

No. 66571-5-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

WEDGEWOOD AT RENTON, INC., a Washington corporation,

Respondent/Plaintiff,

v.

WESTCOTT HOLDINGS, INC., a Washington corporation, and
VERCELLO, LLC, a Washington limited liability company,

Appellants/Defendants/Cross-Claim Plaintiffs,

v.

KOLIN TAYLOR and JANE DOE TAYLOR, husband and wife and their
marital community; and KBS DEVELOPMENT CORPORATION, a
Washington corporation,

Respondents/Cross-Claim Defendants.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. LeRoy McCullough)

BRIEF OF APPELLANTS

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I. INTRODUCTION

Some cases are easy and some are hard. This is an easy one. The primary issue on appeal is the enforceability of an amendment to a real estate purchase and sale agreement entered into by Appellants Westcott Holdings, Inc. and Vercello, LLC (collectively, “Vercello”), on the one hand, and Respondents Wedgewood at Renton, Inc. (“Wedgewood”), KBS Development Corporation (“KBS”) and Kolin Taylor (“Taylor”), on the other hand. It is undisputed that the parties’ intended to amend their agreement, that they all signed “Addendum G” for that purpose, and that closed a multi-million dollar land deal according to its terms. Indeed, and ironically as it would turn out, this case began when Wedgewood filed suit seeking a declaration that it had complied with Addendum G.

The case was assigned to Judge McDermott, who twice rejected Wedgewood’s motions for summary judgment and found that a trial was necessary to determine whether Wedgewood violated Addendum G. After the case was transferred to Judge McCullough, KBS and Taylor devised a new theory. They argued that—despite the parties’ intent; despite their conduct; despite their admissions to Judge McDermott; and despite a signed contract—Addendum G was invalid all along. Why? Because the parties signed Addendum G after their original agreement had expired. According to Respondents, it didn’t matter that the parties intended

Addendum G to revive and modify that agreement; they couldn't do so as a matter of law. Judge McCullough agreed, and dismissed the case.

Judge McCullough was wrong. No principle of law prohibited the parties from reviving and amending their contract by express agreement, and no case holds otherwise. The cases cited by Respondents below addressed a totally different issue: whether one party's reliance on another party's conduct can equitably extend a contract deadline under the doctrines of waiver or estoppel. But that law doesn't apply here. This case has nothing to do with waiver or estoppel. It has everything to do with fulfilling the parties' mutual intent, objectively manifested in an unambiguous signed agreement. The parties understood they had a valid contract; Judge McDermott understood that too. The judgment below must be reversed, and the case remanded for a trial on the merits.

II. ASSIGNMENTS OF ERROR AND ISSUES PRESENTED

This appeal presents two assignments of error. The trial court erred when (1) on October 29, 2010, it entered summary judgment in favor of KBS and Taylor and dismissed all claims of Vercello against KBS and Taylor (CP 700-703), and (2) on January 14, 2011, it entered summary judgment in favor of Wedgewood and dismissed all claims of Vercello against Wedgewood (CP 825-829). The issues presented are:

1. Whether the trial court erred as a matter of law when it concluded that the parties could not revive and modify their real estate purchase and sale agreement after the original expiration date of that agreement where it is undisputed:

a. The parties intended and mutually agreed to revive and modify the real estate purchase and sale agreement through an amendment (Addendum G) to that agreement;

b. Addendum G was signed by all the parties;

c. Addendum G expressly referred to the underlying purchase and sale agreement and incorporated it by reference; and

d. The parties treated Addendum G as an enforceable agreement, and substantially performed according to its terms.

2. Whether the trial court erred as a matter of law when it concluded that—even if Addendum G was enforceable—it violated the statute of frauds because it did not contain a description of the property.

3. Whether the trial court abused its discretion erred when it refused to find that Wedgewood, KBS and Taylor were judicially estopped from denying the enforceability of Addendum G.

