NO. 93414-9

Court of Appeals, Division I, No. 748491-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

SANDRA J. KEATLEY,

PLAINTIFF/RESPONDENT

v.

DUANE BRUNER,

DEFENDANT/APPELLANT.

PETITION FOR REVIEW

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TABLE OF CONTENTS

I. IDENTITY OF PETITIONER 1

II. CITATION TO COURT OF APPEALS DECISION 1

III. ISSUES PRESENTED FOR REVIEW 1

IV. ARGUMENT 3

A. The Decision's holding that proof of payment of consideration is irrelevant merits review under RAP 13.4(b). 5

B. The Decision which holds an end date, a forfeiture clause and a clause which allocates the risk of destruction or improvement, etc. are not material terms to an option or earnest money agreement merits review because it conflicts with Court of Appeals and Supreme Court decisions and is an important issue of public importance. RAP 13.4(b)(1), (2) and (4). 7

C. Review is merited under RAP 13.4(b)(1) because the Decision affirms a trial court holding that the trial court may rewrite the contract by imposing a "reasonable" time to exercise the option at the same time it specifically finds the parties intentionally rejected any end date by which the open ended option need be exercised. 10

D. Review of the Decision is merited under RAP 13.4(b)(1) because the Decision refused to review for the first time on appeal whether Keatley failed to establish facts at trial upon which relief may be granted that the contract was not void because it was an unreasonable restraint on alienation and/or violated the rule against perpetuities contrary to RAP 2.5(a)(2) and Supreme Court precedent. 12

E. Review is merited under RAP 13.4(b) to determine if this "open ended purchase option contract" Finding Q, CP 399, which allows the optionee at any time for a fixed price to exercise the option but imposes no duty on the optionee to ever exercise the option thus leaving the property encumbered forever, renders the contract void as an unreasonable restraint on alienation of property and/or in violation of the rule against perpetuities. 15

V. CONCLUSION 20

Appendix

A. Earnest Money Receipt and Agreement
B. Court of Appeals Decision
C. Order Denying Motion to Reconsider and Publish
D. Trial Court Findings and Fact and Conclusions of Law
E. Amended Judgment

TABLE OF AUTHORITIES

Cases

Betchard v. Iverson, 35 Wn.2d 344, 348, 212 P.2d 783 (1949) 16
Big Bend Land Co., v. Hutchings, 71 Wash. 345, 348, 128 P. 652 (1912) 16
Bogel & Gates, P.L.L.C v. Zapel, 121 Wn. App. 444, 449, 90 P.3d 703 (Div. 1 2004) 5
Bogle & Gates, P.L.L.C. v. Holly Mountain Res., 108 Wn App. 557, 560 32 P.3d 1002 (Div. 1, 2001) 6
Cahn v. Foster & Marshall, Inc., 33 Wn. App. 838, 840, 658 P.2d 42 (Div. 3, 1983) 6
Coulter & Smith, LTD. v. Russell, 925 P.2d 1258, 1261-63 (1996, Utah App.) 7
Duprey v. Donahoe, 52 Wn.2d 129, 135, 323 P.2d 903 (1958) 9
Family Worship Center v. Weir, 135 Wn. App. 900, 909-10, 146 P.3d 935 (2006) 7
Girard v. Myers, 39 Wn. App. 577, 585, 694 P.2d 678 (1985) 18
Hubbell v. Ward, 40 Wn.2d 779, 785, 246 P.2d 468 (1952) 8
Huberdeau v. Desmarais, 79 Wn.2d 432, 439, 486 P.2d 1074, 1078 (1971) 5
Inglehart v. Phillips, 383 So. 2d 610, 614-15 (1980, Fla. Sup. Ct.) 17
Jones v. Stebbins, 122 Wn.2d 471, 479, 860 P.2d 1009 (1993) 13
Keever & Assocs., Inc. v. Randall, 129 Wn. App. 733, 737, 119 P.3d 926 (2005), rev. denied, 157 Wn.2d 1009 (2006) 6
Labriola v. Pollard Group, Inc., 152 Wn.2d 828, 833, 100 P.3d 791 (2004) 5
Lawson v. Redmoor Corp. 37 Wn.App. 351, 353-54, 679 P.2d 972 (Div. 1, 1984) 18
Lawson v. Redmoor Corp., 37 Wn. App. 351, 355, 679 P.2d 972 (1984). 17
Maynard Inv. Co. v. McCann, 77 Wn.2d 616, 621, 465 P.2d 657 (1970). 13
New Meadows v. Washington Water, 102 Wn.2d 495, 498, 687 P.2d 212 (1984) 13
Roberson v. Perez, 156 Wn.2d 33, 123 P.3d 844 (2009) 12, 14

Robroy Land Company, Inc. v. Prather, 95 Wn.2d 66, 622 P.2d 367 (1980).....15, 17
S. Kitsap Family Worship Ctr. v. Weir, 135 Wn.App. 900, 910, 146 P.3d 935 (Div. 2, 2006).....16
Seattle Prof'l Eng'g Employees Ass'n v. Boeing Co., 139 Wn.2d 824, 833, 991 P.2d 1126 (1999) amended, 1 P.3d 578.....8
Sea-Van Investments v. Hamilton, 125 Wn.2d 120, 129, 882 P.2d 173 (1994).....8
Setterlund v. Firestone, 104 Wn.2d 24, 25, 700 P.2d 745 (1985).....9
Spokane School District v. Parzybok, 96 Wn. 2d 95, 96-97, 633 P.2d 1324 (1981).....16
State v. Hickman, 135 Wn.2d 97, 103 n.3, 954 P.2d 900 (1998).....13
Teratron Gen. v. Institutional Inv'rs Trust, 18 Wn. App. 481, 489, 569 P.2d 1198 (1977).....12
Union Oil Co. v. Hale, 163 Wash. 503, 505, 2 P.2d 87 (1931).....8

Other Authorities

6 *American Law of Property* Sec. 26.64, at 507 (A. Casner ed. 1952).....17
IV *Restatement of Property* Sec. 406 (1944) , 2407.....19
Restatement of Property Sec. 413(2)(b).....18
Restatement of Property Sec. 413, comment *f* at 2444 (1944).....18

Rules

CR 60(a).....3
RAP 13.4(b).....passim
RAP 13.4(b)(1).....passim
RAP 13.4(b)(2).....5, 7, 14, 20
RAP 13.4(b)(4).....5, 7, 14
RAP 2.5(a).....passim
RAP 2.5(a)(2).....passim

I. IDENTITY OF PETITIONER

Duane Bruner, appellant herein, files this Petition for Review.

