No. 89604-6-I

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 69039-6-I

COURT OF APPEALS OF THE
STATE OF WASHINGTON, DIVISION ONE

MUKILTEO RETIREMENT APARTMENTS, L.L.C.,
a Washington limited liability company,

Plaintiff/Respondent,

v.

MUKILTEO INVESTORS, L.P., a Washington
limited partnership, CAMPBELL HOMES CONSTRUCTION, INC.,
a Washington Corporation,

Defendant/Appellants.

APPELLANTS' PETITION FOR REVIEW

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Jason W. Anderson, WSBA No. 30512
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I. IDENTITY OF PETITIONERS

Defendants and Appellants Mukilteo Investors, L.P., and Campbell Homes Construction, Inc., seek review of the decision identified below.

II. COURT OF APPEALS DECISION

Division One of the Court of Appeals issued its partially published decision terminating review on August 19, 2013 (App. A). The court summarily denied reconsideration on October 22, 2013 (App. B).

III. ISSUES PRESENTED FOR REVIEW

1. Waiver of a Judicial Admission. Did the Court of Appeals err in holding, contrary to CR 15(b), that the right to rely on a judicial admission cannot be waived, even when the party entitled to rely upon the admission affirmatively disproved it at trial?

This issue warrants review under RAP 13.4(b)(4) because it is an issue of first impression and one of substantial public interest that should be determined by the Supreme Court.

2. "Agreement to Agree." Did the Court of Appeals err in holding that, where an essential term of an option agreement -- the purchase price -- depends on an integrated formula, and the trial court found that the parties failed to reach a meeting of the minds regarding material components of that formula, the option agreement may nevertheless be enforced in equity based on a price set by the court?

This issue warrants review under RAP 13.4(b)(1) because the Court of Appeals' decision conflicts with this Court's decisions in *Sea-Van Investment Associates v. Hamilton*, 125 Wn.2d 120, 881 P.2d 1035 (1994), and *Sandeman v. Sayres*, 50 Wn.2d 539, 314 P.2d 428 (1957).

3. Consequential Damages. Assuming the option agreement was properly enforced, did the Court of Appeals err in affirming an award

of consequential damages that gave the buyer a windfall by putting it in a substantially better position than had the seller performed?

This issue warrants review under RAP 13.4(b)(2) because the Court of Appeals' decision conflicts with the decisions of the Court of Appeals in *Cornish College of the Arts v. 1000 Virginia Limited Partnership*, 158 Wn. App. 203, 242 P.3d 1 (2010), and *Rehki v. Olason*, 28 Wn. App. 751, 626 P.2d 513 (1981).

IV. STATEMENT OF THE CASE

In the late 1990s, Ronald Struthers and Duane Clark, experienced developers and operators of retirement apartment facilities, formed Mukilteo Retirement Apartments, LLC ("MRA"), and caused it to purchase land for a new facility in Mukilteo, Washington. RP I 105-10, 120, 144. After determining that they had insufficient capital, Struthers and Clark solicited an arrangement with Carl W. Campbell, a successful and well-known developer of retirement facilities. RP I 111-14. In the fall of 1999, Mukilteo Investors, LLP ("MILP"), in which Campbell Homes Construction, Inc., was initially the general partner, agreed to purchase the land from MRA, develop the facility, and lease it back to MRA under a 20-year lease. Exh. 225 at 10 & Exh. C.

MRA also wanted an option to purchase the facility in the future. The parties signed an option agreement that provided that the option price would be "the greater of" three values: (1) the facility's "replacement cost" as of the option exercise date; (2) the facility's "fair market value" as of the option exercise date; (3) the value for the facility as set forth in an

exhibit the parties referred to as "Schedule D," which adjusted upward 3% annually every January 1. Exh. 225 at 1-2. The option agreement defined "facility" as including the improvements and personal property on the site *and* the underlying real property. Exh. 225 at 1.

At trial, Mr. Struthers testified that the parties signed the option agreement despite having failed to agree on the meaning of the replacement cost component of the price formula. Struthers referred to a letter sent during the contract negotiations in which MRA's attorney, Ed Beeksma, insisted to MILP that "replacement cost" be defined or deleted:

> The concept sets a formula for determining a price, a means of determining fair market value but does not address how to calculate replacement cost. The Option Price apparently is to be the greater of those 3. If replacement cost is to remain as one of the Options, we need to define how that is determined.

RP I 130; Exh. 7 at 2. Struthers also referred to a subsequent memorandum in which Mr. Beeksma similarly demanded: "Delete...the method of establishing the purchase price as the replacement cost." RP I 134; Exh. 11 at 5.

Struthers testified that, "fairly soon after this memorandum," he spoke directly with Gene Hiner, a representative for Carl Campbell and MILP, and insisted that "replacement cost" be "delete[d]...or define[d]." RP I 135. According to Struthers, he warned Mr. Hiner that if the parties did not delete or define "replacement cost," they would "end up with a big cat fight" about the price when MRA eventually exercised its option, and it would be a "big mess." RP I 136; RP II 18. Hiner responded that the

construction season was approaching, and it was time to stop "messing around with these documents." RP I 135. Also according to Struthers, Hiner assured Struthers that "[y]ou can trust us" because "Carl Campbell's an honorable man." RP II 17. After this conversation, Struthers and Clark discussed the matter and decided to sign the option agreement despite the absence of agreement on the meaning of "replacement cost." RP I 137-38.

The option agreement provided that the three values of the option price formula were to be determined as of the date the option was exercised by MRA. Exh. 225 at 1. The agreement further provided that the option could be exercised within a 12-month period "commencing on the...eighth (8th) anniversary of the commencement date of the Facility Lease Agreement."[1] Exh. 225 at 3-4. The lease agreement, in turn, provided that its "commencement date" would be the earlier of (1) the issuance of a certificate of occupancy or (2) MRA taking possession of the facility. Exh. 225, Exh. C, at 2.

Before the fall of 2007, the parties understood and agreed that the option would become exercisable on June 15, 2008, based on the date eight years earlier when the certificate of occupancy was issued. RP II 41-42, 67-69; RP IV 11; RP V 55-56, 151; Exhs. 60 & 229. But then MRA hired legal counsel who suggested to MRA that the option period

[1] The option agreement provided for a different commencement date if MILP added onto the facility, which it never did. Exh. 225 at 3-4.

"possibly could be interpreted" as commencing October 21, 2007, eight years from the date the lease was signed. RP II 67-68.

Struthers testified that, "just to be prudent and cover [its] bases," MRA sent MILP a notice of exercise of option dated November 14, 2007. RP II 69; Exhs. 66, 67. But when MILP responded that the option period would not commence until June 15, 2008, and proposed to amend the option agreement to memorialize that date and eliminate any uncertainty about it (Exhs. 70, 82), MRA did not welcome this clarification and proposal. Instead, and contrary to Struthers' trial testimony that MRA was just "cover[ing its] bases," MRA insisted that it properly exercised the option in November 2007. Exh. 78. Furthermore, MRA relied upon the November 2007 date to claim the right to a reduced purchase price, sending MILP a draft purchase and sale agreement based on the 2007 Schedule D value of $15,557,906 -- $466,737 *lower* than the 2008 Schedule D value. Exh. 84; Exh. 225 (Exh. D).

The option agreement's price formula set forth the methods for determining its three component values. Exh. 225 at 1-3. The replacement cost would be determined solely by the appraiser selected by MILP. *Id.* at 2. The agreement allowed each party to appoint an appraiser of fair market value, and it set forth a reconciliation procedure depending on the extent of difference in the valuations. *Id.* at 2. The Schedule D value applicable during each year was set forth in an exhibit to the option agreement. *Id.*, Exh. D. No provision contemplated disregarding any component of the price formula in any circumstances.

In May 2008, without notifying MILP, MRA hired Tellatin, Short, Hansen & Clark to appraise the fair market value and replacement cost of the facility. RP VI 128. Despite MRA's insistence to MILP that the option was properly exercised in November 2007, MRA had Tellatin appraise the facility as of June 2008. Exh. 110. Tellatin determined that the facility's fair market value was $18.82 million. Exh. 110 at MRA 00849. With regard to replacement cost, notwithstanding the inclusion of the land in the option agreement's definition of "facility" (Exh. 225 at 1), MRA instructed Tellatin to exclude the land from its analysis. RP III 26-29; Exh. 281. Tellatin determined that the replacement cost for the building and improvements only was $16.78 million. *See* Exh. 110 at MRA 00849. Tellatin noted, however, that the land had an assessed value of $2,477,800. Exh. 110 at MRA 00894.

Tellatin's fair market value figure significantly exceeded the 2007 *and* 2008 Schedule D values ***as well as the preliminary loan underwriting MRA had obtained based on an assumed purchase price of only $17 million.*** *Compare* Exh. 225 (Exh. D) *with* Exh. 241; *see also* CP 5323 (FOF 61) (MRA had obtained a preliminary loan commitment for a purchase price of "up to" $17 million). In addition, Tellatin's replacement cost value, corrected for the omission of the land value, was over $19.25 million. If either of Tellatin's values was controlling under the option agreement, MRA would confront a price it would not be able to pay, and it would forfeit its chance to purchase the facility. *See* Exh. 225 at 3-4 (requiring that MRA's purchase close within the option period).

MRA did not immediately disclose the Tellatin appraisal, even after MILP notified MRA in June 2008 that it would engage appraiser Aaron Brown to evaluate the fair market value and replacement cost of the facility pursuant to the option agreement.[2] Exh. 102. Instead, in August 2008, MRA sued MILP in Snohomish County Superior Court, seeking specific performance of the option and determination of a price in accordance with its allegation that its exercise of the option in November 2007 was timely and not premature. CP 5606-07.

In September 2008, MILP formally engaged Brown and promptly notified MRA of this engagement. Exhs. 123, 301. In addition, seeking to resolve the dispute over the option exercise date and thus enable determination of the option price, MILP offered to deem the option exercised as of June 15, 2008, or such earlier date as the trial court might set. Exh. 306. MRA continued to insist that it properly exercised the option in November 2007. Exhs. 307, 311.

