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No. 66723-8-I

COURT OF APPEALS  
WASHINGTON STATE  
DIVISION I

224 WESTLAKE, LLC

*Respondent,*

v.

ENGSTROM PROPERTIES, LLC

*Appellant.*

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APPELLANT'S REPLY BRIEF

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**I. WESTLAKE'S RESPONSE OMITTS CRITICAL FACTS, FAILS TO SUPPORT FINDINGS OF FACT, AND MISSTATES OTHER FACTS IN THE RECORD.**

Although Westlake's Response claims that it asked for an extension of 30 days to test the soil in the basement of the Property, Response pp 4, 15, 33, it omits mention that its request for a 30 day extension expired in less than two hours. On February 27, 2009, Westlake proposed a March 31, 2009 closing date. Ex 20. Less than two hours later, Westlake's attorney "corrects" his prior request and demands an open-ended "30 days from the date our expert confirms the property is clean." Ex 255. On March 17, Westlake proposed an even more extended, but equally indefinite closing: "45 days after the report from our consultant that the site is indeed clean." Ex 257. Engstrom's responses to Westlake make clear that its objection to Westlake's requests are that the Closing Date is left open-ended when Engstrom was insecure about Westlake's financial ability to close. Ex 21<sup>1</sup>.

Left unexplained by Westlake is why it needed to extend closing 30 or 45 days *after* its expert confirmed the site was clean if it was truly prepared to close. Although Westlake attempted to obtain loans for closing and

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"Engstrom Properties very much wants the sale to close, and will work with your client to the extent it is reasonable. Your client's request, however, for a virtually open-ended extension, particularly when Engstrom has become insecure about your client's financial ability to complete the purchase, is not acceptable. The last minute cancellation by your client of today's confirmatory testing only serves to make Engstrom more fearful that the real issue here is not a clean site, but instead your client's financial inability to close." Engstrom's attorney's letter to Westlake's attorney on March 4, 2009, ex 21. See also ex 46.

construction, it was never able to get one. RP 337, 341. Westlake's attorney admitted that financing was a problem. Ex 255. The POA, however, has no financing contingency provision to allow Purchaser additional time to obtain financing. Ex 1. The Purchase Option Agreement (POA), ex 1 §3.5, allows only for a reasonable extension to complete tank removal, clean up, and testing, but not to obtain financing. (Because §3.5 is cited frequently, it is reproduced in Appendix A, with the anti-assignment provision, § 13).

While Westlake defends the trial court's Conclusions 12 and 15, CP 363, by reasserting that Engstrom gave no notice of commencement or completion, Response p 31, Westlake does not cite to the record to support the trial court or its own assertions. Westlake cites nothing at all to support its assertion or the trial court's finding that Engstrom gave no notice of completion. Westlake, Response p 31, cites to "RP 43, 44, 179, 247, 383-92" for its contention that Engstrom gave no notice of commencement. These citations do not support the contention.<sup>2</sup>

Similarly, Westlake asserts that Engstrom refused to extend the

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At RP 43-44, Charlie Laboda, Westlake's project manager, initially asserts he received no written notice, but does admit receiving actual notice. Then, at RP 98, he contradicts his testimony by admitting receipt of an email notice, ex 251. The citation to RP 179 is to Michael Corliss's testimony in which he does not mention notice at all. Similarly, the citation to RP 247 is to Paul Riley's testimony in which he does not mention notice at all. The citation to RP 383-92 is to testimony about Engstrom's extended excavation in February 2009, but not the commencement of tank removal and clean up in October 2008.

closing date. (Response pp 16, 33.) Westlake, however, cites no evidence that Engstrom refused to extend closing. The best that can be said for Westlake's citations to exhibits 16, 17, 19-23 is they show that Engstrom proposed March 6 2009 as a reasonable extension and did not agree to Westlake's proposed open-ended extensions. These are not refusals to extend closing.

When findings of fact are challenged, the reviewing court must necessarily search the record to determine whether substantial evidence supports the challenged finding, so that "It also behooves the respondent to direct the court to substantial evidence in support of the challenged findings." *Structurals Northwest, Ltd. v. Fifth & Park Place, Inc.* 33 Wn.App. 710, 717, 658 P.2d 679 (1983). Westlake's failure to do so demonstrates that there is no substantial evidence to support these findings.

Westlake dishonestly claims that Engstrom refused to permit any more than *four* days "to arrange for boring, testing and an analysis and report of the findings." Response 33. On February 23, 2009 when Engstrom notified Westlake of the completion of the cleanup and suggested closing be extended to March 6, 2009, a period of twelve days remained for Westlake to arrange for boring, testing, and analysis. Ex 16. Given that Westlake's consultants had twice taken samples and obtained test results in two days, ex 8, 10, 26, RP 114-15, Westlake had adequate time to conduct any testing it

desired.

