

NO. 74510-7-I

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**COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE**

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KEN HATCH and CATHI HATCH,

Appellants,

v.

CARY FALK,

Respondent.

FILED  
Aug 23, 2016  
Court of Appeals  
Division I  
State of Washington

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**BRIEF OF APPELLANT**

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## **I. INTRODUCTION**

The duties of the parties to a real estate purchase and sale agreement are concurrent. This rule has two consequences. First, for either party to declare the other in breach, that party must first either perform its own obligations or have a legal excuse for not doing so. “A vendor selling land may not put the buyer in default until the vendor has offered to perform; the payment of the purchase price and the delivering of the deed are concurrent acts.” *Wallace Real Estate Inv., Inc. v. Groves*, 124 Wn.2d 881, 897, 881 P.2d 1010, 1019 (1994). Second, when neither party performs nor has a legal excuse for not performing and the closing date passes, the agreement simply expires by its terms and becomes a nullity. “There is no forfeiture involved, for the agreement, by operation of its time provisions, became legally defunct.” *Nadeau v. Beers*, 73 Wn.2d 608, 610, 440 P.2d 164, 166 (1968). When that happens, the earnest money is returned to the buyer.

In this case, Appellants Ken and Cathi Hatch agreed to purchase a home from respondent Cary Falk. The closing date was January 5, 2015, but neither party even had closing documents prepared, let alone tendered performance. Falk nonetheless insists that he is entitled to the \$35,000 earnest money. The Hatches brought this action to recover their earnest money, and the case came before King County Superior Court Judge Monica Benton on cross motions for summary judgment.

The established law controlling this case was briefed and argued to the trial court, but Judge Benton said that she did not “see it that way.” She instead opined that the Hatches were obligated to plead and prove that they were ready to perform as a “predicate” for their claim to recover their earnest money.

Although Falk’s failure to perform was admitted, and although Falk presented no evidence of his ability to perform, Judge Benton granted summary judgment awarding the earnest money to Falk. That order is erroneous as a matter of law, and this Court should reverse. Because the facts are undisputed, it should remand with instructions to enter judgment for the Hatches.

**II. RAP 9.12 DISCLOSURE**

Pursuant to RAP 9.12 and for the convenience of the Court, the following is a comprehensive list of all documents that were considered by the court below.

<b>Document</b>	<b>CP</b>
Complaint*	1-2
Defendant Falk's Motion for Summary Judgment	5-22
Declaration of Nathan Neiman in Support of Defendant Falk's Motion for Summary Judgment	23-81
Response of Plaintiffs Hatch Opposing Defendant Falk’s Motion for Summary Judgment	117-129
Defendant Falk’s Reply in Support of Defendant’s Motion for Summary Judgment	137-141
Plaintiff Hatch’s Motion for Summary Judgment	82-93
Defendant Falk’s Response to Plaintiffs Motion for Summary Judgment	94-107
Second Declaration of Nathan Neiman in Support of Defendant Falk’s	108-116
Response to Plaintiffs Motion for Summary Judgment	117-129
Reply on Hatch’s Motion for Summary Judgment	130-136

\*The Complaint was not referenced in the Order, but during the hearing, Judge Benton called up the Complaint and reviewed it. RP 19-20. No other documents were discussed or used.

### **III. ASSIGNMENTS OF ERROR**

1. The trial court erred when it granted Falk's Motion for Summary Judgment.

2. The trial court erred when it denied the Hatches' Motion for summary judgment.

### **IV. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. When a party to a real estate transaction offers no evidence of any kind about his performance of a purchase and sale agreement, can a court find that he performed or tendered performance? (First and Second Assignments of Error)

2. Is the testimony of a real estate broker that "I think it was clear that the Hatches weren't prepared to close on the house" sufficient to support a finding that the Hatches repudiated a real estate contract when the record contains no evidence from the party with whom the broker was speaking? (First and Second Assignments of Error)

3. Is a seller required to prove that he was ready, willing and able to perform the contract to be entitled to the buyer's earnest money? (First and Second Assignments of Error)

4. When neither party to a real estate purchase and sale agreement performs or tenders performance by the closing date, and neither party has repudiated the agreement, is the buyer entitled to the return of the earnest money? (First and Second Assignments of Error)

### **V. STATEMENT OF THE CASE**

#### **A. Factual Background.**

On November 6, 2014, the Hatches and Falk entered into a purchase and sale agreement for a home in Woodinville, Washington. CP 41-57. The purchase price was \$1,156,000. CP 41. The agreement provided for a

closing date of January 5, 2015. *Id.* Paragraph 1 of the agreement provides that time is of the essence. CP 44.

The Hatches apparently encountered some difficulties in obtaining financing for the purchase. On December 26, 2014, Hoffman sent an email to Falk asking for his phone number so that Ken Hatch could speak to him directly about the purchase. CP 112. Falk responded with an email asking “What does Ken want to talk to me about?” *Id.* Falk then called Hoffman and asked why Hatch wanted to meet. CP 27 (Hoffman Deposition).

Q. What did you tell them?

A. I had sent an e-mail to Cary telling him that Ken Hatch wanted to speak with him, and not referencing why, and could I give him his phone number?

And Cary at that time called me and said basically, "What's the matter? Can't he close?" And I said, "He'd like to talk to you about a lease purchase."

And Cary said, "No offense. I'm sure he's a really nice guy, but I don't want to talk to him about anything other than closing my house."

