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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 296831

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COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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PATRICK H. KOFMEHL,  
Plaintiff-Respondent

v.

BASELINE LAKE, LLC,  
Defendant-Appellant

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REPLY BRIEF OF APPELLANT BASELINE LAKE, LLC

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## I. REPLY TO SPECIFIC FACTUAL CLAIMS

### A. **Baseline Has Appealed The Superior Court's Order Regarding Both Rescission And Restitution.**

Kofmehl claims that Baseline “does not appear to appeal the order of rescission, but instead, only the award of restitution.” *See* Resp. Br., at 11 n.6; *accord id.* at 13-14 (indicating rescission is among issues not on appeal). This is incorrect. Baseline has appealed the order granting rescission in its notice of appeal, CP 853-77, assigned error to the order granting rescission in its brief, App. Br., at 1-2 (assignment of error no. 1), raised the issue of whether Kofmehl is entitled to rescission, *id.* at 2 (issues nos. 1-2), argued that Kofmehl is not entitled to rescission, *id.* at 16-25, and cited authority in support of its argument, *id.*<sup>1</sup> Under these circumstances, issues of rescission and restitution are both squarely before the court.

### B. **Baseline Did Not Unilaterally Change The Description Of The Property On The Day Before Closing; Instead, Kofmehl Knew The Legal Description More Than One Year Before Closing.**

Kofmehl claims that “Baseline unilaterally recorded a short plat which materially altered the legal description of the subject property” on

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<sup>1</sup> The principal authorities on which Baseline relies are *Johnson v. Puget Mill Co.*, 28 Wash. 515, 520-21, 68 Pac. 867 (1902); *Dubke v. Kassa*, 29 Wn.2d 486, 487, 187 P.2d 611 (1947); *Browne v. Anderson*, 36 Wn.2d 321, 324, 217 P.2d 787 (1950); *Gillmore v. Green*, 39 Wn.2d 431, 437, 235 P.2d 998 (1951); *Schweiter v. Halsey*, 146 Wn.2d 707, 710-11, 359 P.2d 821 (1961); and *Home Realty Lynnwood, Inc. v. Walsh*, 146 Wn.App. 231, 189 P.3d 253 (2008), all of which stand for the proposition that neither rescission nor restitution is available to the buyer when the seller is ready, willing and able to perform as agreed under the terms of a real estate contract.

the day before closing. *See* Resp. Br., at 5-6. To support this claim, Kofmehl juxtaposes the description contained in the parties' commercial real estate purchase and sale agreement (PSA), with the description contained in the closing documents. *See* Resp. Br., at 5-6. Those descriptions refer to the exact same property.

The PSA expressly contemplated that the property would be short platted before closing, providing as follows: "offer to purchase subject to the following terms and conditions: 1. Purchaser receiving preliminary plat approval from the City of Quincy[.]" CP 75. In accordance with this condition, confirmation of preliminary plat approval and a copy of the plat map were faxed to Kofmehl's broker on May 8, 2007. CP 90-91.

The preliminary short plat conforms exactly to the recorded short plat, showing the same metes, bounds, acreages, and configuration of lots on the property, and even identifying the lots as "Lot 1," "Lot 2," and "Lot 3." *Compare* CP 91 (preliminary short plat) *with* CP 98 (recorded short plat). It conforms exactly to the original survey of the property on which the preliminary and recorded short plats were based, CP 74. It conforms to the acreages stated in the original and amended listing agreements, CP 97 & 99, and the PSA, CP 75-77. Perhaps most significantly, it conforms to the survey map highlighted by Kofmehl's broker during negotiations for the purchase of the property, CP 371, and

the admissions of Kofmehl's broker, *See App. Br.*, at 36-39 (quoting broker). Kofmehl fails to acknowledge or address any of these facts.