Westlake also dishonestly asserts that Evergreen Capital Trust (ECT) was a guarantor for Westlake. Response pp 8, 10, 16, 35. None of its citations to the record support that ECT was a guarantor of Westlake's or IPDC's obligations to Engstrom. To be clear, ECT had no binding contractual obligation to Engstrom to guaranty IPDC's or Westlake's performance. *See*, POA, ex 1. Engstrom had no guaranty or any other practical remedy for Westlake's default because IPDC was inactivated,<sup>3</sup> RP 29, Westlake has no assets, RP 187, and ECT and all other members of the Investco family are strangers to the POA.<sup>4</sup> Indeed, none of the companies using the name "Investco" has ever owned any assets, RP 26, and none were guarantors of Westlake's performance of the POA.

Westlake also dishonestly claims that it is entitled to the return of its "down payments" as damages. Response pp 39, 40. Westlake made option

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Charlie Laboda testified that IPDC had become "inactive," and "Due to economic conditions, and the need to tighten the belt, Investco Financial Corporation assumed the responsibility of IPDC." RP 29.

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Westlake's lengthy and irrelevant description of the reputation, financial strength and experience of the companies comprising the "Investco family" appears intended to demonstrate that parties who deal with Investco need have no financial concern. The Investco family capitalized on Investco's reputation by sending every communication to Engstrom, whether letter or email, on Investco letterhead. *See*, e.g., ex 3, 4, 5, 9, , 11, 26. The danger to parties who deal with the Investco family is that there is no meaningful recourse when Investco decides to default, and no way to know Investco's true history when Investco adopts the seller's name as the entity which can default without recourse.

payments, but no down payments. It is clear from Westlake's Response that it knows the difference between option payments and down payments and that the law treats them differently. The Option Price is not ever converted to a down payment. Instead, the Option Price would only be "credited to the Purchase Price at Closing in the event Purchaser elects to exercise its Purchase Option and close the purchase of the Property." Ex 1 § 2.1(d).

Westlake clouds the chronology of events by inserting words such as "then," "again," and "repeatedly" to falsely imply that one event followed another or that there multiple events when there were not. Just one example occurs on page 4 of the Response where Westlake uses the word "again" five times in the first paragraph, ending with, "And again, Engstrom covered the site with concrete, which caused Westlake's consultant – again – to undertake additional time and expense to drill through the concrete to again test the soil." Although Westlake's consultant Riley did drill through concrete to take samples, it did so only once. Prior closing the excavation with concrete in November 2008, Engstrom invited Laboda's input regarding scheduling Ex 259. Laboda did not respond. RP 497. When Riley finally returned to the site six weeks later, on January 14, 2009, Engstrom had understandably closed the excavation and Riley drilled through the concrete. Riley never returned to the site again after taking samples in January. RP 274, 276.

In order to clarify sequences and time frames which may be confused

by Westlake's Response, Engstrom submits a Chronology, supported by citations to the record, in Appendix A to this Reply.

**II. BECAUSE NO VALID ASSIGNMENT OCCURRED, WESTLAKE HAS NO CLAIM AGAINST ENGSTROM.**

**A. ENGSTROM MAY PROPERLY APPEAL DENIAL OF SUMMARY JUDGEMENT BASED UPON AN ISSUE OF LAW.**

Westlake's argument that Engstrom may not appeal denial of its summary judgment motion is without merit. Westlake is correct that denial of summary judgment cannot be appealed following a trial if the denial was based solely upon the need to resolve disputed material facts. *Johnson v. Rothstein*, 52 Wn.App. 303, 304, 759 P.2d 471 (1988). "However, such an order is subject to review 'if the parties dispute no issues of fact and the decision on summary judgment turned solely on a substantive issue of law.'" *Kaplan v. Northwestern Mut. Life Ins. Co.*, 115 Wn.App. 791, 800, 65 P.3d 16, 21 (2003), *review denied*, 151 Wn.2d 1037, 95 P.3d 351 (2004), quoting *University Village Ltd. Partners v. King County*, 106 Wn.App. 321, 324, 23 P.3d 1090, *review denied*, 145 Wn.2d 1002, 35 P.3d 381 (2001).

*McGovern v. Smith*, 59 Wn.App. 721, 735, n.3, 801 P.2d 250, 257 (1990), distinguished *Johnson*, relied upon by Westlake. *McGovern* first observed that *Johnson* reserved the issue of whether denial of summary judgment on a substantive legal issue is reviewable. *McGovern* then relied upon other decisions of this Court which review denial of a summary

judgment motion following a trial when the denial was on legal grounds. *Id.*

The trial court's denial of Engstrom's summary judgment motion may superficially appear to be based upon a dispute of material facts.<sup>5</sup> The disputed facts, however, only become material issues of fact through the trial court's underlying error of law. The trial court's legal conclusion that the requirement of reasonable consent "still exists" after Westlake breached the anti-assignment clause is a determination of a legal issue. Had the trial court correctly determined that Westlake could not enforce the provision it breached, the reasonableness of consent was not an issue. Engstrom's appeal of the denial of its motion for summary judgment is based upon the purely legal issue of whether, following the breach of the anti-assignment provision, Westlake may enforce the very provision it previously breached.

