

No. 29683-1-III

COURT OF APPEALS OF THE
STATE OF WASHINGTON, DIVISION III

PATRICK H. KOFMEHL, an individual,

Plaintiff/Respondent,

v.

BASELINE LAKE, LLC, a Washington limited liability company,

Defendant/Appellant.

APPEALED FROM GRANT COUNTY SUPERIOR COURT
CAUSE NO. 08-2-01242-1

Honorable Evan Sperline

BRIEF OF RESPONDENT

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“Void or illegal real estate contracts create a common law right of rescission.”

* * *

“Parties successfully rescinding a contract are entitled to be restored to the positions they would have occupied if no contract had been made.”¹

I. INTRODUCTION

Well-established Washington law was properly applied by the Trial Court to the facts of this case providing Patrick H. Kofmehl (“Kofmehl”) the equitable remedies of rescission and restitution. Recognizing longtime legal precedent, the Trial Judge observed that *“rescission seems to me like a slam dunk in this case².”*

This case arises out of a dispute between the parties regarding the terms and enforceability of a Real Estate Purchase and Sale Agreement executed in April 2007 (“Agreement”). Kofmehl, the buyer, ultimately petitioned the Court for an Order rescinding the Agreement and asking for restitution to restore him to the position he would have occupied had the Agreement not been executed.

In response, Defendant Baseline Lake, LLC (“Baseline”), the seller, refused to rescind the Agreement. Instead, it argued

¹ Hornback v. Wentworth, 132 Wn. App. 504, 513 (2006).

² RP 10/12/10, p. 20, ll. 18-19.

inapplicable contractual theories and equitable exceptions in an attempt to convince the Trial Court to enforce *Baseline's* subjective, unilateral interpretation of the Agreement. However, Baseline's theories contradicted the plain wording of the Agreement and were unenforceable under Washington law. As a result, they were correctly rejected by the Trial Court.

After over two years of protracted litigation, the Trial Court correctly entered an Order rescinding the Agreement on October 22, 2010. Subsequently, on February 17, 2011, the Trial Court then properly entered a Final Judgment awarding restitution to Kofmehl in order to make him whole. The Trial Court's rulings consistently and accurately applied Washington law to the facts at issue³. Therefore, the Final Judgment and the Orders underlying the Final Judgment should be affirmed.

II. RESTATEMENT OF THE ISSUES

1. Whether the Trial Court properly rescinded the real estate Agreement as a matter of law?

³ Baseline's accusations that Kofmehl engaged in misconduct, fraud and other personal attacks against him were argued multiple times at the Trial Court level and rejected in total. Baseline's continued tactics in this regard on appeal remain baseless and are nothing more than an attempt to obfuscate the specific legal issues involved in this appeal. CP 735-41, 1415-20, 1447-64.

2. Whether the Trial Court's grant of restitution in an amount necessary to make Plaintiff Kofmehl whole is legally supportable?
3. Whether Baseline's claim of equitable exceptions to Washington law regarding rescission and restitution were properly dismissed?
4. Whether the Trial Court's entry of the Final Judgment is legally supportable?

III. STATEMENT OF THE CASE

Since the inception of this case, Plaintiff Kofmehl pursued an Order formally rescinding the Agreement and for a restitution award in an amount necessary to make him whole. Rescission and restitution were necessary based on the parties' fundamental disagreement about two issues: (1) *what* real property was actually subject to the Agreement and (2) whether Baseline was obligated under the Agreement to bring sewer and water to the subject real property. CP 980, 1060. After more than two years of litigation, the Trial Court formally rescinded the Agreement and awarded Kofmehl restitution based on its finding there was "*no reason to deny that equitable relief. That both parties should return to where they were when they made their unfortunately ineffectual attempt to arrive at a contract.*" RP 10/12/10, p. 27, ll. 12-16.

A. Background.

In April 2007, Kofmehl and Baseline executed the Agreement for the purchase and sale of real property in Grant County. CP 75-77. The transaction was originally scheduled to close by April 15, 2008. Id. The closing date was continued until July 1, 2008 by two addenda dated April 14, 2008 and May 30, 2008, respectively. CP 78-79. The Agreement and subsequent addenda described the subject property as: “*Approximately 30.12 acres of vacant land situated between 10th Avenue and 13th and legally described as follows: All included inside of FU 182⁴, Block 73, Columbia Basin Project, Grant Co Tax Parcel # 20-0838-000.*” CP 75-79.

Kofmehl intended to develop the subject property into residential lots to be sold to a Seattle-area home builder, Denali Properties, LLC. CP 306-09, 810, 818-19. Indeed, Kofmehl had a deal in place to sell 100 of those projected lots to Denali Properties, LLC. Id. In total, Kofmehl’s development and re-sale project was projected to net a profit of approximately \$4,012,850.88. Id.

⁴ CP 194.

Defendant Baseline knew that Kofmehl's development and re-sale plan was the "*primary reason*" for Kofmehl entering into the Agreement with Baseline Lake. CP 810, 818-19, 825. Immediately after signing the Agreement in April 2007, Kofmehl incurred a host of expenses based on the express requirements of the Agreement, including earnest money (\$50,000), engineering costs (\$37,600) and title insurance costs (\$242.78). CP 75-77, 809-42.

