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STATE OF WASHINGTON  
BY *[Signature]*  
DEPUTY

No. 430071-1-II

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

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JOHN E. and ELLEN PETERSEN, husband and wife,

*Appellants,*

v.

BASELINE ENGINEERING, INC.,

*Respondent.*

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BRIEF OF RESPONDENT

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## I. ASSIGNMENTS OF ERROR

Respondent believes the trial court committed no error.

Issues Pertaining to Assignment of Error.

Respondent respectfully suggests that the issues pertaining to Appellant's Assignment of Error are more appropriately stated as follows:

A. Was summary judgment properly granted where plaintiffs' claim is based on the alleged failure to perform tasks that were specifically excluded from the contract scope of services?

B. Was summary judgment properly granted where plaintiffs failed to respond in the trial court to the argument that nothing Baseline did or failed to do caused plaintiffs' alleged loss?

## II. STATEMENT OF THE CASE

A. Preliminary observation.

The Amended Opening Brief of Appellant contains numerous misstatements and misrepresentations of the evidence, and in many cases appellant failed to provide a citation for his assertions as to the facts in violation of RAP 10.3(a)(5). The more egregious of these problems will be identified below.

B. The facts of the case.

1. The parties, their contract and performance.

The claim arises from an attempt to short plat a small parcel of land in Pierce County. CP 23. Plaintiffs (hereinafter Mr. Petersen) are husband and wife and they owned the land. CP 1. Defendant (hereinafter Baseline) is a firm of surveyors, civil engineers and land planners with its office in Tacoma. CP 36.

In a proposed contract dated October 18, 2006 Baseline offered to complete surveying and land planning services in connection with the short plat application for Mr. Petersen. CP 41-43. The proposed contract contained several relevant terms:

- Baseline agreed to complete a survey of the property and submit an application for a two lot short plat.
- Baseline informed Mr. Petersen that the full extent of Pierce County's requirements for his development would not be known until the short plat application had been submitted. CP 42.
- The contract specifically excluded from the scope of Baseline's work "sensitive areas analysis, traffic impact analysis, geotechnical reports, or other specialized technical studies as may be required by Pierce County during review of the application." Sensitive

areas analysis include wetlands and steep or erosion prone slopes.

CP 42.

- The contract stated that Mr. Petersen was responsible to pay all Pierce County review fees. CP 42.
- The contract contained an attorney fees clause. CP 322.

Appellant's Statement of the Case at page 4 mis-states the evidence in two respects. First, Mr. Petersen states Baseline agreed to... "ultimately shepherd the project to completion of the short plat," citing CP 114-116. In fact, Baseline informed Mr. Petersen that what would be required was unknown until the county conducted its initial review of the short plat application and the scope of any additional services would be determined at that time. CP 42.

Second, Mr. Petersen states, "having never developed property in Pierce County, Mr. Petersen relied on Baseline's expertise in this regard," citing his own Declaration at CP 96, line 10. But that Declaration says only, "We wanted to hire an Engineering firm familiar with and experience in Pierce County." *Id.* In fact, on his own Mr. Petersen contracted with a wetlands biologist and a soils engineer (CP 95); he over-ruled Baseline's recommendation to obtain the County's initial review of the short plat application before commencing the civil design (CP 37, lines 9-15); and he ignored Baseline's opinion that the

wetlands analysis he commissioned did not comply with County regulations (CP 98). Mr. Petersen said,

Mr. Foley indicated he did not feel our Analysis met with County regulations. I believe he said "we needed to submit a wetland analysis that meets Title 18E, Developmental regulation Critical Areas Section." In any case I wanted my expert's sensitive area analysis in the hands of the county environmental biologist. My feeling was; if the county wants something else they would tell us. CP 98.

Mr. Petersen signed the proposed contract with Baseline on November 20, 2006 (CP 43), and Baseline's survey was completed by the end of December 2006. CP 37. Baseline could not complete the short plat application until Mr. Petersen gave Baseline a landscape plan and title report, which he provided seven months later in July 2007. CP 37.

Baseline's contract did not include any civil engineering services. CP 41-43. In June 2007 Kevin Foley, one of Baseline's land planners, declined to take on the civil engineering site development work, telling Mr. Petersen that it would be unwise to undertake the civil design before Mr. Petersen and Baseline had received the county's initial review of the short plat application. CP 37, 57. The site development design work includes the utilities, grading and road design, all of which would be impacted by the county's final decision on such issues as the number of permissible lots and the location of any sensitive areas, including wetlands. CP 57. On July 17, 2007 Mr. Petersen rejected Mr. Foley's

advice and he contracted with civil engineer Brant Schweikl, P.E., to do the site development design work. CP 57, 297-298.