**B. WESTLAKE CANNOT ENFORCE THE ANTI-ASSIGNMENT CLAUSE WHICH IT PREVIOUSLY BREACHED.**

It is black letter law of contracts that, "A party is barred from enforcing a contract that it has materially breached." *Rosen v. Ascentry Technologies, Inc.* 143 Wn.App. 364, 369, 177 P.3d 765, 767 (2008), citing

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The order denying Engstrom's motion states, "1. The Real Estate Option Agreement does not allow assignment without Engstrom's consent on these facts, where Investco/Purchaser did not own 51% of 224 Westlake. Motion is granted on this basis.

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"3. Engstrom cannot reasonably withhold consent to assignment, according to the Agreement. Even though he was not asked at the time of the Assignment, this requirement still exists. Genuine issues of material fact preclude judgment on this issue." CP 157-58.

*Bailie Communications, Ltd. v. Trend Bus. Sys.*, 53 Wn.App. 77, 81, 765 P.2d 339 (1988) (“[I]t is rare that the breaching party can hale the other into court to enforce the agreement.”). The general rule is “that a breaching party cannot demand performance from the nonbreaching party.” *Parsons Supply, Inc. v. Smith*, 22 Wn.App. 520, 523, 591 P.2d 821 (1979).

Furthermore, it is the general rule in nearly all jurisdictions that a party to a contract cannot breach it, and thereby secure for himself some right or advantage to the detriment of the other party thereto. . . .

Among a great number of cases cited as supporting that rule are our own cases of *Bock v. Celleyham*, 100 Wash. 545, 171 P. 525; *Rafferty v. Gaston*, 118 Wash. 689, 204 P. 595; *Kane v. Gwinn Investment Co.*, 123 Wash. 320, 212 P. 256.

*Lea v. Young*, 168 Wash. 496, 507, 12 P.2d 601, 605 (1932). *See also*, *Williams v. Wright*, 68 Wash. 341, 345, 123 P. 446, 448 (1912) (“Having failed to fully comply with his contract, he could not make it the basis of a recovery. Having himself breached it, he could no longer stand upon it and insist upon a strict reading of its terms . . .”). After breaching the anti-assignment provision in the POA, Westlake should not be permitted to stand upon it and insist upon a strict reading of terms that no longer apply.

The POA, § 13, ex 1, App A, provides that it is not assignable except under two conditions: (1) when the Seller has given prior written consent, or (2) without Seller’s written consent, when the assignment is “to a partnership or limited liability company in which Purchaser owns and continues to own

through the Closing Date at least 51% of the ownership interests.” On undisputed facts, the trial court agreed that no assignment had occurred under the second condition. Although the trial court also agreed that prior consent had not been sought, he erroneously concluded that the requirement of prior written consent “still exists.” CP 157-58. Contrary to the rule that a party may not enforce a contract it breached, the trial court erroneously permitted the breaching party to enforce the very same contract provision it breached. Further, it is simply not logically possible to give *prior* written consent *after* the assignment was made without requesting or obtaining consent.

*R.B. Robbins v. Hunts Food & Industries, Inc.*, 64 Wn.2d 289, 391 P.2d 713 (1964), is not applicable here because it is based upon significantly different facts. In *R.B. Robbins*, notice of the assignment was given and consent to the assignment was requested within a few days of the assignment. *Id.*, 292. The assignor and Co-Ply, the other party to the assigned agreement, began meetings and discussions regarding consent to assignment immediately after the assignment occurred. The assignee and Co-Ply also began business transactions with Co-Ply’s full knowledge of the assignment and that consent had not been given. In contrast, IPDC executed an assignment of its rights in the POA to Westlake nearly two years before it gave Engstrom a deceptive notice of that assignment. Ex 2, 3. Engstrom’s subsequent dealings with Westlake were conducted in the absence of any notice or knowledge that the

Assignment breached the anti-assignment provision of the POA.

**C. BECAUSE WAIVER CANNOT OCCUR IN ABSENCE OF NOTICE AND KNOWLEDGE, ENGSTROM COULD NOT WAIVE OBJECTION TO THE ASSIGNMENT BEFORE KNOWING THAT THE ASSIGNMENT VIOLATED THE ANTI-ASSIGNMENT PROVISION.**

The notice and accompanying Assignment, ex 2, 3 were deceptive because they asserted that the Assignment conformed to the requirements of §13 of the POA.<sup>6</sup> Engstrom did not waive any objection because it had no knowledge that the Assignment violated the anti-assignment provision until after this litigation commenced, when it received Westlake's responses to its discovery requests. CP 26-27.

A waiver is the intentional and voluntary relinquishment of a known right. It may result from an express agreement or be inferred from circumstances indicating an intent to waive. To constitute implied waiver, there must exist unequivocal acts or conduct evidencing an intent to waive; waiver will not be inferred from doubtful or ambiguous factors. The intention to relinquish the right or advantage must be proved, and the burden is on the party claiming waiver.

