that *X* had no partners, *A* would have no reason to complain. Why then should be gain by the fact, *which* ***1976** *never influenced his conduct*, that *Y* and *Z* were *X*'s partners when *A* contracted with *X*? [FN25][FN25]

Since *UP*'s liability is a central tenet of undisclosed agency law, a reliance theory has serious explanatory shortcomings. Furthermore, a reliance theory may not explain *T*'s liability to *A* in Illustration 1, since it is not clear how *A*, acting solely on *UP*'s behalf, would have detrimentally relied on *T*. The only relations a reliance theory might explain are: (1) *T*'s liability to *UP* in Illustration 1, if *UP* knew of and relied on *T*'s commitment, and (2) *A*'s obligation in Illustration 1, if *T* can be shown to have relied on *A*'s promise.

Both the efficiency and substantive fairness theories, the third and fourth traditional contract theories we consider, are standards-based. A standards-based theory evaluates the results of the transactions against a predetermined standard regarded as primary. [FN26][FN26] There are two immediate problems with such theories. First, they require a mechanism for discovering and justifying the standards they apply. Second, they would not enforce any transaction that failed to meet the proper standard, even one in which the parties are in mutual agreement. [FN27][FN27]

I discuss elsewhere why an efficiency analysis cannot be itself produce a normative assessment of contractual obligation. [FN28][FN28] Moreover, if a consent theory of contract is consistent with or even necessary to achieving allocational efficiency, [FN29][FN29] then the outcomes it specifies in the area of undisclosed agency are likely to facilitate efficiency without resorting to an explicit efficiency analysis. Still, economic analysis can tell us much of importance about agency relationship. [FN30][FN30] Although to may knowledge economists have yet to discuss specifically the problems unique to undisclosed agency, enforcing contracts made on behalf of undisclosed principals provides important economic benefits. Permitting principals to conceal their existence is one way to overcome strategic behavior-or so-called 'hold-out' problems-that can impair the formation of mutually beneficial contracts. Many buyers seek to avoid having to pay more for a ***1977** particular item solely because the seller knows of the buyer's deep pocket. [FN31][FN31] For example, in *Senor v. Bangor Mills, Inc.*, [FN32][FN32] the defendant, a prodigious user of nylon yarn, had to make frequent and substantial purchases in the 'secondary' market in order to maintain its production levels. Because its needs and economic position were well known, it was asked to pay prices that were very high even for that market. Accordingly, it sought to buy yarn more cheaply through an intermediary. [FN33][FN33]

In addition to the problems mentioned above, since there is nothing in any of the illustrations to indicate the substantive 'unfairness' of the exchange, a substantive fairness theory [FN34][FN34] has nothing whatsoever to say about how these cases should be decided. [FN35][FN35]

The final traditional theory, the bargain theory of contract, [FN36][FN36] only explains *A* and *T*'s liability to each other. Where *UP* did not himself bargain with *T* and *T* certainly did not knowingly bargain with *UP*, it is

unclear under the bargain theory why *UP* or *T* would be liable to each other. The inability of the five best known theories of contractual obligation to explain the seemingly anomalous results of the law of undisclosed agency is symptomatic of the general weakness of each of these five approaches standing alone.

Moving beyond the purview of contract theory, a noncontractual, restitution-based 'unjust enrichment' analysis is deficient as well. Sometimes *UP* is enriched at *T*'s expense, an sometimes (as in Illustration 2) he is not. *UP*'s liability does not usually turn on this fact. 'Enrichment' normally refers to the receipt by a person of benefits not paid for. Therefore, when *UP* is enriched, *A* is surely not. Yet *A* nonetheless remains subject to liability until *T* elects to pursue *UP*. Moreover, *T*'s liability in Illustration 3 cannot be justified in terms of restitution, since *T* has already paid for the goods once.

Although the law of undisclosed agency has lacked adequate theoretical justification, it makes some sense intuitively. [FN37][FN37] If this body of rules ***1978** can be theoretically justified, it will reaffirm an important virtue of a common law system: that the process of adjudicating countless cases can lead judges uninformed by the niceties of legal theory (or despite their familiarity with legal theory) to a more just body of rules. [FN38][FN38] Legal theory, however, is still necessary to shape the doctrines that result from common law adjudication and to assist judges in deciding hard cases. Legal theory is also needed to justify the spontaneously evolved doctrines. For these reasons, Part II critically applies a consent theory of contract to the law of undisclosed agency.

