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I.
INTRODUCTION

Soundbuilt Northwest LLC, the purported successor in interest to Sunridge Homes, Inc., brought this action against Thomas Price, and his marital community, and Hyun Um¹, and his marital community, and a non-existing entity,² for a breach of an Agreement for Purchase and Sale of Membership Units in 176th Street LLC and breach of a Real Estate Purchase and Sale Agreement (“REPSA”). Prior to the execution of the membership units purchase and sale agreement, the undisputed facts at trial demonstrated that Sunridge Homes, Inc. owned 50% of the membership units in 176th Street LLC and P&U Capital Partners I LLC owned the other 50%. It was undisputed at trial that initially the proposal between those two members was for P&U Capital Partners I LLC to sell its membership interest to Sunridge Homes, Inc. The undisputed evidence at trial was that the proposal was switched so that Sunridge Homes Inc. would be the seller and P&U Capital Partners I LLC would be the buyer. The undisputed evidence at trial was that the Roman Numeral One was omitted from the description of “P&U Capital Partners I LLC” so that the term “P&U Capital Partners LLC” was used instead. In return for selling its membership units, Sunridge Homes, Inc. was paid \$650,000 and also

¹ For ease of reference, the Defendants will be referred to as “Price” and “Um.”

² The non-existing entity was P&U Capital Partners LLC.

obtained the right to purchase finished lots from 176th Street LLC pursuant to the REPSA.

176th Street LLC subsequently defaulted on the REPSA. Sound Built Homes, Inc., the successor in interest to Sunridge Homes Inc., filed a lawsuit for breach of the REPSA against 176th Street LLC. It subsequently dismissed that lawsuit with prejudice. Despite dismissing that action with prejudice, it filed this second action based upon the same facts, the same evidence, and the same transaction, as was the basis for its first lawsuit.

Soundbuilt Northwest, LLC brought this action arguing that the omission of the Roman Numeral One was not an accident but was intentional and that Defendants Um and Price, and their marital communities, were personally liable to it for 176th Street LLC breaching the membership units purchase and sale agreement and the REPSA. There was never any evidence at trial, however, that Sunridge Homes Inc. intended to sell its membership units to any entity other than to the only other membership unit owner of 176th Street LLC – P&U Capital Partners I LLC. The undisputed evidence was that Sunridge Homes Inc. always knew it was selling to an LLC and there was no evidence that Sunridge Homes Inc. ever thought it was selling its membership interest to either Um or Price in their individual capacities.

The trial court nonetheless found in favor of Soundbuilt Northwest, LLC and held Price and Um personally liable. Um and Price request this Court to reverse the trial court's judgment and order the trial court to enter judgment in favor of Price and Um.

II.
ASSIGNMENTS OF ERROR

1. The trial court erred in FOF 1 that Soundbuilt Northwest LLC is a successor by merger to Sound Built Homes, Inc. and Sunridge Homes Inc. effective December 2008.
2. The trial court erred in FOF 6. Contrary to the trial court's finding, there was no evidence presented at trial that Mr. Price was involved in the discussion for a purchase and sale of membership units in 176th Street LLC.
3. The trial court erred in FOF 7 as there was no evidence presented at trial that Mr. Sweeney was representing Mr. Um or Mr. Price in the negotiations for the purchase and sale of membership units in 176th Street LLC. The trial court also erred in FOF 7 that Sunridge agreed to sell its membership units to P&U Capital Partners LLC and not P&U Capital Partners I

LLC. The trial court erred in finding that Mr. Um was the managing member of an entity called P&U Capital Partners LLC and erred in finding that he executed a bill of sale on behalf of any such entity.

4. The trial court erred in FOF 9 in that there was no evidence at trial that Sweeney supplied documents to Kerruish that referred to P&U Capital Partners LLC before Kerruish drafted any documents related to the transaction. The trial court erred in finding that Kerruish, Racca, and Wilson, Sunridge, or SBH had no role in determining the identity of the purchaser of the membership units and that they were entitled to rely upon Sweeney's approval to the form of the documents. The undisputed evidence at trial was that all parties to the transaction intended that the purchaser of the membership units was the other member of 176th Street LLC.
5. The trial court erred in FOF 10 for the same reason as identified in the error of FOF 9: the undisputed evidence was that all parties intended that the purchaser of the membership units would be the other member of 176th Street LLC – P&U Capital Partners I

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LLC. The trial court erred in finding that the evidence was not clear, cogent, and convincing that all the parties intended that the purchaser of the membership units was the other member of 176th Street LLC and that the omission of the Roman Numeral One was a mutual mistake.

6. The trial court erred in FOF 11 in that there was no evidence at trial that Price and Um were the promoters/incorporators of the non-existent P&U Capital Partners LLC. The trial court included a conclusion of law in FOF 11 as to the liability of Um and Price which was error.
7. The trial court erred in FOF 12 that the defendants informed Racca that they would not complete the project. Instead, 176th Street LLC, through Um and Price, informed Racca that 176th Street LLC would not be able to comply with the terms of the REPSA. The defendants in this lawsuit made no such representations in their individual capacities and there was no evidence presented at trial that would support such a conclusion.

8. The trial court erred in FOF 13: there was no evidence at trial that the defendants in this lawsuit borrowed \$13.88 million against Frederickson Estates including \$5.05 million from Michael Mastro and \$8.83 million from Washington Federal Savings. The trial court also erred in finding that defendants Price personally guaranteed such debt. There was no evidence presented at trial that defendants Price personally guaranteed any such debt.
9. The trial court erred in FOF 14 as Um was never a member of 176th Street LLC. There was no evidence of personal guarantees by the defendants. There was no evidence as to the fair market value of the lots.
10. The trial court erred in FOF 15 as there was no evidence that Sound Built Homes Inc. expended \$1.3 million in completing the plat improvements and obtaining final plat approval of the subject property.
11. The trial court included conclusions of law in FOF 16 all of which were error.
12. The trial court erred in concluding that defendants Price were liable to the Soundbuilt Northwest LLC or had any obligations under the REPSA or the

membership unit purchase and sale agreement. The trial court erred in imposing liability under RCW 25.15.060 and RCW 23B.02.040.