Plaintiff Kofmehl made it clear he was ready, willing and able to close the transaction as set forth in the Agreement and move forward with his development. This was communicated several times to Baseline: on June 25, 2008, only six days before the scheduled July 1, 2008 closing date; on the closing date; and then again ten days after the closing date. CP 614, 1306-08. However, on June 30, 2008, only one day before the scheduled closing, Baseline unilaterally recorded a short plat, which materially altered the legal description of the subject property – creating "Lot 1," "Lot

2,” and “Lot 3⁵” within the larger parcel previously described as “FU 182, Block 73, Columbia Basin Project.” CP 377, 604-07. As a result, the closing documents and the title insurance policy presented to Kofmehl at the time of closing contained a completely different legal description for the property to be sold than identified within the Agreement and two subsequent addenda. CP 762-85. Baseline’s self-serving and inaccurate characterization of this case as having been brought because Kofmehl “*became concerned about the economic viability*” of this project (Baseline’s Brief, p. 1) is contradicted by the documented evidence in the record and was correctly rejected by the Trial Court. CP 604-37.

Indeed, Baseline’s altered legal description purported to exclude approximately 3.93 acres located in the northwest corner of the subject property. Cf. CP 75-79 and CP 772, 778-85.

- PSA and Addenda – “*Approximately 30.12 acres of vacant land situated between 10th Avenue and 13th*”

⁵ Throughout Baseline’s Brief, it references “Lot 1,” “Lot 2,” and “Lot 3.” However, as Kofmehl pointed out to the Trial Court when the same mistake was made below (CP 377, 1145), Baseline’s use of these terms is inaccurate and completely misleading because the terms were not contained in the Agreement or addenda, and did not even exist prior to June 30, 2008, only one day before the scheduled closing date. The testimony of Warren Morgan, Baseline’s managing member, confirms this fact. CP 184 (short plat took place after the Agreement was executed).

and legally described as follows: All included inside of FU 182, Block 73, Columbia Basin Project, Grant Co Tax Parcel # 20-0838-000.” CP 75-79.

- [Proposed Closing Documents] – *“Lot 1, Baseline Short Plat, according to the Short Plat thereof recorded in Volume 21 of Short Plats, pages 55 and 56, records of Grant County, Washington.” CP 772, 778-85.*

CP 604-37.

At the time of closing, Baseline also had not satisfied numerous other pre-conditions to closing, including failing to bring sewer and water to the subject property as required by the Agreement. CP 75, 604-37. Therefore, although Kofmehl had reiterated his willingness to execute closing documents in conformance with the terms of the Agreement and related addenda only days before the July 1, 2008 scheduled closing, Kofmehl justifiably refused to sign Baseline’s materially-altered closing documents. CP 614, 1306-1308. Accordingly, once the transaction

did not close, Kofmehl commenced this lawsuit for rescission and restitution.

B. Procedural History.

After the closing failed, Baseline threatened to sue Kofmehl for specific performance of *its interpretation* of the Agreement. Specifically, Baseline's unilateral, subjective interpretation of the Agreement ignored the plain wording and instead (1) excluded 3.93 acres located in the northwest corner of the subject property despite there being no exclusion in the Agreement or subsequent addenda; and (2) excluded Baseline's obligation to bring sewer or water to the subject property – despite condition #4 “Accessibility of City Sewer.” CP 965-79, 1010-11, 75-79. In response, Kofmehl commenced the case at bar. CP 965-79, 1010-11. Kofmehl's Complaint requested: “*rescission of the contract and restitution,*” among other alternative relief. Id. Shortly after filing the Complaint, in his December 17, 2008 deposition, Kofmehl reiterated his desire to rescind the Agreement and be made whole:

Q. At this point what are you asking for? What do you want Baseline to do?

A. Well, I -- at this point I think if we just could make me whole again. Rescind the agreement and everybody is free.

Q. Okay. Do you not want to close on the property under any circumstances?

A. Not at this stage.

CP 1060 (emphasis added).

On May 1, 2009, the Trial Court partially granted Kofmehl's Amended Motion for Summary Judgment. In doing so, it conclusively determined that the Agreement did not satisfy the Statute of Frauds, because the subject property was not adequately described such that it could be located without reference to extrinsic evidence. CP 857-59. Therefore, the Agreement was deemed void as a matter of law. Id. In making its decision, the Trial Court dismissed Baseline's counterclaim, which sought specific performance of *its* interpretation of the Agreement, an interpretation that contradicted the plain wording of the Agreement. Id. On appeal, Defendant Baseline's Brief does not challenge the Trial Court's Order finding that the Agreement does not satisfy the Statute of Frauds and is therefore void. See Baseline's Brief.