II. CITATION TO COURT OF APPEALS DECISION

Appellant Bruner seeks review of the Court of Appeals Division I decision in cause number 748491-I filed May 23, 2016. Appellant's timely motion to publish and to reconsider was denied on June 27, 2016.

III. ISSUES PRESENTED FOR REVIEW

A. Is review of a Decision merited under RAP 13.4(b) which holds it is irrelevant whether an alleged $1,000 check for contractual consideration was actually cashed and/or refused based on mutual friendship?

B. Is review merited under RAP 13.4(b) of the Decision which holds the so called "Earnest Money Receipt and Agreement" does not lack material terms when it has no end date for the option purchaser to exercise the option, no forfeiture clause, and no clause allocating the risk of property destruction or improvement, amongst other material missing terms?

C. Is review merited under RAP 13.4(b) when the Decision affirms a trial court holding that the trial court may rewrite the contract by imposing a "reasonable" time to exercise the option at the same time it specifically finds the parties intentionally rejected any end date by

which the "open ended purchase option contract," Finding Q, CP 399, need be exercised?

D. Is review merited under RAP 13.4(b) of the Decision which refuses to review on the merits claims that the open ended option as written is void as an unreasonable restraint on alienation and violates the rule against perpetuities because these claims were not raised in the trial court, contrary to RAP 2.5(a)(2) which allows claims that a party has not established facts upon which relief may be granted to be raised for the first time on appeal?

E. Is review merited under RAP 13.4(b) to determine if this "open ended option" agreement which allows the optionee at any time for a fixed price to exercise the option but imposes no duty on the optionee to ever exercise the option thus leaving the property encumbered forever, renders the contract void as an unreasonable restraint on alienation of property?

F. Is review merited under RAP 13.4(b) to determine if an open ended option agreement with no deadline to exercise the option violates the rule against perpetuities because it extends more than 21 years after a life in being?

IV. ARGUMENT

This proceeding turns on a one page document drafted by Sandra Keatley which she entitled "Earnest Money Receipt and Agreement." See Appendix A Bruner's appeal challenged the trial court's decree of specific performance based on the failure of Keatley to prove the contract's validity because (1) it lacked consideration; (2) it lacked material terms; (3) it was an unreasonable restraint on alienation of property; and (4) it violated the rule against perpetuities.

The document referenced $1,000 earnest money paid to Bruner by check, but there was no evidence that any alleged check had ever been cashed. Ms. Keatley testified Mr. Bruner didn't cash the check because they were friends. The trial court found that the $1,000 had been "paid" but also found, concluded and rendered judgment of specific performance against Bruner requiring Ms. Keatley to pay Bruner $295,000, not $294,000 with credit for the $1,000 "paid" earnest money, to exercise the option—which she ultimately did. The Decision characterized the $295,000 as a "scrivener's error" without any evidence to that effect and despite CR 60(a) which requires "clerical mistakes" be brought to the trial court, not the appellate court.

The document had no end date for the purchase of the property or exercise of the option. The trial court found no time limit to exercise the

option to be the specific intention of the parties, not an unintentional omission. The trial court re-characterized the document as an opened ended option agreement where Ms. Keatley could exercise her option whenever she wanted, if at all, for $295,000. Therefore since there was no end date she could never be in default by the terms of the document.

The trial court rejected Bruner's argument that the contract was void for lack of consideration and because it lacked material terms. The Decision affirmed that result holding whether or not the alleged check was actually cashed was irrelevant and that the trial court could rewrite the contract to infer a "reasonable" time for the option to be exercised, notwithstanding it also found the parties intended there to be no time limit whatsoever.

On appeal, Bruner also argued the contract was void as an unreasonable restraint on alienation and moreover violated the rule against perpetuities. However the Decision refused to determine these arguments on the merits notwithstanding RAP 2.5(a)(2) specifically requires an appellate court to address the failure of a party to "establish facts upon which relief can be granted" when raised for the first time on appeal. The Decision effectively reads the rule and the many Supreme Court cases which follow it out of the book.

A. The Decision's holding that proof of payment of consideration is irrelevant merits review under RAP 13.4(b).

This issue merits review because the Decision conflicts with a decision of the Supreme Court, another division of the Court of Appeals and is of substantial public interest. RAP 13.4(b)(1), RAP 13.4(b)(2) and RAP 13.4(b)(4).

Ms. Keatley testified she left a check for $1,000 with the written agreement on Bruner's desk, RP1-106; however, Ms. Keatley never testified the check actually cleared the bank. She virtually admitted Bruner didn't have and/or cash the check because they were "friends." RP1-115 ("Q. Do you have any proof that Duane ever received or cashed that earnest money check? A. I don't know what he did with the check. I just assumed that we didn't need it because we were still friends.")

The Decision held "It is irrelevant that Bruner didn't cash the check." Decision 5

The Decision that it doesn't matter if the check was not cashed is inconsistent with *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 833, 100 P.3d 791 (2004); *Huberdeau v. Desmarais,* 79 Wn.2d 432, 439, 486 P.2d 1074, 1078 (1971); *Bogel & Gates, P.L.L.C v. Zapel,* 121 Wn. App. 444, 449, 90 P.3d 703 (Div. 1 2004), all of which hold a contract not supported by consideration is void. Since Keatley bears the burden to

establish a valid contract, the finding is implied in the negative. *Bogle & Gates, P.L.L.C. v. Holly Mountain Res.*, 108 Wn App. 557, 560 32 P.3d 1002 (Div. 1, 2001); quoting *Cahn v. Foster & Marshall, Inc.*, 33 Wn. App. 838, 840, 658 P.2d 42 (Div. 3, 1983).

The Decision cites no authority that simply offering a check which is never cashed, or is returned NSF, is valid consideration. Your undersigned knows of no such authority in this state. The decision was thus of first impression and merits review for that reason as well.