III. STATEMENT OF THE CASE

A. **The Parties Enter Into Addendum G To Their Purchase And Sale Agreement; Addendum G Requires Wedgewood And KBS To Offer Vercello A Right Of First Refusal**

Wedgewood and KBS were the owners of several divisions on a plat located in Renton, Washington. CP 5; CP 129 (Taylor Decl., ¶ 3). On January 30, 2007, Wedgewood and Taylor, as president of KBS, entered into a Purchase and Sale Agreement (“PSA”) with Westcott, which subsequently assigned its interest in the PSA to its wholly-owned subsidiary Vercello. *Id.*; CP 241 (Edwards Decl., ¶ 3). Under the PSA, Vercello had a right to purchase 113 lots in the Wedgewood plat over the course of three separate closings. *Id.*; CP 5; CP 8-22 (PSA). The first closing occurred on schedule. CP 241 (Edwards Decl., ¶ 4).

Under the PSA and its amendments, the closing on the second set of lots was to occur no later than January 17, 2008. CP 581. Prior to the closing date, Wedgewood, KBS and Vercello engaged in negotiations to restructure the PSA in light of the significant changes in the housing market. CP 146 (Gilroy Decl., ¶ 3); CP 241-243 (Edwards Decl., ¶¶ 6-10). Those negotiations continued past the date originally set for the second closing and culminated in Addendum G, dated January 29, 2008. CP 253 (Addendum G); CP 244 (Edwards Decl., ¶ 13). Wedgewood, KBS (through Taylor) and Vercello signed Addendum G. CP 253

The parties intended Addendum G to both incorporate and amend portions of the PSA to reflect the terms of the new deal. The parties made this clear in the addendum's first paragraph:

The following is an Addendum to the Real Estate Purchase and Sale Agreement dated January 30, 2007 together with all related addendums and exhibits, by and between Vercello, LLC ("Purchaser" via Assignment) and Wedgewood at Renton, Inc. and KBS Development Corporation ("Sellers"). In the event of any inconsistencies between this Addendum and the Real Estate Purchase Agreement, the terms of this Agreement shall control. The Real Estate Purchase and Sale Agreement and all addenda thereto are collectively referred to as "this Agreement" ...

CP 253. Among its other provisions, Addendum G reduced the purchase price, set new deadlines for the closing on the second and third set of lots, and gave Wedgewood the right to market the third set of lots subject to a "right of first refusal" in favor of Vercello. *Id.*; CP 244 (Edwards Decl., ¶ 13). There is no expiration date on the right of first refusal. CP 253.

No one questioned the enforceability of Addendum G. The parties moved forward and closed on the sale of the second set of lots. CP 38. But in the fall of 2008, months before the deadline for Vercello to close on the third set of lots, and unbeknownst to Vercello, Wedgewood and Taylor began negotiations with American Classic Homes ("ACH") to discuss the possibility of ACH's acquiring lots included in the third closing. CP 255; CP 131 (Taylor Decl., ¶ 7); CP 148 (Gilroy Decl., ¶ 6). The negotiations resulted in a November 2, 2008 "memo of current understanding" between

ACH, Wedgewood and Taylor, in which ACH could purchase lots subject to Addendum G for less money and better terms. CP 259.¹

Under Addendum G, the deadline for Vercello to close on the third set of lots was January 6, 2009. CP 23. Because Vercello had no knowledge that Wedgewood and Taylor had negotiated a deal with ACH (that allowed ACH to undercut Vercello's house prices within the Wedgewood plat), Vercello elected not to close on the third set of lots. CP 273 (Donner Decl., ¶ 5). Apparently believing that Addendum G's right of first refusal expired on January 6, within three days, Wedgewood requested its counsel to prepare a contract to formalize the ACH deal. CP 261. On February 6, 2009 Wedgewood and ACH signed an agreement which set forth the same terms as the "memo of current understanding." CP 132 (Taylor Decl., ¶ 9); CP 263-271 (Wedgewood/ACH Agreement).

Upon learning that Wedgewood was planning to sell the lots to ACH, Vercello's attorneys put Wedgewood and Taylor on notice that such a sale, without affording Vercello a right of first refusal, would violate

¹ On remand, the evidence will show that Wedgewood, KBS and Taylor understood that the deal with ACH triggered Vercello's right of first refusal. In a telling October 2008 email from Taylor to ACH regarding the "terms of a mutually beneficial agreement," Taylor wrote: "I am not suggesting using this as an agreement (in fact, I insist on not using it), but it might be good at a future date (say early [sic] next year), to formalize an agreement" CP 255. Indeed, Taylor admitted that they did not present a similar deal to Vercello because Wedgewood believed the parties' "chemistry was not good." CP 345 (Taylor Decl., ¶ 7).