In June 2009, because Baseline had no affirmative claim remaining, Plaintiff Kofmehl moved the Trial Court for an Order formally rescinding the Agreement, awarding him restitution in an amount necessary to make him whole and entering a Final Judgment concluding the case. CP 1009-17, 1061-69. However, the Trial Court permitted Baseline to amend its answer in order to allege a limited, equitable exception to the Statute of Frauds in the form of an amended counterclaim for promissory estoppel/part performance. CP 313-19, 1078-79, 1018-44. Because Baseline could not satisfy the stringent requirements for promissory estoppel/part performance, Kofmehl moved to dismiss Baseline's amended counterclaim as a matter of law. CP 1111-25, 1161-73. By Order dated May 14, 2010, the Trial Court agreed with Kofmehl and concluded that Baseline could not satisfy the equitable elements of promissory estoppel/part performance and dismissed Baseline's revised theory of its case. CP 1111-34, 1161-74 (clear and unequivocal evidence). The Trial Court expressly permitted Kofmehl to continue his pursuit of rescission and restitution. CP 865-69. On appeal, Baseline

likewise does not challenge the Trial Court's Order dismissing its amended counterclaim.

Ultimately, in September 2010, after having twice dismissed Baseline's contractual and equitable theories of this case, Kofmehl moved the Court for an Order rescinding the real estate Agreement and for restitution. CP 1205-20, 1258-70. Applying established Washington law regarding rescission and restitution, the Trial Court, in October 2010, correctly entered an Order Granting Plaintiff's Motion for Summary Judgment Re: (1) Rescission and (2) Restitution and Denying Defendant's (Renewed) Motion for Summary Judgment. CP 804-08. Although Baseline does not appear to disagree with Washington's general rules regarding rescission⁶ and restitution, it contends a limited court-created exception should apply to prevent Kofmehl from being made whole via a limited award of restitution. However, as set forth below, that exception is factually and legally inapplicable here, and thus, the Trial Court's decision should be affirmed.

⁶ Baseline Lake does not appear to appeal the order of rescission but, instead, only the award of restitution. This is consistent with Baseline's comments to Trial Court Judge Sperline in response to a direct inquiry on whether Baseline opposed rescission, and Baseline simply responded that it was really the restitution issue "*where rubber meets the road.*" RP 10/12/10, p. 19, l. 17-p. 20, l. 23.

IV. ARGUMENT

In Washington a void or illegal real estate contract creates a common law right of rescission. Hornback, 132 Wn. App. at 513. A party successfully rescinding a real estate contract is entitled to restitution in an amount necessary to make that party whole. Id. Here, the Trial Court correctly determined that the Agreement did not satisfy the Statute of Frauds and is therefore void as a matter of law, because no exceptions applied. CP 857-59. The Trial Court then properly rescinded the Agreement and awarded Kofmehl restitution in an amount necessary to make him whole. CP 860-884. The Trial Court correctly ruled that no exceptions apply to the widely-accepted legal principal that a party successfully rescinding a real estate contract is entitled to restitution. Id. Specifically, Judge Sperline correctly refused to apply the exception that restitution may not be awarded if the would-be buyer is “in default” or “breaches” the contract. That is because the facts of this case did not fit within that limited exception. Id. Therefore, the Trial Court’s Final Judgment in favor of Kofmehl should be affirmed. CP 882-84.

A. Issues On Appeal.

The only issues on appeal are whether the Trial Court abused its discretion in rescinding the Agreement, awarding Kofmehl restitution, and refusing to apply Baseline's inapplicable exceptions. Although Baseline's Notice of Appeal attached various other Orders and Rulings by the Trial Court, CP 853-884, only the award of rescission is discussed in Baseline's Brief. Similarly, despite Baseline's "assignment of error" to the Trial Court's award of restitution and attorney fees and costs in favor of Kofmehl, its Brief does not dispute the specific amounts awarded to Kofmehl. Van Geest v. Willard, 27 Wn.2d 753, 769-70 (1947) (a matter not raised or argued by appellants in their brief is waived); Goehle v. Fred Hutchinson Cancer Research Center, 100 Wn. App. 609, 613-14 (2000).

Therefore, the following issues are not on appeal, and are conclusively resolved in favor of Kofmehl:

- The Agreement does not satisfy the Statute of Frauds⁷.
- The “judicial admission” and “agent authority” exceptions to the Statute of Frauds do not apply.
- The Agreement is void as a matter of law.
- Baseline’s counterclaim for specific performance was properly dismissed.
- Baseline’s amended counterclaim for part performance/promissory estoppel was properly dismissed.
- The Agreement was properly rescinded.

CP 857-59, 860-69; RP 10/12/10, p. 19, l. 17 – p. 20, l. 23.

Therefore, the only issues on appeal are whether the Trial Court properly exercised its equitable discretion and applied Washington law in awarding Kofmehl restitution, and refusing to

⁷ In an attempt to divert focus away from the propriety of that result, Baseline cites to a portion of the Trial Court’s ruling, but does so out of context. See Baseline’s Brief, p. 13. Contrary to Baseline Lake’s self-serving and misleading contention, Judge Antosz’s ruling did not “*recognize that Baseline’s understanding of the PSA appeared to be correct.*” CP 122-24, 1233-57. To the contrary, the Trial Court’s entire oral ruling speaks for itself. CP 1233-57. The excerpt of that oral ruling cited by Baseline merely discusses Kofmehl’s previous attempt to move the Court for summary judgment on his claim for mutual mistake. Id. But, Kofmehl’s mutual mistake claim was never fully briefed nor was it pending before the Court at the time of the Court’s April 2, 2009 oral ruling. Id. The artistic license taken by Baseline in misconstruing the Trial Court’s comments should be disregarded.

apply Baseline’s so-called “ready, willing and able to perform as agreed” exception.