CP 27 (Hoffman Deposition). Hoffman and Falk agreed to meet the next day.

At 9:24 a.m. on December 27, 2014, Ken Hatch sent an email to Hoffman stating in part that “We doike and want the home.” [sic]. Hoffman met with Falk later that day. Falk claims that the Hatches repudiated the agreement in his meeting with Hoffman. The only evidence about what occurred at that meeting is the deposition testimony of Toni Hoffman. Falk chose not to submit a declaration with his version of the events. A total of fourteen pages from the transcript of Hoffman’s deposition are in the record. Falk’s Reply in support of his motion refers to three additional pages (pages 26, 61, 62), but they are not in the record.

In her deposition, Hoffman first said that she expressed to Falk that the Hatches could not get a loan. However, when she was asked for the details

of that expression, she recanted her testimony and said that she only said that Hatch wanted to talk to Falk about a lease purchase.

Q. And you said he asked you "Can't he close?" Is that what he asked?

A. You know, and kind of backing up to my previous answer about telling him that he couldn't get a loan, I'm not certain I ever said those words to Cary. I believe I said, "He'd like to talk to you about a lease purchase."

CP 27-28 (Hoffman Deposition). She then testified that the Hatches had told her that they could not get a loan, but when she was directly asked, she denied that Falk ever asked her if the hatches could get a loan.

Q. Did Cary, Mr. Falk, specifically ask if they could get a loan?

A. I don't believe so.

CP 28 (Hoffman Deposition).

Hoffman was then asked if she gave any explanation at all why the Hatches wanted to discuss a lease option, and she responded with her opinion about what Falk understood.

Q. Did you tell him why you were asking about a lease purchase?

A. I honestly don't remember every single word of that conversation. I think it was clear that the Hatches weren't prepared to close on the house and that they wanted to find an alternative way of purchasing the home.

Q. When you say "weren't prepared to close on the house" what do you mean by "weren't prepared"?

A. Couldn't get the loan that was stated in the contract.

Q. So in your conversation with Mr. Falk, do you feel that that was made clear to him when you spoke with him?

MR. FERGUSON: Object to the form. Go ahead.

THE WITNESS: It was clear to him that they weren't going to buy the home and close.

CP 28 (Hoffman Deposition).

Later that day, Hoffman apparently sent an email to the Hatches attaching some document from Falk. Her email stated:

I sent a one page document to sign electronically to your email. It really is simple. If that doesn't work for you, then I can send it via email and you can scan it back to me.

Cary would like it as soon as possible so that he can get his house back on the market.

CP 111. The document that was attached is not in the record, nor is it identified in the record. Ken Hatch responded to the email with one of his own stating:

Tnx again. I need to talk to our lawyer before l/we sign anything. We need to our rights (if anything re earnest money)etc. Toni, could I have Falk's telephone #? Tnx ken

CP 111.

In an email written three months after the closing date, Hoffman explained the notice by saying, “I want to clarify that the release form, that was sent to you after you indicated that you couldn’t get a loan and didn't intend to purchase the home, was simply to allow the seller to put his house back on the market, instead of leaving it in a pending status for additional days.” CP 115. Falk claims that the significance of the form is that the Hatches did not respond to it by affirming that they would close. As Falk himself points out, “Plaintiffs Hatch did not communicate with Defendant Falk following this exchange.” CP 97.

Falk also claims that “Plaintiffs Hatch demonstrated their clear intent not to close when they executed the rental agreement for another home.” CP 97. While it appears to be true that the Hatches signed a lease for another property on December 31, 2014, the claim that they “demonstrated their intent” in doing so is not supported by any evidence. Falk did not learn of the lease until long after this action was filed. He could not have acted or failed to act because of the existence of a lease about which he knew nothing.

It is undisputed that neither party performed or tendered performance on the closing date. CP 2 at ¶¶ 11, 12 (Hatch); CP 106 (Falk). There is no

evidence that either party set up escrow, ordered title, or took any other action to prepare for closing.

**B. Procedural History.**

Recognizing that the matter primarily presented legal questions, the parties coordinated cross motions for summary judgment. Falk's motion made four primary arguments: (1) the buyer must prove that the seller repudiated the agreement to be entitled to the return of earnest money; (2) Falk's performance was excused by the Hatches' repudiation and the useless acts maxim; (3) the earnest money was nonrefundable under any circumstances; and (4) the Hatches forfeited the earnest money because they waived their financing contingency. The Hatches made a single argument that since neither party performed, and neither party's performance was excused, the agreement expired by its terms, and the buyer is entitled to the return of the earnest money.

The hearing on the motion was held on October 30, 2015 before King County Superior Court Judge Monica Benton. RP 1. During argument, it became clear that Judge Benton believed that the Hatches had to prove that they were ready, willing and able to perform. When counsel for the Hatches pointed out that Hoffman testified she never specifically said that the Hatches could not get a loan, Judge Benton interjected, "But this is known before; isn't that correct?" RP 12. Counsel responded:

So now what we're getting down to is what he knew before was the Hatches would like to talk to you about a lease option. That's the only thing in the record that she said she said. The only thing that she says she actually said.