Addendum G to the PSA. CP 6; CP 51. Wedgewood's attorney wrote back, claiming that the deal with ACH did not trigger the right to first refusal because it occurred after January 6, 2009. CP 6. In other words, Wedgewood claimed that its obligations to Vercello under Addendum G had expired, not that Addendum G was unenforceable all along.

B. Wedgewood Files Suit Against Vercello And Seeks Summary Judgment; Wedgewood And Taylor Admit The Validity Of Addendum G; Judge McDermott Denies Wedgewood's Motion

Wedgewood vigorously advanced that same theory in court – at least until Taylor's and KBS's lawyers arrived on the scene. On March 3, 2009, Wedgewood filed a declaratory action against Vercello regarding the parties' rights under the PSA. CP 4-7. The case was assigned to the Honorable Richard F. McDermott. Wedgewood did not seek a declaration that Addendum G was somehow unenforceable *ab initio*. Rather Wedgewood asked the trial court only for a "judicial determination that Vercello's right of first refusal ... terminated on January 6, 2009 when Vercello failed to close its purchase of [the third set of lots]" CP 7.

Vercello answered and counterclaimed for specific performance and damages. CP 24-31. Vercello claimed that Wedgewood's deal with ACH, without affording Vercello a right of first refusal, violated

Addendum G and the implied duty of good faith and fair dealing. *Id.*² In its answer, Wedgewood did not deny the validity of Addendum G or assert any affirmative defenses going to its enforceability. CP 99-103.

Shortly thereafter, Wedgewood moved for summary judgment. CP 203-214. In its motion, Wedgewood admitted that the parties “entered into Addendum G to the [PSA] ... which amended the [PSA] ...” CP 204. The crux of its argument was that the right of first refusal granted to Vercello in Addendum G expired on January 6, 2009 or, if it didn’t, it would violate the Rule Against Perpetuities. *Id.*; CP 297. Wedgewood’s principal and Taylor (who was not yet a party) submitted declarations in support of the motion (CP 145-149 (Gilroy); CP 128-134 (Taylor)), both of which admitted that they negotiated and understood Addendum G to be an enforceable amendment to the PSA. CP 129; CP 146.

At the hearing, no one raised the issue of whether Addendum G was unenforceable because it was entered into after date originally set for the second closing. Indeed, both Wedgewood and the trial court assumed

² Vercello also filed a notice of lis pendens regarding the lots identified for purchase by ACH. CP 32-35. In its motion to cancel, Wedgewood did not challenge the enforceability of Addendum G; indeed, it conceded that “the [PSA] along with the Addenda *constitute an integrated contract*[.]” CP 119 (emphasis added). Rather, as it would in its unsuccessful summary judgment motions, Wedgewood simply argued that the right of first refusal had expired CP 36-47; CP 118-128. The trial court ultimately cancelled the lis pendens. CP 126-127.

the opposite, and the argument focused solely on when Addendum G's right of first refusal expired. RP (5/29/2009) at 1-33. Judge McDermott denied Wedgewood's motion for summary judgment so that the parties could conduct additional discovery. RP (5/29/2009) at 29; CP 314-315.

Several months later, Wedgewood renewed its motion and made essentially the same arguments as before: that negotiations with ACH did not trigger Addendum G's right of first refusal, which expired on January 6, 2009. CP 318-334. Once again, Wedgewood's principal and Taylor filed declarations that did not question the enforceability of Addendum G. CP 335-336 (Gilroy Decl., ¶¶ 2, 3); CP 342-343 (Taylor Decl., ¶¶ 4, 5). And, once again, Judge McDermott denied Wedgewood's motion and specifically refused to find that Vercello's right of first refusal, as embodied in Addendum G, expired on the January 6, 2009 deadline for the third closing. RP (11/12/2009) at 29; CP 477-480; CP 481.³

C. KBS And Taylor Are Added As Parties And Move For Summary Judgment On The Theory That Addendum G Was Unenforceable; Judge McCullough Grants The Motion

After Judge McDermott denied Wedgewood's renewed motion, Vercello added KBS and Taylor (who also served as Vercello's real estate agent in the transactions) as parties and asserted cross-claims for breach of

³ The trial court also concluded that the Rule Against Perpetuities did not apply to void the right of first refusal. CP 478. Neither Wedgewood nor Taylor requested cross-review of that ruling.