The trial court found Keatley had actually "paid" Bruner $1,000, but there was no substantial evidence to support that finding. Nevertheless the Decision didn't set the finding aside inconsistent with *Keever & Assocs., Inc. v. Randall*, 129 Wn. App. 733, 737, 119 P.3d 926 (2005), rev. denied, 157 Wn.2d 1009 (2006) which defines substantial evidence as such evidence that would persuade a "fair minded" person. There is no substantial evidence Keatley "paid" Bruner anything.

But this isn't really so much an evidentiary issue as a legal one: is an uncashed check sufficient for legal contract consideration? This is an important question. Bruner would argue it isn't because a check is only of value if it is backed by sufficient funds and is cashed.

Suppose Bruner took the check and tore it up in front of Keatley saying "Honey, we are friends, I don't need this"? Is that legal consideration? Is a hand shake legal consideration? It seems the Decision holds as much. But Supreme Court and other Court of Appeal decisions hold otherwise. Review is warranted. The Supreme court and other Court of Appeal decisions hold a contract without valid consideration is void.

Moreover an option agreement consists of two elements: (1) an offer to sell which does not become a contract until accepted and (2) a contract to leave the offer open for a specified time, each of which must be supported by separate consideration. *Coulter & Smith, LTD. v. Russell,* 925 P.2d 1258, 1261-63 (1996, Utah App.) But here there was not even *alleged* consideration to leave the offer open. The consideration issue merits review under RAP 13.4(b)(1), RAP 13.4(b)(2) and RAP 13.4(b)(4).

B. The Decision which holds an end date, a forfeiture clause and a clause which allocates the risk of destruction or improvement, etc. are not material terms to an option or earnest money agreement merits review because it conflicts with Court of Appeals and Supreme Court decisions and is an important issue of public importance. RAP 13.4(b)(1), (2) and (4).

This one page document purports to convey an interest in real property and thus is subject to the statute of frauds. *Family Worship Center v. Weir,* 135 Wn. App. 900, 909-10, 146 P.3d 935 (2006) All material terms must be within the writing or the contract is void. The

court is not at liberty to write a contract for the parties they did not write for themselves. *Seattle Prof'l Eng'g Employees Ass'n v. Boeing Co.*, 139 Wn.2d 824, 833, 991 P.2d 1126 (1999) amended, 1 P.3d 578 Rather:

> Under the rules of construction applicable to contracts generally, a provision in a lease giving an option to purchase will be so construed as to effectuate the intention of the parties where it is ascertainable from the language employed by them, and where the parties express without ambiguity their intention, no room for judicial construction is left and no court can alter their agreement, although the bargain is hard or unwise.

Union Oil Co. v. Hale, 163 Wash. 503, 505, 2 P.2d 87 (1931)

Applying *Hubbell v. Ward*, 40 Wn.2d 779, 785, 246 P.2d 468 (1952) missing terms from this "contract" include (1) time and manner for transferring title; (2) procedure for declaring forfeiture of earnest money; (3) allocation of risk with respect to damage or destruction; (4) insurance provisions; (5) responsibility for repairs, water and utilities, (6) restrictions if any on capital improvements, liens, removal or replacement of personal property and types of use and (7) a closing date (although here the court found the parties agreed not to have one.) The contract must be definite enough on material terms to allow the court to enforce the agreement without supplying the terms. *Sea-Van Investments v. Hamilton*, 125 Wn.2d 120, 129, 882 P.2d 173 (1994)

Nevertheless the Decision ignored the bright line rule established by Supreme Court opinions enumerating those essential terms which are obviously missing here, thus meriting review under RAP 13.4(b)(1).

The Decision at 5 manufactures a rule that an option need not have a date or method of calculating a date beyond which the option expires, citing cases which stand for the quite different proposition that *once the option is exercised* the closing may occur within a "reasonable time." See e.g. *Duprey v. Donahoe*, 52 Wn.2d 129, 135, 323 P.2d 903 (1958)

The Decision attempts to get around *Hubble* by citing *Setterlund v. Firestone*, 104 Wn.2d 24, 25, 700 P.2d 745 (1985); however *Setterlund* holds it is part of the prima facie case of the party claiming breach to prove all essential terms are present—it is not an affirmative defense for the defendant to prove. At one point the decision enumerates the 7 material terms identified by Bruner as lacking (p.7) but on the same page dismisses Bruner's claim alleging he doesn't demonstrate these missing seven were "necessary to make this contract enforceable." We have already seen a great deal of discussion about why the absence of a closing or end date to exercise the option is problematic. In fact the whole trial turned on what was a "reasonable" time to exercise the option because it intentionally was not specified in the "agreement." Thus the court was rewriting the contract which on its face had no end date. Without that

term the "contract" would be perpetual thus constituting an unreasonable burden on alienation and a violation of the rule against perpetuities. Without that term Keatley could never be in default for failing to perform an illusory duty to do anything. Without a forfeiture clause the non-existent earnest money could never be forfeited. The Decision states by the time she elected to exercise the option (five years later) the property had appreciated to $500,000 from $295,000—but there was no clause in the agreement to adjust the option price to current fair market value, or a preemptory right of first refusal (which Bruner contended was his understanding).

In short, review should be granted to restore the level of written certainty required of real estate options under the statute of frauds as required by both *Hubble, Setterlund* and many more cases stemming therefrom.

C. Review is merited under RAP 13.4(b)(1) because the Decision affirms a trial court holding that the trial court may rewrite the contract by imposing a "reasonable" time to exercise the option at the same time it specifically finds the parties intentionally rejected any end date by which the open ended option need be exercised.

A court may not construe an option in a manner inconsistent with the intention of the parties, *Union Oil Co.*, supra; however that is precisely what the Decision affirmed. The agreement had no end date to exercise

the option and the trial court expressly found "Keatley and Bruner left the closing date open for the purpose of allowing Keatley to find financing to purchase the property." Finding H, CP 397, see also Finding Q, CP 399, "...the uncontroverted testimony that the date was left open intentionally..."

The rule against perpetuities cannot be defeated by reforming the contract to require the option be exercised within a reasonable time. *Coulter*, supra at 1261-63.