13. The trial court erred in concluding that defendants Um were liable to Soundbuilt Northwest LLC or had any obligations under the REPSA or the membership unit purchase and sale agreement. The trial court erred in imposing liability under RCW 25.15.060 and RCW 23B.02.040.
14. The trial court erred in concluding that the dismissal with prejudice in *Sound Built Homes Inc. v. 176th Street LLC* did not preclude Soundbuilt NW LLC from holding the defendants liable in this action.
15. The trial court erred in awarding attorney fees to Soundbuilt Northwest LLC. Attorney fees and costs should be awarded to Price and Um.
16. The trial court erred in concluding that the use of “P&U Capital Partners LLC” was not a mutual mistake.
17. The trial court erred in concluding that the use of “P&U Capital Partners LLC” was not a scrivener’s error.

III.
STATEMENT OF THE CASE

A. Sunridge Homes Inc. and P&U Capital Partners I LLC held equal membership interests in 176th Street LLC.

Sunridge Homes Inc. and P&U Capital Partners I LLC formed 176th Street LLC on October 4, 2000. (Trial Exhibit 1.) There were no other members to this LLC. The purpose in forming 176th Street LLC was to acquire and develop property. Pursuant to the operating agreement, Sunridge Homes Inc. had the right, under certain conditions, to purchase the finished lots after the property had been developed by 176th Street LLC. (Trial Exh. 1.) The ability of a member to sell its interest in the LLC was restricted. The restrictions included obtaining the prior written consent of the other member after providing written notice of the offer to purchase at which time the remaining member had 60 days in which to exercise its right of first refusal. The ability to sell a member's interest had other restrictions as well. (Trial Exh. 1.) If a member sold its interest to the only other member then those restrictions did not apply.

There was no dispute at trial that in fact the Operating Agreement, Trial Exhibit 1, accurately identified the only two members of 176th Street LLC: (1) Sunridge Homes Inc. and (2) P&U Capital Partners I LLC. . . . Racca the principal owner of Sunridge Homes Inc., testified that he understood those two entities were the members of 17th Street LLC.

Q: Did you have any other understanding as to the ownership of 176th Street, LLC, at the

time you executed that document other than that you were – Sunridge was a 50 percent owner of P&U Capital Partners I, LLC?

A: Yeah. I – was I – say that again?

Q: Did you have any other understanding other than that –

A: That they were –

Q: -- that they were the partner or other member?

A: No.

(Racca, R.P. Vol. III, p. 325.)

Um affirmed the fact that P&U Capital Partners I LLC was the only other entity that had an ownership interest in 176th Street LLC:

Q: But it's your testimony that the sole member, other than Sunridge, the sole P&U-related or Price-and-Um-related entity that was involved in 176th Street was P&U Capital Partners I?

A: Correct.

(Um, R.P., Vol. III, p. 314.)

B. Sunridge Homes Inc. and P&U Capital Partners I LLC agreed that one of them should own all the membership units of 176th Street LLC.

In 2003, Sunridge Homes Inc. and P&U Capital Partners I LLC concluded that it would be in their best interests if only one of them owned all the membership interests in 176th Street LLC. Initially, they explored the option of having P&U Capital Partners I sell its interest to Sunridge

Homes Inc. The parties later decided to reverse the proposal so that Sunridge Homes Inc. would be the seller and P&U Capital Partners I LLC would be the buyer. The following facts at trial were undisputed.

- The original proposal was to have P&U Capital Partners I LLC sell its interest to Sunridge Homes Inc.
- The deal changed so that Sunridge Homes, Inc., instead of being the buyer, would be the seller.
- Sunridge Homes, Inc.'s intent was to sell to the other existing member, P&U Capital Partners I LLC.
- The principal of Sunridge Homes, Inc., Gary Racca, always intended to sell Sunridge Homes Inc.'s interest to P&U Capital Partners I LLC.
- Gary Racca always knew that he was selling to an LLC.
- There was no testimony that Racca ever thought that Um was purchasing Sunridge Homes Inc.'s interest in his personal capacity.
- There was no testimony that Racca ever thought that Price was purchasing Sunridge Homes Inc.'s interest in his personal capacity.

1. Originally, P&U Capital Partners I LLC was going to be the seller, not the purchaser.

Originally, this deal was going to go the other way: instead of Sunridge Homes Inc. being the seller, it was going to be the buyer and purchase P&U Capital Partners I LLC's membership units. Kurt Wilson, on behalf of Sunridge Homes, LLC, testified:

Q: Okay. Do you recall who was going to be the buyer of the units as opposed to the seller at the point in time you first became involved?

A: My recollection, having gone back over some of the documents recently, was that there was, initially, a move by Sound Built to go ahead and acquire P&U Capital's interest in 176th and that that was – that that failed, that it didn't happen. It was discussed but didn't happen.

(Wilson, R.P., Vol. III, p. 215.)

2. The proposal switched so that P&U Capital Partners I LLC would be the purchaser, not the seller.

Wilson recalled it was his recommendation that Sunridge Homes Inc. sell its membership interest “to the partner:”

Q: And Sunridge was going to buy all the membership units at one point, at least that was the topic of discussion, wasn't it?

A: It may have been. I don't –

Q: And then the deal flipped?

A: And it – it could have. I – alls [sic] I remember is the part about negotiating to

buy and my recommendation that we not – that we buy the lots and sell our interest to the partner.

(Wilson, R.P., Vol. II, p. 131.)

3. Sunridge Homes, Inc. intended to sell to the other member of 176th Street LLC which was P&U Capital Partners I LLC.

Wilson also testified that Sunridge Homes Inc. knew it was dealing with a limited liability company and that that company was the other member of 176th Street LLC:

Q: So at the time, you knew that you were dealing with a limited liability company; isn't that correct?

A: Yes, it was the entity that we were selling the membership units from.

Q: And it was contemplated that in the same agreement, you were selling membership units to the other member; isn't that correct?

A: Yes.

(R.P., Vol. II, pp. 133 to 134.)

Racca's testimony was the same: the purpose of the membership unit sale was to sell Sunridge Homes Inc.'s membership unit to the other member of the 176th Street LLC:

Q: And isn't it, also, your understanding when you were executing this agreement that the purpose was the sale of membership units from one member to another member?