Mr. Petersen's Opening Brief suggests he disregarded Baseline's recommendations to wait on the civil design in reliance on discussions with the County. See, e.g., App. Br. at 7. Neither assertion is supported by a reference to the record as required by RAP 10.3(a)(5). More troubling however, is the fact that the trial court barred the hearsay testimony he offered as to what the county told him. CP 346, line 16.

Baseline submitted the short plat application on August 3, 2007, and the application contained all necessary reports, including a report from Sewell Wetlands Consulting dated November 2, 2006. CP 2, 37. Mr. Sewell had concluded, "it is our professional opinion that the site's soil and vegetation conditions are a result of past disturbance and appear to not be a result of wetland conditions." CP 37. Although there was some confusion later about whether Mr. Sewell's wetlands report had been filed with the short plat application, the county records show, in fact, that they received the Sewell report with the rest of the material Baseline submitted with the short plat application. CP 37-38.

Shortly after receiving Mr. Petersen's short plat application, Pierce County issued several letters, two of which are at issue. One letter to Baseline dated August 28, 2007 indicated that the property may be subject

to density regulations that made a two lot short plat impermissible, and it also indicated that there were no environmentally constrained lands including wetlands on the property. CP 50-52.

Mr. Petersen expressed his intent to sell the development when the short plat was completed, and his sale price of the property would be increased if he was able to achieve more than two lots from the development. CP 38. After discussing the County's August 28 letter with Mr. Ferguson, Mr. Petersen instructed Baseline to seek a three lot short plat and a variance from certain road construction requirements that would otherwise be required for a three lot short plat, which was done and the variance was granted. CP 38.

Pierce County's second letter dated September 10, 2007, from Teresa Lewis, Environmental Biologist, was addressed to Mr. Petersen and not Baseline and it told him the County would require a wetlands review. (CP 54-55). The letter informed Mr. Petersen that he would have to submit documentation for a Wetlands Verification and a review fee of either \$535.50 or \$567 depending on who did the review. *Id.* Or, he would have to submit a Wetlands Analysis Report and a fee of \$1,770.30. *Id.* The letter re-iterated Mr. Foley's prescient advice to him that the report must meet the criteria of Title 18E. *Id.*

The assertion in Appellant's Opening Brief that "Baseline did not include the (wetlands) fee or ask Petersen to pay it" is not supported by a reference to the record and it is a half truth. App Br. at 5. By the plain terms of the contract he signed, Mr. Petersen was responsible for all such fees. CP 42. And according to his Declaration, Mr. Petersen said Baseline informed him they "needed a check for the submittal fee (\$567)." CP 105.

The assertion in Appellant's Opening Brief that Mr. Foley (who prepared the short plat application) "was pulled off the project shortly after its submittal, without the knowledge or consent of the Petersens" is simply false. App. Br. at 8.<sup>1</sup> In fact, Mr. Petersen's Declaration says, "I did not want a meeting with Mr. Foley; whom I felt betrayed my trust and I wanted a meeting the owner of the company Mr. Terrell Ferguson." CP 104. Mr. Ferguson recalled Mr. Petersen's wishes similarly, "I felt at that point that Mr. Petersen was kind of asking me to take it, even though he hadn't verbally said that." CP 129, p.28 lines 13-15.

Again, the assertion in Appellant's Opening Brief that "Mr. Ferguson did not consult with Mr. Foley about the project." is false. App. Br. at 8.<sup>2</sup> In fact, when he took over the project Mr. Ferguson sat down

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<sup>1</sup> The record he cites states, "I later found out post lawsuit filing that Kevin Foley had been pulled off the project..." CP 105, line 22-23.

<sup>2</sup> Mr. Petersen cites four pages of Mr. Ferguson's deposition, which states, *inter alia*, "To my recollection, I had no conversations or no input with this project until Mr. Petersen called me." CP 127, page. 17, lines 2-3.

with Mr. Foley and “got as much detail as he could”, “trying to get updated on what had been done and what was left to do.” CP 130. p. 29, lines 10-15.

The assertion in Appellant’s Opening Brief that the County’s September 10, 2007 letter to *Mr. Petersen* “required action from Baseline in order to complete the short plat” is also mistaken, or worse. App. Br. at 9. The plain terms of the contract with Baseline excluded all services relating to sensitive areas analysis, which include wetlands. CP 37. The County’s letter was addressed to Mr. Petersen, not Baseline, and it instructed him to take certain actions, which he did.