MILP provided Brown's appraisal to MRA in November 2008. Exh. 136. Brown appraised the facility's fair-market value at $24 million and the replacement cost (including the land) at $27 million, both as of June 15, 2008. Exh. 107 at 002, 095, 162-3. Even though the Brown and Tellatin appraisals were both as of June 2008, MRA still maintained that it

[2] Mr. Clark testified that MRA withheld the Tellatin appraisal pending valuation of the facility by MILP's appointed appraiser. RP VI 137-38. MRA first disclosed the Tellatin appraisal in November 2008, in response to MILP's appraiser's valuations. RP IV 96; Exh. 311.

properly exercised the option in November 2007. Exh. 311. This dispute precluded determination of the option price under the agreement until the trial court (Hon. Thomas J. Wynne) resolved the exercise date issue in MILP's favor *over three years later*, in November 2010; granting summary judgment to MILP, the court ruled that the option period opened June 15, 2008. CP 4753-55. Shortly after that ruling, MRA hired its testifying appraiser expert, Anthony Gibbons, who concluded that the facility's fair market value was $19 million as of June 15, 2008. RP VI 36, 94; Exh. 147.

The case went to trial in May 2012. MRA's and MILP's experts agreed that the fair market value of the facility was greater than the applicable Schedule D value, and all of their fair market values substantially exceeded the $17 million for which MRA could obtain financing to pay. *See* RP X 100-01, 137; Exh. 110 at 2; Exh. 147; Exhs. 241 & 336.

MRA had alleged in its complaint, and MILP and Campbell Homes had agreed in their answer, that the option agreement was "valid and binding." CP 1270, 1282. But at trial MRA sought to prove that the parties never had a meeting of the minds on a material component of the agreement's price term. MRA's counsel described in his opening statement how Beeksma had insisted that "replacement cost" be defined or deleted from the option price formula; how Mr. Struthers was then rebuffed when he raised this issue directly with Mr. Hiner; and how MRA elected to close the deal even though Struthers and Clark "knew there was

no definition [of] replacement cost." RP I 32-34. MRA then opened its case-in-chief by introducing the evidence supporting these contentions through the testimony of Mr. Struthers (previously described at pages 3-5 of this Petition). MILP did not object to the raising of these contentions, or to the introduction of Mr. Struthers' testimony in support.

Consistent with MRA's evidence, the trial court (Hon. George N. Bowden) found "there was never a meeting of minds with respect to what was to be included in determining replacement cost for the facility" and that it was "therefore impossible to give effect to that pricing method[.]" CP 5324 (FOF 70).[3] The court also found there was no meeting of the minds regarding material aspects of the fair market value component of the price formula. CP 5325 (FOF 72). The court further found that it "would be appropriate to rely upon" the 2008 Schedule D value of $16,024,643, CP 5326 (FOF 77), but the court ultimately disregarded that value, as well, and set a price of $18,725,000 based on a method not provided for in the option agreement.[4] CP 5326 (FOF 77, 78).

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[3] The trial court rejected Brown's appraisal, including his replacement cost figure, based on lack of credibility. CP 5325-26 (FOF 74-75). But the court also found that, because there was no meeting of the minds on how to determine replacement cost, there was no need for the court to determine replacement cost. CP 5324 (FOF 70).

[4] The court described its price as a midpoint between values set forth by Gibbons, but in fact the final values set forth by both Tellatin and Gibbons exceeded the court's price. *See* Ex. 110 at MRA 01040 (Tellatin's reconciliation and final conclusion); Ex. 147 at MRA 01531 (Gibbons' reconciliation and final conclusion).

As a credit toward that price, the court awarded MRA as consequential damages *all* of the rents it had paid since June 2008 (totaling $6,033,805), resulting in a remaining net price of $12,691,195. CP 5327 (FOF 82); CP 5328 (COL 4); CP 5310. This credit did not account for the substantial costs of ownership MRA would have incurred had it owned the facility since June 2008, such as the payments owing to the mortgage lender financing the purchase. Indeed, the credit was approximately four times the difference in cost between owning and leasing for 2008-2012 as calculated by MRA. *See* Exh. 148. The credit also did not account for MRA having delayed resolution of the parties' dispute at least three years by insisting on a right to exercise the option in 2007 (a claim ultimately rejected on summary judgment entered at the end of 2010, and subsequently abandoned by MRA).

The trial court entered a decree of specific performance ordering MILP to sell the facility to MRA at the remaining net price set by the trial court.[5] CP 5310. The trial court also awarded MRA more than $525,000 in attorney's fees and costs, CP 5311, which MILP paid in full pending the final outcome of this appeal.

[5] Although the trial court ordered that the sale close within nine months, MRA has been unable to obtain financing for the purchase, a circumstance that MRA blames on the pendency of this appeal.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. This Court Should Review the Court of Appeals' Decision that the Right to Rely on a Factual Admission in a Pleading Cannot Be Waived.

MILP's primary assignment of error on appeal was to the trial court's enforcement of the option agreement notwithstanding its findings that the parties never reached a meeting of the minds regarding two of the three components of the option price formula. MILP argued that these unchallenged findings meant there was never mutual assent to an essential term of the option agreement -- the price -- rendering the option agreement a mere "agreement to agree," which is unenforceable under *Sea-Van Investment Associates v. Hamilton*, 125 Wn.2d 120, 881 P.2d 1035 (1994), and *Sandeman v. Sayres*, 50 Wn.2d 539, 314 P.2d 428 (1957).[6]

MRA argued in the Court of Appeals that MILP was estopped to deny the option agreement's enforceability, due to its admission in its answer that the agreement was "valid and binding." *Br. of Resp't* at 25-27. MILP responded that MRA had waived its right to rely upon that admission by disproving the admission at trial. *Reply Br. of Appellant* at 8-9. Resolving an issue of first impression in Washington, the Court of Appeals held that a judicial admission is not subject to waiver. *Slip op.* at 11-13 & n.8.

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[6] *See also P.E. Systems, LLC v. CPI Corp.*, 176 Wn.2d 198, 289 P.3d 638 (2012), and *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 94 P.3d 945 (2004), for this Court's most recent statements of Washington "agreement to agree" law.

An unambiguous admission of fact in a pleading may be treated as a judicial admission. *See* CR 8(b); K. TEGLAND, 5B WASH. PRAC., EVID. LAW & PRAC. § 801.53 (5th ed.). Such an admission ordinarily removes the admitted fact from contention, relieving the party with the burden of proof from being required to establish that fact. *See Murphy v. Murphy*, 44 Wn.2d 737, 739, 270 P.2d 808 (1954) (pre-rule case). But legal rights and privileges ordinarily are subject to waiver. *Bowman v. Webster*, 44 Wn.2d 667, 669, 269 P.2d 960 (1954). And under the rule followed in other jurisdictions, the right to rely on a judicial admission is no exception: "[W]here plaintiff does not rely on an admission in the answer of an allegation in the complaint, but introduces evidence that has the effect of disproving his own allegation, defendant is not bound by his admission." 32 C.J.S. EVID. § 628 (2013).[7]

Contrary to established Washington law on waiver and the uniform rule in other jurisdictions on this precise issue, the Court of Appeals' holding gives special status to judicial admissions, designating them as nonwaivable. Quoting a portion of a concurring-in-part and dissenting-in-part opinion by Justice Madsen in *Key Design, Inc. v. Moser*, 138 Wn.2d 875, 983 P.2d 653, *modified*, 993 P.2d 900 (1999), the Court of Appeals

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[7] *See, e.g., Cortez-Pineda v. Holder*, 610 F.3d 1118, 1123 (9th Cir. 2010); *Tabassum v. Younis*, 377 Ill.App.3d 761, 881 N.E.2d 396, 409 (2008); *Plemmons v. Pevely Dairy Co.*, 241 Mo. App. 659, 233 S.W.2d 426, 434 (1950); *Dressner v. Manhattan Delivery Co.*, 92 N.Y.S. 800 (App. Div. 1905); *Robison v. Madsen*, 246 Neb. 22, 516 N.W.2d 594, 599 (1994) (all holding admissions are waived by the introduction of conflicting evidence). MILP has been unable to locate any case from any American jurisdiction, state or federal, ruling otherwise.

reasoned that judicial admissions are "beyond the power of evidence to controvert them." *Slip op.* at 12 n.8, quoting *Key Design*, 138 Wn.2d at 893, quoting *Best Canvas Prods. & Supplies, Inc. v. Ploof Truck Lines, Inc.*, 713 F.2d 618, 621 (11th Cir. 1983), quoting *Hill v. Fed. Trade Comm'n*, 124 F.2d 104, 106 (5th Cir. 1941). But neither Justice Madsen nor any of the courts to which this statement is attributed ever concluded that the right to rely on a judicial admission may not be waived by the opposing party who possesses that right.[8]

The Court of Appeals' holding is also contrary to CR 15(b) -- a rule mentioned for the first time in this case by the Court of Appeals in a question to MRA's counsel at oral argument.[9] CR 15(b) provides for waiver of the right to rely on the pleadings where evidence that raises issues not raised by the pleadings is admitted without objection; the issue is deemed tried by consent of the parties, and the pleadings are deemed amended to conform to the proof. *See Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 766-67, 733 P.2d 530 (1987).[10]

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[8] The rule is only that the *party making the admission* may not seek to controvert it, over the opposing party's objection. *See, e.g., Seidler v. Hansen*, 14 Wn. App. 915, 920, 547 P.2d 917 (1976) (holding that the plaintiff was bound by her admission in pleadings regarding the value of the property at issue and could not seek to controvert it).

[9] MILP addressed CR 15(b) in its motion for reconsideration, which the Court of Appeals summarily denied.

