NO. 748491-I

DIVISION I OF THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON

SANDRA J. KEATLEY,
PLAINTIFF/RESPONDENT

v.

DUANE BRUNER,
DEFENDANT/APPELLANT.

APPELLANT'S REPLY BRIEF

Richard B. Sanders, WSBA #2813
Attorney for Appellant
Goodstein Law Group PLLC
501 South G Street
Tacoma, WA 98405
(253) 779-4000

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Cases

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I. INTRODUCTION

This case concerns the validity and enforceability of a one-page document purporting to grant a right to compel conveyance of Appellant Bruner's house to the Respondent Keatley. For the most part, Keatley's Brief reargues the personal relationship between the parties but adds little to any discussion of the validity/enforceability of the one page. In fact, Keatley would rather avoid the merits altogether by repeatedly claiming Bruner's arguments regarding contractual invalidity are not properly before the court; notwithstanding (1) Keatley herself briefed before the trial court the precise arguments and cases that Bruner raises, and (2) in any breach of contract action it is always the burden of the party claiming the breach to first establish the validity of the contract.

Although Keatley has altered the order of presentation from appellant's opening brief, and Bruner replies in the order adopted by Keatley, the court's attention is first directed to the adequacy of the legal description in the subject Earnest Money Receipt and Agreement. This is as straightforward and clear legal issue as the court will find, and it is dispositive in Bruner's favor as a matter of law.

II. REPLY TO STATEMENT OF THE CASE

Ms. Keatley's Statement of the Case is consistent with Bruner's characterization of her trial evidence which "more resembled a soap box opera ...than a sober legal inquiry into the validity of the contract..." Appellant's Opening Brief p. 1 For the most part her Statement of the

Case has no bearing on issues of contract validity other than identifying the one page "Earnest Money Receipt and Agreement" as Exhibit 20. Respondent's Brief p. 11

III. REPLY TO ARGUMENT

A. No delivery of $1,000 in earnest money.

The trial court found "On March 23, 2005, Keatley and Bruner co-authored and executed a contract wherein Bruner agreed to sell the Chapman Road Property to Keatley for $295,000. Shortly thereafter, Keatley paid Bruner the $1,000 in earnest money called for by the contract." CP 397, paragraph F. Bruner challenges the payment language for lack of substantial evidence and Keatley's response fails to identify anything in the record constituting substantial evidence proving any payment was actually made by Keatley to Bruner. In point of fact Keatley testified "I don't know what he did with the check. I just assumed that we didn't need it because we were still friends." RP1-115 Bruner testified he never received a check from Keatley. RP2-89

Keatley claims the court's finding that Keatley needed $295,000, not $294,000, to close was a "scrivener's error." Respondent's Brief 16. There is no evidence of any error. Moreover, other findings (Conclusion F, CP 400) and the Amended Judgment repeat the $295,000 figure, which reflects the lack of any payment. (CP 410). There is no substantial

evidence[1] Keatley paid any consideration to Bruner for the Earnest Money Receipt and Agreement. None.

B. Without payment of Earnest Money, the contract lacked consideration.

To claim this is a bilateral contract supported by mutual consideration in the form of an exchange of promises strains credulity. Ms. Kealey did not raise this argument in the trial court, nor did the trial court so find. Under the terms of this document, as argued by Keatley and found by the trial court, Keatley had no contractual obligation to do anything. She had no obligation to *ever* purchase the property under the literal language of the document. Bruner, however, had the obligation to sell the property to her for $295,000 when and if she wanted to close. Keatley argued and the trial court found this was an "open ended purchase option contract." CP 399, Finding Q. By the document's literal language, as interpreted by Keatley and the trial court, Keatley assumed no legal duty to Bruner to do anything. For example, if the property went down in value rather than up, Keatley could simply walk away from the deal without recourse by Bruner. The document even lacked a forfeiture clause for the nonexistent earnest money.

[1] Keatley filed a declaration in the trial court during the pendency of this appeal saying she closed the court ordered transaction with Bruner during the course of this appeal, ordered it up in supplemental clerk's papers, CP 448, and referenced it in her responsive brief p. 13, 32-33. This is improper because it was not in evidence for the trial court to consider; however if it is properly referenced in the response brief your undersigned could equally file a declaration attesting Keatley was given absolutely no credit at closing for an alleged $1,000 earnest money payment.