Mr. Petersen met with his wetlands biologist, Mr. Sewell, and Pierce County’s biologist, Ms. Lewis, and they, not Baseline, eventually persuaded Pierce County that the alleged wetlands were not regulated. CP 107, 108. Mr. Petersen described his wetlands hurdles thusly:

We soon set up a meeting with Ms. Lewis and our wetland expert, Mr. Ed Sewall to review the property during a site visit. We found out we had a category 4 wetland but it was below the minimum size to be regulated. She also felt that we possibly had a stream. Shortly thereafter we set up another meeting at the County offices to discuss the potential for a stream. At the meeting Ms. Lewis pulled out an old aerial photo from the 1930’s of our property showing the drainage ditch that entered and passed thru our property to be a natural watercourse. Under the State regulations “If it ever was it still is natural water”. The

Browns Point basin is 85% piped and enters our property in an 18" storm water pipe, according to the State manual it is N2 natural water because it once was natural. Our engineers wrote letters and explained that leaving the ditch open could cause hazardous downstream water problems if it ever became blocked off. At that point Ms. Lewis indicated she would not budge and was unwilling to compromise. She was calling it a N2 natural stream. We could have appealed if wished to do. It would have taken an additional three or four months just to get a hearing with no guarantee of success, or we could go back to the two-lot plat we had been submitted a year earlier. CP 107, 108.

In the late Spring of 2008, Mr. Petersen instructed Baseline to revise the application back to the two lot short plat configuration, which they did. CP 38. Pierce County issued a Preliminary Approval for a two lot short plat in October 2008. CP 38.

Unfortunately, by that time the financial crisis that became apparent in early 2008 was in full bloom and land development in Western Washington all but collapsed. CP 59. Lot values plummeted and Mr. Petersen's investment was worth less than he had spent. CP 59. He never did complete the improvements necessary to complete the short plat. CP 39.

## 2. The alleged damages.

Mr. Petersen alleges two types of damages, additional engineering fees and loss of his investment and expenses. CP 110.

As to the additional engineering fees. Mr. Petersen's civil engineer agreed that most, if not all of the additional fees would have been avoided if only Mr. Petersen had waited to obtain the preliminary approval before commencing the engineering design. CP 310-311.

As to the loss of his investment, on August 28, 2007 Mr. Petersen executed a purchase and sale agreement by which he agreed to sell the property for \$485,000. CP 212. The sale had two contingencies: closing by September 29, 2007 and the buyer had to obtain conventional financing by October 1, 2007. CP 222-224.

But the record contains no other evidence of Mr. Petersen's alleged loss of investment. While Baseline was under the impression that Mr. Petersen lost the property to foreclosure in 2009 (CP 32, line 14), there is in fact no admitted evidence what happened to the property. Instead, Mr. Petersen's hearsay report of what his buyer said was barred. CP 346, line 23.

Mr. Petersen offered no evidence to rebut Baseline's expert opinion testimony that the financial cost of the project was greater than the value of the property as a result of the financial crisis. CP 59. In the summer of 2008 the development was worth substantially less than the \$485,000 price negotiated in 2007. *Id.* When the plat was finally granted

preliminary approval in October of 2008, the only sensible financial option for Mr. Petersen was to walk away from the project. *Id.*

### C. Procedural history

Mr. Petersen commenced this suit alleging Baseline's negligence was a proximate cause of his losses. CP 1-4. By stipulation of the parties, that claim was dismissed and Mr. Petersen amended his claim to allege a single cause of action for breach of contract. CP 20-21.

After completing discovery, Baseline sought summary judgment to dismiss Mr. Petersen's claim. CP 29-80. Baseline's motion asserted, 1) Baseline completed all contract work. 2) Baseline's work was consistent with the standard of care, and 3) Mr. Petersen's alleged loss was caused by the financial crisis and not anything Baseline did or failed to do. CP 32-33.

On December 16, 2010 the Honorable Susan Serko granted Baseline's motion and struck several portions of the evidence Mr. Petersen offered. CP 345-347. On January 13, 2012 Judge Serko denied Mr. Petersen's Motion for Reconsideration and she entered Judgment in favor of Baseline on its claim for attorney fees under the contract. CP 413-415. This timely appeal followed.

### III. SUMMARY OF ARGUMENT

The premise of Mr. Petersen's claim is that Baseline failed to respond *at all* to Pierce County's concerns about wetlands and other

sensitive areas on the parcel of land he wanted to short plat. But the contract specifically excluded “sensitive areas analysis, traffic impact analysis, geotechnical reports, or other specialized technical studies as may be required by Pierce County during review of the application” from the scope of Baseline’s work. It is an undisputed fact that sensitive areas include wetlands and steep or erosion prone slopes.