The Decision at 5 affirms trial court Finding M, CP 398, rewriting the contract to replace no end date by which the option need be exercised with a "reasonable" one. ("...the court will infer a 'reasonable amount of time' for closing...") The Decision cited two opinions which it claimed stood for the proposition that "an open ended option is enforceable so long as closing occurs within a reasonable time *after acceptance*." (Italics added). Decision at 5 Intended or not, this judicial sleight of hand conflates the date, if any, by which the option need be exercised (the issue here) with the date of closing after it *is* exercised. Both dates are loosely identified as "closing" dates however they are distinctly different events, the former being the one at issue here, not the later. If the date by which the option need be exercised is a material term which is missing the deficiency may not be corrected by the court rewriting this contract

subject to the statute of frauds. By the same token if the intentional omission of an end date renders the contract void as an unreasonable restraint on alienation or a violation of the rule against perpetuities, that deficiency may not be corrected by reforming the contract contrary to the statute of frauds. This merits review not only because it is inconsistent with Supreme court precedent but also is of important public concern.

D. Review of the Decision is merited under RAP 13.4(b)(1) because the Decision refused to review for the first time on appeal whether Keatley failed to establish facts at trial upon which relief may be granted that the contract was not void because it was an unreasonable restraint on alienation and/or violated the rule against perpetuities contrary to RAP 2.5(a)(2) and Supreme Court precedent.

The Decision refuses to consider whether the "contract" is an unreasonable restraint on alienation and violates the rule against perpetuities because these claims were not raised in the trial court, citing *Teratron Gen. v. Institutional Inv'rs Trust*, 18 Wn. App. 481, 489, 569 P.2d 1198 (1977). However that case makes clear the rule only applies when there are not exceptional circumstances such as failure to prove facts upon which relief may be granted. Moreover the exclusion rule is not mandatory even when applicable.

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, even when applicable. 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.

Appellant extensively briefed this issue. See e.g. Appellant's Reply Brief p. 4-5, 9-10, 13-14 The Decision does not even cite RAP

2.5(a)(2) or *Roberson v. Perez*, 156 Wn.2d 33, 123 P.3d 844 (2009) or the numerous other cases relied upon by appellant for the proposition it is Keatley's burden to prove facts supporting contact validity and her failure to do so may be raised for the first time on appeal. This includes her duty to prove this contract is not an unreasonable restraint on alienation and does not violate the rule against perpetuities. This was also discussed at oral argument. These issues should have been be considered on the merits; however the Decision is inconsistent with RAP 2.5(a)(2) and *Roberson* when it denied review on the merits.

The Decision's new rule is inconsistent with Supreme Court precedent and is as wrongheaded as it is broad. In *Roberson* the Supreme Court articulated why appellate review of a party's failure to prove facts upon which relief can be granted may occur for the first time on appeal. The Decision is in conflict with this decision of the Supreme Court and thus review is appropriate under RAP 13.4(b)(1). It also conflicts with other decisions of the Court of Appeals including *Teratron* and raises an issue of substantial public interest fundamental to the scope of appellate review thus justifying review under RAP 13.4(b)(2) and RAP 13.4(b)(4).

E. Review is merited under RAP 13.4(b) to determine if this "open ended purchase option contract" Finding Q, CP 399, which allows the optionee at any time for a fixed price to exercise the option but imposes no duty on the optionee to ever exercise the option thus leaving the property encumbered forever, renders the contract void as an unreasonable restraint on alienation of property and/or in violation of the rule against perpetuities.

This "open ended purchase option contract" as construed and found by the trial court intentionally omitted any date by which the option must be exercised, if at all, and was for the fixed price of $295,000. Supreme Court authority overwhelmingly supports the proposition that the contract as written is void as an unreasonable restraint on alienation.

Robroy Land Company, Inc. v. Prather, 95 Wn.2d 66, 622 P.2d 367 (1980) states the rule. That case involved a challenge to a first right of refusal preemption to purchase land under the rule against perpetuities and the rule against unreasonable restraint of alienation. There the first right of refusal was available to the optionee without time limitation. Although the case at bar does not involve a first right of refusal, the *Robroy* analysis is set forth. Our case involves an option, rather than a first right of refusal. Commenting upon *Robroy*, the Court of Appeals noted: "*Robroy* acknowledged that the holder of an ordinary option has a greater interest in land than the holder of a right of first refusal." *S. Kitsap Family Worship Ctr. v. Weir*, 135 Wn.App. 900, 910, 146 P.3d 935 (Div.

2, 2006). Even if the optionee does not exercise his option, he has an interest in land. *Spokane School District v. Parzybok*, 96 Wn. 2d 95, 96-97, 633 P.2d 1324 (1981), cited with approval in *Coulter*, supra.

The *Robroy* court opined "Both the rule against perpetuities and the rules against restraints upon alienation stem from the general policy against withdrawal of property from commerce and both are judge-made law." *Robroy,* 95 Wn.2d at 69. Q*uoting Betchard v. Iverson*, 35 Wn.2d 344, 348, 212 P.2d 783 (1949) the court summarized: "The rule against perpetuities prohibits the creation of future estates which, by possibility, may not become vested within a life or lives in being at the time of the testator's death and twenty one years thereafter. *Any limitation of a future interest which violates this rule is void. The purpose of this rule is to prevent the fettering of the marketability of property over long periods of time by indirect restraints upon its alienation."* (Italics added by *Robroy*) It is well established options are assignable, *Big Bend Land Co., v. Hutchings*, 71 Wash. 345, 348, 128 P. 652 (1912), and thus would violate the rule against perpetuities if there is no end date to exercise the option.

Of importance here the *Robroy* court made a careful distinction between a right of first refusal which it characterized as a "preemption" and an ordinary option such as the court found here:

> A option creates in the optionee a power to compel the owner of property to sell it at a stipulated price whether or not he be willing to part with ownership.