B. Standard Of Review.

1. Trial Court’s Equitable Discretion.

This Court reviews the decision of a trial judge granting equitable relief for abuse of discretion. Sorenson v. Pyeatt, 158 Wn.2d 523, 531 (2006). “*Appellate courts have frequently deferred to the trial court’s judgment in tendering a decree which balances both parties’ interests and reached an equitable solution to the controversy....*” Eichorn v. Lunn, 63 Wn. App. 73, 80 (1991) (citations omitted). When sitting in equity, the Trial Court may fashion broad remedies to do substantial justice to the parties and put an end to litigation. Home Realty Lynnwood, Inc. v. Walsh, 146 Wn. App. 231, 236 (2008); Carpenter v. Folkerts, 29 Wn. App. 73 (1981). Here, the Trial Court properly exercised its power of equity to fashion a fair resolution.

2. Motion For Summary Judgment.

This Court reviews summary judgment orders de novo and engages in the same inquiry as the Trial Court. Home Realty

Lynnwood, Inc. v. Walsh, 146 Wn. App. 231, 236, (2008). Here, the Trial Court correctly determined that there are no genuine issues of material fact, and Kofmehl was entitled to judgment as a matter of law. CR 56(c). Thus, summary judgment was proper.

C. Baseline Has The Burden Of Proof With Regard To The “Ready, Willing And Able To Perform As Agreed” Exception To Rescission And Restitution.

Baseline bears the burden of proving by clear and convincing evidence that an exception applies which prevents the Court from affirming the Trial Court’s correct application of Washington law regarding rescission and restitution in favor of Kofmehl. Home Realty, 146 Wn. App. at 241-42; see also Williams v. Fulton, 30 Wn. App. 173, 178 (1981); Kruse v. Hemp, 121 Wn.2d 715, 725 (1993); Beckendorf v. Beckendorf, 76 Wn.2d 457, 465 (1969). As set forth herein, Baseline cannot meet its burden, and the Trial Court should be affirmed.

D. The Undisputed Facts Require Rescission Of The Agreement And Restitution.

The Trial Court’s Orders (1) rescinding the Agreement and (2) awarding Plaintiff Kofmehl limited restitution in an amount necessary to make him whole, were consistent with established

Washington law and should be affirmed by this Court. CP 870-875, 876-877.

1. The Trial Court Correctly Rescinded The Agreement.

The general rule in Washington is that “*void or illegal real estate contracts create a common law right of rescission.*” Hornback, 132 Wn. App. at 513. Washington courts do not impose their own terms or “reform” real estate contracts when, as here, the “*agreement fails to satisfy the requirement for a formation of a contract for the sale of land.*” Halbert v. Forney, 88 Wn. App. 669, 676-77 (1997). Rather, “*negotiation, not litigation, is the proper method to agree upon those vital terms.*” Id.

In Hornback, a case decided by this Court in 2006, an intervening change in the zoning laws rendered enforcement of the purported real estate contract a legal impossibility. Thus, the real estate contract was “void or illegal” and created a common law right of rescission. Id. at 513. Similarly here, the Trial Court determined it was impossible to enforce the Agreement because its terms fail to satisfy the Statute of Frauds. CP 857-59. Therefore, like the alleged real estate contract in Hornback, the Agreement here is “void or

illegal” and entitles Kofmehl to a common law right of rescission. See Gillmore v. Hershaw, 83 Wn.2d 701, 704 (1979).

In June 2009, the parties briefed the issue of rescission in conjunction with Kofmehl’s [First] Motion for Final Judgment. CP 959-61, 306-12, 962-1017, 1487-1504, 1055-69. At that time, Baseline Lake’s attempt to distinguish the application of Hornback was as follows: “*In Hornback, there was a legal prohibition against the performance contemplated by the parties, but there was no refusal to perform, as in this case.*” CP 1499, ll. 20-23. However, the Trial Court’s subsequent rulings in this case conclusively determined that Baseline’s efforts to avoid Hornback were misplaced. First, as in Hornback, here, the Agreement’s failure to satisfy the Statute of Frauds establishes a “legal prohibition” against performance. Second, Baseline’s unilateral characterization of Kofmehl’s actions as a “refusal to perform” was rejected by the Trial Court when it found that Baseline was not and could not be “ready, willing and able to perform as agreed.” See § V(B)(2)(b). Therefore, the Trial Court’s entry of an Order rescinding the

Agreement is consistent with established Washington law.
CP 1210-11.

Indeed, Baseline's Brief does not appear to challenge the Trial Court's rescission of the Agreement and instead focuses on the issue of restitution, which is consistent with Baseline's comments at the Trial Court level:

THE COURT: ...Most of what you [Baseline] are arguing, it seems to me, has to do with restitution, as opposed to rescission. Unless I misunderstand rescission, it's basically a legal determination that there is no contract. And I don't know how you can at one point in your -- in the structure of the argument say, they can't rely on the title insurance, because the contract is void, but then say, but you shouldn't rescind the contract. What do we do with it then? Does it get enforced? I mean, what does it mean to say that the contract is void?

MR. AHREND: It probably goes -- it's the legal equivalent of limbo as far as I understand. But really where the rubber meets the road is the question of restitution.

