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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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No. 43001-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JOHN E. PETERSEN, JR. and ELLEN PETERSEN,
husband and wife

Appellant,

v.

BASELINE ENGINEERING, INC.

Respondent.

AMENDED OPENING BRIEF OF APPELLANT

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III. INTRODUCTION

Plaintiffs/Appellants John E. Petersen and Ellen Petersen request reversal of the Order Granting Summary Judgment dated December 16, 2011, in Pierce County Superior Court, and the Judgment dated January 13, 2012.

IV. ASSIGNMENTS OF ERROR

It was error for the trial court to grant summary judgment of dismissal of Appellant's breach of contract claim against Respondent land planners, where there were disputed material facts and disagreement by the parties' experts as to whether Respondent breached the applicable standard of care.

V. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether there are disputes of material fact sufficient to preclude summary judgment under CR 56.
2. Whether Respondent Baseline breached the contract between the parties.

VI. STATEMENT OF THE CASE

Appellants hired Baseline Engineering, a firm of surveyors, civil engineers and land planners, to prepare and submit a two lot short plat application for their vacant property to Pierce County Planning, and provide consulting services in relation thereto.

The Baseline contract with Mr. Petersen is dated October 16, 2006. (CP 114-116), and defines Baseline's duties with regard to the project. The contract scope of services required Baseline to prepare and submit an application for a two lot short plat as well as preparation of a boundary and topographic survey. Baseline had preliminarily determined, after consultation with county staff, that two lot short plat was the most economically feasible. (CP 114, paragraph 1) In addition, Baseline agreed to provide consulting services with regard to Pierce County review and related meetings, and ultimately shepherd the project to completion of the short plat (CP 114-116). Having never developed property in Pierce County, Mr. Petersen relied on Baseline's expertise in this regard (Declaration of John Petersen, CP 96, line 10).

Prior to purchase of the property, Petersen had a wetland analysis done on the property by Ed Sewall (CP 117-121). Petersen expected the analysis to be submitted along with the short plat application. While it was determined sometime later Baseline did submit the wetland analysis with

the application, they were unable to confirm that they had done so, which caused confusion and second guessing later in the project as to the extent of the county's knowledge of the site (Petersen declaration, CP 105, line 5-6).

The short plat application also required a county review fee and separate application as part of the submittal package in order for the analysis to be processed. (Brant Schweikl declaration, CP 273, line 9-10) Baseline did not include the fee or ask Petersen to pay it. The payment of the fee was necessary to obtain the county's determination as to the existence of wetlands or other constrained lands on the property that would reduce the developable area, a critical step in the process (Schweikl declaration, CP 273, line 12-13).

Prior to the short plat application submittal in June 2007, Mr. Petersen requested a site visit with Kevin Foley (hereinafter Mr. Foley), the project manager assigned to the Petersen file. The purpose of the meeting was to discuss the engineering challenges and the potential for critical areas that could affect the plat design. Mr. Foley was familiar with the property, was familiar with County codes, and had extensive experience in dealing with employees of Pierce County Planning (Petersen declaration, CP 97-99).

The site contained numerous areas that had the potential to be deemed environmentally constrained lands by the County as identified in Title 18E of the County Code (CP 248-263). Critical areas include erosion hazard, landslide hazard, wetlands, lands below the high water mark of streams and their required buffers and setbacks. (Petersen declaration, CP 101, line 14-17).

After seeing the stream and wet area in the back portion of the property and the steep slope ravine in the front portion of property, Mr. Foley stated to Mr. Petersen that he was sure the County would require a full wetland review of the property and he preferred not to submit the Sewall Wetland Analysis for County review. (Declaration of Petersen, paragraph 8, CP 97-98). He further stated that the County would likely require a more in depth report. During the site visit Mr. Foley also stated that the County review of wetlands and critical areas in general was the most important issue that needed to be addressed by the County with regards to the short plat (Declaration of Petersen, paragraph 8, CP 97-98). Mr. Petersen insisted that the Sewall Report be submitted with the plat application in order to get the ball rolling toward a resolution from the County if any of these areas would be regulated (Declaration of Petersen, paragraph 10, CP 99).

After discussing with the County the feasibility of proceeding with the short plat and site development work at the same time, Mr. Petersen asked Mr. Foley if Baseline would do the civil engineering site development work at the same time as the short plat design. Mr. Foley declined, stating he felt the County needed to review the potential for wetlands (critical areas) on the site first as this could affect the plat and development designs. Mr. Petersen opted to hire civil engineer Brant Schweikl, P.E., to do the site development engineering for the project (Declaration of Petersen, CP 104, line 23).