In sum, the legal description of the property was provided to Kofmehl, in accordance with the terms of the PSA, less than one month after the PSA was executed on April 17, 2007, and more than one year before the amended closing date of July 1, 2008. In light of these events, Kofmehl's claim on appeal that Baseline unilaterally changed the legal description on the day before closing is disingenuous.

Kofmehl claims that the difference between the description of the property in the PSA and the closing documents is the exclusion of the 3.93-acre parcel in the northwest corner of the property. *See Resp. Br.*, at 6. This parcel was always excluded from the PSA. The extensive evidence in the record establishing this fact is summarized in Baseline's brief and will not be repeated here. *See App. Br.*, at 28-30. In essence, Kofmehl is asking the court to interpret the PSA so that its express reference to 30.12 acres should be expanded to include more than 34 acres, and further asking the court to ignore the parties' entire course of performance of the agreement. The court should not grant his request, especially in light of the standard of review on summary judgment.

**C. Baseline Satisfied All Pre-Conditions To Closing, Including “Accessibility Of City Sewer.”**

Kofmehl claims that “[a]t 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[.]” *See* Resp. Br., at 7. Despite making this sweeping claim regarding ostensibly numerous unsatisfied conditions, Kofmehl identifies no other conditions besides accessibility of sewer and water, either in the trial court or on appeal.

Accessibility of water was never a condition of the PSA. CP 75-77. The conditions of the PSA are limited to “accessibility of city sewer.” CP 75. With respect to accessibility of city sewer, Kofmehl ignores the existing easements, CP 387, and the confirmation of accessibility from City of Quincy personnel, CP 334-36.<sup>2</sup>

**D. Baseline Has Accurately Reproduced The Testimony Of Kofmehl’s Broker, Both As It Was Originally Stated In His Deposition, And As It Was Changed In His Summary Judgment Declaration.**

Kofmehl states that “Baseline failed to inform the Court that in April 2009, Mr. Nicholson [i.e., Kofmehl’s broker] attempted to clarify testimony” about the extent of property conveyed under the PSA. *See* Resp. Br., at 36 (citing CP 618-37, 954-58 & 1045-54). The citation reveals that Mr. Nicholson changed (“clarified”) his testimony in

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<sup>2</sup> The legal sufficiency of the easements is established by *Goedecke v. Viking Invest. Corp.*, 70 Wn.2d 504, 424 P.2d 307 (1967), discussed *infra*.

September rather than April 2009. *See* CP 618-37. Baseline has already addressed the September change of testimony, at length, in its brief. *See, e.g.,* App. Br., at 40 (discussing, in particular, statements at CP 621). Although Kofmehl alleges in conclusory fashion that Baseline has somehow distorted his broker's testimony, he does not address the irreconcilable conflict between the broker's deposition testimony and summary judgment declaration. He does not address the fact that the broker reviewed and corrected his deposition testimony in accordance with CR 30(e), and yet did not change his testimony at that time. *Compare* CP 618-21 (summary judgment declaration) *with* CP 632-33 (deposition correction pages). The broker's summary judgment declaration is a sham affidavit that should be disregarded. *See Marshall v. AC&S, Inc.*, 56 Wn.App. 181, 185, 782 P.2d 1107 (1989).

## II. ARGUMENT IN REPLY

### A. **The Burden Of Proof Is On The Buyer Seeking Rescission And Restitution.**

The parties agree regarding the issue to be proved, i.e., was the seller ready, willing, and able to perform as agreed? *See* Resp. Br., at 16 & 21-24. The parties also agree regarding the degree of certainty required to satisfy the burden of proof, i.e., clear and convincing evidence. *See id.* at 21-24. The parties disagree regarding the placement of the burden of

proof, i.e., should it be placed on the buyer seeking rescission and restitution, or should it be placed on the seller?

The disagreement regarding placement of the burden of proof is at the heart of this appeal. The superior court below stated that it could not determine whether Baseline was ready, willing and able to perform as agreed. VRP, Oct. 12, 2010, at 26:14-25; *see also* App. Br., at 24-25. If the burden of proof rests upon Kofmehl, then the superior court's inability to make that determination should have resulted in summary judgment in Baseline's favor.