C. Closing within Reasonable amount of Time.

Whether a five year delay in closing a real estate transaction is "reasonable" is not an error or issue raised by appellant Bruner in this appeal. By the literal language of the Earnest Money Receipt and Agreement there is no date by which the transaction need be closed; and the trial court found this was by the design and intent of the parties. CP 397, Finding H; CP 399, Finding Q

D. Equitable Estoppel doesn't Apply to void contracts.

Equitable estoppel relates to Keatley's claim that she closed within a reasonable amount of time; however Bruner is not contesting that for the purpose of this appeal which concerns the void nature of this "contract". Keatley's claim to enforce a void contract cannot be resurrected by claiming Bruner acted inequitably by not demanding Keatley close a void contract at an earlier date. CP 398, Finding N; CP 399, Conclusion D

E. Bruner did in fact argue at Trial the contract was unenforceable; however arguments as to unenforceability may be raised for the first time on appeal in any event.

Not only did the parties argue about validity of the document at the trial court level, but Ms. Keatley cited most of the leading cases. See e.g. *Plaintiff's Trial Memorandum* 11. CP 80. *Citing Martin v. Segal*, 35 Wn.2d 223, 229, 212 P.2d 107 (1949), leading case on what legal description may satisfy statute of frauds. These cases will be referenced under the more specific topics below; however the more fundamental point is that RAP 2.5(a)(2) provides a party may raise a claimed error for

the first time on appeal for "failure to establish facts upon which relief may be granted."

Roberson v. Perez, 156 Wn.2d 33, 123 P.3d 844 (2009) explains that where RAP 2.5(a) is otherwise applicable, the rule uses the term "may" which makes application of the rule of exclusion discretionary, not mandatory. Id. at 39.

> In addition to its exclusionary nature, RAP 2.5(a) contains several express exceptions from its general prohibition against raising new issues on appeal, including the "failure to establish facts upon which relief can be granted." This exception is fitting inasmuch as "[a]ppeal is the first time sufficiency of evidence may realistically be raised." *State v. Hickman,* 135 Wn.2d 97, 103 n.3, 954 P.2d 900 (1998). For purposes of RAP 2.5(a), the terms "failure to establish facts upon which relief can be granted" and "failure to state a claim" are largely interchangeable. See 1 Wash. Court Rules Ann. RAP 2.5 cmt. (a) at 640 (2nd ed. 2004) ("Exception (2) uses the phrase 'failure to establish facts' rather than the traditional 'failure to state a claim.' The former phrase more accurately expresses the meaning of the rule in modern practice.").

Id. at 40 See also *Jones v. Stebbins*, 122 Wn.2d 471, 479, 860 P.2d 1009 (1993); *New Meadows v. Washington Water,* 102 Wn.2d 495, 498, 687 P.2d 212 (1984), *Maynard Inv. Co. v. McCann,* 77 Wn.2d 616, 621, 465 P.2d 657 (1970).

The rule's reference to "failure to establish facts upon which relief can be granted" pertains "'when the question raised affects the right to maintain the action'" [citing cases] Id. at 40 That is precisely the situation here for failure to prove the elements of a valid enforceable contract.

(i) Statute of Frauds

Many pleadings before the trial court reference the specific application of the Statute of Frauds to legal descriptions, citing the leading cases on point. See, e.g. CP 37-8[2], 81, 101-2, 111-12, 322-3, 352-3, 396-402, 409-12. One of the facts which the plaintiff must establish to prove the contract is valid and enforceable is a proper legal description. *Key Design, Inc. v. Moser*, 138 Wn.2d 875, 889, 983 P.2d 653 (1999) An inadequate legal description simply renders the contract void. *Maier v. Giske*, 154 Wn. App. 6, 15, 223 P.3d 1265 (2010) Failure to prove a proper legal description is a "failure to establish facts upon which relief may be granted" and therefore may be raised for the first time on appeal, RAP 2.5(a)(2); although here the record is replete with arguments directly on this issue citing leading authority.