In declining the site development work, Mr. Foley insisted he would not even proceed with the short plat let alone the site development work without knowing what the County would have to say with regards potential for wetlands. He said finding out what the County would have to say is crucial stating that he had been “burned in the past” by moving forward prior to County approval. (Declaration of Petersen, paragraph 8, CP 98, lin 1-2) Mr. Petersen was in full agreement that knowing what the County would have to say was the most important thing, this was the purpose he called for the meeting at the property. However, Mr. Petersen agreed with the County that the two areas of design could be processed at the same time and be done concurrently to save time as Mr. Petersen was on a very tight schedule.

Unfortunately Mr. Foley, being the only person at Baseline knowing anything about the property and the likelihood of it having wetlands or other environmentally constrained lands, was pulled off the project shortly after its submittal, without the knowledge or consent of the Petersens (Petersen declaration, paragraph 26, CP 105, line 22). Furthermore, Mr. Foley was pulled off the project with no transition of information about the property to his successor, Terrell C. Ferguson (hereinafter Mr. Ferguson). Mr. Ferguson did not consult with Mr. Foley about the project (CP 127), nor did he make a site visit to the property Ferguson deposition, (CP 132, line 20). The Petersens did not learn of the change in project managers until after the filing of this lawsuit.

Despite being unfamiliar with the project, Mr. Ferguson was aware of the importance of the county's determination as to critical areas on the site. At his deposition, Mr. Ferguson admitted that a wetlands issue could cause the County to "reject an expert's Analysis" and stop a project (CP 137, Pg. 60, Ln.3, 25; CP 138, Pg. 61, Ln.1-25; Pg. 62, Ln 1-4,). Mr. Ferguson was further aware that the Petersen's wetland report by Sewall would be reviewed by the County but was not the ultimate authority on whether there were wetlands on the site (Ferguson deposition, (CP 137 Pg. 59, Ln. 22-25; Pg. 60. Ln 1-4).

The fact that the county required a fee to review a wetland report or conduct a site evaluation was not explained to the Petersen's nor were they advised by Baseline of the need to do so as the time of the initial filing. The Petersen's were never asked by Baseline to provide anything to the County with regards their short plat. It was at a meeting at the Baseline offices months later on October 18, 2007 with Mr. Ferguson that Mr. Petersen was informed of the necessity to submit a fee and application along with the Sewall Analysis. Since Baseline had no record of the Analysis being submitted, Mr. Ferguson told Mr. Petersen that he thought it had not been. (Declaration of Petersen, CP 105)

Shortly after receiving the application for the Petersen short plat, the County sent several letters to Baseline and Petersen. According to Baseline records, the letters were sent to and received by them in August and September 2007. Each of the letters were addressed to or copied to Baseline. Each letter required action from Baseline in order to complete the short plat. During this critical phase of the project, Baseline billing records (CP 153-168) show that the only work complete on the Petersen project until November, four months after submittal, were a few hours spent with regards to proposed lot density (two lots vs. three lots).

The first letter addressed to Baseline from the County was from Jason Weeks (CP 177-179). Mr. Weeks' letter made a request for

comments, and included redline markups to be corrected and returned to the County. Baseline billing and time records (CP 153-168) indicate there was no effort to contact Mr. Weeks or process his request for information with regard to the letter.

The second letter, dated August 28, 2007, was from Deirdre Wilson (CP 183-185). Mrs. Wilson is a planner who does not deal with issues such as critical areas (Declaration of Schweikl CP 267 Ln 11-12). She had made a cursory review of the County GIS system that indicated no wetlands on the site. The GIS system lacks information about properties that have not been mapped or have not previously had wetland review, which is explained in Pierce County's "Critical Areas for Pierce County manual Development Regulations Title 18E.30 p. 3, par. 4, WETLAND REVIEW PROCEDURES. A. General Requirements, item 2:

The Critical Areas Atlas – County Wetland Inventory maps provide an indication of where potential wetlands are located within the County. The actual presence or location of a potential wetlands or a potential wetland that has not been mapped, but may be present on or adjacent to a site shall be determined using the procedures and criteria established in this chapter

(CP 252)

The August 28 letter (CP 183-185) did not say there were no wetlands or other critical areas on the proposed site, but only that the GIS system did not indicate their presence. The letter goes on to describe areas

that could be excluded from the density calculations in order for the application to stay within two lots. The Petersen property had the potential for at least six (6) of the nine (9) items listed, many of which are apparent from a visual inspection (Declaration of Petersen, CP 101, line 13-17; Declaration of Schweikl, CP 268, line 6-7). Baseline used this letter as a basis to advise Petersen to switch from a two lot to a three lot plat. (Ferguson deposition: CP 132, Pg. 40, Ln. 21-25, CP 133, Pg. 41 Ln 1-13).