[10] Under CR 15(b), a trial court must adjudicate all legal issues raised by the evidence, regardless of the pleadings. *O'Kelley v. Sali*, 67 Wn.2d 296, 298-99, 407 P.2d 467 (1965). CR 15(b) applies equally to defenses as to affirmative claims. *See, e.g., DiPirro v. United States*, 189 F.R.D. 60 (W.D. N.Y. 1999) (ruling that the unpleaded affirmative defense of failure to mitigate was tried by *(footnote continued on next page)*

In determining whether parties consented to the trial of an issue, "an appellate court will consider the record as a whole, including whether the issue was mentioned before the trial and in opening arguments, the evidence on the issue admitted at the trial, and the legal and factual support for the trial court's conclusions regarding the issue." *Dewey v. Tacoma Sch. Dist. No. 10*, 95 Wn. App. 18, 26, 974 P.2d 847 (1999). With respect to the issue of mutual assent to the replacement cost component of the price formula, MRA did not rely upon MILP's admission that the option agreement was "valid and binding." Instead, MRA affirmatively proved that the parties *did not* reach mutual assent as to the meaning of replacement cost, and the trial court found in accordance with that proof. *See* CP 5324 (FOF 70).

Despite the trial court's unchallenged finding, the Court of Appeals concluded that MRA's raising the issue in its opening statement and presenting evidence in support did not constitute trying an issue under CR 15(b).[11] This conclusion incorrectly elevates the pleadings over the proof and designates admissions as conclusive, regardless of the trial evidence.

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implied consent under Fed. R. Civ. P. 15(b), based on evidence introduced by the plaintiff). The rule is to be liberally construed, *Amende v. Pierce County*, 70 Wn.2d 391, 400, 423 P.2d 634 (1967), and is intended "to discourage arguments...based on formalities of pleadings," *Reichelt*, 107 Wn.2d at 768, and thus "avoid the tyranny of formalism that was a prominent characteristic of former practice." *Harding v. Will*, 81 Wn.2d 132, 136, 500 P.2d 91 (1972).

[11] The Court of Appeals concluded that the issue must not have been litigated because if it had been, "a host of additional questions would necessarily have arisen," such as whether there was sufficient consideration for the lease agreement, given that MRA supposedly agreed to above-market rents in exchange for an option to purchase. *Slip op.* at 14. The trial court, however, *(footnote continued on next page)*

This Court should accept review under RAP 13.4(b)(4) and decide whether a party entitled to rely on a judicial admission waives that right by disproving the admission at trial.[12]

B. This Court Should Review the Court of Appeals' Decision that, Even if Parties Fail to Reach a Meeting of the Minds on Material Components of an Integrated Price Formula in an Option Agreement, the Trial Court May Set a Price According to Its Own Valuation Method and Enforce the Agreement.

An agreement that requires a further meeting of the minds of the parties as to an essential term is an "agreement to agree," and is unenforceable. *Sea-Van*, 125 Wn.2d at 127-29; *Sandeman*, 50 Wn.2d at 541-42. An option contract is an agreement to enter into a future contract, and it must include all the essential terms of the future contract, *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993), including price.

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made no finding that the rents were above market. Moreover, the record plainly shows that MRA's principals knew there was no meeting of the minds on replacement cost, and made a business decision to go ahead anyway and take the risk of a subsequent dispute over price, because they did not want to lose a construction season and delay the opening of the facility. This case is plainly distinguishable from cases such as *Federal Safety Corp. v. Signal Factors, Inc.*, 125 Wn.2d 413, 886 P.2d 172 (1994), in which the party with the burden of proof did not raise the issue in opening or affirmatively introduce evidence on the issue.

[12] If MRA waived its right to rely on MILP's admission in its answer, or if the issue of lack of mutual assent to the price term was tried by implied consent of the parties under CR 15(b), then, as the Court of Appeals recognized, MILP was entitled under RAP 2.5(a)(2) to raise unenforceability for the first time on appeal. *See Slip op.* at 15-16. RAP 2.5(a)(2) allows a party to raise the "failure to establish facts upon which relief can be granted" for the first time on appeal, and this Court has made clear that the rule is mandatory. *See State v. WWJ Corp.*, 138 Wn.2d 595, 601-02, 980 P.2d 1257 (1999).

Valley Garage, Inc. v. Nyseth, 4 Wn. App. 316, 318, 481 P.2d 17 (1971) (recognizing that the price is an essential term of an option contract).

Here, the option agreement provided that the price was to be "the greater of" three values. Exh. 225 at 1-2. There was no basis for the Court of Appeals' conclusion that a dispute over how to determine one of the values could be dismissed as involving a mere "nuance[] of the bargain" to which mutual assent was not required. *See Slip op.* at 14. The Court of Appeals asserted that the agreement "expressly contemplated circumstances in which replacement cost would not be considered in determining a purchase price," such as if the parties failed to timely appoint appraisers. *Slip op.* at 17-19. Yet nothing in the language of the option agreement provides for disregarding any of the three component values under any circumstances. *See* Exh. 225 at 1-3. And even assuming the agreement contemplated that the *replacement cost* component of the price formula could be disregarded, the trial court also found no meeting of the minds regarding the *fair market value* component. Moreover, the trial court ultimately disregarded the formula altogether, including the Schedule D value and "the greater of" language, and set a price according to its own method. CP 5326 (FOF 76-77). Nothing in the agreement authorized the trial court to disregard all of the agreement's values and set a price based on the court's notion of a proper price.

The Court of Appeals incorrectly concluded that the option agreement's severability clause authorized the trial court's action. This Court has never addressed the proper application of a contractual

severability clause. *See P.E. Sys., LLC v. CPI Corp.*, 164 Wn. App. 358, 367-68, 264 P.3d 279 (2011), *rev'd on other grounds*, 176 Wn.2d 198 (2012). A severability clause "is but an aid to construction, and will not justify a court in declaring a clause as divisible when, considering the entire contract, it obviously is not." *Eckles v. Sharman*, 548 F.2d 905, 909 (10th Cir. 1977). Essential terms, such as price, are not severable. *Id.*; *AMB Prop., L.P. v. MTS, Inc.*, 250 Ga. App. 513, 551 S.E.2d 102, 104-05 (2001), *cert. denied* (2002), citing RESTATEMENT (SECOND) OF CONTRACTS § 184(1) and cmt. a (1981).[13]

Moreover, where the parties never assented to material components of an integrated price formula, a severability clause does not authorize the court to strike or rewrite those components, even if doing so would create what would then be an enforceable contract. *See AMB Prop.* 551 S.E.2d at 104-05.[14] There is no basis to enforce an option agreement

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[13] This Court adopted Restatement (Second) of Contracts § 184(1) in *Yakima County Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 395-96, 858 P.2d 245 (1993).

[14] *AMB Property* involved a lease that included a renewal option, under which the rent would be "the greater of a) base rent for the last year of the original term or b) the then existing market rental rate for comparable Shopping Centers." 551 S.E.2d at 103. The trial court severed component b) as too vague to be enforced and ordered that the rent be determined based on component a) alone. *Id.* at 103-04. The appellate court reversed, reasoning that component b) was not a distinct provision that could be severed from the contract, but was instead an "integral part of the pricing formula." *Id.* at 104. The court explained:

> [T]he use of the words "the greater of" manifests an intent that the pricing is an integrated formula requiring that two components be compared and that the greater of those two components be the amount of the rent. Removing one of those components...destroys the formula, as there is then nothing to compare so as to allow the greater to prevail. ... [T]he court in effect not

(footnote continued on next page)

absent mutual assent to the entire, integrated price formula. As this Court made clear in *Haire v. Patterson*, 63 Wn.2d 282, 286, 386 P.2d 953 (1963), there is nothing for equity to enforce, where the parties never reached agreement.

The Court of Appeals' decision is in conflict with *Sea-Van Associates* and *Sandeman*, because it permits enforcement of an agreement to agree. This Court should accept review under RAP 13.4(b)(1).

C. This Court Should Review the Court of Appeals' Decision that a Trial Court May Award Damages that Put the Buyer in a Better Position Than if the Seller Had Performed, Thus Conferring a Windfall.

The purpose of consequential damages when awarded in addition to specific performance is "to restore the nonbreaching party 'as nearly as possible to the position he would have been in had the seller performed.'" *Cornish College of the Arts v. 1000 Virginia Ltd. P-Ship*, 158 Wn. App. 203, 229, 242 P.3d 1 (2010), quoting *Rehki v. Olason*, 28 Wn. App. 751, 757, 626 P.2d 513 (1981). An award in excess of the amount required to so restore the nonbreaching party confers a windfall and is an abuse of discretion. *See id.* at 228-30. Assuming the trial court was correct to enforce the option agreement and find that MILP breached that agreement, MRA's maximum consequential damages flowing from the breach were

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> only excised the "current market rate" language, it also excised "the greater of" language.... This results in a pricing provision radically different from the language agreed on by the parties.

Id. at 104.

the cost difference between leasing the facility and owning it during the period at issue, and should not have included credit for rent payments made while MRA was delaying the case by pursuing an option exercise date contrary to the parties' agreement.

The Court of Appeals concluded that the trial court properly exercised its discretion in awarding MRA a *full* credit of *all* the rents it paid since June 2008. *Slip op.* at 25. But this credit fails to account for the significant costs of ownership that MRA would have incurred. The record establishes that MRA would have needed to borrow at least 75% of the purchase price, at 6% interest for 25 years. *See* RP VI 62-70; Exh. 148. The cost difference to MRA between owning and leasing the property between June 15, 2008, and June 15, 2012, therefore was no greater than about $1.6 million. The credit should have been limited to this difference, and should have been further reduced to exclude rent paid during the period when MRA's erroneous pursuit of a premature option date obstructed the parties' ability to determine a price.[15]

The Court of Appeals' decision conflicts with the principles set forth in *Cornish College* and *Rehki* because it affirms an award that

[15] That the consequential damages were awarded in the form of a credit toward the purchase price, rather than as a money judgment separate from that price, does not change the fact that the award confers an impermissible windfall. And the Court of Appeals' rationale that a finding of bad faith can justify an award of damages, in excess of the amount required to restore MRA to the position it would have been in but for the breach, is tantamount to authorizing punitive damages, contrary to Washington's long-established rule and public policy against such damages. *See, e.g., Dailey v. N. Coast Life Ins. Co.*, 129 Wn.2d 572, 574-75, 919 P.2d 589 (1996).

confers a windfall.[16] This Court therefore should accept review under RAP 13.4(b)(2).