*Jones v. Best*, 134 Wn.2d 232, 241-42, 950 P.2d 1, 6 (1998) (citations omitted). See also, *Ross v. Harding*, 64 Wn.2d 231, 240, 391 P.2d 526, 533 (1964) (When there is no evidence whatever that a party has any knowledge

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Section 3 of the Assignment states, "Pursuant to Section 13 of the Purchase Agreement, Purchaser may assign the Purchase Agreement to a limited liability company in which Purchaser owns at least 51% of the ownership interests." Paragraph 1 then states, "Assignor and Assignee hereby certify that at least 51% of the ownership interests of Assignee are owned by the same parties which own shares of Assignor."

of the facts of a violation until after litigation begins, there is no waiver).

Engstrom agrees with Westlake that Engstrom made no inquiry into Westlake's finances upon its receipt of the Assignment or make any objection to the Assignment before Westlake sued. Engstrom's inquiry or objection was not permitted in the circumstances. The condition of assignment which required prior written consent, would have permitted Engstrom's inquiry and objection. The condition purportedly elected in the Assignment, assignment to an entity in which IPDC owned at least 51%, was not subject to Engstrom's consent, objection, or inquiry. The deceptive Assignment precluded Engstrom's inquiry or objection. See ex 1 § 13, App A.

Engstrom had a right to rely upon IPDC's and Westlake's certification that the Assignment conformed to the requirements of the POA because there is an implied covenant of good faith and fair dealing in every contract. *Lonsdale v. Chesterfield*, 99 Wn.2d 353, 357, 662 P.2d 385, 388 (1983); see also, *State v. Trask*, 91 Wn.App. 253, 272, 957 P.2d 781, 974 P.2d 1269 (1998). Engstrom was entitled to proceed as if Westlake and IPDC were acting in good faith.

Westlake's insistence that Engstrom waived objection after receiving all of the option payments and continuing to deal with Westlake is a red herring. Engstrom, relying on the implied covenant of good faith, had no notice or knowledge that the Assignment was deceptive and actually violated

the POA's anti-assignment provision. Engstrom could not even know that the option payments were from Westlake when even the payment advices for the option payments disguised the identity of the payor. Ex 225, 226. Engstrom did not and could not know that Westlake was not a valid assignee under the terms of the POA until it received responses to its Interrogatories to Westlake. CP 26, 46. Engstrom did not waive what it did not know.

### **III. ENGSTROM BREACHED NO PROVISION OF THE POA.**

#### **A. ENGSTROM COMPLIED WITH ALL OF THE NOTICE REQUIREMENTS OF THE POA, COMMITTING NO MATERIAL BREACH.**

Findings of fact must be supported by substantial evidence, and that evidence must support the conclusions of law. *Endicott v. Saul*, 142 Wn.App. 899, 909, 176 P.3d 560, 566 (2008). Although Engstrom challenges Finding 24 and Conclusions 12 and 15<sup>7</sup> as contrary to the only evidence at trial, Westlake's response cites to no evidence to support the factual components of these Findings and Conclusions and offers no argument or support for the legal conclusions.

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Finding 24, CP 359: "RK Environmental's memorandum, which was comprised only of preliminary data, did not constitute written confirmation of the completion of the clean, as required by the Option Agreement. . . ."

Conclusion 12, CP 362: "Engstrom did not provide 224 Westlake with written notice that it had completed clean up activities."

Conclusion 15, CP 363: "Engstrom's failure to provide Westlake with written notice of its commencement and completion activities, constitute material breaches of the Option Agreement. . . ."

**1. ENGSTROM NOTIFIED WESTLAKE OF THE COMMENCEMENT OF TANK REMOVAL AND CLEAN UP.**

Laboda admitted receiving notice of the commencement of the tank removal and clean up, and that he was actually present on the Property at the commencement of tank removal. RP 98, ex 251. While Engstrom's notice to Westlake of the commencement of tank removal and clean up was by email, rather than the formal method prescribed in the POA, ex 1 §12, this deviation was not material because Westlake received actual notice and acted on the notice without objection. *Park Avenue Condominium Owners Ass'n v. Buchan Developments, L.L.C.*, 117 Wn.App. 369, 383, 71 P.3d 692, 698 (2003) (“a material breach is one ‘serious enough to justify the other party in abandoning the contract . . . one that substantially defeats the purpose of the contract.’”).

Westlake simply misreads the requirements of §3.5 when it asserts that Engstrom was required to provide notice of “commencement” twice, both at the commencement of tank removal and clean up in October 2008 and again in February 2009 when Engstrom reopened and extended the excavation in February. See, App A, § 3.5. The word “commencement” is underlined in the POA. By its nature, commencement only occurs once. Underscoring that the POA means one “commencement,” the same sentence refers back to notice of “commencement” as “such *initial* clean up notice.”

Courts interpret contracts by giving them a practical and reasonable meaning, not a strained or forced meaning that leads to absurd results. *Washington Public Utility Districts Utilities System v. Public Utility Dist. No. 1 of Clallam County*, 112 Wn.2d 1, 11, 771 P.2d 701 (1989), *Allstate Ins. Co. v. Hammonds*, 72 Wn.App. 664, 667, 865 P.2d 560 (1994). The trial court's reading of §3.5's notice provision as requiring multiple notices of commencement following a single commencement is an erroneous, strained reading of the POA.