On review of the superior court's summary judgment order, Kofmehl is obligated to point to competent evidence in the record to avoid summary judgment against him, while Baseline may simply point to the absence of such evidence to obtain summary judgment in its favor. *See Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989) (discussing relationship between summary judgment and burden of proof). If this court finds that Kofmehl has *not* produced competent evidence to meet his burden of proof, then the court should enter summary judgment against him. If, on the other hand, this court finds that he *has* produced competent evidence to meet his burden of proof, then the court should remand for trial. In either event, if the burden of proof rests upon

Kofmehl, the superior court's summary judgment in his favor cannot stand.

In addressing placement of the burden of proof, Kofmehl relies principally on *Home Realty Lynnwood, Inc. v. Walsh*, 146 Wn.App. 231, 241-42, 189 P.3d 253 (2008), as support for the claim that it should be placed on the seller. *See* Resp. Br., at 16 & 22. Kofmehl reads too much into a single quote from *Home Realty*, without proper regard for the procedural posture of the case. Furthermore, Kofmehl's reading of *Home Realty* is contrary to the leading case of *Johnson v. Puget Mill Co.*, 28 Wash. 515, 521, 68 Pac. 867 (1902), differs from the normal placement of the burden of proof in rescission and restitution cases, and is at odds with the policy rationales for prohibiting rescission and restitution when the seller is ready, willing and able to perform as agreed.

- Home Realty's Remand For A Factual Determination Whether The Seller Was Ready, Willing And Able To Perform In Light Of An Inadequate Appellate Record Does Not Explicitly Or Implicitly Address Placement Of The Burden Of Proof.***

Nothing in the *Home Realty* opinion suggests that the parties addressed or even disputed placement of the burden of proof, and the court merely remanded the case for further proceedings to determine whether the seller remained ready, willing and able to perform. The court did not explicitly address placement of the burden of proof, cite any authority,

state any rationale, or provide any instructions on remand. Accordingly, there is no holding in *Home Realty* regarding placement of the burden of proof.

As Baseline acknowledged in its opening brief, there is language in *Home Realty* that implicitly seems to place the burden of proof on the seller rather than the buyer, but only when the language is taken in isolation from the procedural posture of the case. *See App. Br.*, at 22-23. In *Home Realty*, the superior court enforced a real estate purchase and sale agreement, which the Court of Appeals held violated the statute of frauds. *See* 146 Wn.App. at 235-36 (discussing superior court decision); *id.* at 236-39 (Court of Appeals decision).

For the first time on appeal, as an alternative basis to affirm the superior court decision, the sellers argued that there should be no rescission or restitution of earnest money because they remained ready, willing and able to sell the property. *Id.* at 239-40. The Court of Appeals noted that the record was insufficiently developed to affirm, stating:

[T]he Walshes [i.e., sellers] are unable to point to anything in the record demonstrating that they met this standard. On this point, the Lees [i.e., buyers] are correct. The record before us is devoid of conclusive evidence that the Walshes remained ready, willing, and able to perform after the Lees' breach. Therefore, we decline to consider this alternate ground and remand to the trial court for further proceedings.

*Id.* at 241-42<sup>3</sup>; *accord id.* at 242 (stating “[w]e also remand to the trial court for a determination of whether restitution and attorney fees are available”).

Under the Rules of Appellate Procedure, an appellate court will not affirm on alternate grounds unless “the record has been sufficiently developed to fairly consider the ground.” RAP 2.5(a); *Marina Condo. Homeowner’s Ass’n v. Stratford at Marina, LLC*, 161 Wn.App. 249, --- P.3d --- (2011) (citing *Home Realty* for this proposition). In *Home Realty*, the sellers could not obtain affirmance of the superior court decision based on the inadequate record before the appellate court. Application of this procedural rule does not entail any implicit or explicit holding regarding the placement of the burden of proof.<sup>4</sup>

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<sup>3</sup> This passage is quoted in part in Baseline’s brief and also quoted in part in Kofmehl’s brief. *See* App. Br., at 22; Resp. Br., at 22.