*Id.* Judge Benton countered, "But it's not a disputed fact." *Id.*

Judge Benton later inquired of the Hatches' counsel, "is it true that you didn't plead that your client was ready to perform?" RP 19. Counsel

responded, “Yes, it is.” *Id.* Judge Benton then asked, “Well, don't you think that's a predicate?” and counsel responded, “No, it's not, Your Honor.” *Id.*

When asked why, counsel responded:

Because pleading that my clients were prepared to perform is a predicate to bringing an action for contractual relief against Mr. Falk for breach of his duties. I'm not doing that. He's the one doing that. I'm not doing that at all.

I'm saying nobody performs so the agreement dies. That's a completely and utterly different thing. What I'm saying is you didn't perform, I didn't perform; the agreement ceased to exist, it doesn't matter anymore what it says. The only thing that matters is whether your failure to perform was excused.

RP 20. Judge Benton responded, “I don't see it that way.”

Judge Benton likewise indicated that she found the Hatches' rental of another property relevant even though Falk did not know about it. “They rented something else. Don't you think that's the conduct that the law would recognize as unequivocal?” RP 20-21. Counsel responded that the conduct was not unequivocal because renting a property does not make performance of the agreement impossible. RP 21. Judge Benton again replied, “I don't see it that way.”

At that point, counsel moved on to the argument that the seller must prove that he was ready, willing and able to perform, only to be chastised by the trial court.

MR. DAVIS: Okay. Let me say this. There is no evidence before the Court, none, zero that Mr. Falk owned the house. There is no evidence -- you laugh, but this is summary judgment, Judge; your job is to do this on summary judgment.

THE COURT: Mr. Davis.

MR. DAVIS: Yes.

THE COURT: Throwing up anything to see if it will stick --

MR. DAVIS: No --

THE COURT: -- insults the Court.

MR. DAVIS: -- I am --

THE COURT: And it insults you inferentially.

MR. DAVIS: No, it does not, Your Honor. What it does is it shows that the law requires things to be proven, aka, he's ready, willing and able to perform. There's no evidence. The law requires him to

show that he understood that the repudiation happened. There's no evidence of his understanding. There's evidence of the understanding of someone else who had a conversation with him, the terms of which we don't know that what she thinks was clear to him. But there's no testimony from him that it was.

RP 22. Judge Benton then asked for proposed orders and concluded the hearing. *Id.*

Judge Benton signed Falk's proposed order. After a Motion for Reconsideration was denied without calling for a response (CP 148-56, 204, the Hatches filed this appeal.

## **VI. ARGUMENT**

### **A. Standard of Review.**

This Court reviews summary judgement orders *de novo*, "considering the evidence and all reasonable inferences from the evidence in the light most favorable to the nonmoving party." *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080, 1086 (2015). Here, the Court should first determine whether the trial court properly granted summary judgment for Falk. The denial of the Hatches' cross motion for summary judgment is not itself an appealable order, but this Court may grant summary for the nonmoving party when the facts are not in dispute. *Impecoven v. Dep't of Revenue*, 120 Wn.2d 357, 365, 841 P.2d 752, 755 (1992).

### **B. The Hatches and Falk Had Concurrent Duties to Perform.**

In the absence of a specific provision to the contrary, the duties of the buyer and seller in a purchase and sale agreement are concurrent. *Willener v. Sweeting*, 107 Wn.2d 388, 394-95, 730 P.2d 45, 50 (1986). When the duties are concurrent, each of the parties has an independent and absolute duty to perform. The Supreme Court summarized this rule in *Wallace Real Estate Inv., Inc. v. Groves*, 124 Wn.2d 881, 881 P.2d 1010 (1994):

If a contract requires performance by both parties, the party claiming nonperformance of the other must establish as a matter of fact the party's own performance. *Willener v. Sweeting*, 107 Wash.2d 388, 394, 730 P.2d 45 (1986); *Reynolds Metals Co. v. Electric Smith Constr. & Equip. Co.*, 4 Wash.App. 695, 698, 483 P.2d 880 (1971). A vendor selling land may not put the buyer in default until the vendor has offered to perform; the payment of the purchase price and the delivering of the deed are concurrent acts. *Willener*, 107 Wash.2d at 395, 730 P.2d 45; *Bendon v. Parfit*, 74 Wash. 645, 648, 134 P. 185 (1913).

*Id.* at 897.

The parties agree that they had concurrent duties here. CP 12. Consequently, each has a separate and independent duty to perform, and neither may demand that the other perform first. *Gillmore v. Green*, 39 Wn.2d 431, 437, 235 P.2d 998, 1002 (1951).

**C. The Purchase and Sale Agreement Expired When Neither Side Performed on the Closing Date.**

Because the parties had concurrent duties to perform, the purchase and sale agreement expired by its terms when neither party performed on January 5, 2015. The law to that effect is beyond any rational debate.

A purchase and sale agreement with an express expiration date terminates if it is not performed, absent waiver or estoppel.

*Ashmore v. Estate of Duff*, 165 Wn.2d 948, 952, 205 P.3d 111, 112 (2009)

The earnest-money agreement in question is clear and free from ambiguity as to those points essential for decision. Time is made the essence of the agreement, and a termination date is fixed. Payment was not tendered until after the agreement by its terms had expired. Absent conduct giving rise to estoppel or waiver, no further action on the part of appellants was required to effectuate the termination. There is no forfeiture involved, for the agreement, by operation of its time provisions, became legally defunct.

*Nadeau v. Beers*, 73 Wn.2d 608, 610, 440 P.2d 164, 166 (1968).