**2. ENGSTROM ALSO NOTIFIED WESTLAKE OF THE COMPLETION OF TANK REMOVAL AND CLEAN UP.**

The POA's requirement for notice of completion is simple: "Seller shall on or before Closing . . . provide Purchaser with written notice of the completion of tank removal and clean up." Ex 1, §3.5, App A. Westlake's contention that the notice must include an environmental consultant's opinion is not a requirement of the POA.

Although the trial court did not consider RK Environmental's February 25, 2009 memorandum, ex 18, as notice of completion, CP 359, the trial court overlooked the preceding February 23, 2009 letter from Engstrom's lawyer to Westlake's lawyer, ex 16. The letter describes the additional efforts of cleanup undertaken by Engstrom, and concludes, "As I stated above, Engstrom Properties is pleased to notify Investco or its

assignee, that the site is cleaned up as required under paragraph 3.5 of the Agreement.” With or without RK’s memorandum, Engstrom’s lawyer’s letter is written notice as required by the POA. The findings of fact do not support the conclusion that Engstrom did not comply with the POA’s requirement of notice of completion.

**B. ENGSTROM DID NOT REFUSE TO EXTEND CLOSING.**

Westlake cannot cite to any place in the record showing that Engstrom refused to extend the closing date because there is no such evidence. Instead, the evidence shows that Engstrom would not agree to the lengthy, indefinite, and open-ended periods for closing proposed by Westlake. Indeed, Westlake itself never proposed a definite Closing Date except for its single proposal of March 31, 2009 which was effective for only 2 hours. Ex 20, 255.

The POA provides that time is of the essence. Ex 1 §17. That provision is necessarily modified by §3.5. The manner in which a time is of the essence provision is enforced depends upon the circumstances. *Local 112, I. B. E. W. Bldg. Ass'n v. Tomlinson Dari-Mart, Inc.* 30 Wn.App. 139, 142, 632 P.2d 911, *review denied*, 96 Wn.2d 1017 (1981). Here, the reasonableness of any extension for tank removal, clean up, and testing should be viewed from the provision that time is of the essence. Delaying closing burdened Engstrom financially, as he explained to Westlake. Ex 19, 21. On the other hand, if Westlake were truly prepared to close, as it claims,

it did not need the 30 or 45 day period after its consultant determined the site was clean. The POA did not allow for more than an extension “to complete such tank removal, clean up and permitted testing.” Once those tasks are accomplished, there is no basis in the POA for any other further extension.

The agreement to extend closing is a bilateral obligation of both Engstrom and Westlake: “The *parties* further agree that the Closing Date shall be extended as is reasonably necessary . . . .” Ex 1 §3.5 (emphasis added). If it were a breach to not agree to the other parties’ proposed extension, both parties would be in breach because neither agreed with the other. The breach, however, was Westlake’s refusal to close.

The POA assigns Engstrom the responsibility for tank removal and clean up, but it leaves to the Purchaser the decision to test and the performance of additional testing. See §3.5, App A. Engstrom unquestionably performed tank removal and successful clean up as the Department of Ecology confirms. Ex 24. There was nothing more for Engstrom to do before closing.

Laboda admitted that he had scheduled Riley Group to test on March 4, and had also made arrangements for the site to be available that date. RP 136-38. He agreed that testing could have been accomplished had he not cancelled the test. *Id.* He also acknowledged that cancelling the scheduled test would delay Westlake’s receiving its consultant’s report. *Id.* He also

admitted that he never rescheduled testing. *Id.* Westlake elected to not perform additional environmental testing, and cancelled the scheduled tests because Westlake unilaterally decided there was not enough time even though it previously had test results in 48 hours of testing, received its consultants report within 9 days of testing, and expected the same time frame to apply. Ex 26, Rp 157-8.

Engstrom urged Westlake to return, do its testing, and complete any testing it desired and to close. RP 385. See, ex 15 (February 23: “Please schedule your confirmation testing as soon as possible”); ex 16 (February 23: Engstrom will make its consultants and the site available); ex 21 (March 4: Engstrom will work with Westlake to the extent reasonable); ex 256 (March 13: Engstrom again offers Westlake access to Engstrom’s consultants and the property); ex 258 (March 19: If Westlake changes its mind, Engstrom will consider reviving the POA). Westlake responded to Engstrom’s invitations by making further extra contractual demands that it must have known Engstrom could not agree to meet.<sup>8</sup> Westlake’s intransigence was a self-constructed obstacle to its optional testing and mandatory closing.

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On March 5, 2009, Westlake’s attorney declared Engstrom in material breach, and demanded that “Engstrom reopen the site and pay for the cost of any additional testing by 224 Westlake’s expert.” Ex 22, p 6. On March 17, 2009, Westlake demanded that closing occur “45 days after the report from our consultant that the site is indeed clean,” that “Engstrom shall deposit the \$600,000 in option payments into escrow,” and that Engstrom pay all of Westlake’s costs and expenses related to the transaction, “amounts in excess of \$400,000.” Ex 257.

Westlake incorrectly asserts that “Engstrom’s refusal constituted a material anticipatory breach of the POA. . .” (Response p 40.) Westlake apparently does not understand the nature of an anticipatory breach.