VI. CONCLUSION

This Court should accept review to (1) decide whether a party entitled to rely on a judicial admission may waive that right by affirmatively disproving the admission; (2) resolve the conflict between the Court of Appeals' decision and this Court's decisions in *Sea-Van Associates* and *Sandeman*, which forbid enforcement of an agreement to agree; and (3) resolve the conflict between the Court of Appeals' decision here and its decisions in *Cornish College* and *Rehki*, which forbid an award of consequential damages that confers a windfall.

RESPECTFULLY SUBMITTED this 15th day of November, 2013.

CARNEY BADLEY SPELLMAN, P.S.

By: Michael B. King

Michael B. King, WSBA No. 14405
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Attorneys for Appellants

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[16] Material factual distinctions between this case and *Cornish College* illustrate the conflict. In *Cornish College*, the landlord-defendant not only breached an option agreement but evicted the tenant, Cornish College. 158 Wn. App. at 214. The Court of Appeals affirmed a decree of specific performance and award of consequential damages to reimburse Cornish College for costs incurred due to the breach, including to lease and renovate alternate facilities. Here, in contrast, MRA remained in possession of the facility, and the credit of all rents paid allows MRA to retain all the benefits it derived from its use of the facility for over four years, effectively rent free, while MILP continued to be responsible for the entire existing mortgage obligation on the property.

APPENDICES

APPENDIX A: Opinion, dated August 19, 2013

APPENDIX B: Order Denying Appellant Mukilteo Investors L.P.'s Motion for Reconsideration, dated October 22, 2013

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MUKILTEO RETIREMENT APARTMENTS, L.L.C., a Washington limited liability company,	)	DIVISION ONE
Respondent,	)	No. 69039-6-I
v.	)	PUBLISHED IN PART OPINION
MUKILTEO INVESTORS L.P., a Washington limited partnership; CAMPBELL HOMES CONSTRUCTION, INC., a Washington corporation,	)	
Appellant.	)	FILED: August 19, 2013

DWYER, J. — Rule of Appellate Procedure (RAP) 2.5(a)(2) permits an appellant to claim as error, for the first time on appeal, the "failure to establish facts upon which relief can be granted." While functioning as an exception to the general rule that we do not consider new theories and arguments on appeal, the rule's applicability is limited to circumstances wherein the proof of particular facts at trial is required to sustain a claim. Where "relief can be granted" in the absence of such proof, RAP 2.5(a)(2) does not operate to permit a claimant to

argue for the first time on appeal that particular facts were not established at trial.

In this case, Mukilteo Retirement Apartments LLC (MRA) filed a lawsuit for the specific performance of an option agreement that granted MRA the right to purchase a retirement facility from Mukilteo Investors Limited Partnership (MILP). In turn, MILP counterclaimed against MRA, contending that MRA had breached the option agreement by declining to accept MILP's proposed purchase price. Following a bench trial, the trial court determined that MILP had breached the option agreement. The court thereafter entered a decree of specific performance requiring MILP to sell the facility to MRA.

On appeal, MILP contends, for the first time in over three years of litigation, that the option agreement was unenforceable because the parties failed to reach mutual assent regarding a method for determining the facility's purchase price. The issue of the contract's enforceability, however, was neither raised within the pleadings of the parties nor litigated at trial by either implied or express consent. Accordingly, MRA was not required to introduce any evidence in order to prove the existence of an enforceable contract. Because, in such circumstances, RAP 2.5(a)(2) does not permit an appellant to raise the question of a contract's enforceability for the first time on appeal, MILP has failed to demonstrate an entitlement to appellate review of this issue. MILP's additional contentions are also without merit and, accordingly, we affirm the trial court in all respects.

I

In 1997, Ron Struthers and Duane Clark purchased undeveloped real

property in the Harbor Pointe area of Mukilteo. They formed Mukilteo Retirement Apartments LLC for the purpose of developing the property into an independent living and assisted living facility for seniors. Over the course of the following year, Struthers and Clark secured the permits and obtained architectural plans necessary to construct the facility.

In the spring of 1999, Struthers and Clark realized they had insufficient funds to complete construction of the facility. Accordingly, they contacted Carl Campbell, whose construction company, Campbell Homes Construction Inc., was a leading builder of similar facilities in the Northwest. They discussed an arrangement in which Campbell Homes would purchase the property, build the facility, and then lease it back to MRA. Struthers and Clark told Campbell that such an agreement must also include an option for MRA to purchase the facility at a future date.

Mukilteo Investors Limited Partnership was formed as the legal entity to purchase, construct, and lease the facility back to MRA.[1] On October 21, 1999, following extensive negotiations, MILP agreed to purchase the property and construct the facility. MRA signed a 20-year lease to staff and operate the facility, including responsibility for all upkeep and maintenance. The lease provided for annual increases in monthly rent beginning in the fifth year of

[1] Ownership of MILP initially consisted of Campbell Homes (2 percent), Kris Campbell (49 percent) and HD Retirement Investors, LLC (49 percent). Campbell Homes was designated as the general partner of MILP. Kris Campbell, the grandson of Carl Campbell, also served as the vice president of Campbell Homes.

occupancy.[2] Although MRA believed that these monthly rental payments exceeded market rents, it agreed to the lease terms in order to secure a contractual right to purchase the facility from MILP.

Accordingly, the parties entered into an option agreement, giving MRA the right to purchase the facility after eight years. The "facility" was defined as the real property, as improved, together with certain personal property. The parties agreed that the purchase price would reflect the highest of three pricing methods: (1) the "fair market value" of the facility on the date the option was exercised, (2) the "replacement cost" of the facility, or (3) the "prospective fair market value" set forth in an attached exhibit (Schedule D), reflecting a base price with annual increases of 3 percent.[3]

The agreement specified that following MRA's exercise of the option, MILP and MRA would have 15 days to reach agreement regarding the "fair market value" of the facility. If no agreement could be reached within that time period, each party would then have five additional days to appoint a disinterested appraiser. Each appraiser would then have 30 days to appraise the facility's fair market value. In the event that only one appraiser was appointed or only one appraiser completed the appraisal within the 30-day period, that appraiser's determination of fair market value would be "final and binding upon the parties."

By contrast, "replacement cost" was to be determined by an appraiser of

[2] Keith Therrien, Campbell Homes' long-time attorney, drafted the agreements. MRA also engaged an attorney, Ed Beeksma, to provide it with legal advice during the negotiations.

[3] The parties and the trial court refer to the attached exhibit as Schedule D. This convention is also adopted herein.

MILP's choosing. MILP's selection of such an appraiser was to occur "pursuant to" the same paragraph setting forth the procedure for appointing an appraiser to determine "fair market value." Replacement cost was to be "included in the appraiser's appraisal report on the Facility."

The option agreement stipulated that MRA must exercise its option to purchase the facility during the period beginning on the "eighth (8th) anniversary of the commencement date of the Facility Lease Agreement" and ending on the "first day of the twelfth (12th) month" following that anniversary. The facility lease agreement stipulated that the lease term would commence upon the earlier of (1) "the issuance of a certificate of occupancy" or (2) MRA taking possession for the purpose of installing trade fixtures, personal property, and equipment for use in the operation of the facility.

MILP thereafter secured a loan and began construction. Following the completion of the facility, MRA took possession on or around June 1, 2000. A certificate of occupancy was issued by Snohomish County on June 15, 2000.

MRA hoped to exercise its option to purchase the facility as soon as possible. MRA believed that the commencement date for exercising the option was October 21, 2007—eight years from the date of execution of the lease agreement. Accordingly, on November 14, 2007, MRA sent notice to MILP that it was exercising its option to purchase the facility. MRA noted its willingness to negotiate a closing date but emphasized that time was of the essence. When MILP did not respond, MRA sent a second letter on December 9, 2007, asking MILP to confirm a purchase price of $16,024,643, the 2008 purchase price set

forth by Schedule D. MRA explained that it was in the process of securing financing.

MILP replied by letter on December 28, 2007. The letter explained MILP's position that the earliest the option could be exercised was June 15, 2008, eight years after the date upon which the certificate of occupancy was issued. MILP invited MRA to send another notice at that time.

Nevertheless, on January 3, 2008, MILP retained an appraiser, James A. Brown and Associates, to provide an "analysis of the facility lease agreement and option agreement to determine the proper method of determining the option purchase price under the option agreement for the assets subject thereto." MRA was not informed that James Brown had been retained; nor was MRA provided a copy of the report. Indeed, James Brown neither maintained a working file nor prepared a written report detailing its conclusions with respect to this project.

On February 21, 2008, MRA sent a draft purchase and sale agreement to MILP, inviting further negotiation or revision "regarding closing dates, etc."[4] MILP responded to this letter on March 14, 2008, again rejecting MRA's attempt to exercise the option as premature.[5]

During this period, the ownership of MILP was being substantially restructured. Kris Campbell and Campbell Homes were divested of their

[4] The suggested purchase price contained in this document, $15,557,906, reflects the purchase price of the facility set forth in Schedule D for 2007.

[5] MRA and MILP were unable to reach agreement regarding the date that MRA could properly exercise its option. On November 30, 2010, the trial court determined that the option period began on June 15, 2008, eight years from the date upon which the certificate of occupancy was issued.

interests in MILP, and Cimco Properties, a wholly-owned entity of Thomas Dye, became the new general partner. Keith Therrien and Les Powers, Campbell Homes' long-time attorneys, also obtained substantial ownership interests in MILP.

Struthers and Clark met with Dye several times during the spring and summer of 2008. They repeatedly noted MRA's desire to purchase the facility. Nevertheless, although Dye stated that he wished to be accommodating and acknowledged MRA's concerns over price, financing, and a closing date, he did not offer to sell the facility. Instead, Dye presented a proposal whereby MRA could obtain a 20 percent ownership interest in the facility.[6] Struthers and Clark, however, had no interest in this arrangement.