The authorities previously cited establish that once a termination date expires, in the absence of an existing waiver or estoppel the agreement is dead. *Nadeau v. Beers*, *supra*; *Vacova Co. v. Farrell*, 62 Wash.App. 386, 814 P.2d 255 (1991).

*Mid-Town Ltd. Partnership v. Preston*, 69 Wn.App. 227, 235, 848 P.2d 1268, 1273 (1993).

As for Mr. Farrell's contention that time was not of the essence with respect to the payment of the 3-day note, when an agreement makes time of the essence, fixes a termination date, and there is no conduct giving rise to estoppel or waiver, the agreement becomes legally defunct upon the stated termination date if performance is not tendered.

*Vacova Co. v. Farrell*, 62 Wn.App. 386, 407, 814 P.2d 255, 267 (1991).

When an agreement expires, it becomes "legally defunct," and as result, nothing can be done with it.

*Pavey v. Collins*, 31 Wn.2d 864, 870, 199 P.2d 571, 574 (1948). *Pavey* later described the circumstance as "the agreement terminated and ceased to exist, by its own terms." *Id.* at 872.

**D. Falk's Arguments Are Erroneous.**

Falk's summary judgment motion effectively concedes all of this la, but then proceeds to ask the Court to ignore it. Falk made four substantive arguments in support of his motion for summary judgment: (1) The Hatches must prove that Falk repudiated the agreement to recover their earnest money; (2) the Hatches repudiated the agreement; (3) the earnest money was nonrefundable under the terms of the agreement; and (4) the Hatches lost their claim to the earnest money when they waived their financing contingency. Summary judgment was not warranted on any of those grounds.

**1. Falk's Argument that the Hatches Breached the Agreement Misses the Point.**

Falk's first argument is that the Hatches breached the agreement by failing to close and that he therefore is entitled to the earnest money. CP 9. He then goes on to cite a number of cases holding that "courts have consistently denied recovery of earnest money paid where the buyer defaulted and the seller was ready, willing and able to complete the transaction." CP 9.

The Hatches have no argument with those authorities, but Falk never did anything to show that he was “ready, willing and able to complete the transaction.” In that regard, Falk even quotes the Supreme Court’s statement in *Willener v. Sweeting*, 107 Wn.2d 388, 395 730 P.2d 45 (Wash. 1986) that “If a contract requires performance by both parties, the party claiming nonperformance of the other must establish as a matter of fact the party’s own performance.” *See also Wallace Real Estate Inv., Inc. v. Groves*, 124 Wn.2d 881, 897, 881 P.2d 1010, 1019 (1994).

Falk, however, never establishes his own performance as a matter of fact. He never says a thing about his own performance. Instead, he claims that “The purchaser has the burden to show that the seller repudiated or was not ready, willing, or able to perform.” CP 10.

Falk relies entirely on a line of cases that deal with the specific situation when a buyer refuses to perform a purchase and sale agreement because it fails to satisfy the statute of frauds. In that specific context, Washington courts have developed a special rule. However, the legal description is not an issue in this case, and those cases are completely irrelevant.

Washington law requires that purchase and sale agreements contain the legal description for platted property. *Key Design Inc. v. Moser*, 138 Wn.2d 875, 881, 983 P.2d 653, 657 (1999). Courts have long held that an agreement concerning real estate that lacks a legal description is “void.” *Maier v. Giske*, 154 Wn.App. 6, 15, 223 P.3d 1265, 1270 (2010) (“An agreement containing an inadequate legal description is void.”); *Geonerco, Inc. v. Grand Ridge Properties IV LLC*, 146 Wn.App. 459, 466, 191 P.3d 76, 80 (2008).

As a result, either party to a real estate agreement that lacks a legal description can refuse to close with legal excuse. Sellers have long argued

that it is unjust to allow those buyers to recover their earnest money when the seller was ready, willing and able to perform the agreement. This question appears to have first come before a Washington court in 1947.

A. H. Dubke, the respondent, orally agreed to purchase the home of Mr. and Mrs. Thomas Kassa, the appellants, for \$4,400.00, and made a payment of \$250.00. The transaction was evidenced by just one piece of writing, a receipt which read as follows:

‘Received of A. H. Dubke \$250.00 as deposit on 2418 E. Hartson. Total price to be \$4,400.00.

‘Thomas Kassa.’

Thereafter, respondent refused to purchase the property, and the appellants were at all times prior to the commencement of this action ready, willing, and able to complete the sale. This action was commenced to recover the \$250.00 payment. Thereafter, the appellants sold the property to a third party.

The applicable rule is that a vendee under an agreement for the sale and purchase of property which does not satisfy the statute of frauds, Rem.Rev.Stat. § 5824 et seq., cannot recover payments made upon the purchase price if the vendor **has not repudiated the contract but is ready, willing, and able to perform in accordance therewith**, even though the contract is not enforceable against the vendee either at law or in equity: 49 Am.Jur. 870, § 564; 37 C.J.S., 612 Frauds, Statute of, § 256; 2 Restatement of the Law of Contracts 614, § 355; *Johnson v. Puget Mill Co.*, 28 Wash. 515, 68 P. 867 (dicta).

*Dubke v. Kassa*, 29 Wn.2d 486, 486–87, 187 P.2d 611, 611–12 (1947) (emphasis added). *Dubke* appears to have equated not repudiating the agreement with being ready, willing and able to perform it.