A: Yeah. I think so.

(R.P. Vol. III, p. 333-34.)

Mr. Price's testimony was the same.

Q: I'd like you to look at Exhibit No. 2, and tell me if you can identify that.

A: This is an agreement to purchase the membership units in 176th Street, LLC.

Q: What was your understanding as to who was – the purchaser of the membership units was?

A: P&U Capital Partners I, LLC, was a member of 176th Street, LLC, which purchased Sunridge Homes, Inc.'s units.

Q: At that time, was there any entity that you were aware of that existed named P&U Capital Partners, LLC?

A: No. There's never been an entity named P&U Capital Partners, LLC.

(R.P., Vol. IV, p. 363.)

Um testified to the same as well.

Q: What was your understanding as to the identity of the purchaser of the membership units in that agreement?

A: P&U Capital Partners I, LLC.

Q: To your knowledge, has an entity known as P&U Capital Partners, LLC, ever existed?

A: No.

(Um, R.P., Vol. IV, p. 375.)

4. There was a mistake in the description of P&U Capital Partners I LLC – the mistake was the omission of the Roman Numeral One.

The initial proposal, in which P&U Capital Partners I LLC was going to be the seller, and not the buyer, had the description of P&U Capital Partners I LLC incorrectly described – the Roman Numeral One was omitted. That proposal, which was never executed and was admitted into evidence as Exhibit 39, was drafted as follows:

Comes Now P&U Capital Partners LLC,³ a Washington Limited Liability Company, Grantor, and Sun Ridge Homes, Inc., a Washington Corporation, Grantee, as the sole members of 176th Street LLC, a Washington Limited Liability Company. Grantor, P&U Capital Partners LLC, in and for consideration of Six Hundred and Fifty Thousand Dollars (\$650,000) hereby transfers and conveys to Grantee, Sun Ridge Homes, Inc, all of P&U Capital Partners' membership interest of 176th Street LLC subject to the following terms and conditions:

There was no dispute that Matt Sweeney, the attorney representing P&U Capital Partners I LLC, was the source of that error.

Sunridge Homes Inc. subsequently retained an attorney, David Kerruish, to draft what eventually became the membership unit purchase and sale agreement at issue here. Kerruish testified that he was the one

³ This omission of the Roman Numeral One was a mistake in drafting. There was never an entity known as P&U Capital Partners I LLC and as such this non-existent entity never held a membership interest in 176th Street LLC.

who made the first draft of the membership units purchase and sale agreement and then shared it with Sweeney, the attorney representing P&U Capital Partners I LLC:

Q: Can you – first of all, who were you – who was your opposite number? Who were you interacting with?

A: Mr. Sweeney.

Q: Okay. Would you agree or disagree with the contention that you were the sole drafter of Exhibit No. 2?

A: Well, I would disagree with sole drafter. We exchanged – what I do is: I – I have a – the reason I refer to things as my documents, I have a format I normally use. I, usually, use an aerial type, and this – this is something I would generate, initially; and then it would have been exchanged with the other side, and there would have been changes made. I think that in that particular instance, Mr. Sweeney tended to provide changes by letters opposed to by interlineations into the document; and so what would likely have happened in the course of preparing this agreement is that his changes would be reflected in my doing compare function in Word, taking his comments from written communications and incorporating those comments into a – into the document to the extent that I was willing to recommend their adoption.

(Kerruish, R.P. Vol. III, pp. 231-32.)

Q: And what is Exhibit No. 2?

A: The agreement for the sale of membership units, and it – it's something that generated originally, apparently, from my office because it carries my document coding.

(Kerruish, R.P., Vol. III, p. 231.)⁴

Kerruish admitted that he did not do any investigation into the identity of the purchaser:

Q: Okay. So did you conduct any investigation or inquiry with respect to the identity of the purchaser?

A: No, I didn't.

(R.P. Vol. III, p. 237.)

The reason it wasn't important to Mr. Kerruish is because the intent of the transfer was to transfer the shares between the members.

Q: Wouldn't you agree that it's standard practice for a competent attorney in this jurisdiction to review an operating agreement that's the subject of a membership unit sale to see if there are any restrictions in that operating agreement concerning the transfer of membership units?

A: No. I wouldn't say that's the case at all. We had both of the members agreeing to a transfer between them, so there wouldn't have been any issues related to restrictions because both members – all the members who were parties to the operating agreement

⁴ The first draft of the real estate purchase and sale agreement that was part of Exhibit 2 also started with Mr. Kerruish's office. (R.P., Vol. III, p. 233.)

were present and agreeing. The operating agreement only matters in terms of transfer if there is a transfer occurring with less than all the members.

Q: So this was understood to be a transfer from one owner to another owner of membership units; isn't that correct?

A: It was proposed to be that, yes.

(R.P. Vol. III, p. 240-41, emphasis added.)

Kerruish admitted that if the Operating Agreement were correct in the proper identification of the parties (which it was undisputed that it was), then he made a mistake in drafting the Agreement:

Q: I think you understand. If the operating agreement which is Exhibit No. 1 is correct

—

A: Right. If it's correct, yes.

Q: -- if it's correct, then you were mistaken in your reference to P&U Capital Partners without the I as the ownership of 50 percent interest of the 176th Street, LLC?

A: Yes. Yes.

Q: Okay.

A: If the operating agreement were correct.

(R.P. V. III, p. 245.)

5. An entity known as P&U Capital Partners LLC never existed.

It was also undisputed at trial that there had never been an entity named P&U Capital Partners, LLC. Mr. Price testified:

Q: At that time, was there any entity that you were aware of that existed named P&U Capital Partners, LLC?

A: No. There has never been an entity named P&U Capital Partners, LLC.

(Price, R.P., Vol. IV, p. 363.)

C. 176th Street LLC breached the purchase and sale agreement with Sunridge Homes Inc.

Um, on behalf of 176th Street LLC, informed Sunridge Homes Inc., through Racca, that 176th Street LLC would not be able to meet its obligations under the REPSA. Sound Built Homes, Inc., as a result, filed an action for breach of contract against 176th Street LLC and filed a lis pendens to cloud title. (Additional Finding of Fact, “A” and “B.”)