Keatley also cites *Mahoney v. Tingley*, 85 Wn.2d 95, 100, 529 P.2d 1068 (1975) for the proposition that "certain defenses are required to be pleaded affirmatively in order to avoid surprise." Response p. 26 The issue there was whether the defendants could raise a defense based on a liquidated damage clause that had not be pleaded as an affirmative defense under CR 8(c). Our Supreme Court held even assuming the clause fell

[2] Plaintiff was very conscious of her duty to prove a proper legal description and filed many pleading claiming a description by tax parcel number would suffice: "The contract entered into by Plaintiff and Defendant references Tax Parcel numbers in lieu of providing a legal description. This practice has been accepted by the courts as an 'incorporation by reference.' In *Bingham v. Sherfey*, the court held so long as the county tax parcel numbers referencing the tax assessor's records provided a sufficient legal description of the property, the use of tax parcel numbers referencing the tax Assessor's records, which are referenced by the earnest money agreement between Plaintiff and Defendant, contains a legal description of the property that is the subject of the contract." CP 38 Other cited portions of the record contain similar language. The issue was squarely raised to the trial court.

within the scope of the rule, the rule is not absolute and the matter may be considered anyway where raised without objection. "To conclude that defendants are precluded from relying upon that clause as a defense would be to impose a rigid and technical formality upon pleadings which is both unnecessary and contrary to the policy underlying CR 8(c)..." *Id.* at 101 Here, both the Statute of Frauds and adequacy of legal description was extensively discussed without objection by Keatley. *Plaintiff's Memorandum of Authorities in Opposition to Defendant's Motion to Dismiss*: "No court has held that an earnest money agreement fails to satisfy the statute of frauds or is otherwise unenforceable as 'a written agreement' for failure to have the contract acknowledged'". CP 37. *Id.* at 38: "The contract entered into by Plaintiff and Defendant references Tax Parcel numbers in lieu of providing a legal description". *Plaintiff's Trial Memorandum Re: Statute of Limitations and Equitable Estoppel.* "After the court's decision in *Martin v. Seigel*, earnest money agreements were required to contain a legal description of the property which was the subject of the written agreement...No court has held that an earnest money agreement fails to satisfy the statute of frauds or is otherwise unenforceable as a 'written agreement' for failure to have the contract acknowledged". CP 80. The court made an express affirmative finding "the contract contains a legal description by reference and all other essential contract terms," CP 397 Finding G, and Concluded the parties "entered into an enforceable written agreement..." CP 399, Conclusion A.

Given the record below, the Appellant's arguments concerning the Statute of Frauds and legal description are properly before the Court.

Nearly a century ago, the Washington Supreme Court expressly rejected the English rule that required parties to affirmatively plead the Statute as a defense. Our court instead held that a party to a real property contract need not affirmatively plead the Statute of Frauds in an answer.

> Our court, however, holds that the statute affects the contract itself, and therefore whenever one is required to prove the contract which he seeks to enforce (if it be one within the purview of the statute) he must show that it has been executed in contemplation of the statute, and that by legal evidence.

Hendry v. Bird, 135 Wn.174, 180, 237 P. 317, 320 *aff'd per curium*, 135 Wn.174, 240 P. 565 (1925), quoting *Jordan v. Greensboro Furnace Co.*, 126 N.C. 143, 35 S.E. 247 (1900). "We cannot conceive of such a thing as a contract that is void under the statute, and yet can be the foundation of a legal obligation arising out of nothing else. A complaint on such a contract presents the question of whether or not a cause of action is stated which under our practice may be raised at any time." *Hendry v. Bird*, 135 Wn. at 179-80. Here, (1) Bruner's Answer stated the Contract should be declared "null and void", and (2) the burden rested with Ms. Keatley to prove the existence of a valid contract. Therefore, the Statute of Frauds issue is ripe for appellate review because: (1) the issue was raised repeatedly in writing to the trial court; (2) the issue was determined by the trial court in its Findings of Fact; and (3) in any event, compliance with the Statute of Frauds may be raised for the first time on appeal

because failure to prove a proper legal description is a "failure to establish facts upon which relief may be granted." RAP 2.5(a)(2)