[An] anticipatory breach occurs when one of the parties to a bilateral contract either expressly or impliedly repudiates the contract prior to the time of performance. A party’s intent not to perform may not be implied from doubtful and indefinite statements that performance may or may not take place.

*Wallace Real Estate Inv., Inc. v. Groves*, 124 Wn.2d 881, 898, 881 P.2d 1010, 1020 (1994). The anticipatory breach was Westlake’s because it declared it would not perform “useless acts,” and refused to close. Ex 23. It would have not been a useless act to perform its testing if Westlake actually intended to close.

Engstrom performed, but Westlake did not. Engstrom never repudiated the POA, but instead executed all papers necessary to closing. RP 395. Westlake failed to tender performance as it is required to do in order to maintain an action for breach of a contract for sale of real estate.

“We have held a purchaser may not rescind a contract without a tender of the purchase price if the duties are concurrent.” *Willener v. Sweeting*, 107 Wn.2d 388, 394-95, 730 P.2d 45, 50 (1986). Here, the POA makes the Seller’s and Purchaser’s duties concurrent. Ex 1 §5.1. (“Purchaser and Seller shall, on demand, deposit with the Closing Agent all instruments and moneys necessary to complete the sale of the Property in accordance with

this Agreement.”)

Westlake is correct that Engstrom’s removal of the tanks and cleanup are a condition of Westlake’s obligation to close. As the Department of Ecology confirmed, ex 24, Engstrom satisfied that condition. Westlake’s testing is not, however, a condition of closing. The POA permits Westlake to test, but does not require it. Westlake had an opportunity to test before and after the closing date of March 1, and certainly by Engstrom’s offered extension of March 6, 2009. Because Westlake could have tested, but chose not to, it was required to meet its obligation to close or be in default.

#### **IV. THE DAMAGES AWARD SHOULD BE REVERSED.**

##### **A. THE OPTION PAYMENTS ARE NOT PROPER DAMAGES FOR BREACH OF A PURCHASE AND SALE AGREEMENT.**

Although *Turner v. Gunderson*, 60 Wn.App. 696, 701, 807 P.2d 370 (1991), cited by Westlake, does not stand for the proposition contended, the case is nevertheless instructive here<sup>9</sup>. *Turner* states, “Once an option is exercised, it becomes a new contract of ‘purchase and sale.’” citing 1A A. Corbin, *Contracts* § 264, at 507-08, 510, 512 (1963), *Valley Garage, Inc. v. Nyseth*, 4 Wn.App. 316, 318, 481 P.2d 17 (1971). The obligations of the

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*Turner* does not stand for the proposition that damages for breach of a contract to purchase real estate include the return of option payments. There was no issue in the case about option payments because the consideration for the option was a lease. *Turner* does, however, award a return of the down payment, an altogether different issue from the circumstances here which do not involve a down payment by Westlake.

parties to an option contract changes once the option has been exercised. *Id.* Here, once the option was exercised, the POA was no longer an option contract, but a new contract of purchase and sale, and the option portion of the POA had become an executed contract.

It is undisputed that respondent kept the option open for the full time specified therein and did nothing which in any way interfered with appellant's right to purchase and acquire the property upon the terms and conditions of the option, had he so elected. No part of the option agreement itself remained executory. Both parties had done all that they were required to do thereunder. Respondent not only had granted an irrevocable right for the specified time, but also had refrained from interfering with that right during the prescribed period; and appellant had paid in full the consideration for that right. The option agreement was therefore an executed contract.

*Hopkins v. Barlin*, 31 Wn.2d 260, 270, 196 P.2d 347 (1948).

The importance of the distinction is that separate consideration applies to the two contracts, and damages for breach of one of the two contracts is different than damages for breach of the other. Westlake did not claim breach of the option portion of the POA. Once the option was exercised, it became an executed contract. Had Engstrom breached the option portion, Westlake could be entitled to a return of the option payments. In the absence of breach, the return of the option payment as damages for breach of the purchase and sale agreement robs Engstrom of the consideration he earned on the option portion of the POA.

**B. WESTLAKE'S DEVELOPMENT EXPENSES ARE PRECLUDED**

**AS DAMAGES BY THE POA AND LAW.**

“Contract damages are ordinarily based on the injured party's expectation interest and are intended to give that party the benefit of the bargain by awarding him or her a sum of money that will, to the extent possible, put the injured party in as good a position as that party would have been in had the contract been performed.” *Mason v. Mortgage America, Inc.* 114 Wn.2d 842, 849, 792 P.2d 142 (1990). Although Westlake cites *Mason* as support for its argument on damages, it overlooks that *Mason*, while sustaining the damages award, reduced it by the amounts the plaintiff would have had to pay had the contract been performed. Had the contract been performed, Westlake would have had to pay the purchase price.

Contracts are to be construed and enforced according to the intention of the parties as determined by all of the terms employed in the contract, and specifically including terms relating to remedies. *West American Finance Co. v. Finstad*, 146 Wash. 315, 319 (1928). The POA §3.2 places all the risk of the development expenses on the Purchaser. “Purchaser agrees to pay all costs incurred in its Development Activities and further agrees to indemnify and hold harmless Seller from any and all costs, damages, loss, injury or other expense that may be incurred in connection therewith, including those that may result if Purchaser fails to purchase the Property pursuant to this Agreement.” The award of development costs as damages is contrary to the

parties own agreement and should not be upheld.