Sound Built Homes, Inc. subsequently dismissed that lawsuit with prejudice. (Additional Finding of Fact, “E.”)

IV.
ARGUMENT

A. If Soundbuilt Northwest LLC’s argument as to the omission of part of the name of an LLC is valid, then this Court should reverse the trial court’s judgment as a matter of law because there was no evidence presented at trial that Soundbuilt Northwest LLC is the successor in interest to Sunridge Homes Inc. or Sound Built Homes, Inc.

The plaintiff in this lawsuit is Soundbuilt Northwest, LLC. There were two agreements that form the bases of this lawsuit – the membership unit purchase and sale agreement and the REPSA. Soundbuilt Northwest, LLC was not a party to either of those agreements. The parties to the first agreement were Sunridge Homes, Inc. and P&U Capital Partners I LLC.⁵ The parties to the second agreement, the REPSA, were Sound Built Homes, Inc. as purchaser and 176th Street LLC as seller. In order to succeed in this lawsuit, Soundbuilt Northwest LLC had to present evidence that it acquired the rights held by Sunridge Homes Inc. and Sound Built Homes, Inc.

The only evidence on this subject was provided by. Wilson, a land acquisition manager for Soundbuilt Northwest, who testified: “Soundbuilt Northwest was – well, Sound Built Homes and – and Sun – Sunridge

⁵ Price and Um acknowledge that Soundbuilt Northwest LLC is arguing that the other party to the Agreement for Purchase and Sale of Membership Units is not P&U Capital Partners I LLC but instead an entity that did not exist, “P&U Capital Partners LLC.”

Homes were merged into Soundbuilt Northwest at the end of last year.” (R.P. Vol. II, p. 33.) His testimony was taken in 2010.

This evidence is insufficient to support Soundbuilt Northwest, LLC’s burden of proof for one, possibly two, reasons.

First, there is no foundation for this testimony. There was no evidence that Wilson, as a land acquisition manager, had any first-hand knowledge as to whether or not those entities merged.

Second, if Soundbuilt Northwest, LLC’s argument is correct that the omission of the Roman Numeral One in describing an LLC should be strictly construed so that the omission somehow demonstrates a change of intent, then it failed in meeting its burden of proof here where there was no evidence that the entities that were part of two agreements were succeeded by Soundbuilt Northwest, LLC. Mr. Wilson did not testify that “Sunridge Homes Inc.” and “Sound Built Homes Inc” were succeeded by Soundbuilt Northwest, LLC. Instead, his testimony was that “Sunridge Homes” and “Sound Built Homes” were merged with Soundbuilt Northwest, LLC. He left off the “Inc.” portion of the description and by Soundbuilt Northwest, LLC’s logic, that omission was fatal. (As with any trial court finding, there has to be sufficient evidence in the record to support a finding of fact. *See, e.g., IBF, LLC v. Heuft*, 141 Wn. App. 624, 638, 174 P.3d 95 (2007) (counsel’s reference to a water bill at a show

cause hearing not sufficient evidence to support a finding that owner was liable for water bill).

Price and Um do not believe this second reason should prevail as mistakes happen and the law is not such that when one makes a mistake, especially in the description of a name, that the mistake should automatically result in outcome that is contrary to the intent of the parties. However, if Soundbuilt Northwest, LLC truly believes in the argument that it is advancing, then it failed in its burden of proof.

B. There was no evidence at trial that would support any conclusion other than that the omission of the Roman Numeral One was a mutual mistake.

The trial court ruled that Price and Um failed to prove by clear, cogent, and convincing evidence that a mutual mistake had occurred. That ruling was error and merits reversal by this Court.

Here, the only evidence presented at trial was that Sunridge Homes Inc. intended to sell its membership interest to the other member of 176th Street LLC – that is, to P&U Capital Partners I LLC. Because the only evidence admitted at trial was that a mistake had occurred, the trial court erred by ruling that the evidence was not clear, cogent, and convincing that a mistake had occurred. Accordingly, under either the theory of “mutual mistake” or “scrivener’s error,” the trial court should have reformed the contract so that it reflected the parties’ intent.

A mutual mistake occurs when parties share an identical intent when they form a written contract, but failed to express that intent in the contract document. *See, e.g., Seattle Prof'l Eng'g Employees' Ass'n v. Boeing Co. (SPEEA)*, 139 Wn.2d 824, 832, 991 P.2d 1126 (2000). The rationale supporting the rule is that the parties would have successfully executed the contract but for that mutual mistake. *Id.*; *Tenco, Inc. v. Manning*, 59 Wn.2d 479, 485, 368 P.2d 372 (1962); *Halbert v. Forney*, 88 Wn. App. 669, 674, 945 P.2d 1137 (1997). For reformation purposes, a “mistake” is “a belief not in accord with the facts.” *Halbert*, 88 Wn. App. at 674; *see also Schweitzer v. Schweitzer*, 132 Wn.2d 318, 328, 937 P.2d 1062 (1997) (“A mistake as to expression is a mistake as to a basic assumption of a contract”).

A scrivener’s error, like a mutual mistake, occurs when the intention of the parties is identical at the time of the transaction but the written agreement does not express that intention because of an error. This permits a court acting in equity to reform an agreement. *Bort v. Parker*, 110 Wn. App. 561, 579, 42 P.3d 980 (2002). Reformation may be an appropriate remedy where either (1) the parties made a mutual mistake, or (2) one of them made a mistake and the other engaged in inequitable conduct. *Denaxas v. Sandstone Court of Bellevue, L.L.C.*, 148 Wn.2d 654, 662, 63 P.3d 125 (2003). Reformation is justified when the parties’ intentions were identical at the time of the transaction. *SPEEA*, 139 Wn.2d

at 832-33. The party seeking reformation must prove the facts supporting its claim by clear, cogent and convincing evidence. *Kaufmann v. Woodard*, 24 Wn.2d 264, 269, 163 P.2d 606 (1945).