Although CR 8(c) calls out the statute of frauds as an affirmative defense, in the context of this case it is an element of contract validity to be proved by the person seeking to enforce the contract rather than an "avoidance or affirmative defense." Keatley affirmatively discussed and briefed the statute of frauds and legal description issues below. Keatley even cited the precise case that necessitates reversal. CP 80, *citing Martin v. Seigel.*

(ii) Unreasonable Restraint of Alienation/Rule Against Perpetuities

Keatley admits she has no authority that either an unreasonable restraint on alienation or rule against perpetuities is an affirmative defense. She does cite *Harting v. Barton*, 101 Wn.App. 954, 961, 6 P.3 91 (2000) for the proposition that an avoidance or affirmative defense is "[a]ny matter that does not tend to controvert the opposing party's prime facie case."

But here Keatley's prima facie case by necessity includes her burden to prove contractual validity. In an effort to carry that burden she cited *Lawson v. Redmoor Corp.*, 37 Wn. App. 351, 679 P.2d 972 (1984), to the trial court, *see* e.g., CP 84, which discussed in detail the rule against unreasonable restraints on alienation and the rule against perpetuities, also citing *Robroy Land Co., v. Prather*, 95 Wn.2d 66, 622 P.2d 367 (1980) These are the principal cases relied upon by Bruner in his Opening Brief,

p. 14-17 and therefore come as no surprise to Keatley. As set forth in the principal brief of Bruner, compliance with the unreasonable restraint and perpetuities doctrine are prerequisites to establish contractual validity—part of Keatley's prima facie case. Their applicability is determined by terms of the contract Keatley has the burden to show is (1) valid, and (2) broken by Bruner.

Although Keatley claims she was "robbed of the opportunity to develop a factual record directed at this allegation", Respondent's Brief p. 28, Ms. Keatley bears the burden to prove the contract was valid. Keatley had every opportunity to submit evidence of contractual validity; however her focus at trial (as well as her Response Brief) is the personal relationship between the parties rather than the legal relationship *viz a viz* the validity of the contract. As a matter of fact, the facts proposed by Keatley to the court for Factual Findings, over the opposition of Bruner, only strengthened legal arguments that the unreasonable restraint and perpetuities doctrines had been violated. After all, RAP 2.5(a)(2) pertains to the sufficiency of facts, and the facts are not determined by the trial court until it finds them.

(iii) Lack of essential Contract terms

Keatley again claims Bruner failed to present his claim that the contract was void for failure to incorporate essential terms. To the contrary, if Bruner needed to raise this argument to the trial court, he did

so plainly and repeatedly. See, e.g. CP 111[3] (*Bruner Trial Memorandum of Facts and Authorities*), 150[4] (*Memorandum*), CP 176[5], CP 190[6], CP 199[7], CP 204[8] (*Bruner Trial Memorandum*). Once again, Keatley cannot defend this judgment on the merits so tries to invent bogus arguments why she should be excused from proving her case.

F. The legal description by tax parcel number for a platted lot violates the Statute of Frauds.

This issue was more than adequately handled in the opening brief. The strict rule in this state is that a legal description is only adequate if it describes platted property by "the correct lot number(s), block number, addition, city county, and state." *Key Design, Inc v. Moser,* 138 Wn.2d 875. 882, 983 P.2d 653 (1999), quoting *Martin v. Segal*, 35 Wn.2d 223, 229, 212 P.2d 107 (1949) This rule pertains to platted property. In contrast unplatted property described by metes and bounds may be identified by tax parcel number. *Bingham v. Sherfey*, 38 Wn.2d 886, 889,

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[3] "But agreements to buy and sell real estate 'must be definite enough on material terms to allow enforcement without the court supplying the terms.' *Setterlund v. Firestone*, 104 Wn.2d 24, 25, (1985) ...the 13 material terms of a real estate contract are

(a) time and manner for transferring title; (b) procedure for declaring forfeiture; (c) allocation of risk with respect to damage or destruction; (d) insurance provisions; € responsibility for: (i) taxes, (ii) repairs, and (iii) water and utilities; (f) restrictions, if any, on: (i) capital improvements, (ii) liens, (iii) removal or replacement of personal property, and (iv) types of use; (g) time and place for monthly payments; and indemnification provisions.