On June 20, 2008, Dye persuaded Struthers and Clark to meet with him again. Once again, there was no offer from MILP to sell the facility outright to MRA. However, in this proposal, which assumed the facility's fair market value to be $16.75 million, MILP offered to convey a larger ownership interest to MRA. More importantly to Struthers and Clark, the proposal gave MRA the right to purchase the entire facility through a second option agreement. After further negotiations, Struthers and Clark agreed to purchase a 40 percent interest in the Harbor Pointe facility with an option to purchase the remaining 60 percent at the end of another ten years.

For the next month and a half, Struthers and Clark heard nothing from MILP regarding the status of this new agreement. Finally, on August 4, 2008,

[6] This proposal noted that the facility's "assumed" fair market value was $18.24 million.

Dye sent another proposal. This offer, however, differed substantially from the previously agreed upon arrangement. Although the new proposal still included the opportunity for MRA to acquire a 40 percent ownership interest in the facility, it no longer included an option for MRA to purchase the remaining 60 percent of the facility after ten years.

On August 28, 2008, MRA filed suit for specific performance, monetary damages, and declaratory relief.

On September 17, 2008, MILP again engaged James Brown to perform a fair market and replacement cost analysis of the facility. On October 10, appraiser Aaron Brown, who was assigned to perform the analysis, sent a draft report to MILP. Therrien reviewed the report and made a series of changes. Most significantly, Therrien deleted Brown's inclusion of depreciation as a factor for determining replacement cost, writing into the report that the option agreement contemplated the replacement cost of an undepreciated facility. This modification was later estimated to increase James Brown's valuation of the facility by approximately $3 million. James Brown ultimately accepted all of Therrien's changes.

James Brown issued its final report on November 7, 2008, more than 30 days after MILP had engaged its services. Nevertheless, its transmittal letter was backdated to October 10, 2008. In its report, James Brown opined that the facility's fair market value was $24 million and that its undepreciated replacement cost was $27 million.

On November 10, 2008, MILP offered to sell the facility to MRA for $27

million, the facility's replacement cost as determined by James Brown. MILP stated that this figure was "not subject to challenge."

Both parties moved for summary judgment in March 2012. MRA sought a determination that MILP had breached the option agreement by refusing to sell the property except at the "replacement cost" determined by James Brown. MILP, in turn, sought a determination that the option had been exercised by MRA, and requested that the purchase price be set at $27 million. The trial court denied both motions.

A bench trial commenced in May 2012 and, after four weeks of testimony, the trial court found in favor of MRA. MILP, the court determined, had breached the implied covenant of good faith and fair dealing by deliberately attempting to prevent MRA from purchasing the facility. The court further ruled that MILP had breached the option agreement and that MRA was entitled to specific performance and consequential damages. The trial court set the purchase price of the facility at $18.725 million, which represented the midpoint between MRA's appraisers' determinations of fair market value as of June 15, 2008. MRA was allotted nine months from July 15, 2012 to close the transaction.[7] As consequential damages, the court awarded to MRA the amount of its rental payments to MILP during the period of June 15, 2008 to July 15, 2012.

MILP appeals.

[7] The trial court ruled that MRA was obligated to continue to make lease payments from July 15, 2012 until the date of closing. The court noted that it would "retain jurisdiction to extend the closing if circumstances warrant and upon such terms as may be warranted."

II

MILP first contends that the trial court erred by enforcing the option agreement after determining that there was no meeting of the minds with respect to determining "replacement cost," one of three valuation methods contemplated by the agreement for determining the purchase price of the facility. MILP asserts that, although it admitted in its answer that the option agreement was a valid and binding contract, RAP 2.5(a)(2)—which permits an appellant to raise, for the first time on appeal, the "failure to establish facts upon which relief can be granted"—entitles MILP to appellate review of this issue. However, in promulgating RAP 2.5(a)(2), our Supreme Court did not intend to render the civil rules of pleading nullities. Where one party has expressly informed the other that it will not defend on a particular basis (and trial thereafter proceeds as though the issue has been definitively resolved), RAP 2.5(a)(2) does not function to permit an appellant to raise the issue for the first time on appeal. Moreover, even had MILP properly raised the issue of the contract's validity at trial, because the option agreement included all the essential terms of a valid contract, the trial court did not err by enforcing it. We discuss each of these determinations in turn.

A

Our Supreme Court has inherent authority to adopt procedural rules necessary to the operation of the courts. State v. Edwards, 94 Wn.2d 208, 212, 616 P.2d 620 (1980). "As all court rules emanate from one source, it is reasonable to conclude that when the Supreme Court promulgates a rule, it is aware of all other rules and thus can avoid adopting contradictory rules."

Hedlund v. Vitale, 110 Wn. App. 183, 188, 39 P.3d 358 (2002). Accordingly, in interpreting the various court rules of our state, we presume that the Supreme Court intended that such rules apply harmoniously.

It is, of course, among the most fundamental rules of pleading that a defendant's answer must "state in short and plain terms his [or her] defenses to each claim asserted and [to] admit or deny the averments upon which the adverse party relies." Civil Rule (CR) 8(b). If the defendant intends to deny only a part of an averment, "he [or she] shall specify so much of it as is true and material and shall deny only the remainder." CR 8(b). "The theory of Rule 8 is that a defendant's pleading should apprise the plaintiff of the allegations in the complaint that stand admitted and will not be in issue at trial and those that are contested and will require proof to be established to enable plaintiff to prevail." Yarnell v. Roberts, 66 F.R.D. 417, 423 (E.D. Pa. 1975). As the courts of our state have long held, "'[t]he purpose of an answer is to formulate issues by means of defenses addressed to the allegations of the complaint.'" Shinn Irrigation Equip., Inc. v. Marchand, 1 Wn. App. 428, 432, 462 P.2d 571 (1969) (quoting Lopez v. United States Fid. & Guar. Co., 18 F.R.D. 59, 61 (D. Alaska 1955)).

Here, in its complaint, MRA alleged that "[t]he Option Agreement that contains all material terms of the parties' obligations is a valid and binding contract for plaintiff's option to purchase the real property." In its answer, MILP agreed. MILP responded that it "admits the option agreement was a valid and binding contract as between the parties." Indeed, in reliance upon the existence

of a valid option contract, MILP brought its own counterclaim, alleging that MRA had breached the agreement by failing to pay the $27 million "replacement cost" determined by its appraiser.

MILP's answer informed MRA that the enforceability of the contract would not be an issue at trial and that MRA need not offer any evidence to prove a valid and binding contract containing the essential terms of the parties' bargain. Rather, the issues to be litigated were limited to determining which party had breached the agreement and what damages resulted therefrom. Although this would require a determination of the meaning of the parties' contractual agreement, the contract's enforceability was not an issue raised within the pleadings.

The civil rules of our state provide a specific mechanism for circumstances where issues outside the pleadings arise at trial.[8] CR 15(b) provides that "[w]hen

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[8] MILP contends that, because MRA introduced evidence tending to disprove that the parties manifested mutual assent to an essential term of the option contract, it is not bound by its "judicial admission" that the contract was valid and binding. It asserts that it is well established that a plaintiff waives reliance on a defendant's judicial admission where the plaintiff introduces evidence that tends to disprove his or her own case.

However, no court in our state has adopted such a rule. Indeed, as Justice Madsen has noted, judicial admissions within a defendant's answer "have been defined as 'stipulations by a party or its counsel that have the effect of withdrawing a fact from issue and *dispensing wholly with the need for proof of the fact.*'" Key Design, Inc. v. Moser, 138 Wn.2d 875, 893, 983 P.2d 653, 993 P.2d 900 (1999) (Madsen, J., concurring in part and dissenting in part) (quoting 2 MCCORMICK ON EVIDENCE: THE HEARSAY RULE AND ITS EXCEPTIONS § 254, at 142 (John W. Strong ed., 4th ed.1992)). Such admissions are "'proof possessing the highest possible probative value. Indeed, facts judicially admitted are facts established not only beyond the need of evidence to prove them, *but beyond the power of evidence to controvert them.*'" Best Canvas Prods. & Supplies, Inc. v. Ploof Truck Lines, Inc., 713 F.2d 618, 621 (11th Cir.1983) (emphasis added) (quoting Hill v. Fed. Trade Comm'n, 124 F.2d 104, 106 (5th Cir.1941)). Thus, it is not true, as MILP would have it, that all courts have considered a defendant's judicial admissions so easily waived.

More importantly, MILP's agreement that the option contract was a "binding and valid" contract was more than a judicial admission as to a particular fact. Instead, as discussed above, MILP's answer to MRA's averment formulated the issues that would be litigated at trial. Through

issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." "At the discretion of the trial court, the pleadings may be amended to conform to the evidence at any stage in the action, including at the conclusion of a trial, and even after judgment." Green v. Hooper, 149 Wn. App. 627, 636, 205 P.3d 134 (2009). "'However, amendment under CR 15(b) cannot be allowed if actual notice of the unpleaded issue is not given, if there is no adequate opportunity to cure surprise that might result from the change in the pleadings, or if the issues have not in fact been litigated with the consent of the parties.'"[9] Green, 149 Wn. App. at 636 (quoting Harding v. Will, 81 Wn.2d 132, 137, 500 P.2d 91 (1972)). In determining whether the parties impliedly consented to the trial of an issue, "an appellate court will consider the record as a whole, including whether the issue was mentioned before the trial and in opening arguments, the evidence on the issue admitted at the trial, and the legal and factual support for the trial court's conclusions regarding the issue." Dewey v. Tacoma Sch. Dist. No. 10, 95 Wn. App. 18, 26, 974 P.2d 847 (1999.)

Here, neither MRA nor MILP expressly or impliedly consented to try the issue of the option contract's enforceability. Indeed, throughout the litigation, both parties asserted that the contract should be enforced—MRA contending that

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this pleading, MILP expressly informed MRA that it would not defend MRA's breach of contract action on the basis that the option contract was unenforceable. Indeed, MILP itself relied upon the validity of the contract in bringing its counterclaim against MRA for breach of contract. Where an issue is not raised in the pleadings, as was the case here, CR 15(b) provides the exclusive means for determining whether resolution of that issue constitutes the proper basis for a judgment.