**C. THE DAMAGE AWARD IS OUTSIDE THE EVIDENCE.**

Although an appellate court will not disturb an award of damages within the range of substantial evidence in the record, *Mason v. Mortgage America, Inc.* 114 Wn.2d 842, 850, 792 P.2d 142, 146 (1990), the damage award here is far outside the range of evidence.

The trial court stated Westlake's damages as \$600,000 in Option Payments and \$437,354.15 in development costs, CP 363, which totals \$1,037,354.15. The total in Westlake's summary, ex 253, is likewise \$1,037,354.15. Exhibit 253, p 1, shows expenses of \$173,993 paid to IPDC which go into its total Project Expenses of \$437.354.15, ex 253, p 4. The entry for the \$173,993 references exhibits 51-52. The detail to exhibit 52 shows that included in the amount of \$173,993 are two \$75,000 option payments totalling \$150,000. That \$150,000 is also in the option payment total of \$600,000, and was clearly added twice. Westlake's Response does not dispute this duplicate charge.

In addition, exhibits 83, 99, 107, 119, 127, and 150 are for intercompany charges or entity expenses totaling \$85,000. Further, Laboda admitted there are no invoices for \$40,000 of the totals. RP 434. These discrepancies total \$275,000. Again, Westlake does not address these.

With a total award for development costs of \$437,354.15, CP 363, the

discrepancy is more than 60 percent of those costs. This discrepancy and the prejudgement interest attributable to it are far outside the range of substantial evidence and cannot be upheld.

**V. THE FEE AWARD WAS AN ABUSE OF DISCRETION.**

The trial court abused its discretion in relying upon evidence in an ex parte, in camera review of Westlake's attorneys' billing records, while excluding Engstrom's attorney from that review. CP 423. With exceptions not applicable here, "A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, before that judge's court . . ." CJC 2.9(A). The trial judge did not merely examine Westlake's billing records to determine whether they contained privileged information. The trial judge considered the merits of those records without making them available to Engstrom's attorneys. "Our judicial system is designed to function in the context of adversary proceedings. We are therefore reluctant to authorize ex parte, in camera determinations unless they are truly necessary to protect important governmental interests." *Erckman v. U.S.*, 416 U.S. 909, 916, 94 S.Ct. 1618, 1622, 40 L.Ed.2d 115 (1974) (dissenting opinion).

Westlake's gross summaries, CP 318-41, 365-71, did not provide the detail required by *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581,

675 P.2d 193 (1983). Without that detail, the trial court could not “discount hours spent on unsuccessful claims, duplicated effort or otherwise unproductive time.” *Id.* While the trial court possibly obtained the necessary detail in its improper consideration of the in camera ex parte billing records, Engstrom was unable to challenge what it could not review, and of course, this Court is also unable to review them.

An award of attorney fees should be reversed when the court exercised its discretion on untenable grounds or for untenable reasons. *Chuong Van Pham v. City of Seattle*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007). The trial court’s reliance upon in camera ex parte evidence is an untenable ground for its award.

The trial court also abused its discretion in awarding \$190,402 as a risk additive to the \$110,000 lodestar amount to reach total fees and costs of \$312,826.24. CP 425. “The contingency adjustment is based on the notion that attorneys generally will not take high risk contingency cases, for which they *risk no recovery at all* for their services, unless they can receive a premium for taking that risk.” *Chuong*, at 541, citing *Bowers*, at 598 (emphasis added.) “Therefore, the risk factor should apply *only* where there is no fee agreement that assures the attorney of fees regardless of the outcome of the case.” *Bowers*, at 599 (Emphasis added.) Westlake’s attorneys received their full fees for the initial months of their case and were assured

of receiving half of their fees for the remainder if they lost. CP 322. There was never a “risk of no recovery at all.” Our courts presume that the lodestar represents a reasonable fee, and “occasionally a risk multiplier will be warranted because the lodestar figure does not adequately account for the high risk nature of a case.” *Chuong*, at 542. Certainly there was no risk to warrant adding a risk factor contingency almost double the lodestar amount to arrive at a fee award almost triple the lodestar amount.

**VI. CONCLUSION.**

Engstrom asks the Court to dismiss Westlake’s claim entirely because it has no standing to enforce the POA following its breach of the anti-assignment clause. Alternatively, Engstrom asks the Court to reverse the trial court’s conclusion that Engstrom breached the POA and to reverse the awards of damages and legal expenses.

RESPECTFULLY SUBMITTED This August 1, 2011

REAUGH OETTINGER & LUPPERT, P.S.