This issue next came before the Supreme Court in *Schweiter v. Halsey*, 57 Wn.2d 707, 709, 359 P.2d 821, 823 (1961), where a buyer refused to perform a purchase sale agreement over a missing legal description, and the seller “promptly tendered performance, which was refused.” The Court again held that the buyer could not recover its earnest money because the seller did not repudiate and tendered performance.

Although the earnest-money agreement was unenforceable and could not be made the subject of reformation, this does not entitle respondents to a return of their earnest money. At no time did

appellants **repudiate the contract**. On the contrary, they **tendered performance** and did not otherwise dispose of the property until after respondents commenced this action.

*Id.* at 710-11 (emphasis added). Like *Dubke*, the *Schweiter* court appears to have treated performance the same as not repudiating the agreement.

In 2008, this Court faced the same question once again in *Home Realty Lynnwood, Inc. v. Walsh*, 146 Wn.App. 231, 189 P.3d 253, 258 (2008). There, the buyer refused to close a purchase over the lack of legal description and sought the return of its earnest money. The question in the case was whether oral testimony about an “intent” to attach the legal description would be sufficient, which this Court answered in the negative.

However, the seller also argued that even in the absence of a legal description, it should keep the earnest money under *Schweiter* and *Dubke*. This Court agreed.

The Walshes argue that even if the purchase and sale agreement does not comply with the statute of frauds, they are still entitled to retain the earnest money because the Lees defaulted and the Walshes remained ready, willing, and able to sell the house to them. Although the Washes raise this argument for the first time on appeal, it is not an assignment of error but rather an alternate ground for affirming the trial court. The appellate court may affirm the trial court on any theory supported by the record, even if the trial court did not consider it. RAP 2.5(a); *Mendez v. Palm Harbor Homes, Inc.*, 111 Wash.App. 446, 460–61, 45 P.3d 594 (2002).

“Washington's rule is that, even if a contract for the sale of land is unenforceable because it does not satisfy the statute of frauds, a purchaser may not obtain restitution of his earnest money if the vendor is ready, willing, and able to perform as agreed.” 18 STOEBUCK & WEAVER, *supra*, at 250 (citing *Schweiter v. Halsey*, 57 Wash.2d 707, 359 P.2d 821 (1961) and *Dubke v. Kassa*, 29 Wash.2d 486, 187 P.2d 611 (1947)). This is the general rule followed by a great majority of other jurisdictions. See 169 A.L.R. 187 (2008). The 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 agreed to do.” 18 Stoebuck & Weaver, *supra*, at 250.

*Id.* at 239-40.

At that point, however, the buyer objected that there was no evidence that the seller was ready, willing and able to perform. This court agreed again, and refused to rule on the issue.

The Lees also seek to distinguish *Schweiter* because in that case, the record conclusively established that the sellers remained ready, willing, and able to perform following the breach, whereas here, the Walshes are unable to point to anything in the record demonstrating that they met this standard. On this point, the Lees 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.

Most recently, in *Kofmehl v. Baseline Lake, LLC*, 177 Wn.2d 584, 595, 305 P.3d 230, 236 (2013), the Supreme Court held that a buyer who refuses to close over a legal description has the burden of proving the seller's repudiation of the agreement. *Kofmehl* did not discuss or change the requirement of *Willener* and *Wallace* that a seller must establish its own performance as a matter of fact as a condition to any claim that the buyer breached the agreement. *Willener* 107 Wn.2d at 394–95; *Wallace*, 124 Wn.2d at 881.

## **2. The Hatches Did Not Repudiate the Agreement.**

Repudiation of a contract requires a positive statement or action by the promisor that distinctly and unequivocally says that he or she will not or cannot perform. Anything less is not a repudiation. This is an area where courts speak in forceful terms and require forceful evidence.

A party's intent not to perform may not be implied from doubtful and indefinite statements that performance may or may not take place. *Lovric*, at 282, 567 P.2d 678. Rather, an anticipatory breach is a “ ‘**positive statement or action by the promisor** indicating **distinctly and unequivocally** that he either **will not or cannot substantially perform** any of his contractual obligations.’ ” *Olsen Media*, 32 Wash.App. at 585, 648 P.2d 493 (quoting *Lovric*, 18 Wash.App. at 282, 567 P.2d 678). Neither case presents a communication similar to Wallace's December 13 letter. In *Olsen*

*Media*, a letter raising a question as to the extent of services was found not to be an anticipatory breach, and in *Lovric*, a letter stating that the defendants “may” not be able to perform also did not constitute an anticipatory breach. Wallace's letter stated that he could not perform on December 17 and requested a new agreement. In the words of the trial court, the letter “was clearly an anticipatory breach.”

The sellers would have been perfectly entitled in not even showing up themselves on the 17th. They were not required to do a useless act. They were told that payments into escrow would not be made; that the defendant would not tender into closing; and they were entitled to rely on that information. Everything in the history of their dealing with this purchaser supported the conclusion that when he said he wasn't going to be there with his \$1.5 million, then he wasn't going to be there. Their performance, in a sense, was excused by the prior breach, the anticipated breach, by the buyer/plaintiff.

Trial Court's Oral Decision, CP, at 203. We agree with both the trial court and the Court of Appeals that Wallace's December 13 letter constituted an anticipatory breach.

*Wallace Real Estate Inv., Inc. v. Groves*, 124 Wn.2d 881, 898, 881 P.2d 1010, 1019-20 (1994).