[9] Where issues outside the pleadings have in fact been litigated, the mere failure to amend the pleadings does not affect the result of the trial of these issues. CR 15(b).

MILP had breached the option agreement "by rejecting [MRA's] attempts to exercise its option," and MILP asserting that "it [was] MRA who has breached the option agreement by failing to purchase the property for the required option price on time, as required by the option agreement." No challenge to the enforceability of the contract was noted in the various motions of the parties, their trial briefs, or during opening argument. Although the parties disagreed at trial regarding the meaning of the term "replacement cost," neither party argued that this disagreement rendered the contract unenforceable. See 25 DAVID K. DEWOLF ET AL., WASHINGTON PRACTICE: CONTRACT LAW AND PRACTICE § 2.8, at 43 (2d ed. 2007) ("Mutual assent does not . . . require both parties to have an actual and identical understanding of all of the nuances of the bargain."). MILP, MRA, and the trial court—which entered no conclusion of law regarding the contract's validity and instead simply enforced it—all treated the question of the contract's enforceability as affirmatively established.

Indeed, if the issue of the contract's enforceability had been litigated, a host of additional questions would necessarily have arisen. MRA, for instance, asserts that it agreed to pay above-market rents to MILP in order to secure a contractual right to purchase the facility from MILP at a later date. Thus, MRA contends, the option agreement was a material part of the consideration for the lease agreement. If true, then a determination that the option agreement was invalid would raise the issue of whether the lease agreement failed for lack of consideration. At minimum, it would require the trial court to determine if the rents were in fact above-market, the amount of the overcharge, and the extent to

which MILP would be required to disgorge past rent payments in order to avoid unjust enrichment. As noted above, none of these questions emerged during the trial.

Nevertheless, although the issue of the option contract's enforceability made no appearance at any stage of the litigation, MILP asserts that this matter may be raised for the first time on appeal pursuant to RAP 2.5(a)(2). In general, we will not review an issue, theory, argument, or claim of error not presented at the trial court level. Pellino v. Brink's, Inc., 164 Wn. App. 668, 685 n.8, 267 P.3d 383 (2011). RAP 2.5(a)(2), however, provides a limited exception to the general rule, permitting a party to claim as error for the first time on appeal the "failure to establish facts upon which relief can be granted." MILP asserts its claim falls within this exception.[10]

As noted above, the Supreme Court promulgates the procedural rules of our courts with the intent that such rules will apply harmoniously. See Hedlund, 110 Wn. App. at 188-89. At oral argument, MILP's counsel indicated his belief that the requirements of CR 8(b) and CR 15(b) are meaningless where a party seeks to raise as error the failure to prove essential facts pursuant to RAP 2.5(a)(2). We disagree, however, that in promulgating RAP 2.5(a)(2), our Supreme Court intended to render nullities these basic rules of pleading. Indeed,

[10] We note that we have previously refused to review the question of a contract's enforceability where the issue was raised for the first time on appeal. Neiffer v. Flaming, 17 Wn. App. 443, 446, 563 P.2d 1300 (1977). As MILP does here, in Neiffer, the appellant contended that an option provision in a lease did not contain sufficient terms and conditions necessary for the sale of the property and that, accordingly, the option was unenforceable. 17 Wn. App. at 446. Because this issue was raised for the first time on appeal, however, we determined that we would not consider the appellant's contention. Neiffer, 17 Wn. App. at 446.

by its own language, RAP 2.5(a)(2) pertains only to issues that must be established by proof of particular facts at trial. Where no proof of such facts is required in order to obtain relief, the rule is simply inapplicable. If "relief can be granted" despite the absence of particular facts, an appellant cannot thereafter invoke RAP 2.5(a)(2) in order to argue for the first time on appeal that such facts were not established.

Here, having indicated in its answer that the option contract's enforceability was not a contested issue in the case, MILP cannot be heard to complain on appeal that the facts necessary to demonstrate a valid contract were not established at trial. Given the pleadings, the various motions of the parties, and the way the case was actually tried, no proof of "mutual assent" was necessary for MRA to obtain relief on its breach of contract claim. See Yarnell, 66 F.R.D. at 423. The question of the contract's validity had been definitively resolved, and no proof of facts demonstrating its enforceability was necessary. Accordingly, RAP 2.5(a)(2) is inapplicable and, thus, MILP has not demonstrated an entitlement to appellate review.

B

Even had MILP denied the validity of the option agreement in its answer, given the language of the contract, we perceive no error in the trial court's decision to enforce it. MILP contends that the parties failed to reach mutual assent with regard to the material term of the facility's price and that, accordingly, the option agreement was an unenforceable "agreement to agree." In support of this contention, MILP points to the trial court's finding that there was no "meeting

of the minds with respect to what was to be included in determining replacement cost for the facility." However, the option agreement expressly contemplated circumstances in which replacement cost would not be considered when determining a purchase price. Indeed, even in the absence of replacement cost, the contract provided a specific, detailed mechanism for determining the purchase price of the facility. Given that the parties expressly agreed to these terms, MILP's contention is without merit.

In order for a valid contract to form, the parties must objectively manifest their mutual assent to the essential terms of the contract. Yakima County Fire Prot. Dist. No. 12 v. City of Yakima, 122 Wn.2d 371, 388, 858 P.2d 245 (1993). The essential terms of an option contract for a sale of land include the parties, a description of the property, and a means for determining the purchase price. Neiffer v. Flaming, 17 Wn. App. 443, 446, 563 P.2d 1300 (1977) (citing Valley Garage, Inc. v. Nyseth, 4 Wn. App. 316, 481 P.2d 17 (1971)).

Here, the option agreement stipulated that the facility's purchase price would be the greater of the facility's "fair market value," "replacement cost," or "prospective fair market value" set forth in Schedule D. MILP contends that the plain language of the agreement required that each of these three valuation methods be considered in determining the final purchase price and that, accordingly, the trial court's finding that there was "no meeting of the minds" with respect to the meaning of "replacement cost" equates to a determination that the

parties failed to mutually assent to the essential term of the facility's price.[11] Thus, MILP asserts, the option contract is unenforceable. We disagree.

Contrary to MILP's assertion, the option agreement did not require that all three pricing methods be utilized in determining the facility's final purchase price. Rather, the agreement contemplated that as few as one of the pricing methods could be sufficient. In order for either "fair market value" or "replacement cost" to apply, the parties were required to take timely, proactive steps. The agreement specified that if MILP and MRA were unable to agree upon a "fair market price" within 15 days of MRA's exercise of its option, then each party would be granted five additional days to appoint a disinterested appraiser to assess fair market value. MILP's selection of a disinterested appraiser to assess "replacement cost" was likewise to occur pursuant to this procedure.[12] In the event that no

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[11] MILP further contends that the trial court's finding that there was no meeting of the minds regarding whether to include the value of MRA's business when determining the facility's fair market value also renders this pricing method unenforceable. However, this finding applied only to the question of whether the parties had agreed to include one particular factor among many that might be included when assessing fair market value. In contrast to the trial court's evaluation of "replacement cost," the court did not determine that this pricing method could not be given effect.

[12] The option agreement stipulated that "[r]eplacement cost shall be determined by the appraiser selected by MILP pursuant to the next succeeding paragraph, and shall be the amount included in the appraiser's appraisal report on the Facility." The next succeeding paragraph stipulated:

> MILP and MRA shall within five (5) days and the expiration of the fifteen (15) day period each promptly appoint an [sic] disinterested appraiser who is a member of the American Institute of Real Estate Appraisers (or any successor organization thereto) experienced in the appraisal of facilities like that of the Facility. The appraisers appointed, shall, within thirty (30) days after the date of the notice appointing the first appraiser, proceed to appraise the Facility to determine the Fair Market Value thereof as of the relevant date (giving effect to the impact, if any, of inflation from the date of their decision to the relevant date); provided, however, that if only one (1) appraiser shall have been so appointed, or if two (2) appraisers shall have been appointed but only one (1) such appraiser shall have made such determination within thirty (30) days after the appointment of the first

disinterested appraiser was selected by either party within the five-day period, the purchase price would be determined solely by Schedule D, which set forth the "prospective fair market value" of the facility. Accordingly, MILP is incorrect that the purchase price of the facility could not be determined in the absence of an evaluation of replacement cost.

Moreover, the option agreement expressly contemplated circumstances in which certain of its provisions might be found unenforceable. A broad severability clause provided that "[t]he invalidity or unenforceability of any particular provision of this Agreement shall not affect the other provisions hereof, and this Agreement shall be construed in all respects as if such invalid or unenforceable provision were omitted." Pursuant to this provision, the contract remained enforceable even after the pricing method based upon replacement cost was stricken. Indeed, even if both fair market value and replacement cost were severed from the agreement, the remaining contract would retain a valid method for determining the facility's price: namely, Schedule D of the option agreement.[13]

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appraiser, then the determination of such appraiser shall be final and binding upon the parties.

[13] Furthermore, in this case, the trial court determined that MILP's appraiser, James Brown, was not a disinterested appraiser and that, accordingly, all of its opinions must be disregarded. The court explained that Aaron Brown, the appraiser assigned to evaluate the facility, had "abandoned his own independence and integrity" by following MILP's directions to change his final report. The trial court further noted that Brown had repeatedly violated the standards of professional appraisal practice, changed his assessment of construction quality in order to increase the facility's valuation, ignored his own inspector's report of water damage and construction defects, and arbitrarily backdated his report from September 24, 2008 to June 15, 2008. Contrary to MILP's assertion at oral argument, these actions by Brown related not only to the determination of fair market value but also to the determination of replacement cost.

Accordingly, no disinterested appraiser was timely appointed by MILP to calculate the facility's fair market value and replacement cost. As the trial court noted, in such circumstances,

Under the broad severability provision of the option agreement, the pricing method based upon replacement cost was properly severed from the contract. The remaining agreement set forth all the essential terms of a valid option contract, including a sufficient mechanism for determining the purchase price. The trial court did not err by enforcing this agreement.