Robroy, 95 Wn.2d at 70, quoting 6 *American Law of Property* Sec. 26.64, at 507 (A.Casner ed. 1952) For the reasons discussed in the opinion, the court was unwilling to apply the rule against perpetuities to a preemption, unlike an option. The court also opined the rule against perpetuities might be limited to a reasonable time in a commercial lease where the time for performance was omitted by inadvertence; however here this is *not* a commercial transaction and the court found the parties *intended* there be no time limit. Moreover the perpetuities rule is one of property, not contract, which permits no reformation to limit the option exercise to a reasonable time. *Coulter, supra* at 1261-63. A fixed price option violates the rule against perpetuities. *Inglehart v. Phillips,* 383 So. 2d 610, 614-15 (1980, Fla. Sup. Ct.) (cited with approval in *Lawson v. Redmoor Corp.*, 37 Wn. App. 351, 355, 679 P.2d 972 (1984) And it is an unreasonable restraint on alienation as well:

> Thus the question before us is whether a fixed price right so fetters alienability that it must be invalidated as an unreasonable restraint on alienability.
>
> A fixed price preemptive right may have a substantial effect on the alienability of land because:
>
> A fixed price is usually set sufficiently low, in the light of possible developments, to enable the designated person to

> reap the benefits of any increase in value...the owner of the estate will be deterred from attempting to sell his property because of the improbability that he will realize the full market value.

Lawson v. Redmoor Corp. 37 Wn.App. 351, 353-54, 679 P.2d 972 (Div. 1, 1984), quoting *Restatement of Property* Sec. 413, comment *f* at 2444 (1944).

Girard v. Myers, 39 Wn. App. 577, 585, 694 P.2d 678 (1985) concluded even a fixed price preemptive right is an invalid unreasonable restraint on alienation when "it sets no time limit within which the holder must act, it contains no procedural requirements that the holder must follow to exercise the right and it interferes with alienation by requiring an onerous commission or reduction in price." The court opined this restraint should be analyzed under *Restatement of Property* Sec. 413(2)(b) which requires consideration of Sec. 406(c) criteria whether the restraint is "reasonable under the circumstances." *Comment i* details that the restraint is unreasonable if the person imposing the restraint has no interest in the land, the restraint is unlimited in duration or if the number of persons to whom alienation is prohibited is large.

Of course the restraint here is even more unreasonable since it continues without regard to whether there is a purchase offer, i.e. it is a fixed priced option, not a preemption, it is of unlimited duration, the one

imposing the restraint, Keatley, has no interest in the land, and the number of persons to whom alienation is prohibited is everyone in the world besides Keatley.

Also according to *Lawson* a restraint is generally unreasonable when it is unlimited in duration, or prohibits alienation to a large number of persons. *Lawson* at 354, *Restatement of Property* at 2402. Here the "open-ended purchase option contract" was without termination date by design and with a fixed price. It in effect prohibited alienation to anybody but Keatley. See also *Stoebuck*, Ibid, Sec. 1.26 at 51 ("When the restraint is against alienation of a future estate in fee simple and the restraint is capable of lasting until the estate will or may become possessory, it will probably be held void.").

Although the trial court found Keatley exercised her option within a reasonable time, the validity of the option must be judged on the date of execution of the contract and whether she exercised the option at all, much less when, tells us nothing about whether this contract created an unreasonable restraint on the alienation of land and is thus void by its terms. By its language and as found by the court, the contract was perpetual. See also IV *Restatement of Property* Sec. 406 (1944), 2407 (restraint on sale of land unreasonable when one imposing restraint has no

interest in land, it is unlimited in duration and the number of persons to whom alienation is prohibited is large.)

The "open ended purchase option contract" by its terms and as construed by the trial court is void as a matter of law under Supreme Court and other Court of Appeals decisions; nevertheless the Decision refused to even consider relevant authority justifying review under RAP 13.4(b)(1) and RAP 13.4(b)(2).

V. CONCLUSION

The Decision merits review under RAP 13.4(b).

Respectfully submitted this 25 day of July, 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 — 3-23-05
Seller — Date

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

Sandra Jo Keatley — 3-23-05
Purchaser — Date

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 A

PLAINTIFF'S EXHIBIT
ID#20 EX#20 12-2-14
11-3-00095-2

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington
Seattle

DIVISION I
One Union Square
600 University Street
98101-4170
(206) 464-7750
TDD: (206) 587-5505

May 23, 2016

Richard B Sanders
Goodstein Law Group
501 S G St
Tacoma, WA 98405-4715
rsanders@goodsteinlaw.com

Matthew J Andersen
Walstead Mertsching PS
1700 Hudson St Fl 3
PO Box 1549
Longview, WA 98632-7934
mjandersen@walstead.com

CASE #: 74849-1-I
Sandra J. Keatley, Respondent v. Duane Bruner, Appellant

Cowlitz County, Cause No. 11-3-00095-2

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

"Affirmed."

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days. The Supreme Court has determined that a filing fee of $200 is required.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

APPENDIX B

Should counsel desire the opinion to be published by the Reporter of Decisions, a motion to publish should be served and filed within 20 days of the date of filing the opinion, as provided by RAP 12.3 (e).

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

emp

Enclosure

c: The Honorable Marilyn K. Haan

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SANDRA J. KEATLEY, Respondent, v. DUANE BRUNER, Appellant.	)	No. 74849-1-I DIVISION ONE UNPUBLISHED OPINION FILED: May 23, 2016

BECKER, J. — This appeal is from a judgment and an award of specific performance entered after a bench trial of an action for breach of a contract to sell real property. Substantial evidence supports the trial court's findings of fact and the parties' agreement provides material terms sufficient to support enforcement by specific performance. We therefore affirm.

FACTS

This matter was called for a bench trial in December 2014. According to unchallenged findings of fact, appellant Duane Bruner and respondent Sandra Keatley were involved in an intimate, familial relationship from 1982 through 2002. During this time, Bruner purchased the property at issue, 10 acres on Chapman Road in Castle Rock. The property had been in Keatley's family for many years. Bruner and Keatley developed the property together with a home

and a shop. Bruner built a barn on the land that Keatley used, in conjunction with property she owned to the north to run a cattle operation.

On March 23, 2005, Keatley and Bruner, without the help of attorneys, coauthored and executed a contract wherein Bruner agreed to sell the Chapman Road property to Keatley for $295,000. Although they entitled the contract as an "Earnest Money Receipt and Agreement," the trial court found that they "intended to create an open-ended purchase option contract." The trial court based this finding on the lack of a closing date, the uncontroverted testimony that the date was left open intentionally to allow Keatley time to find financing to purchase the property, and the parties' actions after they executed the contract.