Addendum G and the implied duty of good faith and fair dealing, as well as for breach of fiduciary duty and tortious interference. CP 352-354; CP 371-386. In their separate answers, both KBS and Taylor admitted that Addendum G amended the PSA. CP 495; CP 485-486 (“KBS Development Corporation admits that the parties agreed to Addendum G which was ... an addendum to the existing agreement ...”).

On September 13, 2010, the case was transferred from Judge McDermott to the Honorable LeRoy McCullough. CP 502. Four days later, KBS and Taylor separately moved for summary judgment. CP 503-514; CP 556-576. Ignoring all that had been said before, KBS and Taylor claimed that Addendum G was void from inception because it was entered into after January 17, 2008—the original date for the second closing under the PSA. KBS and Taylor argued that—even though the parties mutually agreed to amend the PSA, signed Addendum G to confirm that fact, closed the second set of lots per its terms, and never questioned its enforceability with Judge McDermott—Addendum G was unenforceable as a matter of law because, “[n]o matter what the parties did after the [original PSA] became defunct, they could not resurrect it.” CP 572.

Vercello opposed the motion and, additionally, pointed out that KBS’s and Taylor’s position was contrary to the prior sworn declarations Taylor had filed in support of Wedgewood’s unsuccessful motions. CP

580-593; CP 655-681. To Vercello's astonishment, Judge McCullough accepted KBS's and Taylor's argument. CP 700-703. In his oral ruling, Judge McCullough concluded that Addendum G could not extend the PSA because "the revival effort took place after January 17th, 2008 when the agreement had already basically expired." RP (10/29/2010) at 8. He further concluded that Addendum G "could not constitute a legally binding contract," because it did not contain "the legal description of the property," and therefore did not satisfy the statute of frauds. *Id.*

D. Wedgewood Repudiates Its Prior Theory Of The Case And Moves For Summary Judgment On The Same Grounds As KBS And Taylor; Judge McCullough Grants The Motion

Wedgewood quickly jumped on the bandwagon. A week or so after Judge McCullough dismissed KBS and Taylor, ignoring its prior legal theory and representations to the court, Wedgewood filed a motion for summary judgment, arguing that "[w]hile this situation is not quite res judicata because Wedgewood is not the same entity as is Taylor or KBS, it stands in exactly the same legal position," and therefore should be dismissed for the same reasons as KBS and Taylor. CP 704-707.

Vercello opposed and asked the court to reverse its prior ruling regarding the enforceability of Addendum G. In addition, Vercello argued that Wedgewood had already admitted—both in its pleadings and sworn statements—that Addendum G was an enforceable contract and, as such,

the doctrine of judicial estoppel barred Wedgewood from changing its position. CP 718-735. After a hearing, the court gave the parties an opportunity to submit additional briefs on the incorporation by reference doctrine. CP 746; RP (1/7/2011) at 20-22. Thereafter, without another hearing or a reasoned order, Judge McCullough granted Wedgewood's motion and dismissed Vercello's claims in their entirety. CP 825-829.⁴

Vercello filed a timely notice of appeal. CP 830-843.

IV. ARGUMENT

A. Standards of Review.

This Court reviews summary judgment de novo, engaging in the same inquiry as the trial court and viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 501, 115 P.3d 262 (2005). Summary judgment is proper if the pleadings, depositions, answers to interrogatories, admissions, and affidavits show that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. CR 56(c); *Hearst*, 154 Wn.2d at 501.

⁴ At the same time, the court severed and referred to mandatory arbitration a separate lawsuit between Vercello and Wedgewood, Case No. 10-2-30119-4 KNT, that had been previously consolidated with this case for purposes of trial. CP 828. Commissioner Verellen ruled that the pendency of that separate suit does not affect appealability in this case.

This Court reviews a trial court's decision to apply judicial estoppel for abuse of discretion. *Miller v. Campbell*, 164 Wn.2d 529, 536, 192 P.3d 352 (2008). "Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Id.* (quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

B. Addendum G Is An Enforceable Agreement To Revive And Modify The Purchase And Sale Agreement.

The core issue on appeal is straightforward: can the parties to an expired contract revive and modify the contract by mutual agreement, objectively manifested by a signed amendment that incorporates the underlying contract by reference? The answer is yes. For the reasons that follow, Judge McCullough's conclusion that an amendment to an expired contract is *per se* invalid improperly defeats the parties' intent, and is contrary to law and common sense. The decision below must be reversed.