The remainder of this opinion has no precedential value. Therefore, it will be filed for public record in accordance with the rules governing unpublished opinions.

III

MILP next contends that the trial court erred by awarding consequential damages to MRA where, MILP asserts, the undisputed evidence establishes that MRA came into equity with unclean hands. We disagree.

"'[A] decree for specific performance seldom brings about performance within the time that the contract requires.'" Rekhi v. Olason, 28 Wn. App. 751, 757-58, 626 P.2d 513 (1981) (alteration in original) (quoting Restatement (Second) of Contracts § 365 cmt. d (1979)). Thus, when ordering specific performance, a court may also award consequential damages in order to make the nonbreaching party whole. Cornish Coll. of the Arts v. 1000 Virginia, Ltd. P'ship, 158 Wn. App. 203, 228, 242 P.3d 1 (2010). Such damages are not awarded for breach of the contract but, rather, "at the equitable discretion of the trial court." Cornish, 158 Wn. App. at 228.

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it would be appropriate to rely solely upon Schedule D in setting the purchase price for the facility. Thus, based upon the facts of the case as well, the trial court properly determined that replacement cost was not a valid measure upon which to base the facility's valuation.

MILP is correct that "[e]quity jurisprudence requires the party seeking equitable relief to have acted in good faith and to come into equity with clean hands." Cornish, 158 Wn. App. at 216. In this case, however, the trial court expressly found that MRA performed all of its obligations under the option agreement in good faith. A trial court's findings of fact are reviewed for substantial evidence. In re Marriage of Chua, 149 Wn. App. 147, 154, 202 P.3d 367 (2009). Substantial evidence is the quantum of evidence sufficient to persuade a rational, fair-minded person that the premise is true. Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wn.2d 873, 879, 73 P.3d 369 (2003).

Here, MILP claims that the trial court's finding that MRA acted in good faith was incorrect for two reasons. First, MILP contends that MRA acted in bad faith by asserting the right to exercise its option on a date that was later determined by the trial court to be premature. However, MRA's position on this issue hardly evidences bad faith. The language of the option agreement specified that the option period would commence on the eighth anniversary of "the commencement date of the Facility Lease Agreement."[14] MRA reasonably interpreted this language to indicate that its right to purchase the facility arose eight years after the lease agreement was signed. This claim was not found to be frivolous. The fact that a court ultimately concluded that the option period did not commence until eight years after a certificate of occupancy was issued in no way indicates that MRA's claim was brought in bad faith.

[14] The lease agreement specified that the "term of this lease" would commence upon the earlier of (1) "the issuance of a certificate of occupancy" or (2) MRA taking possession of the property. The lease agreement itself, however, was signed on October 21, 1999.

Second, MILP contends that MRA's bad faith was evidenced when, at trial, MRA's appraisers utilized a definition of "replacement cost" that excluded the value of the underlying land, a definition that, MILP asserts, MRA knew had been rejected during negotiations. However, there is scant evidence in the record that MRA "knew" that MILP's definition of replacement cost excluded the value of land. The lease agreement contained a definition of "full replacement cost" that did not include any reference to the underlying land. Indeed, the lone source of such a proposition was the testimony of MILP's owner and attorney, Keith Therrien, whom the trial court, as the sole judge of credibility, was entitled to either believe or disbelieve. In determining that MRA acted in good faith, the trial court implicitly rejected Therrien's version of events.[15]

The record does not support MILP's assertion that MRA came into equity with unclean hands. The trial court did not err by determining that MRA was entitled to equitable relief in the form of consequential damages.

[15] MILP asserts that negotiations regarding the language of the option agreement also demonstrate that MRA knew that any definition of "replacement cost" must include the value of the underlying land. MILP contends that MRA's own attorney initially proposed a definition of replacement cost that excluded the underlying land and that MILP specifically rejected this definition. However, it is far from clear that MRA proposed such a definition or that this definition was rejected because it excluded the value of the underlying land. The proposed language to which MRA points specifically references "Alzheimer's facilities," which MRA had no plans to include at the facility. The only party that did maintain facilities with Alzheimer's residents was Campbell Homes, the general partner of MILP. Thus, the evidence suggests that it was Campbell Homes which was the source of this language. Moreover, the reference to Alzheimer's residents rendered this definition of replacement cost inappropriate for the parties' option contract. Accordingly, it is unclear whether the rejection of this contractual language occurred because it excluded the value of the underlying land or because it referenced subjects not contemplated by the parties' agreement.

IV

MILP next contends that the trial court abused its discretion in determining the amount of consequential damages to which MRA was entitled. It asserts that it was error for the court to award, as consequential damages to MRA, MRA's lease payments from June 18, 2008 (the date upon which the court determined that MRA had exercised its option) to July 18, 2012 (the date upon which the court determined the purchase and sale agreement should be executed). The trial court found that MRA's lease payments to MILP would have "gone toward reducing [MRA's] underlying mortgage had [it's] attempts to purchase the facility not been frustrated by [MILP]" and that, accordingly, all lease payments during this period should be deducted from the facility's purchase price. On appeal, MILP asserts several challenges to the amount of this award. None have merit.

"[T]rial courts have broad discretionary power to fashion equitable remedies." SAC Downtown, Ltd. P'Ship v. Kahn, 123 Wn.2d 197, 204, 867 P.2d 605 (1994). The fashioning of such a remedy is reviewed for abuse of discretion. Niemann v. Vaughn Cmty. Church, 154 Wn.2d 365, 374, 113 P.3d 463 (2005). Accordingly, an award of consequential damages will not be disturbed absent a showing that the trial court's decision was "'manifestly unreasonable or exercised on untenable grounds.'" Cornish, 158 Wn. App. at 228-29 (quoting Paris v. Allbaugh, 41 Wn. App. 717, 720, 704 P.2d 660 (1985).

MILP first contends that MRA was entitled to no consequential damages for the period of June 18, 2008 to November 30, 2010. This is so, MILP contends, because until the latter date, MRA continued to assert that it had

properly exercised its option in 2007, a year in which the value of the facility was substantially lower. Until that dispute was resolved, MILP asserts, it would have been impossible to reach agreement on a purchase price and, thus, equally impossible for MILP to perform under the contract. Because consequential damages "must run from the date at which the contract required performance," Cornish, 158 Wn. App. at 229, MILP contends that no such damages should have been awarded for the period prior to November 30, 2010.

However, contrary to MILP's assertion, the record does not indicate that MRA was insisting upon a 2007 purchase price until November 2010. Indeed, in June 2009, MRA offered to purchase the facility for $19 million, a higher price than that set forth by Schedule D for the 2007 calendar year. Moreover, the trial court expressly determined that, although the parties remained at an impasse regarding the commencement of the option period, nothing precluded MILP from negotiating a purchase price or setting a closing date until that dispute was resolved. MILP assigns no error to these findings. Accordingly, MILP's assertion that performance was impossible prior to November 30, 2010 is without merit.

Similarly, MILP's contention that performance of the contract was prevented by MRA's "unproductive" investigation of Campbell Homes' relationship to James Brown is also unsupported by the record. There is no indication that MRA's discovery regarding this issue was unproductive. The trial court expressly determined that MRA's discovery efforts "contributed greatly to [its] determination to disregard the testimony of [MILP's appraiser]" at trial. The court explained that many of the same persons and entities comprising MILP had

longstanding involvement with Campbell Homes. Therrien, for instance, had for years served as Campbell Homes' attorney, during which time he had many dealings with James Brown appraisers. As the trial court found, evidence of such previous relationships was crucial to its determination that Aaron Brown's opinions had been improperly manipulated by MILP. This finding is supported by substantial evidence and, accordingly, MILP's contention provides no basis for overturning the award of consequential damages.

MILP next contends that it was error for the trial court to award the entire amount of MRA's rental payments to MILP as consequential damages to MRA. MILP asserts that if MRA had exercised its option in June 2008, then MRA would have been required to make substantial loan payments in order to finance its purchase. Accordingly, because the purpose of consequential damages is to place the nonbreaching party in the position that he or she would have been had the contract been performed, MILP contends that MRA is entitled to no more than the difference between its actual rental payments and the hypothetical costs of owning the property.

However, MILP does not dispute that MRA made over $6 million in rental payments to MILP after the date upon which the contract required MILP to sell the facility to MRA. MILP does not contend that it was somehow entitled to such rental payments. Thus, in order to place MRA in the position that it would have been had the contract been performed, it was necessary for MILP to disgorge these rental payments to MRA. See Cornish, 158 Wn. App. at 215 (affirming

award of rental payments as consequential damages). Such payments constituted, in effect, a down payment on the purchase price.

Moreover, had the sale of the facility occurred in June 2008 (as the contract required), MRA would thereafter have made substantial progress toward paying down any loan procured in order to purchase the property. MRA would have satisfied over four years of such obligations during the period that MILP delayed performance. Thus, for this reason as well, in order to place MRA in the position that it would have been had the exercise of the option been honored, a reduction in the purchase price was required.

Nevertheless, MILP contends that a seller who breaches a contract to sell real property is entitled to interest payments on the purchase price during the period of delayed performance. MILP notes that in similar circumstances, this court has held that a seller may be entitled to receive the value of his or her lost use of the purchase money during the period performance is delayed. Paris, 41 Wn. App. at 720. There is, however, no indication in the record that MILP ever requested such an accounting between the parties. MILP cites to no portion of the record in which it argued, as it does now on appeal, that the proposed award was inequitable.

Moreover, if MRA's consequential damages were to be reduced in such a manner, the award would "fall short of making whole the nonbreaching party, which is the purpose for which consequential damages are awarded." Cornish, 158 Wn. App. at 229-30 n.15. As noted above, MRA made over $6 million in lease payments to MILP after the date upon which it exercised its option.

Particularly given the trial court's determination that MILP acted in bad faith by deliberately attempting to prevent MRA from purchasing the facility, a reduction in MRA's award to cover MILP's losses would not be equitable.[16] The trial court did not err by awarding the full amount of MRA's rental payments to MILP as consequential damages.