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**APPENDIX A**  
**PROVISIONS OF PURCHASE OPTION AGREEMENT, EX 1**

3.5 Underground Storage Tanks. The parties acknowledge that there are two (2) underground storage tanks that exist on the Property. Seller shall on or before Closing remove the tanks, complete any clean up of the Property required by any applicable state, federal, or local rule, regulation, ordinance, statute, ruling, decision, or other determination relating to Hazardous Substances as defined in Section 7.1(b) and provide Purchaser with written notice of the completion of such tank removal and clean up. Seller and Purchaser agree that the removal of the tanks and completion of any required clean up of the Property is a condition to Purchaser's obligation to Close under Section 5.1. The parties acknowledge that the Property is currently subject to a lease and sublease, the terms of which extend through December 31, 2008, and that Seller may be precluded from removing such tanks and performing such clean up until after such lease termination date. Seller further agrees to notify Purchaser in writing at the commencement of such tank removal and clean up work and that Purchaser may, following receipt of such initial clean up notice and subject to the other Provisions of this Article III, contract for any additional environmental testing, at its own cost, Purchaser may deem necessary or appropriate, provided that such additional testing shall not delay the normal tank removal and clean up work performed

by Seller. The parties further agree that the Closing Date shall be extended as is reasonably necessary to complete such tank removal, clean up and permitted testing.

13. Assignment. This Agreement is not generally assignable by Purchaser or Seller without Seller's or Purchaser's prior written consent, which consent shall not be unreasonably withheld; provided, however, that Purchaser shall be able to assign this Agreement to a partnership or limited liability company in which Purchaser owns and continues to own through the Closing Date at least 51% of the ownership interests without the consent of Seller and upon written notice to Seller.

**CHRONOLOGY– Appendix B**

<b>DATE</b>	<b>EVENT</b>	<b>RECORD</b>
11/20/06	Purchase Option Agreement executed	Ex 1
06/08/07	Assignment from IPDC to Westlake	Ex 2
10/20/08	Engstrom notifies Westlake of commencement of tank removal and clean up	Ex 251, RP 98
10/23/08	Westlake exercises option and notifies Engstrom of assignment	Ex 3
11/21/08	Riley takes soil samples before excavation and clean up complete	RP 247-48
12/01/08	Riley sends 11/21/08 samples to lab	Ex 10, p 1
12/03/08	Riley receives 12/01/08 sample test results	Ex 10, p 1, ex 4
12/8/08	First RK Environmental Report	Ex 7
01/14/09	Riley takes second samples	Ex 10, p3
01/16/09	Riley receives results from 01/14/09 samples	Ex 26
01/23/09	Pinnacle GeoSciences takes soil samples and receives results same day	Ex 12, p 3, p
01/24/09	Pinnacle receives tests results 24 hours later	RP 303
02/05/09	Engstrom hand delivers Pinnacle GeoSciences Report to Laboda	Ex 12, RP 506-07
02/06-2/20/09	To satisfy Westlake, Engstrom reopens and enlarges excavation, removes and tests soil	Ex 18, RP 507
02/20/09	Westlake demands 60 day extension	Ex 14
02/23/09	Engstrom Properties notifies Westlake of completion of clean up and offers cooperation	Ex 15, 16

<b>DATE</b>	<b>EVENT</b>	<b>RECORD</b>
02/23/09	Laboda schedules Riley to perform additional testing	Ex 40, 247, RP 263-64
02/25/09	2 <sup>nd</sup> RK Environmental report of additional activities and tests to Westlake	Ex 18
03/04/09	Westlake cancels Riley's confirmatory testing	RP 136-37
03/04/09	Engstrom offers to work with Westlake to close sale	Ex 21
03/05/08	Westlake declares Engstrom in "material breach" and demands that Engstrom pay for Westlake's testing	Ex 22
03/06/09	Engstrom completes all Seller's obligations for closing	RP 395
03/06/09	Westlake again asserts Engstrom is in material breach and Westlake will not close	Ex 23
03/13/09	Engstrom offers Westlake access to its environmental consultants and to site	Ex 256
03/17/09	Westlake again declares Engstrom in material breach, demands that Engstrom pay for Westlake's testing, that closing occur 45 days after its consultant's report, and that Engstrom deposit \$600,000 in escrow	Ex 257
03/19/09	Engstrom offers to negotiate if Westlake decides to purchase	Ex 258
03/26/09	Westlake sues Engstrom	CP 1
04/27/09	Department of Ecology confirms site is clean	RP 88-89, 236, Ex 24
06/05/09	Engstrom first learns of breach of anti-assignment provision in discovery responses	CP26-28,46-48

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**COURT OF APPEALS, DIVISION I  
OF WASHINGTON STATE**

**224 WESTLAKE, LLC,**

**Plaintiff,**

**v.**

**ENGSTROM PROPERTIES, LLC,**

**Defendant.**

**No. 66723-8-I**

**DECLARATION OF SERVICE**

I Sylvia Luppert, attorney for Engstrom Properties, LLC declare that on August 1, 2011 I caused to be served by email to Christopher Brain and Adrienne McEntee at the addresses Cbrain@Tousley.com, and Amcentee@Tousley.com Engstrom Properties Reply Brief. I also deposited in the United States mail a copy of the brief to Mr. Brain at 1700 Seventh Avenue, Suite 2200, Seattle, Washington 98101.

  
Sylvia Luppert, WSBA 14802