Keatley and Bruner continued to use the property jointly until October 2010. During this time, Keatley asked Bruner at least every three months whether he wanted or needed to close on the March 2005 contract. Bruner repeatedly assured Keatley that he was in no hurry and that there was no need to close on the sale. Keatley relied on those assurances. Until October 2010, she continued to make daily use of the property under the assumption that Bruner would sell the land to her pursuant to the contract. Keatley is a businesswoman with substantial assets. The court found that but for Bruner's assurances, Keatley could have and would have marshaled her assets to purchase the property at the stated price.

In October 2010, Keatley demanded closing. Bruner refused. For the first time, he claimed that the contract had expired. By this time, the fair market value of the property was $500,000.

Keatley commenced this litigation in February 2011. One of her claims was for dissolution of a committed intimate relationship. That claim was dismissed on a motion for summary judgment. This appeal involves only Keatley's claim for breach of contract, in which she sought to compel Bruner to convey the property to her at the agreed price.

The contract is titled "Earnest Money Receipt and Agreement." It is dated March 22, 2005, at Castle Rock. It designates Bruner as "seller" and Keatley as "purchaser" and is signed by each. It states that Keatley agrees to purchase the property described and Bruner agrees to sell it. The contract recites Bruner's acknowledgement of receipt of a check for $1,000 as earnest money:

> 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.

The trial court concluded the parties "entered into an enforceable written agreement" under which Keatley would purchase and Bruner would sell the Chapman Road property for $295,000. Concluding that Bruner breached the contract in October 2010, the court entered judgment for Keatley.

The Chapman Road property had been in Keatley's family for many years before Bruner acquired title. Keatley played a large role in the design and placement of the home on the property, which was built within one foot of the

boundary line of Keatley's adjacent land, and she used the property for years to run a cattle operation. The court found that the property was unique to Keatley. The judgment ordered Bruner to convey the property to Keatley free and clear of all encumbrances in exchange for $295,000.

CONSIDERATION

On appeal, Bruner first assigns error to finding of fact F insofar as it states: "Keatley paid Bruner the $1,000.00 in earnest money called for by the contract." Keatley testified that she handed an earnest money check to Bruner in the sum of $1,000. But Bruner testified that he did not receive the check. The record contains no documents showing that Bruner actually cashed or deposited the earnest money check. The judgment required Bruner to convey the property to Keatley in exchange for $295,000, a figure which is inconsistent with the finding that Keatley paid the earnest money to Bruner. If Keatley paid the $1,000 in earnest money, the total amount due to close should have been $294,000. Bruner contends that on this record, the finding that Keatley paid him $1,000 in earnest money is erroneous, with the result that the option contract is unsupported by consideration and must be set aside as void.

Factual findings are reviewed to determine if they are supported by substantial evidence. McDonald v. Parker, 70 Wn.2d 987, 988, 425 P.2d 910 (1967). Substantial evidence is such evidence that would persuade a fair minded person the facts were actually proven. Keever & Assocs., Inc. v. Randall, 129 Wn. App. 733, 737, 119 P.3d 926 (2005), review denied, 157 Wn.2d 1009 (2006).

Substantial evidence supports the challenged finding. The trial court was entitled to, and did, find Keatley's testimony more credible than Bruner's. The oral ruling noted that the court had "great trouble believing the defendant and his testimony." Keatley testified that she handed Bruner the check. It is irrelevant that Bruner did not cash the check. The $1,000 discrepancy is most reasonably seen as a scrivener's error by Keatley's attorney in drafting the findings. We conclude it does not undermine finding of fact F.

CLOSING WITHIN A REASONABLE TIME

Bruner also assigns error to finding of fact M, that the contract implicitly required Keatley to demand closing within a reasonable time:

> Given the lack of a closing date, the Court will infer a "reasonable amount of time" for closing and, under the circumstances of this case, Keatley's demand for closing in October 2010 was within a reasonable amount of time.

Bruner claims that by inferring the parties intended to impose a "reasonable time" limit on closing, the court inserted a term not agreed upon by the parties. He argues this finding is inconsistent with the finding that the parties intentionally left the closing date open to allow Keatley time to obtain financing.

A court is not at liberty to write a contract for the parties they did not write themselves. See Seattle Prof'l Eng'g Emps. Ass'n v. Boeing Co., 139 Wn.2d 824, 832-33, 991 P.2d 1126, 1 P.3d 578 (2000). But the lack of a definite closing date does not render an agreement fatally defective. An open ended option is enforceable so long as closing occurs within a reasonable time after acceptance. Foelkner v. Perkins, 197 Wash. 462, 466-67, 85 P.2d 1095 (1938); Duprey v. Donahoe, 52 Wn.2d 129, 135, 323 P.2d 903 (1958). What is a reasonable time

is to be determined by the circumstances of a case and the purpose of the parties that entered into an agreement. Thompson v. Thompson, 1 Wn. App. 196, 201, 460 P.2d 679 (1969); see also Lawson v. Redmoor Corp., 37 Wn. App. 351, 356, 679 P.2d 972 (1984). The trial court correctly considered the longstanding intimate familial relationship that existed between Keatley and Bruner before they entered into the contract as well as the purpose of their agreement. We find no error in finding of fact M.

MATERIAL TERMS

Bruner contends that the contract is unenforceable because material terms are missing.

Preliminary agreements "must be definite enough on material terms to allow enforcement without the court supplying those terms." Setterlund v. Firestone, 104 Wn.2d 24, 25, 700 P.2d 745 (1985). Specific performance cannot be decreed unless the terms are complete and free from doubt, making the precise act which is to be done clearly ascertainable. Hubbell v. Ward, 40 Wn.2d 779, 785, 246 P.2d 468 (1952). In Hubbell, the purchaser agreed to pay $9,000 down and sign a contract for the balance. Hubbell, 40 Wn.2d at 780. The seller refused to go forward with the transaction. The purchaser sued and obtained a decree of specific performance directing the seller to enter into a real estate contract according to the terms of the earnest money agreement. The decree was reversed on appeal because the agreement failed to reflect any understanding of what the terms of the future contract for the balance would be; it

only "contemplated that a real estate purchase contract which would contain new and additional terms might be executed in the future." Hubbell, 40 Wn.2d at 782.