A party's anticipatory repudiation of a contract excuses the other party's performance. *CKP, Inc. v. GRS Constr. Co.*, 63 Wash.App. 601, 620, 821 P.2d 63 (1991). Such repudiation must occur before the other party's performance is due. *Wallace v. Kuehner*, 111 Wash.App. 809, 816, 46 P.3d 823 (2002). “An intent to repudiate may be expressly asserted or circumstantially manifested by conduct.” *CKP*, 63 Wash.App. at 620, 821 P.2d 63. The repudiation must consist of a “**positive statement or action by the promisor** indicating **distinctly and unequivocally** that he either **will not or cannot substantially perform** any of his contractual obligations.” *Wallace Real Estate Inv. Inc. v. Groves*, 124 Wash.2d 881, 898, 881 P.2d 1010 (1994) (quoting *Olsen Media v. Energy Scis., Inc.*, 32 Wash.App. 579, 585, 648 P.2d 493 (1982)). A party's “doubtful and indefinite statements” suggesting only that it may not perform do not demonstrate repudiation. *Wallace Real Estate*, 124 Wash.2d at 898, 881 P.2d 1010.

*Grant Cnty. Port Dist. No. 9 v. Washington Tire Corp.*, 187 Wn.App. 222, 231-32, 349 P.3d 889, 894 (2015).

There is no evidence of any “**positive statement or action by the promissor**” that was known to Falk. A repudiation “must be a clear and positive statement or action that expresses an intention not to perform the

contract.” *Alaska Pac. Trading Co. v. Eagon Forest Products, Inc.*, 85 Wn.App.. 354, 365, 933 P.2d 417, 422 (1997) (emphasis added). *Versuslaw, Inc. v. Stoel Rives, LLP*, 127 Wn.App.. 309, 321, 111 P.3d 866, 872 (2005) (Repudiation by a contracting party requires a clear and positive statement or action that expresses an intention not to perform the contract.) (citation and quotation marks omitted). The Hatches never made any statements of any kind to Falk. Their apparent rental of another property was not known to him. Although Hoffman did testify that was “expressed to Cary Falk at that point that they were not going to close on the transaction,” she never explained what was said or how it was “expressed.” CP 37. Moreover, whatever Hoffman may have said was not a statement by the Hatches.

Even if one accepted Hoffman’s statement that it was “expressed” to Falk that the Hatches would not perform, there is no evidence that the expression was **distinct and unequivocal**. Cases finding repudiation consider the precise words used in the purported repudiation, but that is impossible here. *See, e.g., State v. Brown*, 92 Wn.App.. 586, 602, 965 P.2d 1102, 1111 (1998) (“To constitute a repudiation, a party’s language must be sufficiently positive to allow one to reasonably interpret it as stating that the party will not or cannot perform.”); *Olsen Media v. Energy Scis., Inc.*, 32 Wn.App.. 579, 585, 648 P.2d 493, 497 (1982) (“But by its terms, the letter is not a “positive statement or action by the promisor indicating distinctly and unequivocally that he either will not or cannot substantially perform any of his contractual obligations”). The Court does not even have the alleged statement before it.

The point that Falk and Judge Benton seem to have missed is that a repudiation of a contract is a deliberate communication, not some abstract concept. A purported repudiation has no effect if it is not known to the other

party. In *Alaska Pac. Trading Co. v. Eagon Forest Products, Inc.*, 85 Wn.App. 354, 366, 933 P.2d 417, 423 (1997), the court pointed out that “Washington courts have refused to hold that **a communication between contracting parties** that raises doubt as to the ability or willingness of one party to perform, but is not an outward denial, is a repudiation of the contract.” That is why *Wallace* required a “positive statement or action by the promisor **indicating** distinctly and unequivocally that he either will not or cannot substantially perform.” *Wallace*, 124 Wn.2d at 898.

The Hatches never communicated anything to Falk. Hoffman may or may not have said things to Falk, but the only one to which she testified was to convey Ken Hatch’s message that “He’d like to talk to you about a lease purchase.” It is settled law that parties to an agreement are free to propose modifications to it any time they like.

The law does not preclude a party, like UFCC, from proposing modifications to a negotiated agreement. *See, e.g., M.A. Mortenson Co. v. Timberline Software Corp.*, 140 Wash.2d 568, 590, 998 P.2d 305 (2000) (“It is well established that the offeror is the master of his offer under traditional contract law principles.”). And, conversely, the law does not “obligate a party to accept a material change in the terms of its contract” *Badgett v. Sec. State Bank*, 116 Wash.2d 563, 569, 807 P.2d 356 (1991).

*United Financial Casualty Co. v. Coleman*, 173 Wn.App. 463, 473, 295 P.3d 763, 768 (2012).

The other matters that Judge Benton found relevant were completely unknown to Falk or his own communication. Falk apparently sent the Hatches some notice after his December 27 meeting with Hoffman, but the notice is not in the record, and it is not known what it said. The Hatches responded to Hoffman’s email to them about it by declining to do anything without first speaking to their attorney. What happened after that is

completely unknown, including whether Hoffman ever said anything to Falk.

Assuming that the Hatches rented a home on December 31, 2014, there is no evidence that Falk learned that prior to discovery in this action. It could not be the reason why he failed to perform on January 5, 2015. Moreover, signing a lease for a home would not make performance of the agreement impossible. It would be possible for a person to rent one house and purchase another. Even if the fact were communicated to Falk, it would not “indicate distinctly and unequivocally” that the Hatches would not perform.