<sup>4</sup> While *Home Realty* is best understood in light of the procedural posture of the case, at most the quoted language from the opinion may contain some indication of the sellers’ burden of *production* regarding their willingness and ability to perform, without implying that the ultimate burden of *persuasion* rests upon them. *See Petersen v. State*, 145 Wn.2d 789, 42 P.3d 952 (2002) (noting “that the term ‘burden of proof’ includes the ‘burden of production’ and the ‘burden of persuasion’”); *State v. Burt*, 24 Wn.App. 867, 874, 605 P.2d 342 (1979) (distinguishing burden of production, which requires party “to present some evidence with respect to the fact in issue,” from the burden of persuasion, which requires party “to affirmatively establish the fact in issue”; quotation omitted); *Federal Signal Corp. v. Safety Factors, Inc.*, 125 Wn.2d 413, 434, 886 P.2d 172 (1994) (stating “[i]t is axiomatic that each party must sustain a certain burden of production in any civil dispute”).

**2. The Remaining Cases Cited By Kofmehl Do Not Alter Placement Of The Burden Of Proof On The Buyer Seeking Rescission And Restitution.**

In addition to *Home Realty*, Kofmehl also cites *Williams v. Fulton*, 30 Wn.App. 173, 178, 632 P.2d 920, *rev. denied*, 96 Wn.2d 1017 (1981); *Kruse v. Hemp*, 121 Wn.2d 715, 725, 853 P.2d 1373 (1993); and *Beckendorf v. Beckendorf*, 76 Wn.2d 457, 465 (1969), as support for placing the burden of proof on Baseline. *See* Resp. Br., at 16. None of these cases supports the proposition for which Kofmehl cites them. While *Williams* and *Kruse* are inapplicable, *Beckendorf* supports placing the burden of proof on Kofmehl, as the party seeking rescission.

*Williams* did not involve a claim of rescission and restitution, let alone the placement of the burden of proof to obtain rescission and restitution. Instead, the buyer of real estate sought to reform a legal description that violated the statute of frauds on grounds of mutual mistake, or the in alternative to enforce the real estate contract on grounds of part performance. *See* 30 Wn.App. at 176 (stating issues presented for review). Kofmehl cites page 178 of the *Williams* opinion, which relates to the part performance claim. *See* Resp. Br., at 16. The opinion does not mention rescission in any respect, and the court specifically declined to address the issue of restitution. *See id.* at 178 n.5 (stating “[b]ecause the [buyers] did not plead restitution and have not asserted that theory either at

the trial court level or on appeal, we need not consider it”). As a result, *Williams* is beside the point.

Likewise, *Kruse* did not involve a claim of rescission and restitution, nor did it address placement of the burden of proof. In *Kruse*, the Court held that a buyer could not specifically enforce an option contract for the purchase of real estate because it was too indefinite, and that the doctrine of part performance could not remedy the omission of material terms from the option contract. *See* 121 Wn.2d at 721-724 (indefiniteness); *id.* at 724-25 (part performance). Kofmehl cites page 725 of the *Kruse* opinion, which addresses the part performance doctrine. *See* Resp. Br., at 16. While there was an argument in *Kruse* that the legal description in the option contract violated the statute of frauds, the Court specifically declined to address this issue, among others. *See id.* at 725 (stating “we need not address the property description or easement issues”). The *Kruse* opinion does not mention rescission in any respect, and the only discussion of restitution is in connection with an argument that the seller waived the right to contest specific performance based on the acceptance of benefits of the trial court decision. *See id.* at 720-21 (discussing RAP 2.5(b)). In this respect, *Kruse* is no more helpful than *Williams* regarding placement of the burden of proof.