This letter, Mr. Ferguson explained at his deposition, was the reason, along with the Sewall report (CP 118-121.) for Baseline giving Petersen the ill fated advice to switch from a two lot to a three lot short plat (CP 138 Pg.62, Ln. 12-25, Pg.63, Ln.1-25). Mr. Ferguson stated that he took this letter as a mandate to switch to a three lot plat.

A third letter, dated September 10, 2007, was sent to Petersen and Baseline by Teresa Lewis, a county wetland biologist (CP 186-187). In contrast to the August 28 letter, the September 10 letter stated that there appeared to be wetlands on the subject property, and that the county required a site evaluation. Mr. Petersen, after reviewing the letter, wondered whether the county had in fact received his wetland analysis, which stated that there were no wetlands, and requested a meeting at

Baseline with Mr. Ferguson, the owner of the Company. The meeting took place October 18, 2007 (CP 105).

At the meeting, it seemed Mr. Ferguson had no recollection of seeing either the Petersens Analysis (CP 117-121) or the September 10 letter (CP 186-187) prior to the meeting and believed the Sewall wetland report had not been submitted because it had not been added to transmittal form or cover page. (CP 139, Pg. 66, Ln. 1-7; Declaration of Petersen, CP 105, paragraph 26) Mr. Ferguson had numerous explanations of possibilities why the Sewall analysis had not been submitted with the application for short plat as promised.

It was at this time that Mr. Ferguson told Mr. Petersen of the requirement that the Sewall wetland analysis should have included a site investigation fee as part of their short plat application in order for the county to provide an evaluation. (Declaration of Petersen, CP 105, paragraph 26)

Mr. Ferguson further advised Petersen that the County was requiring an increase in density of the proposed short plat from a two lot plat to a three lot plat. Mr. Ferguson based this on the August 28, 2007 letter from Deirdre Wilson to Baseline (CP 183-185). Mr. Ferguson believed it was mandatory for Petersens to switch to a three lot short plat based on the County planners preliminary conclusion that the GIS map

had no record of the property containing any environmentally constrained lands (CP 138, Pg. 62, Ln. 16, Pg. 63, Ln1).

Mr. Petersen relied on the advice of Baseline and agreed to a revision of the short plat application to three lots, which in turn necessitated an application for a variance from county road standards once it was determined three lots would not fit on the property with full road improvements.

Unfortunately, as it turned out, there were environmentally constrained lands on the property as Mr. Foley, the first project manager, had predicted and as suggested by Mrs. Lewis in the September 10 letter (CP 108). The county would only allow a two lot subdivision (CP 108). The result of the switch to a three lot short plat application was a costly seven month detour during which the Petersens lost a favorable sale of the property, which was in escrow needing only preliminary plat approval to close (Purchase and Sale Agreement, CP 211-225).

The Petersen's damages include the additional engineering fees owing to Baseline and Schweikl as a result of the plat redesign to three lots, additional interest paid on their property loan, and the loss of a favorable sale on the property (CP 110).

After filing this lawsuit as a negligence claim, Appellants Petersen stipulated to a dismissal of the negligence claim and substitution of a breach of contract claim in its place (CP 20-22). Respondent Baseline moved for summary judgment on the breach claim (CP 29-80), arguing that it was Petersen who directed the amendment of the short plat application, and that Petersen in any event bears the risk of proceeding simultaneously with short plat and site development work. Respondent submitted a declaration from Bruce Dodds, P.E., in support of the motion stating that Defendant had complied with the contract of the parties.

The Petersens disputed this allegation and submitted a declaration from Brant Schweikl, P.E., who concluded that Baseline's conduct in failing to respond to the letters from Pierce County and steaming ahead with the three lot short plat application fell below the standard of care and breached the contract (CP 275-277). Nonetheless, the trial court granted the motion, (CP 345-347) awarding judgment to Respondent for attorneys fees (CP 403-405), from which this appeal was taken (CP 406-415). Appellants request reversal of the Order and Judgment and remand for trial on the merits

VII. ARGUMENT

STANDARD OF REVIEW

An appellate court reviews orders granting summary judgment orders de novo, viewing all the facts and inferences in the light most favorable to the nonmoving party. Fitzpatrick vs. Okanogan County, 169 Wn. 2d 598, 238 P. 3d 1129 (2010). A party moving for summary judgment has the burden of proving that there is no genuine issue as to any material fact. Id. In Fitzpatrick, the Supreme Court upheld Division Three's reversal of the trial court's order granting summary judgment of dismissal of Plaintiff's surface water damage claims against the county. The Court held that expert testimony offered by Plaintiffs that the county had blocked a natural floodplain raised a question as to whether defendants could rely on the common enemy doctrine as a defense. Id. at 611.