1. The Parties Intended To Revive And Modify The PSA When They Signed Addendum G.

There is no dispute that the parties intended Addendum G to be an enforceable amendment to the PSA. Where, as here, the facts are not in dispute, interpretation of a contract is a question of law. *Tyrrell v. Farmers Ins. Co.*, 140 Wn.2d 129, 132-33, 994 P.2d 833 (2000). The

primary goal in interpreting a contract is to ascertain and give effect to the parties' intent. *Berg v. Hudesman*, 115 Wn.2d 657, 663, 801 P.2d 222 (1990); *Paradise Orchards v. Fearing*, 122 Wn. App. 507, 516, 94 P.3d 372 (2004). Washington follows the objective manifestation theory of contracts and, thus, in order to form a valid contract, there must be an objective manifestation of mutual assent. *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 177-78, 94 P.3d 945 (2004).

Neither mutual assent nor the parties' intent is an issue here. When the second closing did not occur as scheduled, the parties could have walked away from their original PSA. They chose not to. Instead, they negotiated a modified deal that, among other things, revived and extended the PSA deadlines for the second and third closings and granted Vercello a right of first refusal. CP 129-130 (Taylor Decl., ¶ 5); CP 146 (Gilroy Decl., ¶ 3); CP 244 (Edwards Decl., ¶ 13). The parties objectively manifested their mutual assent to a modified PSA according to these terms in the best way possible: through a written agreement—Addendum G—signed by the principals of Wedgewood, KBS and Vercello. CP 253.

While the parties dispute the scope of the right of first refusal embodied in Addendum G (something that will be decided on remand), there is no dispute that Addendum G was intended to amend the PSA:

The following is an Addendum to the Real Estate Purchase and Sale Agreement dated January 30, 2007 together with

all related addendums and exhibits, by and between Vercello, LLC (“Purchaser” via Assignment) and Wedgewood at Renton, Inc. and KBS Development Corporation (“Sellers”). In the event of any inconsistencies between this Addendum and the Real Estate Purchase Agreement, the terms of this Agreement shall control. The Real Estate Purchase and Sale Agreement and all addenda thereto are collectively referred to as “this Agreement” ...

CP 253. Nor can there be any dispute that Addendum G was intended to revive and extend the duration and deadlines of the PSA itself: “The Second Closing shall occur on or before Thirty Five (35) days from Mutual Acceptance of this Addendum G” and “The Third Closing ... shall be on or before January 6, 2009.” *Id.*⁵

To be sure, all the parties believed that Addendum G amended the PSA. CP 129-130 (Taylor Decl., ¶ 5); CP 146 (Gilroy Decl., ¶ 3); CP 244 (Edwards Decl., ¶ 13). After it was signed, they closed on the second set of lots (CP 38) and, as discussed below, Wedgewood and Taylor repeatedly admitted its enforceability during the proceedings below. Indeed, even after KBS and Taylor convinced Judge McCullough to void the addendum on legal grounds, Wedgewood’s counsel told the court, “[r]eality is both sides believe that Addendum G was an addendum to the

⁵ Indeed, Addendum G sets forth only one condition for its enforceability: “This Addendum must agreed upon by Purchaser, executed and delivered to Purchaser by delivery fax or email by 5:00 PM January 30th 2008 or this addendum is void and the Purchase and Sale Agreement which is the subject of this addendum shall be void.” CP 253. It is undisputed that this sole condition was satisfied.

real estate purchase and sale agreement and extend the duration of the real estate purchase and sale agreement[.]” RP (1/7/2011) at 14. Exactly. The ruling below must be reversed to give effect to the undisputed mutual intent of the parties to revive and modify the PSA through Addendum G.