II

UNDISCLOSED AGENCY IN A CONSENT THEORY OF CONTRACT

A. A Consent Theory of Contract

Although a consent theory of contract is more fully expounded elsewhere, [FN39][FN39] I should give a brief summary of it here before applying it to the law of undisclosed agency. A consent theory of contract is part of a more comprehensive, proprietary conception of legal entitlements. This conception construes legal rights as enforceable claims to acquire, use, and transfer resources-claims to control one's person and external resources. [FN40][FN40] Because contracts serve to transfer control of certain resources, contract law should be grounded in a theory that explains why people have and can control those resources in the first place. Contract theory searches for the 'other factors' that transform an unenforceable promise or statement of intention into a legally enforceable contract. [FN41][FN41] A consent theory of contract requires that an enforceable contract satisfy at least two conditions. First, the subject of a contract must be a morally cognizable right possessed by the transferor that is interpersonally transferable, or 'alienable.' Second, the possessor of the alienable right must ***1979** manifest his intention to be legally bound to transfer the right-that is, he must consent. [FN42][FN42] In a consent theory, neither consideration nor reliance are essential to contract formation. [FN43][FN43]

In the vast majority of contracts cases, the vexing issue is neither the alienability of rights nor even whether the parties manifested consent to transfer rights. Most 'real-world' contractual disputes involve determining precisely which rights were intended to be transferred by the parties. [FN44][FN44] But a close examination of either the alienability or the consent requirement can explain the persistent 'hard cases' for traditional contract theories. For example, a close analysis of the consent requirement can explain both the justification for enfor-

C

Supreme Court of the United States
BENJAMIN FORD, PLAINTIFF IN ERROR,
v.
JOHN S. AND HERMAN VILLIAMS.
December Term, 1858

**1 [MR. JUSTICE WAYNE DID NOT SIT IN THIS CAUSE.]

THIS case was brought up by writ of error from the Circuit Court of the United States for the district of Maryland.

Ford lived in New York, and brought an action against John S. Williams & Brother upon the following contract:

BALTIMORE, *October* 31, 1855.

For and in consideration of the sum of one dollar, the receipt whereof is hereby acknowledged, we have this day purchased from John W. Bell, and agree to receive from him in all the month of February next, at his opinion, two thousand barrels Howard street super flour, we paying for the same at the rate of nine dollars per barrel, on the day the said flour is ready for delivery.

JOHN S. WILLIAMS & BRO.

Upon the trial in the court below, much evidence was given which it is not necessary to recite in the present aspect of the case. The court, on the application of the defendants' counsel, instructed the jury that, upon the above contract, Ford could not recover. The only question in the case was whether, assuming the contract to have been made for the benefit of the plaintiff, without any disclosure to the defendants of his interest, he was competent to maintain a suit in his own name.

West Headnotes

Evidence 157 ⚷418

157 Evidence
157XI Parol or Extrinsic Evidence Affecting Writings
157XI(A) Contradicting, Varying, or Adding to Terms of Written Instrument
157k418 k. Parties to Instrument or Obligation. Most Cited Cases

Evidence 157 ⚷459(1)

157 Evidence
157XI Parol or Extrinsic Evidence Affecting Writings
157XI(D) Construction or Application of Language of Written Instrument
157k459 Identification of Parties
157k459(1) k. In General. Most Cited Cases
Parol evidence is admissible to show that defendant is an undisclosed principal.

Frauds, Statute Of 185 ⚷107(1)

185 Frauds, Statute Of
185VIII Requisites and Sufficiency of Writing
185k105 Contents of Memorandum
185k107 Designation and Description of Parties
185k107(1) k. In General. Most Cited Cases
It is not necessary to the validity of a contract under the statute of frauds that the writing disclose the principal.

Principal and Agent 308 ⚷143(2)

308 Principal and Agent
308III Rights and Liabilities as to Third Persons
308III(B) Undisclosed Agency
308k143 Rights of Undisclosed Principal
308k143(2) k. Contracts in General. Most Cited Cases
A principal may sue on a contract made by his

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agent, though the latter appeared as principal in the transaction without disclosing his agency.