THE COURT: Okay. That's what I wanted to confirm. I don't think there's any question, at least not in my mind, that this contract, this attempted contract should be rescinded for the reason that it did not comply with the statute of frauds.

I think it's a different question about whether or not because the parties, the evidence suggests the parties clearly agreed and failed in their attempt to reduce their agreement to writing, that the remedy of -- the

*equitable remedy of restitution should not be granted.
Different issue.*

But rescission seems to me like a slam dunk in this case. *Because the parties didn't agree on anything. At least not in terms of the writing required by law. There is no contract. Isn't that -- isn't that it?*

MR. AHREND: *Well, the contract's void....*

RP 10/12/2010, p. 19, l. 17 – p. 20, l. 23 (emphasis added).

The Trial Court properly applied Washington law to the facts of this case and correctly rescinded the Agreement. Its ruling in this regard should be affirmed.

2. Justice Requires Kofmehl Be Made Whole.

a. A Party Successful In Rescinding A Contract Is Entitled To Be Made Whole.

A party who successfully rescinds a contract is entitled to be restored to the “*position they would have occupied if no contract had ever been made.*” Hornback, 132 Wn. App. at 513 (citations omitted); Hackney v. Sunset Beach Investments, 31 Wn. App. 596, 601-02, (1982); Thompson v. Hunstad, 53 Wn.2d 87, 91 (1958) (citing Cone v. Ariss, 13 Wn.2d 650 (1942)); Home Realty Lynnwood, Inc., 146 Wn. App. at 240. In Thompson, despite the fact that the plaintiff had not pled restitution, the Supreme Court of

Washington stated: “*The contract is void, but the plaintiff is, under the allegations of the Complaint, entitled to restitution of the amount which he paid.” Thompson, 53 Wn.2d at 91 (emphasis added). Here, Kofmehl not only pled restitution in his September 2008 Complaint, he also testified in December 2008 that the purpose of this litigation was to rescind the Agreement and be made whole. CP 965-79, 1010-11, 1060). Therefore, the Trial Court properly awarded Kofmehl restitution⁸, and its Final Judgment should be affirmed.*

b. Baseline Did Not Establish An Applicable Exception To The General Rule Regarding Restitution.

Baseline appears to agree with the general rule cited above. However, the crux of Baseline’s appeal is its contention that some exception to this widely-accepted legal principal must apply, and therefore, Kofmehl should not be made whole. However, Baseline cannot meet its burden of proving by clear and convincing evidence

⁸ Additionally, Kofmehl’s entitlement to restitution (at a minimum the earnest money paid) is provided for in the express wording of the Agreement, which states: “*If title is not so insurable and cannot be made so insurable by termination date set forth in Paragraph 8, the Earnest Money shall be refunded and all rights of purchase terminated....*” CP 76. Here, Baseline never satisfied the necessary title insurance requirements, and the earnest money must be refunded per the express terms of the Agreement. CP 768-85.

that any equitable exception applies. Despite Baseline's unsupported argument to the contrary, the Home Realty decision confirms that Defendant Baseline, not Plaintiff Kofmehl, has the burden of proof by clear and convincing evidence:

"[t]he Walshes are unable to point to anything in the record demonstrating that they meet [the conclusive evidence] standard... [t]he record before us is devoid of conclusive evidence that the [Sellers] remained ready, willing and able to perform...."

Home Realty, 146 Wn. App. at 241-42.

"The power of equity to disregard the Statute of Frauds should be exercised only where it is necessary to do so in order to prevent gross fraud from being practiced." Beckendorf, 76 Wn.2d at 465. Washington courts appear to have created a limited exception to the general rule that a rescinded contract leads to restitution. However, that exception has only been applied where the would-be purchaser or vendee is "*in default*" or in "*in breach*." Home Realty Lynnwood, Inc. v. Walsh, 146 Wn. App. at 240; Gillmore v. Green, 39 Wn.2d 431, 437 (1951). In other words, for the exception to apply, the material contract terms must be capable of identification so that a court could determine whether one party is

“*in default*” or “*in breach*.” Id. Essentially, the exception exists to fix the inequity that would occur if a buyer fraudulently breached a contract but escaped liability by invoking the Statute of Frauds. Id.; Beckendorf, 76 Wn.2d at 465.

Unlike the case at bar, in both Home Realty, supra 231, and Gillmore, supra 431, the parties did not dispute what property was subject to the alleged real estate contract. Thus, the Court in those cases was in a position to determine whether one party was “*in default*” or “*in breach*.” Id. In fact, none of the cases cited by Baseline in support of the application of the “ready, willing and able” exception involve genuine disputes between two parties regarding material terms of the purported agreement⁹. As stated above, Washington Courts do not “reform” real estate contracts. Halbert, 88 Wn. App. at 676-77.

In Home Realty, the Court recognized that in limited circumstances a would-be seller could retain the earnest money paid under a void real estate contract. Supra 236. However, this can

⁹ Baseline’s Brief, p. 20 (citing Schweiter v. Halsey, 57 Wn.2d 707, 710-11 (1961); Dubke v. Kassa, 29 Wn.2d 486, 487 (1947); Home Realty Lynnwood, Inc. v. Walsh, 146 Wn. App. 231, 240 (2008); Browne v. Anderson, 36 Wn.2d 321, 324 (1950); Johnson v. Puget Mill Co., 28 Wash. 515, 520-21 (1902)).

occur only if there was clear and convincing evidence that the seller was ready, willing and able to perform as agreed. Id. The parties in Home Realty agreed on what terms would be included in the contract and thus, could make a determination whether one party tendered performance or not. (“*[t]here is no argument that there was any confusion which piece of property was being sold here.*”) Id. (emphasis added).