2. The Parties May Mutually Agree To Amend A Contract After Its Date Of Expiration.

The trial court ignored the parties’ intent and voided Addendum G as a matter of law. Relying on “black letter law” that doesn’t exist and waiver and estoppel cases that don’t apply, KBS and Taylor argued that once the PSA expired, the parties were “legally incapable” of reviving it—even though there was no dispute that the parties agreed to do just that, and did so in a signed writing. Judge McCullough bought the argument wholesale, which Wedgewood later piggybacked on to gain its own dismissal. RP (10/29/2010) at 8; CP 700-703; CP 825-829. Put simply, the purported rule of law espoused by KBS and Taylor—and adopted by the trial court—does not exist and is flat wrong.

“With contracts, there can be life after death.” *Kroll v. Doctor’s Associates, Inc.*, 3 F.3d 1167, 1170 (7th Cir. 1993). All that is required is an agreement to do so, and that agreement can come after the contract’s original expiration date. *Id.* at 1169-70 (parties revived contract based on “meeting of the minds” reached 6 months after expiration); *Curreri v. Heritage Prop. Invest. Trust, Inc.*, 48 A.D.3d 505, 506-507, 852 N.Y.S.2d

278 (N.Y. 2008) (parties revived contract by “amendment ... agreeing to extend the duration of that contract” reached 11 months after expiration); *Kahler, Inc. v. Weiss*, 539 N.W.2d 86, 89 (S.D. 1995) (“Though the original listing agreement expired on June 1, 1991, Weiss and Kahler extended it by executing an amendment on June 3, 1991.”). As described above, there is no dispute that the parties agreed to revive the PSA.

Washington courts recognize this too. In *Mid-Town Ltd. P'ship v. Preston*, 69 Wn. App. 227, 848 P.2d 1268 (1993), the parties' purchase and sale agreement had a closing date of October 31, 1988. When the deal did not close, “both parties could have walked away from the agreement because, by its own terms, the agreement had expired.” *Id.* at 235. Like here, however, they did not walk away, but rather signed a post-expiration addendum dated April 26, 1989 that moved the closing date to June 1, 1989. *Id.* at 230. This Court held that the addendum revived the parties' agreement and extended it to June 1. *Id.* at 232 (“except for the changes specifically set forth in the addendum, all other terms and provisions of the sale agreement remained in effect. The addendum expressly so provides”). The only issue was whether the June 1 date (not the October 31 date) could be extended by waiver or estoppel. *Id.* at 233-36.

Mid-Town reveals the distinction between a post-expiration *agreement* to extend a deadline, on the one hand, and a party's reliance on

another's post-expiration *conduct* to extend a deadline through waiver or estoppel, on the other hand—a distinction Judge McCullough missed. As *Mid-Town* and other cases show, the former is sufficient, but the later is not. *Id.* at 235 (“once a termination date expires, in the absence of an existing waiver or estoppel the agreement is dead”); *Uznay v. Bevis*, 139 Wn. App. 359, 368, 161 P.3d 1040 (2007) (“absent Sawyer’s signature or actions ... that unequivocally evince an intention to waive her signature, the PSA expired”); *Nadeau v. Beers*, 73 Wn.2d 608, 610, 440 P.2d 164 (1968) (“Payment was not tendered until after the agreement by its terms had expired.”). Vercello doesn’t rely on waiver or estoppel to extend the PSA, and—in light of the parties’ express agreement—doesn’t have to.

The Supreme Court’s decision in *Pavey v. Collins*, 31 Wn.2d 864, 199 P.2d 571 (1948), is instructive on this point. There, the parties’ brokerage contract expired on December 31, 1946. *Id.* at 866. On January 12, 1947, the owner sent the broker a letter confirming that the contract had expired, but inviting the broker continue efforts to locate a buyer. *Id.* When the broker later found a buyer, the broker sued the owner for a commission pursuant to the expired contract. When considering whether the letter extended the brokerage contract, the Court stated in part:

[W]hen the contract has terminated or been extinguished, it is no longer subject to extension, for extension implies an existing agreement. *To bring the terms of an extinguished*

contract into renewed existence requires a new contract embodying such terms.

Id. at 870 (emphasis added). The Court rejected the broker's argument that the January 12 letter—even assuming it incorporated the expired contract by reference—constituted a “new contract” because it was never signed by the agent, expressly confirmed the expiration of the original contract and, perhaps most importantly, did not obligate the owner or agent to do anything whatsoever. *Id.* at 871-872.