Falk’s repudiation argument comes down to Hoffman’s testimony that “I think it was clear that the Hatches weren't prepared to close on the house.” CP 28. The testimony of a nonparty about what she thinks was clear in a conversation does not rise to the level of proof of repudiation, particularly when the record contains no evidence that the other party to the conversation shared that belief. Falk has failed to prove repudiation as a matter of law.

### **3. Calling the Earnest Money Nonrefundable Changes Nothing.**

Falk next argued that the earnest money was nonrefundable and negotiated in connection with a price reduction. The Counteroffer Addendum to the Agreement provides that \$20,000 of the Earnest Money is non-refundable to the buyer.” CP 54. When the Inspection Contingency was removed, the parties included a provision stating that “Earnest monies of \$35,000 to be released to Seller, non-refundable to buyer, once inspection response is agreed upon.” CP 58. Falk claims that the term “nonrefundable” provides a defense to the return of the earnest money.

It is not clear if Falk is arguing that he was entitled to the earnest money if the sale failed to close for any reason at all, or if it made his own

performance irrelevant. He says that “the parties agreed the earnest money deposit was non-refundable and intended to act as liquidated damages if the purchaser defaulted.”

In support of his argument, Falk cites *Watson v. Ingram*, 124 Wn.2d 845, 881 P.2d 247, 249 (1994), which probably is the best authority on the effect of calling earnest money nonrefundable. *Watson* was a dispute over an agreement with a provision for “nonrefundable” earnest money. *Id.* at 849. Calling earnest money nonrefundable cannot remove it from liquidated damages analysis because the first sentence in the Analysis section of the opinion states:

This case presents a single issue for review: whether the parties' contract provision requiring Watson to forfeit a \$15,000 **nonrefundable earnest money deposit** is enforceable as liquidated damages.

*Id.* at 550. The *Watson* court then proceeded to thoroughly analyze the case under liquidated damages law.

Liquidated damages can only be awarded in the event of a breach or default by one of the parties. *Minnick v. Clearwire U.S. LLC*, 174 Wn.2d 443, 463, 275 P.3d 1127, 1137 (2012) (“A fee imposed upon breach is by definition a liquidated damages provision.”). The Agreement provides that the Seller will retain the earnest money only if the buyer fails to close “without legal excuse.” CP 40 at ¶ p.

For this reason, Washington courts routinely treat earnest money the same whether it is denominated as nonrefundable or released to the seller. *E.g., Renfro v. Kaur*, 156 Wn.App. 655, 659, 235 P.3d 800, 802 (2010) (buyer awarded earnest money designated as nonrefundable in agreement); *Wallace Real Estate Inv., Inc. v. Groves*, 124 Wn.2d 881, 884, 881 P.2d 1010, 1012 (1994) (nonrefundable earnest money treated as liquidated

damages); *Watson v. Ingram*, 124 Wn.2d 845, 850, 881 P.2d 247, 249 (1994) (earnest money called nonrefundable). Most notably, in *Willener v. Sweeting*, 107 Wn.2d 388, 390–91, 730 P.2d 45, 48 (1986), the earnest money was called nonrefundable in the parties’ agreement, and the Court ordered its return to the buyer when neither party performed on the closing date.

Falk also seems to argue that the release of the earnest money to him was significant. This Court considered the same argument in *Home Realty Lynnwood, Inc. v. Walsh*, 146 Wn.App. 231189 P.3d 253 (2008) and rejected it.

The Lees argue that *Schweiter* is distinguishable because there, the earnest money was in the seller's possession, whereas here, the Lees' earnest money deposit was placed in escrow and is now being held by the court. Therefore, the earnest money remained their property and the sellers could not claim it without a right of action for recovery. And because the only conceivable source of such a right would be the purchase and sale agreement, which is void and unenforceable under the statute of frauds, the buyers retain ownership and have the right to withdraw it from escrow. We disagree. There is nothing in *Schweiter* indicating that the court's decision was based on the identity of the party holding the earnest money. Furthermore, this is not a meaningful distinction because the rule generally applies even if the earnest money is in the hands of a third person. 73 Am.Jur.2d *Statute of Frauds* § 450 (2008).

*Id.* at 241.

Falk also overlooks the simple fact that when the agreement expired, it ceased to exist and could no longer be the basis for a claim to the earnest money no matter what it said. Even if the terms of the agreement did somehow survive, the agreement continued to provide that the earnest money would only be retained by Falk if the Hatches failed to close without legal excuse, which Falk cannot prove.

**4. The Financing Contingency Has No Effect on the Earnest Money.**

Lastly, Falk claimed that the Hatches waived their financing contingency by changing lenders, and that they forfeited their earnest money as a result. He cited no authority for the proposition that the waiver of a contingency entitles the other party to liquidated damages or the earnest money. The Hatches have never claimed that they are entitled to the return of their earnest money under the financing contingency, and this argument has no relationship to this case.

**E. When An Agreement Expires, the Earnest Money Is Refunded to the Buyer.**

When the agreement expired and ceased to exist, it could no longer provide the basis for Falk to claim the earnest money. To the extent that terms of the agreement continued to matter at all, they provided for Falk to retain the earnest money only if the Hatches failed to close without legal excuse. Falk's own failure to close and the resulting expiration of the agreement provided the Hatches with that legal excuse. To the extent that the terms became wholly inoperative, Falk has no grounds to retain money that belongs to the Hatches.