Conversely here, as set forth above, the limited exception discussed in Home Realty cannot and does not apply because the parties vehemently disagreed on what terms comprised the “contract.” Therefore, Baseline Lake, as a matter of law, could not have been ready, willing and able to perform. To determine otherwise would require the Court to speculate and create terms in complete derogation of Washington’s “strict” Statute of Frauds rule and “unequivocal evidence” standard necessary for part performance/promissory estoppel. Home Realty, 146 Wn. App. at 237. Therefore, the general rule that entitles Kofmehl to restitution applies.

Similarly, in Gillmore, the court rejected a would-be purchaser's request for restitution because "*the vendee is in default.*" 39 Wn.2d at 437. The Gillmore court contrasted its decision with the earlier decision of Park v. McCoy, 121 Wash. 189 (1922). Discussing Park, the Gillmore court stated:

"The real reason assigned for our opinion in the cited case [Park v. McCoy] was that the formal contract which was drawn subsequent to the earnest money receipt did not describe the same property as was described in the earnest money receipt."

Gillmore, 39 Wn.2d at 438 (emphasis original). The situation in Park, was where two pertinent legal documents did not contain identical legal descriptions. This too is precisely the situation in the case at bar. Here, the legal description in the April 2007 PSA "*did not describe the same property as*" the property "tendered" by Baseline in June 2008:

- April 2007 – "*Approximately 30.12 acres of vacant land situated between 10th Avenue and 13th and legally described as follows: All included inside of PU 182, Block*

73, Columbia Basin Project, Grant Co.

Tax Parcel # 20-0838-000.”

- July 1, 2008 – *“Lot 1, Baseline Short Plat, according to the Short Plat thereof recorded in Volume 21 of Short Plat, pages 55 and 56, records of Grant County.”*

CP 75-79, 772, 778-85. In fact, the designations “LOT 1,” LOT 2,” and “LOT 3” did not even come into existence until one day before the deal was supposed to close. CP 772. Therefore, as in Park, the Orders granting Kofmehl rescission and restitution should be affirmed.

E. Baseline’s Motion For Summary Judgment Was Properly Denied.

The Trial Court properly applied the law to the undisputed facts of this case, rescinding the Agreement and awarding Kofmehl restitution, while rejecting Baseline’s attempts to invoke exceptions. In rejecting Baseline’s attempt to invoke the “ready, willing and able” exception, the Trial Court correctly denied Baseline’s Motion for Summary Judgment seeking to dismiss Kofmehl’s claims for rescission and restitution. CP 865-69.

Baseline's appeal of the Trial Court's denial of its Motion for Summary Judgment is strained and convoluted. See Baseline's Brief, pp. 26-42. On the one hand, Baseline states that it "*does not seek to enforce [Baseline's interpretation] the agreement on appeal.*" Id. at p. 1. However, by asking this Court to "[e]nter or direct entry of summary judgment in favor of Baseline, dismissing Kofmehl's claims for rescission and restitution," Baseline is necessarily asking this Court to ignore both facts and law (1) to confirm *its* unilateral, subjective interpretation of the Agreement, and (2) conclude it was ready, willing and able to perform. Baseline's Brief, p. 43. As set forth above, neither Washington law nor the facts of this case can support either contention and the Trial Court's dismissal of Baseline's Motion for Summary Judgment should be affirmed.

Nonetheless, to the extent the Court deems it relevant to consider Baseline's "facts" in support of its misplaced argument, Kofmehl responds as follows.

1. The Evidence Does Not “Confirm” Baseline’s Interpretation of The Agreement¹⁰.

The Trial Court correctly ruled that Baseline was unable to prove *its* interpretation of the Agreement “*clearly and unequivocally and [through evidence] which leaves no doubt as to the terms, character, and existence of the contract.*” Williams, 30 Wn. App. at 173; see also Thompson, 53 Wn.2d at 91 (“*[i]f they may be accounted for on some other hypothesis, they are not sufficient.*”) (emphasis added). Here, the objective evidence in the record confirms the Trial Court’s ruling, and illustrates that Baseline’s sweeping conclusions are not only legally untenable, but also factually inaccurate.

First Offer – Unaccepted

- On or about March 9, 2007, Kofmehl offered Baseline Lake \$1,500,000 to purchase a portion of land in Farm Unit 182, Block 73, Grant County. Kofmehl’s offer specifically *excluded* 3.93 acres located in the

¹⁰ See Baseline’s Brief, pp. 28-33. Each item cited by Baseline as “overwhelming evidence” was raised at the Trial Court level, rebutted by Kofmehl, and ultimately correctly rejected by the Trial Court. CP 1165-68, 860-69. In the interest of judicial economy, Kofmehl incorporates his previous rebuttal on these issues. CP 1165-68.

northwest corner of the property, which was reflected as follows:

- A map was attached marking the 3.93 acres as “*EXCLUDED*”¹¹;
 - Terms and Conditions No. 3 read, in part: “...*if seller chooses to develop the 3.93 acres he has excluded from the overall parcel...*”;
 - Terms and Conditions No. 5 granted Kofmehl a first right of refusal on the 3.93 acres; and
 - The offer’s legal description accounted for the 3.93 acre exclusion by emphasizing the offer only applied to property: “*all inside and a part of...*” CP 604, 610-13.
- The parties did not agree to the terms set forth in Kofmehl’s March 9, 2007 offer. CP 604.