The Hubbell court identified 13 material terms that must be specified in an option contract to enter into a future real estate contract. Hubbell, 40 Wn.2d at 782-83; Kruse v. Hemp, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993). Bruner sets forth 7 of the Hubbell terms that are missing from his agreement with Keatley, and he argues that their absence makes the agreement unenforceable: (1) time and manner for transferring title; (2) procedure for declaring forfeiture of earnest money; (3) allocation of risk with respect to damage or destruction; (4) insurance provisions; (5) responsibility for taxes, repairs, and water and utilities; (6) restrictions, if any, on capital improvements, liens, removal or replacement of personal property, and (7) a closing date.

In applying Hubbell, the problem "is not one of determining how many more terms are included in one agreement or another, but whether a particular agreement includes sufficient material terms." Setterlund, 104 Wn.2d at 26. "We do not enumerate those items which constitute material terms which must be agreed upon in the earnest money agreement. The general principle must be applied factually in each case." Setterlund, 104 Wn.2d at 26-27. Bruner does not attempt to demonstrate that the seven Hubbell terms he lists were necessary to make this particular contract enforceable.

The contract is not a preliminary agreement to enter into a future contract, as was true in Hubbell, Setterlund, and another case cited by Bruner, Sea-Van Invs. Assocs. v. Hamilton, 125 Wn.2d 120, 128-29, 881 P.2d 1035 (1994).

Keatley and Bruner did not contemplate entering into a future real estate contract with new and additional terms. Their contract identifies the seller, the buyer, the property to be sold, and the price; and it states that the title is to be free of encumbrances or defects upon transfer. The omission of a closing date is not a fatal defect, because as discussed above, it was proper under the circumstances for the trial court to enforce the agreement upon finding that Keatley demanded closing within a reasonable amount of time. We conclude the contract specified sufficient material terms to make it enforceable.

ISSUES ABANDONED OR WAIVED

Bruner's opening brief argued that the legal description in the contract is insufficient to satisfy the real estate statute of frauds, RCW 64.04.010. On March 14, 2016, Bruner submitted a document to this court in which he withdrew this argument. We therefore do not consider the issue.

Bruner contends that the contract constitutes an unreasonable restraint on alienation and violates the rule against perpetuities because it allowed Keatley to exercise her option anytime she wanted and potentially would have forever kept Bruner from encumbering it or selling it to anyone else. These issues will not be considered on appeal because they were not raised in the trial court. "A lawsuit cannot be tried on one theory and appealed on others." Teratron Gen. v. Institutional Inv'rs Trust, 18 Wn. App. 481, 489, 569 P.2d 1198 (1977), quoting Puget Sound Marina, Inc. v. Jorgensen, 3 Wn. App. 476, 480-81, 475 P.2d 919 (1970).

Affirmed.

Becker, J.

WE CONCUR:

Trickey, ACJ

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

SANDRA J. KEATLEY, Respondent, v. DUANE BRUNER, Appellant.	No. 74849-1-I ORDER DENYING MOTION FOR RECONSIDERATION AND FOR PUBLICATION OF OPINION

Appellant, Duane Bruner, has filed a motion for reconsideration and for publication of the opinion filed on May 23, 2016. Respondent, Sandra Keatley, has not filed an answer to appellant's motion. The court has determined that said motion should be denied. Now, therefore, it is hereby

ORDERED that appellant's motion for reconsideration and for publication of the opinion is denied.

DATED this 27th day of June, 2016.

FOR THE COURT:

Becker, J.
Judge

APPENDIX C

FILED
SUPERIOR COURT

2015 MAR 20 A 9:26

COWLITZ COUNTY
STACI L. MYKLEBUST, CLERK

BY_____

SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

SANDRA J. KEATLEY, Plaintiff, v. DUANE BRUNER, Defendant.	No. 11 3 00095 2 FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came before the Court for trial without jury on December 2, 2014. Plaintiff, Sandra Keatley, originally filed this action as the Plaintiff seeking the following relief:

a. Dissolution of Committed Intimate Relationship (CIR);

b. Breach of Contract;

c. Equitable Estoppel; and

d. Quiet Title.

Defendant, Duane Bruner, by way of his answer filed a counterclaim for adverse possession. Bruner also asserted the three-year and six-year statutes of limitation as affirmative defenses.

Keatley's CIR claim was dismissed on summary judgment prior to trial. All other matters were tried before this Court.

Walstead Mertsching PS
Civic Center Building, Third Floor
1700 Hudson Street
PO Box 1549
Longview, Washington 98632-7934
(360) 423-5220

ORIGINAL

APPENDIX D

I. FINDINGS OF FACT

A. From the year 1982 through 2002, Keatley and Bruner were involved in an intimate, familial relationship. During this time, Keatley and Bruner developed the property commonly known as 1176 Chapman Road, Castle Rock, Washington, and more fully described at Exhibits A and B hereto (hereinafter, "the Chapman Road Property"). The Chapman Road Property had been in Keatley's family for many years before Bruner purchased it.

B. Keatley owns the property directly to the north of the Chapman Road Property.

C. When Bruner built the shop on the Chapman Road Property, he did so within one foot of the boundary with the Keatley property. Bruner built the home on the Chapman Road Property close to the boundary as well, extending the fenced backyard across the boundary and onto Keatley's property. He did so with Keatley's permission. Keatley played a large role in the design and placement of the home on the Chapman Road Property.

D. Bruner built a barn on the Chapman Road Property that Keatley used, in conjunction with her property to the north, to run a cattle operation.

E. After the house was built on the Chapman Road Property, Keatley made daily use of the house and barns on the property.

F. 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 $295,000.00. Shortly thereafter, Keatley paid Bruner the $1,000.00 in earnest money called for by the contract. Keatley continued to make daily use of the property until October of 2010.

G. The contract contains a legal description by reference and all other essential contract terms.

H. The contract does not contain a date for closing the transaction. Keatley and Bruner left the closing date open for the purpose of allowing Keatley to find financing to purchase the property.