Finally, *Beckendorf* supports placing the burden of proof on Kofmehl, as the party seeking rescission. In *Beckendorf*, parents sought to rescind a deed given to their son and daughter-in-law on grounds of fraud. *See* 76 Wn.2d at 458. The Court held that the burden of proof of fraud was clear, cogent and convincing evidence, and that this burden was properly placed upon the parents, as the parties seeking rescission. *See id.* at 462. Because the parents failed to prove the elements of fraud to the requisite degree of certainty, the Court held that they were not entitled to rescission. *Id.* 462-64.<sup>5</sup>

Kofmehl cites page 465 of the *Beckendorf* opinion, which relates to a different issue. On the cited page, the Court granted the parents a life estate in the property that was the subject of their rescission action, based upon part performance, i.e., their continuous residence on, and use of, the property after they deeded it to their son and daughter-in-law. This portion of the opinion does not address, let alone undermine, the placement of the burden of proof on a party seeking rescission.

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<sup>5</sup> It is unclear whether the parents seeking rescission in *Beckendorf* were also seeking restitution. There is no reference to restitution in the text of the opinion. However, the Court does say that, given the parents' failure to prove their entitlement to rescission, "[w]e need not consider whether there is evidence to support a finding that the [parents] suffered damage" as a result of the fraud on which their claim for rescission was based. *See* 76 Wn.2d at 464.

**3. Kofmehl Ignores The Seminal Case Of *Johnson v. Puget Mill Co.*, Which Places The Burden Of Proof On The Buyer Seeking Rescission And Restitution.**

In *Johnson v. Puget Mill Co.*, 28 Wash. 515, 521, 68 Pac. 867 (1902), the Court denied rescission of a real estate contract and restitution of a down payment on the contract in the absence of evidence that the seller was *not* ready, willing and able to perform. Specifically, in describing the absence of evidence, the Court stated: “[t]here is no proof whatever that the respondent was not at all times, during the period covered by the terms of the contract, able, ready, and willing to fully perform its part thereof.” *Id.* On this basis, the Court denied recovery for the buyer. *Id.*; *see also* App. Br., at 20 (discussing *Johnson*).<sup>6</sup>

The result in *Johnson* constitutes a holding, albeit an implicit one, that the burden of proof is on the buyer seeking rescission and restitution. Because the buyer had the burden of proof, she was denied recovery based on the absence of evidence. If the seller had had the burden of proof, then the absence of evidence would have required the opposite result, i.e., the buyer would have been able to obtain her recovery.

Kofmehl does not address this aspect of *Johnson*, even though it is the seminal case in Washington for the rule that a buyer cannot obtain

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<sup>6</sup> Although the Court used the language “repudiate” and “recover” rather than “rescission” and “restitution,” the concepts appear to be the same, and they have been interpreted that way in subsequent cases.

rescission or restitution when the seller is ready, willing and able to perform as agreed. See *Schweiter*, 146 Wn.2d at 711-12, (quoting *Johnson*); *Browne*, 36 Wn.2d at 324 (same); *Dubke*, 29 Wn.2d at 487 (citing *Johnson*). The significance of the case is to completely undercut Kofmehl's reading of *Home Realty*.

**4. Placement Of The Burden Of Proof On The Buyer Is Consistent With The Policy Rationales For Prohibiting Rescission And Restitution When The Seller Is Ready, Willing And Able To Perform As Agreed.**

Two policy rationales for prohibiting rescission and restitution when the seller is ready, willing and able to perform can be discerned from the case law: (1) preventing a buyer from using his own refusal to perform as a means to escape a contractual obligation; and (2) protecting the seller from essentially being defrauded by application of the statute of frauds. See App. Br., at 18-21. Both of these policies are reflected in the text of the *Home Realty* opinion. See 146 Wn.App. at 240 (stating “[t]he rationale is that ‘a purchaser should not be allowed to use his own breach to escape his contractual obligations—in effect, to have an election not to perform what he has to do’”; quotation omitted); *id.* at 240 (stating “the contract cannot be considered void so long as the vendor, for the protection of whose rights the statute [of frauds] exists, is willing to treat and consider the contract good”).