In *Bort*, the plaintiff contractor had omitted the term “Company” in the drafting of the construction contract. 110 Wn. App. at 561. There was evidence in the record, however, that the parties knew that the plaintiff contractor was acting through a company and not individually. *Id.* at 575. Despite that fact, the trial court granted the defendant owner’s motion for summary judgment ruling that the plaintiff was doing business in his individual capacity and not through his company. *Id.* at 567-68. On appeal, the court of appeals reversed:

Here, as discussed earlier, the evidence raises a reasonable inference that the parties intended LBC to be the contractor. It may be inferred that the word “Company” was to be included in the contract but was omitted.

Id. at 579.

Here, there is not simply the inference but in fact the undisputed evidence was that the purchaser of Sunridge Homes Inc. membership units in 176th Street LLC was intended to be P&U Capital Partners I LLC. The undisputed evidence was that the omission of the Roman Numeral One was a mistake. The written agreement did not express the intentions of the parties and accordingly, the trial court should have reformed the contract.

The Restatement (Second) of Contracts addresses this issue.

**When Mistake of Both Parties as to
Written Expression Justifies
Reformation.**

Where a writing that evidences or embodies an agreement in whole or in part fails to express the agreement because of a mistake of both parties as to the contents or effect of the writing, the court may at the request of a party reform the writing to express the agreement, except to the extent that rights of third parties such as good faith purchasers for value will be unfairly affected.

Restatement (Second) of Contracts § 155 (1979).

Comment *a* to the Restatement makes it clear that the agreement should be reformed to express the parties intent in the situation where they attempted to reduce the agreement in writing but the writing contains an error – the exact situation here. Comment *a* provides:

Scope. The province of reformation is to make a writing express the agreement that the parties intended it should. Under the rule stated in this Section, reformation is available when the parties, having reached an agreement and having then attempted to reduce it to writing, fail to express it correctly in their writing. Their mistake is one as to expression – one that relates to the contents or effect of the writing that is intended to express their agreement – and the appropriate remedy is reformation of that writing properly to reflect their agreement.

...

The Illustrations to the Restatement help clarify the scope of this remedy.

1. A and B agree that A will sell and B will buy a tract of land for \$100,000 and that B will assume an existing mortgage of \$50,000. In reducing the agreement to writing, B's lawyer erroneously omits the provisions for assumption, and neither A nor B notices the omission. At the request of either A or B, the court will reform the writing to add the provision for assumption.
2. A and B agree that A will sell and B will buy all the coal that B shall require in his business during a five year period. In reducing the agreement to writing, B mistakenly provides that he will buy all the coal that he shall desire to buy during that period, and A fails to notice the error. At the request of either A or B, the court will reform the writing to provide that B will buy all the coal that he shall require rather than all that he shall desire to buy.
3. A agrees with B to guarantee the collectability of a debt owed by C to B. In reducing the agreement to writing, the parties mistakenly choose words that, unknown to both of them, have the effect of making A an ordinary guarantor rather than a guarantor of collectability only. At the request of either A or B, the court will reform the writing to limit A's obligation to that of a guarantor of collectability.

Here, the only evidence presented at trial was that both Sunridge Homes, Inc. and P&U Capital Partners I LLC made a mistake in the description of P&U Capital Partners I LLC for the membership purchase

and sale agreement. The only evidence presented at trial was that both Sunridge Homes, Inc. and P&U Capital Partners I LLC intended that the purchaser of Sunridge Homes, Inc.'s membership interest would be P&U Capital Partners I LLC.

There was never any evidence at trial introduced that demonstrated an intent by any party that Price or Um were purchasing Sunridge Homes, Inc. membership interest in 176th Street LLC in their individual capacities, or on behalf of any other entity other than P&U Capital Partners I LLC.

The mistake was a mutual mistake –both Sunridge Homes, Inc. made the mistake of omitting the Roman Numeral One and P&U Capital Partners I LLC did not catch that mistake. The evidence at trial was that the first draft of the membership purchase and sale agreement between Sunridge Homes Inc. and P&U Capital Partners I LLC started with Sunridge Homes Inc. Kerruish testified that the first draft was his and that he sent it to Sweeney. The evidence at trial was that all parties intended the purchaser to be the other member of 176th Street LLC, that is, P&U Capital Partners I LLC. There was absolutely no evidence that either party intended a third entity to purchase Sunridge Homes Inc.'s membership interest.

Moreover, the evidence is undisputed that the parties attempt to accurately reflect their agreement in writing failed because of the omission of the Roman Numeral One. As in the Illustrations to Restatement

(Second) of Contracts § 155, the trial court here, based upon the undisputed evidence, should have reformed the writing to correct the mistake made in the written reduction of the parties' agreement.

An appellate court's review of a trial court's findings of fact and conclusions of law is a two-step process. First, the appellate court determines if the trial court's findings were supported by substantial evidence in the record. If yes, then the appellate court then determines whether those findings of fact support the trial court's conclusions of law. *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999).

In *Worthington v. Worthington*, the Court held that the trial court's factual finding that certain real property had a fair market value of \$50 per acre was error as there was no evidence to support such a finding. 73 Wn.2d 759, 440 P.2d 478 (1968). Instead, the only evidence admitted at trial was that the property had a fair market value of at least \$135 per acre. The court applied the well-recognized principle that a trial court's factual findings are determinative only when there is evidence in the record to support them. *Id.* at 765.

Here, there was simply no evidence to support the trial court's finding. All witnesses uniformly agreed that the parties intended the sale to be between the two existing members of 176th Street LLC: P&U Capital Partners I LLC and Sunridge Homes Inc. Kerruish testified that it was a

mistake to omit the Roman Numeral One in describing P&U Capital

Partners I LLC:

Q: I think you understand. If the operating agreement which is Exhibit No. 1 is correct

–

A: Right. If it's correct, yes.

Q: -- if it's correct, then you were mistaken in your reference to P&U Capital Partners without the I as the ownership of 50 percent interest of the 176th Street, LLC?

A: Yes. Yes.

Q: Okay.

A: If the operating agreement were correct.

(R.P. V. III, p. 245.)