Like the Plaintiffs in Fitzpatrick, the Appellants have offered expert testimony in this case that the short plat would have received preliminary approval in 3 months (CP 274) had Respondent simply responded to the county's requests for information (CP 274), or if the planner who had inherited the Petersen file had gone out to the property to view site conditions in person (CP 273). As it turned out, the application took nearly a year to obtain preliminary approval due to the decision to switch to the three lot plat recommended by Baseline.

A dispute exists as to material facts, therefore summary judgment should have been denied.

CR 56(c) directs a court to grant summary judgment to a moving party "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." A material fact is one upon which the outcome of the litigation depends. Ruff v. King County, 125 Wn.2d 697, 703, 887 P.2d 886 (1995). Summary judgment is not proper if "reasonable minds could draw different conclusions from undisputed facts, or if all of the facts necessary to determine the issues are not present." Ward v. Coldwell Banker/San Juan Props., Inc., 74 Wn. App. 157, 161, 872 P.2d 69, review denied, 125 Wn.2d 1006, 886 P.2d 1133 (1994). In reviewing a summary judgment motion, the appellate court stands in the same position as the trial court, and must consider all of the evidence and reasonable inferences therefrom in the light most favorable to the nonmoving party. Central Wash. Bank v. Mendelson-Zeller, Inc., 113 Wn.2d 346, 351, 779 P.2d 697 (1989).

Baseline in its motion denied giving Petersen the advice to deviate from the two lot recommendation in the contract and apply for a three lot short plat, and argued that it was Petersen's idea. However, both Petersen

and Schweikl were at the October 18, 2007 meeting where the issue was discussed, and they both state under oath (CP 105 and 276) that it was Baseline's Terrell Ferguson who made the three lot recommendation, based on the county's preliminary review of the GIS map. Petersen relied on the advice, which turned out to be incorrect, resulting in a loss of the sale of the property, which was in escrow at the time. Additional engineering fees were also incurred in having to redo the short plat application. This disputed fact as to who's recommendation it was to change the plat application midstream is clearly material as it goes to the heart of Petersen's breach of contract claim. Baseline's advice was made without a site investigation or input regarding wetlands by the county. As a result, summary judgment should have been denied because of disputed facts and the case should have proceeded to trial.

Baseline breached the contract between the parties.

A breach of contract occurs when a party to a contract fails to comply with a specific term therein. Poulsbo Group, LLC v. Talon Development, LLC, 155 Wn. App 339 (2010).

The primary breaches alleged in this case are Baseline's failure to consult with the county, failure to submit payment and application fee to the county for site investigation as required by the contract, and failure to properly advise Appellant as to the correct density for the property. Had

Baseline included the fee along with the application, or read or responded to the September 10, 2011 letter from Teresa Lewis, the county would have received the site investigation fee months earlier as was done properly at time of three lot submittal, and subsequently identified the wetlands on the site much sooner. With knowledge of the existing wetlands in hand, Baseline would never have given the disastrous advice to Petersen to apply for three lots.

Instead, Baseline filed an incomplete application without including the wetland analysis or the fee for county site investigation, and then reassigned the planner, Mr. Foley, to another job. Mr. Foley was the only planner at Baseline with familiarity with the project. Baseline then failed to respond when the county returned the drawings with markups and failed to respond to the September 10, 2007 letter identifying the possibility of wetlands on the site. Several months passed with no action on the file, as indicated by Baseline's billing records. When Mr. Petersen brings his concerns to Mr. Ferguson, he is advised erroneously to increase the density of the proposed plat, without knowing what the county had to say about wetlands on the site. Ironically, Baseline's motion blames Petersen for proceeding with site development and short plat at the same time without knowing what the county's wetland review would produce. Yet the reason why Petersen didn't know was what the county would say

was because Baseline didn't consult with the county as required by the contract. In this manner, Baseline breached the contract between the parties and the trial Court should have denied their Motion for Summary Judgment.

Appellants were damaged by Respondent's breach.

Damages recoverable for a breach of contract are those which may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Crest, Inc. v. Costco Wholesale Corp., 128 Wn. App. 760 (2005).