Second Offer - Unaccepted

- On or about March 22, 2007, Kofmehl submitted a second \$1,600,000 offer to Baseline Lake, which did

¹¹ See Baseline’s Brief, Appendices A-2, A-14.

not include a map excluding 3.93 acres nor any reference to a 3.93 acre exclusion, which was rejected. CP 100-02.

Third Offer - Accepted

- On or about April 13, 2007, Kofmehl submitted a third offer to Baseline Lake for \$1,650,000, which included the following material terms:
 - *“Item 4: Accessibility of city sewer;”*
 - *“All included inside of FU 182, Block 73,” not “a part of,”* as in the March 9, 2007 offer; and
 - No specific exclusion of the 3.93 acres located in the northwest corner. CP 605, 75-77.
- Baseline accepted Kofmehl’s April 13, 2007 offer, the Agreement. Id.

Material Terms of April 2007 PSA

- Approximately one week after executing the Agreement, Kofmehl hired project manager Bob West to assist in developing the property. CP 570. Based on Kofmehl’s contemporaneous comments in April

2007, Mr. West understood that the subject property included the 3.93 acres located in the northwest corner, and that Baseline would bring the sewer to the property. CP 574-75, 605 (emphasis added).

- There is no evidence that sewer was or is “accessible.” Likewise, Baseline’s reliance on Goedecke v. Viking Invest. Corp. is misplaced. 70 Wn.2d 504, 506 (1967). In Goedecke, unlike here, the parties agreed that the requirement “availability of sewer” referred to a right-of-way to build a sanitary line. Id. Conversely here, the Agreement stipulated “accessibility of city sewer,” the meaning of which became a material dispute. CP 106.
- Shortly after executing the Agreement, Kofmehl also hired Western Pacific Engineering per the terms of the Agreement to begin platting the subject property, including the 3.93 acres located in the northwest corner. CP 605, 565. Baseline knew Kofmehl hired Western Pacific Engineering and that Western Pacific

Engineering platted lots on the 3.93 acres in the northwest corner. CP 578. Baseline did not object to Western Pacific Engineering (“WPE”) platting lots on the 3.93 acres, which is illustrated by a contemporaneous drawing provided by Kofmehl to WPE, which includes lots on the 3.93 acres located in the northwest corner of the subject property. CP 598-601, 605. Similarly, Kofmehl created a Work Order Addendum which reflects the Agreement did not contain any “exclusion.” CP 735-41, 40.

Dispute Regarding PSA Terms

- Kofmehl and Baseline twice agreed to extend the Agreement’s closing date because of issues with Item 4: Accessibility of city sewer; and the legal description¹². CP 78-79.
- On June 25, 2008, Kofmehl declared he was “*ready, willing and able to close on the Quincy property based*

¹² Baseline’s self-serving characterization of the two agreed extensions as an opportunity for Kofmehl to negotiate the additional purchase of the 3.93 acres in the northwest corner of the subject property is unsupported by the record and is false. Rather, the extensions were the product of two businessmen attempting to work out a dispute regarding material terms of the Agreement. See e.g., CP 106.

upon the terms and conditions of our agreement, dated April 13, 2007.” CP 614.

- Intending to timely close the transaction based upon the terms of the Agreement, Kofmehl ordered closing documents from Chicago Title Company as a “*Super Rush.*” CP 615.
- On June 30, 2008, only one day before the closing date, Baseline recorded its plat of the subject property, which materially changed the legal description of Farm Unit 182, Block 73, Grant County. CP 762-85.
- As a result of Baseline’s unilateral conduct, the Agreement’s legal description materially differed from the legal description set forth in the closing documents and Statutory Warranty Deed, as submitted by Baseline Lake on July 1, 2008. CP 772.
- Baseline’s last-minute, unilateral change to the legal description caused Kofmehl great concern and justified his refusal to close the altered transaction as tendered by Baseline. CP 604-37. Additionally, Kofmehl

refused to close the transaction because Baseline Lake never satisfied Item 4: Accessibility of city sewer. Id.

It is obvious from these facts that, contrary to Baseline's assertions, there is no evidence in the record supporting Baseline's unilateral, subjective interpretation of the Agreement, let alone "clear and unequivocal evidence" necessary to prevail on a claim for part performance/promissory estoppel. Since Baseline cannot show the requisite clear and unequivocal evidence as to the terms of the Agreement, Baseline cannot prove it was ready, willing and able to perform.