The foregoing policies support placing the burden of proof on the buyer seeking rescission and restitution. Placing the burden of proof on the buyer ensures that there is, in fact, something more than a mere refusal to perform before rescission and restitution is granted. Otherwise, the buyer could obtain rescission and restitution based on nothing more than a failure of proof by the seller.

Moreover, placing the burden of proof on the buyer also protects the seller, consistent with the purpose of the statute of frauds. Otherwise, the statute of frauds could be used to perpetrate, rather than prevent, a fraud. Kofmehl does not address either one of these policies, nor does he identify any countervailing policies that would support placing the burden of proof on Baseline. His reading of *Home Realty* is at odds with these policies and should be rejected.

**5. Placement Of The Burden Of Proof On The Party Seeking Rescission And Restitution In This Context Is Consistent With The Normal Placement Of The Burden Of Proof In Other Contexts.**

Kofmehl's reading of *Home Realty* is contrary to the normal placement of the burden of proof in other contexts. The leading case outside of the statute of frauds context is *Gillmore v. Green*, 39 Wn.2d 431, 437, 235 P.2d 998 (1951). See 18 William B. Stoebuck & John W. Weaver, *Washington Practice: Real Estate* § 16.9 (2d ed.) (discussing

*Gillmore*). In *Gillmore*, a buyer sought rescission of a real estate contract and restitution on grounds that the seller failed to provide a title report as required by the contract, and also did not own the property that was the subject of the contract. *See* 39 Wn.2d at 432 (describing rescission and restitution claim). The Court denied rescission and restitution on grounds that the buyer failed to satisfy her burden of proving that the seller was not ready, willing and able to perform as agreed. *See id.* at 437 (stating: “[t]he burden is upon the plaintiff (vendee) to allege and prove that the vendor cannot perform when the time for performance arrives”; parentheses in original). Although Kofmehl cites *Gillmore*, he does not acknowledge its holding regarding placement of the burden of proof. *See* Resp. Br., at 22-23.

There is no reason why the placement of the burden of proof should be any different in the statute of frauds context than in *Gillmore*. The underlying rationale is the same; namely, preventing a buyer from using his own refusal to perform as a means to escape a contractual obligation. *See* 18 Stoebeck, *supra* § 16.9. If anything, the rationale for placing the burden of proof on the buyer is even stronger in the statute of frauds context, given the fact that the statute is intended to protect the seller. *See id.* (describing statute of frauds cases as stating an “even stronger expression” of the underlying policy rationale).

**B. Kofmehl Cannot Distinguish The Cases On Which Baseline Relies, Either As A Matter Of Law Or A Matter Of Fact.**

Kofmehl attempts to distinguish all of the cases on which Baseline relies, ostensibly on grounds that none of them involves genuine disputes between the parties regarding material terms of their agreement. *See* Resp. Br., at 23 & n.9 (citing *Johnson*, *Dubke*, *Brown*, *Gillmore*, *Schweiter*, and *Home Realty*). Because he now disagrees with Baseline regarding the extent of the property conveyed (i.e., whether it includes or excludes the 3.93-acre parcel in the northwest corner), and the accessibility of city sewer and water, Kofmehl reasons that it is impossible to determine whether Baseline was ready, willing and able to perform. *See* Resp. Br., at 24. This reasoning is non sequitur. Just because there is a factual dispute, the court is not thereby prevented from deciding whether the dispute is sufficiently genuine and material to avoid summary judgment, nor is it prevented from holding a trial or evidentiary hearing to resolve a dispute that is genuine and material.