A finding of fact by the trial court reached on an erroneous basis, and not supported by substantial evidence, is not binding upon the appellate court. *Nord v. Eastside Assoc.*, 34 Wn. App 796, 798, 664 P.2d 4 (1983). Similarly, if a trial court rejects uncontroverted credible evidence, or capriciously disbelieves undisputed evidence, then the finding is not binding upon the appellate court. *Smith v. Pacific Pools, Inc.*, 12 Wn. App. 578, 582, 530 P.2d 658 (1975). In *Pacific Pools* the trial court made the following finding of fact:

Neither plaintiff nor Pacific Pools has established by a fair preponderance of the credible evidence that anything is due from

either of them to the other and the court therefore finds that nothing is due from plaintiff defendant Pacific Pools, Inc. or from Pacific Pools, Inc. to plaintiffs”

Id. at 580. The court of appeals rejected this finding of fact because, to the contrary, the evidence was in fact undisputed that the defendant owed the commission to the plaintiff.

A situation similar to the situation here occurred in *In re Larson's Estate*, 71 Wn.2d 349, 428 P.2d 558 (1967). That case involved an estate issue as to whether the decedent intended to make a gift \$8,500 to his son, Clifford Larson, or merely a loan. The trial court held that Larson failed to sustain his burden of proving that the transaction was a gift by clear and convincing evidence. On appeal, the respondent argued that the Court should not substitute its judgment for that of the trial court on disputed issues of fact. The Court, however, noted that the general rule was not applicable because there was no dispute of the evidence and that the undisputed evidence demonstrated that the transaction, while originally a loan, later became a gift. The Court accordingly reversed the conclusion of law entered by the trial court because there was no evidence to support the finding of fact.

Because the evidence at trial was undisputed, and because there was no evidence to support the trial court's finding of fact that Price and Um had not proved by clear, cogent, and convincing evidence that a mutual mistake had been made, this Court should reverse the trial court's

conclusion of law that Um and Price were jointly and severally liable for the breach by 176th Street LLC. This Court, under RAP 12.2, has the authority to direct that judgment be entered in favor of Price and Um as there is nothing left for the trial court to do. *Dependency of A.S.*, 101 Wn. App. 60, 6 P.3d 11 (2000), *rev. denied*, 141 Wn.2d 1030, *cert. denied*, 532 U.S. 930; *see also State v. Mecca Twin Theater*, 82 Wn.2d 87, 93, 507 P.2d 1165 (1973) (Court will not remand case for entry of further findings when there is no dispute of fact and entry of formal findings is useless and unnecessary).

C. There was no evidence presented at trial that could form the basis of holding Price and Um personally liable under the membership purchase and sale agreement.

It is axiomatic that a breach of contract claim can only be brought against a party to a contract. *E.g., Northwest Indep. Forest Mfrs. v. Dep't of Labor and Indus.*, 78 Wn. App. 707, 712, 899 P.2d 6 (1995). Here, there was no evidence introduced at trial that Sunridge Homes Inc. ever thought that Price or Um were personally purchasing its membership ownership in 176th Street LLC. Moreover, there is no evidence that Sunridge Homes, Inc. ever thought it was selling its ownership interest to any entity other than P&U Capital Partners I LLC.

There was never an entity that did business under the name of P&U Capital Partners LLC. Price and Um were never parties in their

individual capacities to the contracts that form the bases of Soundbuilt Northwest, LLC's claims. As such, they cannot be held liable for any breach of those contracts.

D. The trial court erred in ruling that Soundbuilt Northwest, LLC was not precluded from bringing the current action because of the earlier dismissal of the *Sound Built Homes Inc. v. 176th Street LLC* lawsuit.

There is no dispute that Sound Built Homes Inc. brought an earlier lawsuit against 176th Street LLC that arose out of 176th Street LLC's failure to comply with the REPSA. According to Soundbuilt Northwest LLC, it is the successor in interest to Sound Built Homes Inc. Accordingly, there is an identity of entities between these two actions.

There should be no dispute that the essence of both actions arose out of the failure of 176th Street LLC to provide the lots that it said it would provide pursuant to the REPSA.

There is no dispute that the first action was dismissed with prejudice.

Under these circumstances, the trial court erred in not ruling that Soundbuilt Northwest, LLC was precluded from bringing this action because of the earlier dismissal of the prior action.

- 1. Soundbuilt Northwest, LLC is taking the position that P&U Capital Partners LLC (an entity that never existed) was the purchaser of its membership units in 176th Street LLC and that Price and Um were individually liable. If that position**

is accepted, then Soundbuilt Northwest LLC is precluded from bringing this action by reason of res judicata.

Res judicata requires proof that the prior litigation and the current litigation are substantially identical in four respects:

(1) subject matter; (2) cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made.

Rains v. State, 100 Wn.2d 660, 663, 674 P.2d 165 (1983); *see also*, e.g., *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 866-67, 93 P.3d 108 (2004); *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995).

Here, all four elements were met.

First, the subject matter was identical: the plaintiff in both actions sought to enforce the RESPA for the delivery of finished lots.

Second, the causes of actions were the same: while the first sought specific performance and the second sought money damages, for purposes of res judicata analysis, those are the same. *See, e.g., Seattle-First Nat'l Bank v. Kawachi*, 91 Wn.2d 223, 588 P.2d 725 (1978).

Third, the parties were substantially the same. As noted earlier, the plaintiffs were the same according to Soundbuilt Northwest, LLC. Moreover, according to Soundbuilt Northwest, LLC's theory in this case, the defendants were substantially the same. According to Soundbuilt Northwest, LLC's theory, Price and Um were individually responsible for

providing the lots. As Washington courts have recognized, parties need not be identical to satisfy this portion of the test. Parties who may be nominally different will be considered the same for purposes of this element if in effect the first lawsuit was a lawsuit against the parties in the second lawsuit. *See, e.g., Rains*, 100 Wn.2d at 664. Here, the action against 176th Street LLC was, in effect, under Soundbuilt Northwest, LLC's theory, a lawsuit that involved Price and Um.

Fourth, the quality of the persons against whom both suits were brought were the same for the reasons in the prior paragraph.