SEA-VAN Investments v. Hamilton, 125 Wn.2d 120, 128 (1994) citing *Kruse v. Hemp*, 121 Wn.2d 715, 722 (1993), citing *Hubbell v. Ward,* 40 Wn.2d 779, 785 (1952)" CP 111-12

[4] "An earnest money agreement is unenforceable if it lacks material terms".

[5] *Setterlund v. Firestone*, 104 Wn.2d, 24, 25, 700 P.2d 745 (1985) authority concerning material terms of an earnest money agreement.

[6] *Hubbell v. Ward,* , authority concerning enforceability of real estate contract.

[7] *Defendant's Renewed Motion to Dismiss and/or Motion for Summary Judgment.* "[S]aid so-called contract lacks an essential term, the date of performance".

[8] *Defendant's Trial Memorandum.* "An earnest money agreement or other preliminary real property buy and sell agreement is not subject to specific performance unless it includes all of the necessary material terms...."

234 P.2d 489 (1951). This is platted property but was described only by street address and tax parcel number. The contract is unenforceable and void. Keatley finds no way around this.

Asotin County Port Dist. v. Clarkston Community Corp., 2 Wn. App. 1007, 472 P.2d 554 (1970) does not hold otherwise, i.e. it does not hold platted lots may be adequately described by tax parcel number and, as a matter of fact, found the legal descriptions at issue there improper, setting them aside.

Keatley also cites *Tenco, Inc. v. Manning*, 59 Wn.2d 479, 368 P.2d 372 (1962), Response Brief p. 31, claiming "it in no way limited the application of the rule to unplatted lands." Response Brief p.31 But how Keatley can make this claim in light of the language in *Tenco* is a mystery:

> The classic case in Washington law with respect to property description problems is, of course, *Martin v. Siegel* (1949), 35 Wn.2d 223, 212 P.2d 107, 23 A.L.R. 2d 1. It was there held that an earnest-money agreement containing a description of certain property by street number, city, county, and state, was insufficient to satisfy the statute of frauds, and that the contract was therefore, unenforceable. The court volunteered a rule for determining whether descriptions of **platted** property were sufficient by indicating that a memorandum must contain 'the description of such property by the correct lot number(s), block number, addition, city county, and state.' *Martin v. Siegel* has since been qualified to a certain extent [], but, along with *Bingham v. Sherfey*, 38 Wn.2d 886, 234 P.2d 489, which sets forth description requirements for **unplatted** property, and other cases...

Id. at 484-85 (emphasis added) Legal description by tax parcel number is clearly inadequate and renders the contract void. This is dispositive in Bruner's favor.

G. The contract is an unreasonable restraint on alienation and also violates the rule against perpetuities

Keatley argues these issues were not argued to the court but relies on *Lawson*, 37 Wn. App. at 354-55 and fn.1, 679 P.2d 972; *Fieder*. 40 Wn. App. at 592, 699 P.2d 801, and *Robroy Land Company, Inc. v. Prather*, 95 Wn.2d 66, 74, 622 P.2d 367 (1980), cases cited to the trial court by Keatley and relied upon by Bruner in his Opening Brief.. *See e.g.* CP 84 Moreover it was the burden of Keatley to prove facts necessary to sustain the validity of the contract, and she is never relieved of that burden whether the responding party addresses it or not. RAP 2.5(a)(2).

While it is true under some circumstances *Lawson* recognizes a reasonable termination date may be implied to avoid the rule against perpetuities, 37 Wn. App. at 354 n.1, the same cannot be said for an unreasonable restraint on alienation. Keatley also concedes "a trial court's unreasonable restraint of alienation analysis is a factual one..." Response Brief p. 32 Here the factual findings of the trial court were significantly different than those urged by Bruner, strengthening his claims under these doctrines on appeal. For example at Keatley's urging the trial court rejected any claim the failure to include a closing date was by mere inadvertence, finding instead it was very intentional. CP 397, Finding H; CP 399, Finding Q ("the uncontroverted testimony that the date was left open intentionally...establish that they intended to create an open-ended purchase option contract.")