Kofmehl's distinction is legally insufficient as well as logically problematic. There is no support for the distinction in any of the cases cited by either party. To the contrary, the Supreme Court's recognition in *Johnson*, 28 Wash. at 520-21, that the availability of rescission and restitution hinges upon proof whether the seller was not ready, willing and

able to perform, and the Court of Appeals' remand in *Home Realty*, 146 Wn.App. at 241-42, for a determination whether the seller was or was not ready, willing and able to perform, both confirm that the courts can and should resolve factual disputes regarding this issue. The recourse to factual proof and the existence of a burden of proof are premised on the potential for a factual dispute such as the one presented by this case.

Kofmehl's distinction is also factually untenable because at least some of the cases cited by Baseline involved disputes between the parties regarding the seller's readiness, willingness and ability to perform. For example, in *Johnson*, 28 Wash. at 516, the parties disputed whether the seller had title to the property. Similarly, in *Gillmore*, 39 Wn.2d at 432, the parties disputed whether the seller was excused from providing a title report under the terms of a real estate contract, and also whether the seller had title to the property. The precise grounds of these disputes admittedly differ from the grounds of the dispute in this case, but they still involve the seller's readiness, willingness, and ability to perform. The existence of the disputes belies Kofmehl's attempted distinction.

If Kofmehl's attempted distinction were correct, then the policy rationales for prohibiting rescission and restitution when the seller is ready, willing and able to perform would be compromised. If the mere existence of a factual dispute, no matter how colorable, required rescission

and restitution, then there would be no protection for the seller. The buyer would effectively be able to use his or her own refusal to perform as a means to escape his or her contractual obligation, and there would be strong incentive to manufacture such a dispute.

**C. Kofmehl's Reliance On *Hornback v. Wentworth* is misplaced.**

Kofmehl relies extensively on *Hornback v. Wentworth*, 132 Wn.App. 504, 132 P.3d 778 (2006), *rev. granted*, 158 Wn.2d 1025 (2007), *appeal dism'd*, for the proposition that a void contract gives rise, ipso facto, and in all circumstances, to rights of rescission and restitution. *See* Resp. Br., at 1, 12, 17, 18 & 20.<sup>7</sup> As an initial matter, *Hornback* did not purport to address the rule prohibiting rescission and restitution of a real estate contract when the seller is ready, willing and able to perform. It did not cite or discuss any of the authorities on which Baseline relies. As a result, it is simply inapplicable.

*Hornback* is distinguishable because it involved a claim of impossibility of performance of a real estate contract based on an intervening change in zoning laws. 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. This distinction finds support in the cases cited by Baseline because impossibility of performance would

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<sup>7</sup> Review was dismissed as improvidently granted in *Hornback* by an unpublished order of the Supreme Court, dated May 15, 2007.

necessarily preclude a finding that the seller was ready, willing and able to perform. It also finds support in the policy rationales underlying the cases cited by *Baseline*, which are not implicated when performance is thwarted by circumstances other than the conduct of the parties to the contract.

Kofmehl tries to equate the impossibility of performance in *Hornback* with what he describes as a “legal prohibition” against performance of the contract in this case based on the statute of frauds. *See* Resp. Br., at 18. This equation misapprehends the nature of the statute of frauds. The statute of frauds does not render a contract impossible to perform, illegal or void. *See* 18 Stoebeuck, *supra* § 16.9. Instead, it renders a contract merely voidable upon the motion of a party. *See id.*<sup>8</sup>

In any event, the reasoning of the *Hornback* decision itself is questionable. *Hornback* relied on *Gilmore v. Hershaw*, 83 Wn.2d 701, 704, 521 P.2d 934 (1974), for the proposition that “[v]oid or illegal real estate contracts create a common law right to rescission.” *See Hornback*, 132 Wn.App. at 513. However, *Gilmore* does not contain any such holding. Instead, the cited portion of *Gilmore* holds that former Ch. 58.16

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<sup>8</sup> *Accord Burt v. Heikkala*, 44 Wn.2d 52, 54, 265 P.2d 280 (1954) (stating real estate broker’s agreement that “was voidable under the statute of frauds” is not “a nullity”); *White River Lumber Co. v. Hoffman*, 122 Wash. 90, 91, 210 Pac. 32 (1922) (describing suretyship agreement as “voidable under the statute of frauds”); *Matzger v. Arcade Bldg. & Realty Co.*, 80 Wash. 401, 406, 141 Pac. 900 (1914) (indicating unacknowledged lease was “voidable under the statute of frauds”); *Johnson*, 28 Wash. at 518 (quoting argument that real estate contract “was voidable, not void” under the statute of frauds).