An illustrative case is *Sound Built Homes v. Windermere*, 118 Wn. App. 617, 72 P.3d 788 (2003). There, in lawsuit number one, Robinson Homes sued Michael Mastro for breach of a purchase and sale agreement. Robinson Homes also sued Sound Built and Windermere. Mastro defended on the basis that his signature on the purchase and sale agreement was forged. He brought cross and counter-claims for attorney fees. Sound Built cross-claimed against Windermere on the basis of "equitable indemnity" and negligent misrepresentation. The trial court found in favor of Mastro against the plaintiff and all other defendants. The trial court ruled against Sound Built on its claims of equitable indemnity and negligent misrepresentation against Windermere. Mastro collected his entire judgment against Sound Built.

Sound Built then initiated lawsuit number two – this one was against only Windermere. In lawsuit two, Sound Built sought to recover 100% of the amount it paid to Mastro from Windermere. Windermere raised the defenses of res judicata and collateral estoppel. The trial court rejected those defenses and found in favor of Sound Built entering judgment in its favor for the full amount that it had had paid Mastro and also for its attorney fees for lawsuit number two. Windermere appealed.

The court of appeals reversed the trial court’s judgment holding that the trial court erred in not applying res judicata. In analyzing the issue, the court of appeals noted that claim preclusion, often referred to as res judicata, prevents a matter from being litigated a second time when the parties are the same and the first action ended in a final judgment. The scope of claims preclusion includes not only the actual claims that were raised, but claims that “could have been raised, and in the exercise of reasonable diligence should have been raised, in the prior proceeding.” *Id.* at 628. In other words, “res judicata acts to prevent relitigation of claims that were *or should have been* decided among the parties in an earlier proceeding.” *Id.* (emphasis in original).

Applying the principles of res judicata, the court held that Sound Built was precluded from raising claims in lawsuit number two where it had made such a claim, under a different legal theory, in lawsuit number one:

Since 1994 or 1995, Sound Built has been claiming that Windermere should provide reimbursement for any amounts Sound Built had to pay to Mastro. In the King County action, its theories were “equitable indemnity” and negligent misrepresentation In this Pierce County action, its theory has been that Windermere breached an implied warranty of authority It is apparent that all three theories were based on the same facts, the same evidence, and the same transaction. At bottom then, Sound Built’s position is that a party can bring as many actions as he or she has substantive legal theories, even if all theories involve the same facts, the same evidence, and the same transaction.

Based on the foregoing authorities, we reject this position.

Id. at 631-32.

The same is true here. Soundbuilt Northwest, LLC’s legal theories in this lawsuit, as were its legal theories in the first action, were “based on the same facts, the same evidence, and the same transaction.” Soundbuilt Northwest LLC dismissed its claims, with prejudice, from the first lawsuit as part of a business decision. Under the doctrine of res judicata, Soundbuilt Northwest LLC was precluded from bringing this second action.

Accordingly, the trial court erred in failing to dismiss this lawsuit on the basis of res judicata.

2. Under Soundbuilt Northwest LLC’s theory, its second lawsuit was precluded under the doctrine of collateral estoppel.

Collateral estoppel bars a subsequent action to be brought when the following four elements exist:

(1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding, (2) the earlier proceeding ended in a judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding, and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied.

Christensen v. Grant County Hosp. Dist. No. 1, 152 Wn.2d 299, 307, 96 P.3d 957 (2004); *see also*, e.g., *Lenzi v. Redland Ins. Co.*, 140 Wn.2d 267, 279, 996 P.2d 603 (2000); *Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wn.2d 255, 262-63, 956 P.2d 312 (1998).

Under collateral estoppel, there is no requirement that all parties be the same – only the party against whom the collateral estoppel is sought.

The only element that is different is the fourth – that its application does not work an injustice against whom the doctrine is applied. This requirement is met if the party against whom collateral estoppel is invoked was “afforded a full and fair opportunity to litigate” its claim in the first lawsuit. *Nielson, supra*, 135 Wn.2d at 264-65. Here, Sound Built Homes,

Inc. had the opportunity to litigate all of its claims in the first lawsuit that arose out of its right to have finished lots delivered to it for \$65,000 a lot.

Accordingly, Price and Um request this Court to reverse the trial court's decision with directions to dismiss all claims brought against the defendants in the action below based upon the application of collateral estoppel.

E. The trial court erred in finding Price and Um liable under RCW 25.15.060 and RCW 23B.02.040.

1. Neither Price or Um were liable under RCW 25.15.060.

RCW 25.15.060 provides:

Members of a limited liability company shall be personally liable for any act, debt, obligation, or liability of the limited liability company to the extent that shareholders of a Washington business corporation would be liable in analogous circumstances. ...

To pierce the veil of the limited liability company so that liability can attach to a member, a plaintiff must prove that the limited liability form was used to violate or evade a duty and that the limited liability form must be disregarded to prevent loss to an innocent party. *Chadwick Farms Owner Ass'n v. FHC LLC*, 166 Wn.2d 178, 207 P.2d 1251 (2009).

Here, the trial court erred in imposing liability under RCW 25.15.060 for a number of reasons. First, and most fundamentally, there was never a limited liability company known as P&U Capital Partners

LLC. Second, there was never any evidence that Price or Um were ever members of this non-existent and hypothetical company. Third, there was no evidence that this hypothetical limited liability company was used to violate or evade a duty. Finally, there is no evidence that the hypothetical form had to be disregarded to prevent a loss to an innocent party. Accordingly, Price and Um request this Court to reverse the trial court on this conclusion of law and order that judgment be entered in their favor.

2. Neither Price or Um were liable under RCW 23B.02.040.

RCW 23B.02.040 provides:

All persons purporting to act as or on behalf of a corporation knowing there was no incorporation under this title, are jointly and severally liable for liabilities created while so acting except for any liability to any person who also knew that there was no incorporation.

The trial court's conclusion that Price and Um were liable under RCW 23B.02.040 was error. There was no evidence that Price or Um ever made any representations to any agent or representative of Sunridge Homes Inc. that they were acting on behalf of an entity known as P&U Capital Partners LLC. Instead, the only evidence at trial was that an error was made by Sweeny when he drafted the first proposal where P&U Capital Partners I LLC would sell its interest in 176th Street LLC to Sunridge Homes Inc. The undisputed evidence was that Sunridge Homes

Inc. knew that it would be selling its membership interest to the other member of 176th Street LLC. There was no evidence that Sunridge Homes Inc. intended to deal with Price or Um in their personal capacities.