V

MILP next asserts that MRA's motion to amend the trial court's preliminary findings of fact and conclusions of law was untimely. It asserts that the filing of this instrument constituted an "entry of judgment" and that, accordingly, CR 52(b) required that MRA file its motion to amend within ten days of this document's issuance. We disagree.

Following a bench trial, a trial court is required to "find the facts specially and state separately its conclusions of law." CR 52(a)(1). A party may bring a motion asking the court to amend its findings or make additional findings "not later than 10 days *after entry of judgment*." CR 52(b) (emphasis added). CR 54(a)(1) defines a "judgment" as "the final determination of the rights of the

[16] MILP contends that the trial court erred by determining that MILP breached the implied covenant of good faith and fair dealing under the option contract. However, this finding is supported by substantial evidence. In evaluating MILP's intentions, the trial court explained:

> [T]he refusal of [MILP] after that date to discuss pricing or a closing date, the repeated effort to lure [MRA] into meetings in which the only discussion was a refinance of the facility to allow them to acquire a minority interest, the lack of candor or recollection by Mr. Dye with regard to his efforts to stall and subvert their exercise of rights under the Option, and the concerted effort of [MILP] to inflate the purchase price through submission of the belated and altered appraisal of Aaron Brown, cumulatively can only be found by the court to have been a deliberate effort to prevent [MRA] from purchasing the facility.

The court's characterizations of MRA's conduct are amply supported in the record, and MILP does not and could not argue that such actions do not constitute bad faith. The trial court did not err by determining that MILP breached the implied covenant of good faith and fair dealing.

parties in the action and includes any decree and order from which an appeal lies." Judgments may be presented at the same time as the findings of fact and conclusions of law. CR 54(f)(1). However, "[n]o order or judgment shall be signed or entered until opposing counsel have been given 5 days' notice of presentation and served with a copy of the proposed order or judgment." CR 54(f)(2).

In determining whether a judgment has been entered, "substance controls over form." Nestegard v. Inv. Exch. Corp., 5 Wn. App. 618, 623, 489 P.2d 1142 (1971). MILP is correct that a reviewing court must look to an instrument's content and not to its title when evaluating the nature of the instrument. Nestegard, 5 Wn. App. at 623. Thus, in Nestegard, we explained that where an "order" purports to finally determine the rights of the party, stating that "Judgment be and it is hereby entered for the plaintiff and against the defendant," such an order is properly deemed a judgment, notwithstanding its title. 5 Wn. App. at 621.

Here, MILP asserts that the filing of Judge Bowden's findings of fact and conclusions of law constituted the entry of a "judgment" and that, accordingly, MRA's failure to move to amend these findings and conclusions within the ten-day time limit rendered the motion untimely. However, both the contents of this instrument and the circumstances of its filing belie this contention.

Following trial, Judge Bowden sent a letter to the parties enclosing copies of a document entitled "Findings of Fact and Conclusions of Law." Judge Bowden explained that rather than issuing a letter decision, he had drafted his

own findings in order to save the parties further disagreement and ongoing attorney fees. However, he noted, "[i]f either of you feel that specific additional findings or conclusions should be provided, I remain willing to entertain additional such requests." The parties were not served with notice that a judgment had been entered as is required by CR 54(f)(2). Nor did the findings and conclusions contain any operational language requiring the parties to take action. Instead, Judge Bowden simply signed and dated this document.

This instrument contained none of the hallmarks of a judgment. Indeed, its title accurately reflected its contents: the findings of fact and conclusions of law of the trial court. The instrument neither purported to finally determine the rights of the parties nor indicated that judgment had been entered. Judge Bowden himself specifically stated that he did not intend his findings and conclusions to be a "judgment." Because the filing of this instrument did not constitute an "entry of judgment," the ten-day time limitation set forth by CR 52(b) was inapplicable to MRA's motion. The trial court did not err by determining that the motion to amend was timely.

VI

MILP next contends that the trial court erred by determining that Campbell Homes was jointly and severally liable for MILP's breach of the option agreement. This is so, MILP asserts, because Campbell Homes was no longer the general partner of MILP on the date that MRA exercised its right under the option agreement to purchase the facility. We disagree.

A general partner is "liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law."[17] RCW 25.05.125(1). "A partner's dissociation does not of itself discharge the partner's liability for a partnership obligation incurred before dissociation." RCW 25.05.260(1). "One partner may not relieve himself of liability for past debts of the partnership merely by terminating the partnership." Hewitt Rubber Co. v. Thompson, 127 Wash. 363, 368, 220 P. 767 (1923). Rather, in order to avoid continued personal liability upon withdrawing from the partnership, the dissociated partner must generally obtain the agreement of both partnership creditors and the partners who will continue the business.[18] RCW 25.05.260(3).

An option contract is a "complete, valid and binding agreement by the terms of which a collateral offer is kept open for a specified period of time." Bennett Veneer Factors, Inc. v. Brewer, 73 Wn.2d 849, 853, 441 P.2d 128 (1968). The grantor of an option is "under a duty not to '*repudiate or make performance impossible or more difficult.*'" Thompson v. Thompson, 1 Wn. App. 196, 200, 460 P.2d 679 (1969) (quoting McFerran v. Heroux, 44 Wn.2d 631, 638, 269 P.2d 815 (1954)). Importantly, "[a]n option contract is binding upon the offeror and actually becomes a contract *before* the option holder decides whether or not to exercise the power." 25 DAVID K. DEWOLF ET AL., supra, § 2.16, at 53

[17] MILP was a limited partnership. In such a partnership, only the general partner is individually liable for the partnership's obligations. See, e.g., Dwinell's Cent. Neon v. Cosmopolitan Chinook Hotel, 21 Wn. App. 929, 934, 587 P.2d 191 (1978).

[18] Alternatively, "[a] dissociated partner is released from liability for a partnership obligation if a partnership creditor, with notice of the partner's dissociation but without the partner's consent, agrees to a material alteration in the nature or time of payment of a partnership obligation." RCW 23.05.260(4). MILP does not contend that anything of this nature occurred in this case.

(emphasis added) (citing Turner v. Gunderson, 60 Wn. App. 696, 807 P.2d 370 (1991)).

Here, MRA and MILP entered into the option agreement on October 21, 1999. On that date, Campbell Homes, as general partner, became obligated to sell the property upon MRA's exercise of its option. Under RCW 25.05.260(1), Campbell Homes remained jointly and severally liable for all obligations under the option agreement, even for breaches that occurred after it withdrew from the partnership on May 1, 2008. MILP's assertion to the contrary is without merit.[19] The trial court did not err by determining that Campbell Homes was jointly and severally liable for MILP's breach of the terms of the option contract.

VII

MILP's final contention is that the trial court erred by awarding MRA its attorney fees for discovery related to determining the relationship between Campbell Homes and James Brown appraisers. It asserts that, because MRA uncovered no evidence that Campbell Homes had undue influence over James Brown, this discovery was unproductive. MILP is correct that an award of attorney fees may be reduced for time spent on unsuccessful claims or theories. Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 581, 597, 675 P.2d 193 (1983). Here, however, the trial court expressly found that MRA's discovery efforts contributed greatly to its decision to disregard the testimony of Aaron

[19] Although MILP is correct that a new purchase and sale agreement is formed upon the exercise of the option, this is irrelevant to the issue at hand. Here, it was the offer itself, contained in the option agreement, that MILP failed to honor. Accordingly, it is MILP's breach of the option agreement—and not of a secondary purchase and sale agreement—that gives rises to the liability in this case.

Brown. As discussed above, this finding is supported by substantial evidence. The trial court did not err by awarding attorney fees to MRA for time spent investigating the relationship between Campbell Homes and James Brown.

VIII

Both parties request attorney fees and costs on appeal. A contract that provides for attorney fees at trial also supports such an award on appeal. Atlas Supply, Inc. v. Realm, Inc., 170 Wn. App. 234, 241, 287 P.3d 606 (2012). Here, the option agreement stipulates that "[i]n the event of any action arising hereunder, the prevailing party shall be granted its attorneys fees and court costs." MRA has prevailed both at trial and on appeal. Accordingly, MRA is entitled to an award of reasonable attorney fees. Upon proper application, a commissioner of this court will enter an order awarding to MRA its fees and costs on appeal.

Affirmed.

We concur:

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MUKILTEO RETIREMENT APARTMENTS, L.L.C., a Washington limited liability company, Respondent, v. MUKILTEO INVESTORS L.P., a Washington limited partnership; CAMPBELL HOMES CONSTRUCTION, INC., a Washington corporation, Appellant.	)	DIVISION ONE No. 69039-6-I ORDER DENYING APPELLANT MUKILTEO INVESTORS L.P.'s MOTION FOR RECONSIDERATION

The appellant, Mukilteo Investors L.P., having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

Dated this 22nd day of October, 2013.

FOR THE COURT:

Judge

No. _____

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 69039-6-I

COURT OF APPEALS OF THE
STATE OF WASHINGTON, DIVISION ONE

MUKILTEO RETIREMENT APARTMENTS, L.L.C., a Washington limited liability company, Respondent, vs. MUKILTEO INVESTORS, L.P., a Washington limited partnership; CAMPBELL HOMES CONSTRUCTION, INC., a Washington corporation, Appellants.	DECLARATION OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that I am over the age of 18 years, not a party hereto and competent to be a witness herein. I certify that I served a copy of *Appellants' Petition for Review; and,* D*eclaration of Service,* on counsel of record as follows:

Jerry Kindinger Robert King Ryan Swanson & Cleveland 1201 Third Avenue, Suite 3400 Seattle, WA 98101-3034	_x_ U.S. Mail, postage prepaid ___Messenger ___ Fax _X_ Email

kindinger@ryanlaw.com king@ryanlaw.com	___ Other
James A. Perkins Larson Berg & Perkins, PLLC 105 North 3rd Street PO Box 550 Yakima, WA 98907 Jim@lbplaw.com	_X_ U.S. Mail, postage prepaid ___ Messenger ___ Fax _X_ Email ___ Other

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 15th day of November, 2013.

Patti Saiden, Legal Assistant