The proper interpretation and construction of a contract is within the court’s bailiwick and here Judge Serko did not err when she confined Baseline’s contract scope of services to the completion of a survey and submission of the short plat application. And the undisputed evidence *belies Mr. Petersen’s misdirection feints as to whether the Sewell wetlands report was submitted with the short plat application or whether he knew a review fee was required.*

As to causation, Mr. Petersen offered no evidence or narrative to rebut Baseline’s contention that his alleged loss was the result of the poor financial climate and not anything that was within Baseline’s scope of services.

#### IV. ARGUMENT

A. Judge Serko correctly granted summary judgment because plaintiffs’ claim is based on the alleged failure to perform tasks that were specifically excluded from Baseline’s contract scope of services.

1. The standard of review is *de novo*.

The standard of review is *de novo*, which means the appellate court will review a summary judgment by engaging in the same inquiry as the trial court, to determine if there is any genuine issue of material fact requiring a trial and if the moving party is entitled to summary judgment as a matter of law. *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 64 P.3d 22 (2003). All facts and reasonable inferences therefrom must be viewed most favorably to the party resisting the motion. If the nonmoving party does not come forward with evidence sufficient to establish each element of his or her claim that are put into issue by the moving party's opening papers, summary judgment is properly granted. An order granting summary judgment may be affirmed on any legal basis supported by the record. *LaMon v. Butler*, 112 Wn.2d 193, 770 P.2d 1027 (1989).

2. The material facts were not disputed.

Plaintiff in a contract action must prove a valid contract between the parties, a breach, and resulting damage. *Lehrer v. State Dept. of Social and Health Services*, 101 Wn. App. 509, 5 P.3d 722 (2000). Here, there was a written contract and its terms excluded from the scope of services any services relating to "sensitive areas analysis, traffic impact analysis, geotechnical reports, or other specialized technical studies as may be required by Pierce County during review of the application." CP 42.

It is an undisputed fact that sensitive areas include wetlands, and it was for the trial court and not Mr. Petersen's expert to decide the legal effect of this undisputed fact. As the Court stated in *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990):

Construction of a contract determines its legal effect. "Construction ... is a process by which legal consequences are made to follow from the terms of the contract and its more or less immediate context, and from a legal policy or policies that are applicable to the situation." Citations omitted.

In construing a contract, the court must interpret it according to the intent of the parties as manifested by the words they used. *Realm, Inc. v. City of Olympia*, \_\_\_ Wn. App. \_\_\_, 277 P.3d 679, 2012 Wash. App. Lexis 553 (Div. 2 2012). Courts should neither disregard contract language which the parties have employed nor revise the contract under a theory of construing it, and an interpretation of a writing which gives effect to all of its provisions is favored over one which renders some of the language meaningless or ineffective. *Wagner v. Wagner*, 95 Wn.2d 94, 621 P.2d 1279 (1980).

Mr. Petersen ignores these rules and asks the court to impose on Baseline contract duties to respond to Pierce County's request for a wetland review, to consult with the County about the wetlands issue, to pay for the wetlands review, and to go to the site and investigate the

sensitive areas, all of which were outside the scope of the contract. Judge Serko correctly refused Mr. Petersen's invitation to ignore the contract language and impose obligations that Baseline did not undertake. To do otherwise would render the exclusion from services in their contract meaningless or ineffective.

Indeed, Mr. Petersen's conduct before and after he contracted with Baseline was entirely consistent with the objective manifestation of the terms of the contract that excluded sensitive areas, including wetlands, from Baseline's scope. In discerning the parties' intent, subsequent conduct of the contracting parties may be of aid. *Lehrer v. State Dept. of Social and Health Services*, supra; WPI 301.05. Mr. Petersen hired the wetlands consultant and his report is dated November 2, 2006. CP 45. He signed Baseline's contract 18 days later on November 20, 2006. CP 43. Ms. Teresa Lewis, Pierce County's Environmental Biologist, wrote directly to Mr. Petersen informing him of the need for a wetland review and payment of a fee. CP 54-55. Mr. Petersen met with his wetlands biologist and Pierce County's biologist and they, not Baseline, eventually persuaded Pierce County that the alleged wetlands were not regulated. CP 108. His conduct shows without question that he did not intend any of these efforts to be within Baseline's contract scope of services.