The agreement missing in *Pavey* exists here. Whether viewed as an amendment to the PSA, or a new deal incorporating the PSA by reference, Addendum G successfully revived and modified the PSA. *See Brust v. McDonald's Corp.*, 34 Wn. App. 199, 207, 660 P.2d 320 (1983) (“Since the 1973 amendment to [the] lease refers to the 1969 lease, they should be read in conjunction with each other”); *Turner v. Wexler*, 14 Wn. App. 143, 148-49, 538 P.2d 877 (1975) (“Where a writing refers to a separate agreement, an agreement or so much of it as referred to should be considered as part of the writing.”). Addendum G refers to and incorporates the PSA, which it modifies in specific ways. CP 253. The parties made it clear that they intended the PSA, prior amendments *and Addendum G* to constitute their “Agreement.” *Id.* (“The Real Estate Purchase and Sale Agreement and all addenda thereto are collectively referred to as ‘this Agreement.’”). That agreement is plainly enforceable.

3. Addendum G Satisfies The Statute Of Frauds.

For similar reasons, this Court can readily reject the trial court's additional ruling that—even if Addendum G was otherwise enforceable—it violated the statute of frauds because it did not contain a “legal description of the property.” RP (10/29/2010) at 8. There is no dispute that the original PSA properly described the property subject to the second and third closings. CP 8-22. As an amendment to the PSA, and/or by incorporating the PSA by reference, the parties' entire agreement satisfied the statute of frauds. Indeed, Wedgewood's counsel conceded this point to Judge McDermott before later disavowing the enforceability of Addendum G.⁶ The parties did not have to reinvent the wheel.

It is axiomatic that “[c]ompliance with the Statute of Frauds is not limited to a single, signed piece of paper, but may be evidenced by several documents clearly related.” *Bigelow v. Mood*, 56 Wn.2d 340, 341, 353 P.2d 429 (1960). This includes documents referred to or incorporated by reference in the signed paper. *Bingham v. Sherfey*, 38 Wn.2d 886, 889, 234 P.2d 489 (1951) (“to comply with the statute of frauds, a contract ... must contain a reference to another instrument which does include a

⁶ RP (11/12/2009) at 21 (“It's got to be read in conjunction with the real estate purchase agreement. ... [Y]ou have to look at the real estate purchase and sale agreement to glean that's necessary for Addendum G, such as the identification of the remaining lots.”).

sufficient description [of the land]”); *Knight v. American Nat. Bank*, 52 Wn. App. 1, 5, 756 P.2d 757 (1988) (same). The PSA and Addendum G must be read together. The lots subject to Addendum G are sufficiently described in the PSA, and no one has ever contended otherwise. The trial court’s judgment must be reversed for this reason as well.⁷

C. The Doctrine Of Judicial Estoppel Prevents Respondents From Taking Inconsistent Positions Regarding Addendum G.

Although this Court does not need to reach the issue, the doctrine of judicial estoppel provides yet another ground for reversal. The doctrine prevents a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position in the same or another proceeding. *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007). “The purposes of the doctrine are to preserve respect for judicial proceedings without the necessity of resort to the perjury statutes; to bar as evidence statements by a party which would be contrary to sworn testimony the party has given in prior judicial proceedings; and

⁷ As Vercello noted below, the doctrine of part performance also removes Addendum G from the statute of frauds. Under the doctrine, a court may enforce a contract subject to the statute if a party can show: “(1) delivery and assumption of actual and exclusive possession; (2) payment or tender of consideration; and (3) the making of permanent, substantial and valuable improvements, referable to the contract.” *Pardee v. Jolly*, 163 Wn.2d 558, 567, 182 P.3d 967 (2008). All three are present here. It is undisputed that, pursuant to Addendum G, Vercello paid Wedgewood nearly \$9 million and received statutory warranty deeds to 41 lots, which it subsequently developed and sold.

to avoid inconsistency, duplicity, and the waste of time.” *Seattle-First Nat. Bank v. Marshall*, 31 Wn. App. 339, 343, 641 P.2d 1194 (1982).

The primary, but non-exhaustive, factors for judicial estoppel are (1) whether the party’s “later position is clearly inconsistent with the [its] earlier position,” (2) “judicial acceptance of the second position would create a perception that either the first or second court was misled by the party’s position,” and (3) “the party asserting the inconsistent position would obtain an unfair advantage or imposes an unfair detriment on the opposing party if not estopped.” *Ashmore v. Estate of Duff*, 165 Wn.2d 948, 951-52, 205 P.3d 111 (2009). All three factors are present here.