2. Baseline Misrepresents The Testimony Of Michael Nicholson¹³.

Baseline did not and cannot prove *its* interpretation of the Agreement by unequivocal evidence. Thus, the "ready, willing and able" exception is inapplicable, and the testimony of Michael Nicholson is inapposite. Nevertheless, as it did at the Trial Court level¹⁴, Baseline again makes the sweeping conclusion that the testimony of Kofmehl's real estate agent, Michael Nicholson, somehow changes the application of established Washington law

¹³ See Baseline's Brief, pp. 27-28, 36-43.

¹⁴ RP 2/8/10, p. 41, l. 15 – p. 44, l. 17.

regarding rescission and restitution. Baseline's argument fails both legally and factually. Legally, Baseline's interpretation of Nicholson's testimony does not change the Court's application of Washington law to the facts of this case. Factually, as shown below, Baseline's accusations of misconduct regarding Nicholson's testimony are unsupportable and nothing more than a last-ditch effort to muddle the issues before this Court. The Trial Court appropriately considered and rejected Baseline's efforts in this regard.

a. Baseline's Interpretation Of Nicholson's Testimony Does Not Change The Application Of The Statute Of Frauds.

The Agreement did not satisfy the Statute of Frauds and is therefore void as a matter of law. In Washington, “[a] *real estate agent cannot alter the law applicable to the principal...*” Home Realty, 146 Wn. App. at 239. There, the Court specifically rejected the argument that a principal is bound by the alleged knowledge of their agent. Id. However, unlike Home Realty, where it was undisputed that the agent knew *what* property was subject to the real estate contract, here the undisputed evidence is that Nicholson was

not involved in all pertinent negotiations and transactions between Kofmehl and Baseline. CP 1146. Therefore, Baseline's attempt to bind Kofmehl by a misconstrued statement of Nicholson must fail. Denaxas v. Sandstone Court of Bellevue, LLC, 148 Wn.2d 654, 666-67 (2003). CP 1164-65, 1225-26.

b. Baseline Misstates Nicholson's Testimony.

In an effort to manufacture non-issues for this Court, Baseline distorts Mr. Nicholson's deposition testimony. Baseline's Brief, pp. 27-28, 36-43. Baseline failed to inform the Court that in April 2009, Mr. Nicholson attempted to clarify testimony mischaracterized by Baseline regarding a line of questioning pertaining to the alleged exclusion of 3.93 acres. CP 618-37, 954-58, 1045-54. He stated that his testimony in that regard applied to a previous, rejected offer dated March 2007, not the Agreement. Id. On August 28, 2009, Mr. Nicholson submitted a Declaration Clarifying Deposition Testimony to further address and clarify Baseline's distortion of his previous testimony. Id. In addition to limiting the "exclusion" testimony to the March 2007 offer, Mr. Nicholson explained that Baseline's unilateral, material alteration of the Agreement only one day before

the closing date provided further basis for Kofmehl's refusal to close the transaction. Id. In any event, Nicholson's testimony does not and cannot change the fact that the Agreement is void and no exceptions apply. Baseline otherwise is only trying to confuse the issues before the Court.

F. Kofmehl Was Entitled To Restitution And Prevailing Party Attorney Fees And Costs.

The Trial Court's determination that the Agreement failed to satisfy the Statute of Frauds correctly applied Washington law and should be affirmed. Likewise, the Trial Court properly exercised its equitable discretion in awarding Kofmehl restitution in an amount necessary to make him whole as well as attorney fees in accordance with the contract¹⁵. RCW 4.84.330; Herzog Aliminum v. General American, 39 Wn. App. 188, 197 (1985); Hackney, 31 Wn. App. at 601 (1982). The Trial Court's Final Judgment and underlying Orders applied the "stringent elements" required for rescission and restitution, while rejecting Baseline's proposed exceptions. The Trial Court's application of the law to the facts is consistent with this

¹⁵ CP 75-77; 1280-81; 1312-1414; 1427; 1473-86.

Court's recent discussion of equitable principals in Krystal v. Davis, et al., Cause No. 28682-7-III (June 9, 2011).

In sum, the Trial Court's February 2011 Final Judgment should be affirmed.

V. RAP 18.1 MOTION FOR ATTORNEY FEES AND COSTS

Based on RAP 18.1, Patrick H. Kofmehl respectfully requests an award of reasonable attorney fees and costs incurred on appeal. A party may be awarded attorney fees based on a contractual fee provision at the trial and appellate level. See e.g., Renfro v. Kaur, 156 Wn. App. 655, 666-67 (2010). Here, the Agreement provided that the prevailing party is entitled to recover his/her attorney fees. CP 75-77.

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VI. CONCLUSION

This Court should affirm the Final Judgment and related Orders of the Trial Court.

DATED this 17th day of June, 2011.

DUNN & BLACK, P.S.



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Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17 day of June, 2011, I caused to be served a true and correct copy of the foregoing document to the following:

- | | | |
|-------------------------------------|------------------|------------------------|
| <input type="checkbox"/> | HAND DELIVERY | George M. Ahrend |
| <input checked="" type="checkbox"/> | U.S. MAIL | Ahrend Law Firm, PLLC |
| <input type="checkbox"/> | OVERNIGHT MAIL | 100 East Broadway Ave. |
| <input type="checkbox"/> | FAX TRANSMISSION | Moses Lake, WA 98837 |
| <input type="checkbox"/> | EMAIL | |



MICHAEL R. TUCKER