Principal and Agent 308 ⚷183(2)

308 Principal and Agent
308III Rights and Liabilities as to Third Persons
308III(F) Actions
308k183 Rights of Action by Principal or Agent, or Both
308k183(2) k. Actions by or in the Name of Principal or Agent on Agent's Contracts. Most Cited Cases
Though an agent make a contract in his own name, the principal may maintain an action thereon.

***288** It was argued by *Mr. Brown* for the plaintiff in error, and by *Mr. Nelson* for the defendants.

****2** The case of the New Jersey Steam Navigation Company *v.* The Merchants' Bank (6 Howard, 381) was considered to be decisive of the question.

There is no marginal note in the report of that case, showing that the point was made. The reason was, that there were eight judges upon the bench, only three of whom concurred with Mr. Justice Nelson in the opinion which he delivered, although Mr. Justice Woodbury concurred in the judgment. There being no opinion, therefore, of the court, as such, the ***289** reporter did not think himself authorized to insert in his head note all the points ruled in the opinion delivered by Mr. Justice Nelson.

Where a contract is made by an agent, the principal whom he represents may maintain an action upon it in his own name, although the name of the principal was not disclosed at the time of making the contract; and, although the contract be in writing, parol evidence is admissible to show that the agent was acting for his principal.
Mr. Justice GRIER delivered the opinion of the court. The single question presented for our decision in this case is, whether the principal can maintain an action on a written contract made by his agent in his own name, without disclosing the name of the principal.

It is not necessary to the validity of a contract, under the statute of frauds, that the writing disclose the principal. In the brief memoranda of these contracts usually made by brokers and factors, it is seldom done. If a party is informed that the person with whom he is dealing is merely the agent for another, and prefers to deal with the agent personally on his own credit, he will not be allowed afterwards to charge the principal; but when he deals with the agent, without any disclosure of the fact of his agency, he may elect to treat the after-discovered principal as the person with whom he contracted.

The contract of the agent is the contract of the principal, and he may sue or be sued thereon, though not named therein; and notwithstanding the rule of law that an agreement reduced to writing may not be contradicted or varied by parol, it is well settled that the principal may show that the agent who made the contract in his own name was acting for him. This proof does not contradict the writing; it only explains the transaction. But the agent, who binds himself, will not be allowed to contradict the writing by proving that he was contracting only as agent, while the same evidence will be admitted to charge the principal. 'Such evidence (says Baron Parke) does not deny that the contract binds those whom on its face it purports to bind; but shows that it also binds another, by reason that the act of the agent is the act of the principal.'(See Higgins *v.* Senior, 9 Meeson and Wilsby, 843.)

The array of cases and treatises cited by the plaintiff's counsel shows conclusively that this question is settled, not only by the courts of England and many of the States, but by this court ***290** (See New Jersey Steam Navigation Co. *v.* Merchants' Bank, 6 How., 381, et cas. ib. cit.)

****3** The judgment of the court below is therefore reversed, and a *a venire de novo* awarded.

U.S.,1858

Ford v. Williams
62 U.S. 287, 21 How. 287, 1858 WL 9383 (U.S.Md.), 16 L.Ed. 36

END OF DOCUMENT

DECLARATION OF SERVICE

I hereby declare under penalty of perjury under the law of the State of Washington and the United States that I filed the original and one copy of the **BRIEF OF RESPONDENTS** with the appellate court and served the **BRIEF OF RESPONDENTS** as filed with the court and case set forth therein, on the parties to this appeal, by placing a true and correct copy thereof, in a sealed envelope and deposited in the U.S. Postal Service at Portland, Oregon with first class postage prepaid on the date stated below, addressed to:

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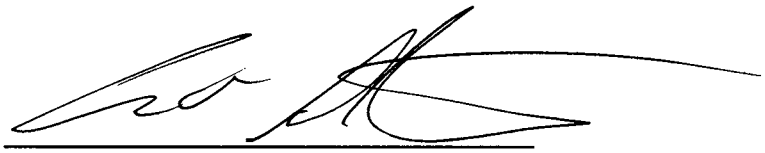
DATED: November 7, 2008.



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