Under this heading Keatley does not deal with, let alone refute, Bruner's argument that the contract as written and construed by the court violates the unreasonable restraint on alienation doctrine as well as the rule against perpetuities. The court has no place changing contract language from what the parties intentionally agreed upon. Bruner relies on his opening brief which is not seriously challenged.

H. The contract does not contain all essential terms

Bruner argued repeatedly to the trial court that the contract was void because it lacked essential terms. *See* e.g. CP 111, 150, 176, 190, 204, 205, 262, 270, 283, see also *infra* footnote 3. Bruner's argument that the contract lacks essential terms in his opening brief pp. 11-12 is not seriously rebutted. Unlike Keatley's argument, the essential terms doctrine is not limited to Real Estate Contracts but applies to purchase and sale agreements and options as well. *Sea-Van Investments v. Hamilton*, 125 Wn2d 120, 129, 882 P.2d 173 (1994).

Essential terms missing from this contract include: (1) valid legal description; (2) time and manner of transferring title; (3) procedure for declaring forfeiture of earnest money; (4) allocation of risk with respect to damage or destruction; (5) insurance provisions; (6) responsibility for repairs, water and utilities; (7) restrictions if any on capital improvements, liens, removal or replacement of personal property and types of use and (8) a closing date (although the court found the parties agreed not to have one.) *Hubbell v. Ward*, 40 Wn.2d 779, 785, 246 P.2d 468 (1952).

IV. CONCLUSION

This appeal boils down to a one page document. The trial court's factual findings mostly have not been challenged on appeal. The merit of the appeal is based on application of settled law to uncontested facts.

The legal description in the contract is either proper or it isn't. Settled law provides a platted lot in a conveyance cannot be properly described by street address and tax parcel number. But this was.

Settled law provides an Earnest Money Agreement must contain all essential terms. This contract lacked many terms our courts have previously deemed essential.

Contracts not supported by consideration are invalid. This had none.

A contract for an "open-ended option" with a fixed price for perpetuity is, by its very terms, an unenforceable/void unreasonable restraint on alienation and a violation of the rule against perpetuities, if there ever was one.

Reversal on any of these dispositive grounds is the remedy Bruner is entitled as a matter of law.

DATED this 26th day of February 2016.

GOODSTEIN LAW GROUP, PLLC

Richard B. Sanders, WSBA #2813
Attorney for Appellant/Defendant Duane Bruner

EARNEST MONEY RECEIPT AND AGREEMENT

Castle Rock, Washington
March 22, 2005

SANDRA JO KEATLEY (hereinafter called "Purchaser") hereby agrees to purchase, and the undersigned Seller hereby agrees to sell the following described real estate located in Castle Rock, County of Cowlitz, State of Washington, described as:

Parcel# WK2713005 located at 1176 Chapman Road and adjacent Parcel# WK2713007. Total land being approximately 10 acres.

TOTAL PURCHASE PRICE IS: $295,000 00 Dollars.

1. Title of Seller is to be free of encumbrances or defects.

2. Earnest Money: Purchaser hereby deposits, and receipt is hereby acknowledged of, ONE THOUSAND ($1,000.00) DOLLARS, evidenced by personal check paid or delivered as earnest money in part payment of the purchase price for the aforedescribed real estate.

On this date, I hereby approve and accept the sale set forth in the above Agreement and acknowledge receipt of a true copy of this Agreement signed by both parties.

Duane Bruner — Date 3-23-05
Seller

Seller's Address: 1176 Chapman Road, Castle Rock, WA 98611
Seller's Phone: (360) 274-7103

Sandra Jo Keatley — Date 3-23-05
Purchaser

Purchaser's Address: 6806 West Side Highway, Castle Rock, WA 98611
Purchaser's Phone: (360) 274-5363
Purchaser hereby warrants she is of legal age.

APPENDIX 1

PLAINTIFF'S EXHIBIT
ID#20 EX#20
11-2-120095-2