Moreover, there was no evidence to fulfill the requirement that Price or Um were knowingly acting on behalf of entity that was not incorporated. RCW 23B.02.040 requires that in order for a party to be personally liable, that party knows that there is no incorporation of the entity upon which the party is acting. Here, as noted above, there was no evidence that Price and Um ever purported to Sunridge Homes Inc. that they were acting on behalf of an entity known as P&U Capital Partners LLC much less the higher requirement of proof that requires that they knowingly were acting on behalf of entity that was not incorporated.

This defect, while apparent for both Price and Um, is especially glaring on behalf of Price. There was no evidence that Price had any involvement with the membership unit purchase and sale negotiations, had any financial interest in P&U Capital Partners I LLC at the time of the sale of Sunridge Homes Inc.'s membership units, or had ever guaranteed any loans on behalf of P&U Capital Partners I LLC involving its transactions with Sunridge Homes Inc. Yet the trial court imposed a judgment of over five million dollars against Price. This was an egregious error.

In short, the trial court erred in finding Price and Um liable under RCW 25.15.060 and RCW 23B.02.040 and the trial court's judgment should be reversed.

F. The trial court erred in finding that Soundbuilt Northwest, LLC incurred \$1.3 million to finalize the plat improvements.

The trial court erred in its finding of fact 15 that Sound Built Homes Inc. expended \$1.3 million to complete plat improvements. There was no evidence at trial to support this finding. Accordingly, in addition to Price and Um not being liable to Soundbuilt Northwest, LLC, the amount of damages calculated was in error and this portion of the trial court's judgment should also be reversed.

G. Price and Um request attorney fees and expenses pursuant to RAP 18.1.

Soundbuilt Northwest, LLC brought this action against Price and Um for breach of the membership unit purchase and sale agreement and the RESPA. Both have provisions providing that the prevailing party in any litigation arising from those agreements will be entitled to an award of attorney fees and costs. Price and Um request this Court to award them all attorney fees and costs they expended at the trial and appellate level that arose from this litigation pursuant to RAP 18.1.

V.
CONCLUSION

The trial court erred in three fundamental ways: (1) it ruled that a drafting mistake would override the parties' intent; (2) it imposed liability under two statutes, neither of which are applicable; and (3) it ruled that Soundbuilt Northwest, LLC, despite previously dismissing its action with prejudice for its claim for the lots being developed by 176th Street LLC, could bring this subsequent action seeking to hold Price and Um personally liable for the failure of 176th Street LLC to produce those lots.

A drafting error does not trump, supersede, or negate the intent of the parties entering into a contract. That is the very purpose for the doctrines of mutual mistake and scrivener's error. The evidence was undisputed that the parties intended that P&U Capital Partners I LLC would be purchasing the membership units from Sunridge Homes Inc. The trial court erred in disregarding the undisputed evidence. This court should reverse on this basis alone.

The second fundamental error made by the trial court was imposing liability upon Price and Um under RCW 25.15.060 and RCW 23B.02.040. RCW 25.15.060 is not applicable as there was never a limited liability company known as P&U Capital Partners LLC. RCW 23B.02.040 is not applicable because neither Price nor Um ever were purporting to act on behalf of such an entity to Sunridge Homes Inc.

The third error made by the trial court was its ruling that Soundbuilt Northwest LLC's could bring a second action despite earlier dismissing, with prejudice, its action to enforce the agreement that required 176th Street LLC to provide it with finished lots at a certain price. The rationale for the doctrine of res judicata and collateral estoppel is to prevent piecemeal litigation and to ensure the finality of decisions. When Soundbuilt Northwest LLC dismissed its prior action with prejudice for its claims for the finished lots, that action was forever finished. This current action, a second action, is based upon the same facts, the same evidence, and the same transaction, as was the basis for its first lawsuit. The trial court erred in allowing Soundbuilt Northwest LLC to resurrect its claim that the finished lots were not provided to it by 176th Street LLC. For that independent reason, the trial court's decision should be reversed.

What is especially egregious about the trial court's judgment is the ruling that Tom Price and his wife, Patricia, were individually liable. There was never any testimony that Tom Price was involved in the negotiations of Sunridge Homes LLC's interest in 176th Street LLC. The trial court's finding of fact 13 that Price had guaranteed loans was not based upon any evidence. There was never any testimony by anyone associated with Sunridge Homes LLC that they thought that Tom Price had an ownership interest in P&U Capital Partners I LLC – either under its correct description or the incorrect description that omitted the Roman

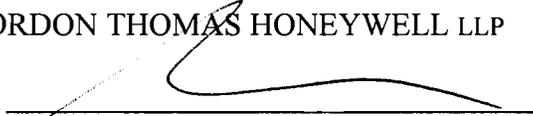
Numeral One. Why the trial court entered a five million dollar judgment against the Prices based upon the trial record is a mystery.

Price and Um request this Court to reverse the trial court's decision and remand to the trial court with directions to enter judgment in favor of Price and Um dismissing, with prejudice, all of Soundbuilt Northwest, LLC's claims and awarding attorney fees, both at the appellate level and the trial court level, in favor of Price and Um.

Dated this 17 day of June, 2010.

Respectfully submitted,

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By 

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DECLARATION OF SERVICE

I, Gina A. Mitchell, declare that on June 18, 2010, I caused the following pleadings:

1. APPELLANTS' OPENING BRIEF

together with this Declaration of Service, to be served on counsel for Respondents as follows:

Paul Edward Brain, WSBA 13438	[XX] Via ABC-Legal Messenger
Brain Law firm PLLC	[] Via U.S. Mail
1119 Pacific Avenue, Suite 1200	[] Via Facsimile:
Tacoma, WA 98402	[] Via E-filing Notification/LINX
<u>pbrain@paulbrainlaw.com</u>	[XX] Via Email

I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Gina A. Mitchell
 Gina A. Mitchell, Legal Assistant
 GORDON THOMAS
 HONEYWELL

FILED
 COURT REPORTERS
 10 JUN 18 PM 1:33
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