RCW did not provide a remedy of rescission to the vendee of an improper sale of unplatted land. *See Gilmore*, 83 Wn.2d at 704. It requires a dramatic inferential leap to go from this holding to the proposition for which *Hornback* cites *Gilmore*. At best, the proposition on which *Hornback* relies is merely assumed in *Gilmore* and constitutes dicta.

Neither *Hornback* (nor *Gilmore*) provides any authority for rescission and restitution in the circumstances presented by this case. Just as importantly, there is nothing in either case that would undercut the authority of the cases on which Baseline relies.

**D. Kofmehl Misreads *Goedecke v. Viking Invest. Corp.*, Regarding Accessibility Of City Sewer.**

Baseline relies on *Goedecke v. Viking Invest. Corp.*, 70 Wn.2d 504, 424 P.2d 307 (1967), for the proposition that a condition for “accessibility of city sewer” in the parties’ real estate contract is satisfied by existing easements. *See* App. Br. at 30-32. Kofmehl attempts to distinguish *Goedecke* on grounds that the parties in that case *agreed* that a condition “that public sewers are available to property” was satisfied by an existing right-of-way. *See* Resp. Br., at 31. There was no such agreement in *Goedecke*, and this distinction is factually incorrect.

The buyers in *Goedecke* alleged that the seller breached the availability-of-sewer condition of the parties’ real estate contract. *See* 70

Wn.2d at 505. The superior court found breach and awarded damages to the buyers. *Id.* at 506. The Supreme Court reversed, finding as a matter of law that the existence of a right-of-way satisfied the condition. In short, the entire *Goedecke* case was premised on the fact that the buyers and seller did *not* agree that the existing right-of-way satisfied the condition. The attempted distinction does not undermine Baseline's reliance on *Goedecke* in any respect.

### CONCLUSION

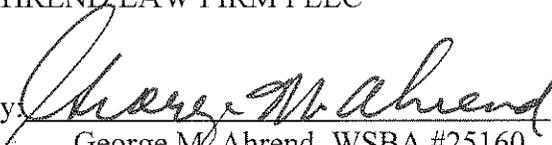
Based on the foregoing argument and authorities, Baseline asks the Court for the following relief:

1. Reverse the decision of the superior court;
2. Vacate the superior court orders granting summary judgment to Kofmehl, awarding him restitution and attorney fees and costs, and the judgment in his favor;
3. Enter or direct entry of summary judgment in favor of Baseline, dismissing Kofmehl's claims for rescission and restitution; and
4. Award attorney fees and costs to Baseline pursuant to RAP 18.1 and contract as the prevailing party.

Respectfully submitted this 26th day of July, 2011.

AHREND LAW FIRM PLLC

By

  
George M. Ahrend, WSBA #25160  
Attorney for Appellant

**CERTIFICATE OF SERVICE**

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On July 26, 2011, I served the Respondent with the document to which this is annexed as follows:

By  facsimile transmission to (509) 455-8734,  email to [mtucker@dunnandblack.com](mailto:mtucker@dunnandblack.com),  First Class Mail, postage prepaid,  Fed Ex, Priority Overnight, and/or  hand delivery, to:

Michael R. Tucker  
Dunn & Black, P.S.  
N. 111 Post, Ste. 300  
Spokane, WA 99201

Signed at Moses Lake, Washington this 26th day of July, 2011.



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