This specific question was answered by the Supreme Court in *Willener v. Sweeting*, 107 Wn.2d 388, 730 P.2d 45 (1986).

Substantial evidence in the record supports the trial court's conclusion plaintiffs did not perform their part of the contract. There is testimony throughout the record questioning plaintiffs' ability to provide the necessary funds to close the deal with defendants. Plaintiffs had a concurrent duty to perform; they did not perform. Their failure to perform was not excused. They have no right to bring an action for contract damages.

The same law that applies to plaintiffs applies to defendants. If defendants have not performed, they cannot bring an action for the liquidated damages available from breach of the agreement. The trial court found defendants did not satisfy the performance required by the agreement. Defendants did not deposit in escrow the documents required to convey marketable title to plaintiffs. This fact is undisputed. For the same reasons plaintiffs were denied

contract damages, defendants should not receive contract damages of plaintiffs' earnest money in forfeiture pursuant to paragraph 3 of the agreement. *Reynolds Metals Co. v. Electric Smith Constr. & Equip. Co.*, 4 Wash.App. 695, 483 P.2d 880 (1971).

*Id.* at 396.

**F. The Court Should Reverse and Remand With Instructions to Enter Summary Judgment for the Hatches.**

Judge Benton necessarily ruled that the Hatches repudiated the agreement as a matter of law. Viewing the evidence in a light most favorable to the Hatches, that ruling cannot be upheld. At a bare minimum, the order granting summary judgment for Falk should be reversed.

When the facts are undisputed, the Court can order entry of summary judgment for the appellant. *Impecoven v. Dep't of Revenue*, 120 Wn.2d 357, 365, 841 P.2d 752, 755 (1992). Here, the parties relied on legal arguments, not factual disputes. To the extent that factual issues arose, they concerned the legal significance of the facts and not what actually happened.

Moreover, although the order denying the Hatches' motion is not appealable as a matter of right, this Court has the discretion to decide it.

Although there is no appeal as of right from the denial of a motion for summary judgment, we may exercise our discretion and rule on a denied motion for summary judgment to serve the interest of judicial economy where there are no genuine issues of material fact. *See Waller v. State*, 64 Wash.App. 318, 338, 824 P.2d 1225, review denied, 119 Wash.2d 1014, 833 P.2d 1390 (1992).

*Anderson v. State Farm Mut. Ins. Co.*, 101 Wn.App. 323, 329, 2 P.3d 1029, 1033 (2000). Because the motions were briefed and presented in coordinated motions and concern the same legal issues, the Court should review the order denying summary judgment as well.

Falk has failed to present any evidence at all to meet his threshold burden of proving his own performance. He has provided no evidence at all of his participating in the December 27 meeting, no explanation for his failure to perform, and no evidence of his ability to perform. The Hatches'

motion was a direct challenge to the sufficiency of the evidence on those points. Summary judgment should be entered for the Hatches because of Falk's failure to come forward with admissible evidence. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182, 188 (1989).

**G. The Court Should Award the Hatches' Attorney Fees.**

The Agreement contained an attorney fee provision. CP 44 at ¶ q. The attorney fee provision expired along with the rest of the agreement. However, Falk sought and obtained an award of attorney fees under the agreement. The Hatches therefore are entitled to an award of attorney fees under the doctrine of mutuality of remedy. *Almanza v. Bowen*, 155 Wn.App. 16, 24, 230 P.3d 177, 180 (2010); *Kaintz v. PLG, Inc.*, 147 Wash.App. 782, 786–87, 197 P.3d 710 (2008).

**VII. CONCLUSION**

This appeal comes down to three simple and indisputable legal rules. Judge Benton erred in failing to follow them.

First, “the party claiming nonperformance of the other must establish as a matter of fact the party's own performance. *Wallace*, 124 Wn.2d at 897; *Willener*, 107 Wash.2d at 394. Falk claims the earnest money because of the Hatches' nonperformance, but he has presented no evidence of his own.

Second, a seller's performance will be excused if the buyer repudiates, but repudiation requires a “positive statement or action by the promisor indicating distinctly and unequivocally that he either will not or cannot substantially perform.” *Wallace*, 124 Wn.2d at 898. Falk alleges that the Hatches repudiated, but he never communicated with them and has offered only the opinion of the Hatches' broker about what was “clear” in a conversation.

Third, when the seller cannot prove performance or repudiation, the earnest money is returned to the buyer. *Willener*, 107 Wn.2d at 396. Absent a valid claim for breach, the seller has no basis to claim the earnest money.

This Court should enforce these three rules and reverse the order granting summary judgment for Falk, award the Hatches attorney fees, and remand with instructions to enter summary judgment for the Hatches.

DATED this 19<sup>th</sup> day of August, 2016.

**DAVIS LEARY LLC**

By   
Matthew F. Davis, WSBA No. 20939  
Attorneys for Appellants

**DECLARATION OF SERVICE**

I, Matthew Davis, hereby declare as follows:

1. I have personal knowledge of the facts set forth herein and am competent to testify thereto.
2. On August 23, 2016, I served the foregoing document on the parties identified in paragraph 3.
3. The documents identified in paragraph 2 were served on the following persons at the email addresses stated pursuant to agreement of counsel.

Nathan Neiman Nneimail@aol.com

DATED this 23<sup>rd</sup> day of August, 2016 at Seattle, Washington.

  
\_\_\_\_\_  
Matthew F. Davis