First, Wedgewood, KBS and Taylor (individually and as president of KBS) admitted that Addendum G was an enforceable agreement, which was “clearly inconsistent” with their later position. Wedgewood filed a declaratory action predicated on the enforceability of Addendum G (CP 4-7); Wedgewood, KBS and Taylor admitted Addendum G’s validity when answering Vercello’s counter- and cross-claims (CP 99-103; CP 482-491; CP 492-499); Wedgewood’s principal and Taylor filed numerous sworn declarations, all of which described Addendum G as a valid amendment that revived and extended the PSA (CP 129-134; CP 145-149; CP 335-340; CP 341-348); and Wedgewood’s attorney said the same thing to Judge McDermott. CP 119 (PSA and Addendum G were an “integrated

contract”); RP (11/12/2009) at 20 (“the right of first refusal terminated on January 6th along with the real estate sales and purchase agreement”).

Second, allowing Wedgewood, KBS and Taylor to disavow the fundamental factual underpinning of the case would create a perception that either Judge McDermott or McCullough, or both, were misled. This concern is particularly significant given the fact that Respondents did not raise their unenforceability argument until after the case was transferred away from Judge McDermott—who had twice rejected Wedgewood’s motions for summary judgment. CP 314-315; CP 477-480. Although Judge McCullough did not overrule Judge McDermott *per se*, his later rulings cannot be squared with Judge McDermott’s earlier rulings.

Third, and finally, Wedgewood, KBS and Taylor would obtain an “unfair advantage” and Vercello would suffer an “unfair detriment” absent estoppel. As discussed above, all of the parties rightly understood Addendum G to be enforceable; they all relied on it when they finalized the second closing; they all sued and counter-sued on it; they all admitted its validity in court; and Judge McDermott concluded that Vercello was entitled to a trial on the merits to determine whether the Respondents violated Addendum G when they secretly negotiated with ACH without affording Vercello a right of first refusal. Wedgewood, KBS and Taylor should not be permitted to have their cake and eat it too. They cannot

admit to the enforceability of Addendum G when they seek to benefit from its terms (*i.e.*, the second closing), only to deny its very existence when confronted with evidence that they violated its terms (*i.e.*, the right of first refusal). Such a result would be unfair in every sense of the word.

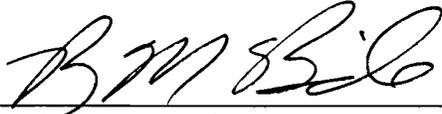
V. CONCLUSION

The parties wanted to restructure their deal. They negotiated an agreement to do so. They confirmed that agreement in a signed writing. They closed a multi-million dollar real estate transaction according to the agreement's terms. And when a dispute arose, they asked the court to interpret and enforce the agreement. Judge McDermott determined that a trial was necessary to resolve that dispute. Judge McCullough's ruling ignores all of this, and effectively rewrites history. In the end, his ruling begs the question of what more could the parties have done?

Nothing. They did it right the first time. There is no rule of law that prevents the parties from agreeing to revive and/or amend an expired contract—through an addendum or a new contract incorporating the old. To hold otherwise would defeat the parties' undisputed intent and create an arbitrary and unprecedented exception to the ordinary rules of contract. This is not a case about unilateral conduct creating a waiver or estoppel. This is a case about mutual assent. The judgment below must be reversed.

RESPECTFULLY SUBMITTED 11th day of April, 2011.

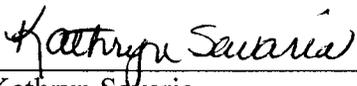
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CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2011, I caused to be served a copy of the foregoing document on the following person(s) in the manner indicated below at the following address(es):

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Mr. Joseph C. Calmes Hanson Baker Ludlow & Drumheller, P.S. 2229 112th Avenue NE, Suite 200 Bellevue, WA 98004-2936	<input type="checkbox"/> by Electronic Mail <input type="checkbox"/> by Facsimile Transmission <input type="checkbox"/> by First Class Mail <input checked="" type="checkbox"/> by Hand Delivery <input type="checkbox"/> by Overnight Delivery
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