In the present case, the Petersens were required to pay additional interest on their property loan, additional engineering fees to Baseline and Schweikl, and lost the sale of property they had in escrow, the sale of which was contingent upon preliminary plat approval. But for Baseline's failure to perform the agreed tasks, the Petersens would have paid less for engineering and planning services related to the ill fated three lot short plat, would have paid less interest on the property loan, and would have sold the property for a profit rather than lose it to foreclosure by delaying the project during a favorable market conditions and sliding it into a

depressed market. Appellants were damaged by Baseline's breach of contract.

VIII. CONCLUSION

Mr. Petersen hired Baseline to do a short plat of his property. At no time was he advised, instructed, requested or otherwise asked by Baseline to do anything with regards corresponding with the County in regards to the short plat.

Mr. Petersen met with Baseline at their property to discuss the steep slope, the stream that cut through the middle of the property and the wet area in the back of the property to see if the County would agree with his biologist and soils engineer. The Baseline project manager Mr. Foley was sure the County would want more input and said he would prefer not to submit the Analysis nor would he proceed further on the project until he received their decision with regards to any restrictions.

Although Mr. Petersen agreed with Mr. Foley that the County would make the decision on the critical areas he wanted them to have his consultants input. Mr. Petersen felt very confident in Mr. Foley's conviction to get the County's decision.

Just weeks into the project Mr. Foley was removed without the transfer of critical information about the project and replaced by Mr.

Ferguson who knew nothing about the property. Mr. Ferguson has never been to the property, had no idea it had a stream going through the middle of it, or that it had a category IV wetland and steep slope. Any of these things could reduce the developable area, which meant continuing with the two lot plat.

Baseline had done next to nothing on the Petersen short plat for months once Mr. Foley was removed (with the exception of a few hours having been worked on the density issue).

Billing records indicate Mr. Ferguson spent a few hours in the month of September with regards to problem resolution but ignored the other three letters sent to Baseline by the County with redline drawings and requesting information.

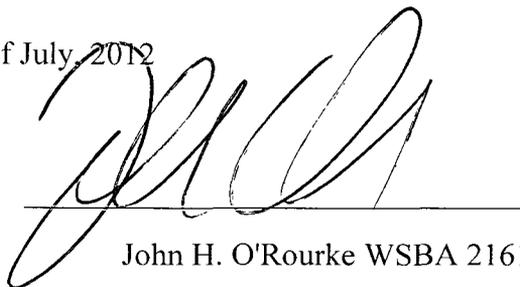
One of the letters ignored was a mandate from the County requiring a "wetland report" Mr. Ferguson proceeded with a very time consuming deviation and three lot plat design because as he says he had no choice that was many times more costly and detailed than the two lot design. The three lot design had to be discarded once the County received Mr. Petersen's Analysis along with the fee and application submitted with the new three lot design, the same fee and application not provided by Baseline at the time of the original submittal.

The resulting loss of precious time in a booming economy, the loss of a buyer ready to close on the purchase paying top market price and the tens of thousands of dollars invested in a three lot plat design that had to be discarded as well as months of additional property payments and fast sliding into a declining market.

The Petersen's do not blame Baseline for the declining economy for their losses. But they do feel that Baseline did not provide the services as outlined in their contract with them. By the time the revised two lot plat was resubmitted to the County a year after the original the economy had declined from a peak market in the fall of 2007 to the crash in late 2008 and 2009. But for Baseline's breach of contract, the Petersens would have had Preliminary Plat approval by November 2007 and would have sold the property to an approved buyer.

For the foregoing reasons, Appellants request reversal and remand of the trial court's decision.

Dated this 2nd day of July, 2012

A handwritten signature in black ink, appearing to read "J. O'Rourke", is written over a horizontal line.

John H. O'Rourke WSBA 21615

Attorney for Appellants

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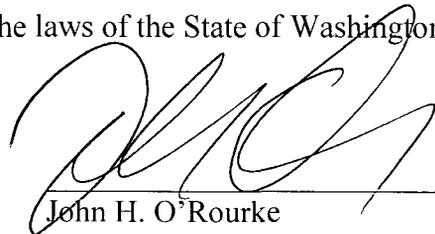
DECLARATION OF
SERVICE OF AMENDED OPENING
BRIEF

John H. O'Rourke hereby certifies that on the 16th of July, 2012, he mailed a copy of Appellant's Amended Opening Brief in the above appeal via U.S. Mail, postage prepaid, addressed to the following persons or parties:

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

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