Mr. Petersen's argument that summary judgment was improper because, as he states it, "who's (sic) recommendation it was to change the plat application midstream is clearly material" and disputed, is similarly faulty. App. Br. at 17. His argument depends entirely on the fallacy that a wetlands or other sensitive areas analysis was within Baseline's scope.

The summary judgment should be affirmed because Mr. Petersen claims Baseline failed to perform duties that were outside its scope of services. The evidence shows only that Baseline met the contract obligations it undertook.

B. No admissible evidence or narrative was offered to rebut Baseline's contention that the alleged loss was the result of the poor financial climate and not anything that was within Baseline's scope of services.

1. Mr. Petersen ran headlong into the financial crisis.

Under CR 56, in order to defeat a motion for summary judgment, the resisting party must set forth specific facts that sufficiently rebut the moving party's contentions. *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 721 P.2d 1 (1986). Baseline's motion argued that the financial crisis that became apparent in early 2008 caused land development and values in Western Washington to all but collapse; lot values plummeted and Mr. Petersen's alleged loss was caused by the

fact that his investment was greater than the value of the project. CP 59.

Mr. Petersen offered no evidence to rebut these contentions.

This court may uphold the trial court's ruling on any basis supported by the record. *Stieneke v. Russi*, 145 Wn. App 544, 190 P.3d 60 (2008). As no facts or argument were offered in response to Baseline's evidence and argument, summary judgment should be affirmed.

2. Mr. Petersen offered no admissible evidence of a loss or its cause.

Mr. Petersen argues that he had a buyer lined up and, if only Baseline had done its contracted work, Pierce County would have issued the short plat preliminary approval in time for his sale to close. But no fact or admissible opinion supports that argument.

As to the time to achieve preliminary approval, Mr. Petersen relies exclusively on the opinion of Brant Schweikl, P.E., who claims that if Baseline had done its job, "Petersens would have received preliminary approval sometime between November 2007 and at the latest the end of February, 2008." CP 274, lines 16-19. The opinions and conclusions of an expert are not admissible unless they are based upon facts and not conjecture. CR 56(e). Conclusory or speculative expert opinions are insufficient to preclude summary judgment. *Miller v. Likins*, 109 Wn. App. 140, 148, 34 P.3d 835 (2001). Mr. Schweikl's opinion is conclusory

and speculative and does not appear to be based on any fact and should be insufficient to preclude summary judgment.

And in any event, his speculation that the County would have completed its review and issued a preliminary opinion is wholly meaningless unless Mr. Petersen had a buyer for the project; and the only evidence of the existence of a buyer shows that the purchase was contingent on two events neither of which was met. The sale was contingent on closing by September 29, 2007 and the buyer had to obtain conventional financing by October 1, 2007. CP 222-224. No evidence shows that either contingency was satisfied.

In fact, in order to prove that Baseline's alleged breach of contract resulted in any damage at all under his theory, Mr. Petersen would have to show that the preliminary approval probably would have been granted less than *two months* after Baseline filed the plat application. Baseline filed the plat application with Pierce County on August 3, 2007. CP 2. The contingencies had to be satisfied by October 1, 2007, which is less than two months after the plat application was submitted. No evidence shows that the County under any circumstances would have completed its review and issued the preliminary approval in less than two months.

The court should affirm the entry of summary judgment because Mr. Petersen failed to offer any admissible evidence to show that Baseline's acts or omissions caused him any loss.

C. Baseline is entitled to attorney fees and costs.

The contract provides for the recovery of attorney fees and costs in the event of a dispute. CP 322. In accordance with RAP 18.1(a), Baseline requests an award of attorney fees and costs.

#### V. CONCLUSION

This court should affirm Judge Serko's entry of summary judgment and judgment because there were no genuine issues of material fact and Baseline was entitled to entry of judgment as a matter of law. In addition, the court should award Baseline its attorney fees and costs on appeal pursuant to the parties' contract.

Respectfully submitted this 15<sup>th</sup> day of August, 2012.

SCHEDLER BOND, PLLC

*Michael J. Bond*

By \_\_\_\_\_  
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CERTIFICATE OF SERVICE

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I, Michael J. Bond, certify and declare as follows:

I am over the age of 18 and am otherwise competent to make this declaration. This declaration is made upon personal knowledge setting forth facts I believe to be true.

On August 15, 2012, I deposited in the U.S. Mail, postage prepaid, a copy of Respondent's Brief and this Certificate of Service to the following:

Court of Appeals, Division Two  
950 Broadway, Suite 300  
Tacoma, WA 98402-4454

and

John H. O'Rourke  
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DATED: August 15, 2012, at Mercer Island, Washington.

  
Michael J. Bond, WSBA #9154