///

///

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I. Between March of 2005 and October of 2010, Keatley and Bruner made joint use of the Chapman Road Property. During this time, Keatley inquired at least every three months with Bruner regarding his desire and/or need to close on the March 2005 contract. Bruner repeatedly assured Keatley that he was in no hurry and that there was no need to close the sale.

J. Keatley relied on these assurances and continued to use the property under the assumption that Bruner would sell it to her pursuant to the contract.

K. In October of 2010, Keatley demanded closing and Bruner refused, claiming for the first time that the contract had expired.

L. Keatley commenced this action in February of 2011.

M. This was a long term relationship of twenty years, and things were done in a loose manner without involving attorneys. These were both business people that had both purchased property. Given the lack of a closing date, the Court will infer a "reasonable amount of time" for closing and, under the circumstances of this case, Keatley's demand for closing in October of 2010 was within a reasonable amount of time.

N. Bruner has taken the position that Keatley's right to close had expired due to the passage of time despite his prior assurances that Keatley could wait to close the transaction. Had Bruner demanded closing sooner, Keatley would have purchased the property. Allowing Bruner to change position would harm Keatley in that it would undermine her right to purchase the Chapman Road Property under the terms of the contract.

O. The Chapman Road Property has a fair market value of $500,000.00

P. The Chapman Road Property is unique to Keatley given its proximity to her property, her familial connection to the property, her long-term use of the property, and the role she played in designing the buildings constructed on the property.

Q. The contract was drafted by Plaintiff and Defendant without the help of attorneys. Although they entitled the contract as an "Earnest Money Receipt and Agreement," the lack of a

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closing date, the uncontroverted testimony that the date was left open intentionally to allow Plaintiff time to finance the purchase of the property, and the parties' actions post-execution, establish that they intended to create an open-ended purchase option contract.

R. The Plaintiff is a business woman with substantial assets, business acumen, and financial support. But for Defendant's repeated assurances, Plaintiff would have and could have marshaled her assets to purchase the property for $295,000.00, a price that was $205,000.00 below its fair market value as admitted by Defendant. It would have been futile, ~~costly, and with regard to applying for a commercial or private loan, dishonest,~~ to take the necessary measures to actually secure $295,000.00 in cash in October of 2010 given Defendant's unequivocal refusal to sell the property from the very moment Plaintiff demanded closing through the following four and a half years of litigation.

II. CONCLUSIONS OF LAW

A. Bruner and Keatley entered into an enforceable written agreement under which Keatley would purchase and Bruner would sell the Chapman Road Property for $295,000.00.

B. Bruner breached this contract in October of 2010.

C. The six-year statute of limitations under RCW 4.16.040 applies to Keatley's breach of contract claim. This action was commenced with four months of the date of breach and, therefore, Keatley's claims are timely.

D. Keatley demanded closing within a reasonable amount of time under the circumstances and, even so, Bruner is equitably estopped from claiming that Keatley waited too long to demand closing.

E. Under *McFerran v. Heroux*, 44 Wn.2d 631, 269 P.2d 815 (1954), Defendant bore the burden of proving that Plaintiff had the inability to close on the purchase of the Chapman Road property. Defendant failed to meet his burden. To the contrary, Plaintiff proved by a preponderance of the evidence that she had the ability to close on the purchase of the property and would have done so but for Defendant's repudiation of the contract. As such,

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were the court to apply *Carlson v. Leonardo Truck Lines, Inc.*, 13 Wn.App. 795, 538 P.2d 130 (1975), and place the burden of proof on the Plaintiff, she would meet her burden under the evidence in the record.

F. Keatley's breach of contract damages are $205,000.00 plus prejudgment interest at the statutory rate. These damages are inadequate given this property's uniqueness to Keatley.

G. Bruner shall convey the Chapman Road Property, free and clear of all encumbrances, to Keatley, in exchange for $205,000.00 not later than one hundred twenty days from the date final judgment is entered.

H. Bruner shall maintain the property in its current condition pending sale to Keatley.

I. Bruner has proven none of the elements of adverse possession and title to all property lying north of the legally described northern boundary of the Chapman Road Property is quieted in Keatley and Bruner is ejected from the same.

J. Keatley is the prevailing party in this action and is entitled to statutory attorney fees and costs.

Dated: March 20th, 2015.

JUDGE

Presented by:

Dated: March 20, 2015

MATTHEW J. ANDERSEN, WSBA #30052
Of Attorneys for Plaintiff

Approved as to form and notice of presentation waived:

Dated: March 20, 2015

WILLIAM P. KOGUT, WSBA #14992
Of Attorneys for Defendant

Walstead Mertsching PS
Civic Center Building, Third Floor
1700 Hudson Street
PO Box 1549
Longview, Washington 98632-7934
(360) 423-5220

Cowlitz Coun Assessor's Parcel Search

1/5/2015 11:45 AM

Parcel: WK2713005 Site Address: 1176 CHAPMAN RD , CASTLE ROCK 98611

10

Account: R016063

Owner: BRUNER DUANE R
Mailing Address: 1176 CHAPMAN RD
CASTLE ROCK, WA 98611

Jurisdiction: COWLITZ COUNTY

Abbr Property Ref: SECT,TWN,RNG:27-10N-2W DESC: T-13D EXC RD R/W FEE 771223 EXC ESMT TO COUNT Y FEE 840402038 EXC T-8A-6,13D-1 OWN SEG 1071 PARCEL: WK2713005

Neighborhood: 66 - WK NORTH OF RIVER

Tax District: 650 Castle Rock (Rural/Outlying Area)

Levy Code: 650 = R-401-LV-#6-C1

Current Assessed Value

Assess Year	Tax Year	Type	Actual Value	Assess Value	Acres
2014	2015	IMPROVEMENTS	229,200	229,200	0
2014	2015	LAND	38,850	38,850	5

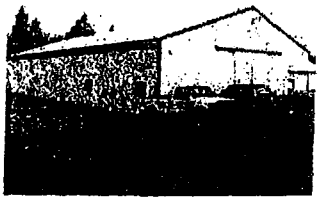
Conveyance History:

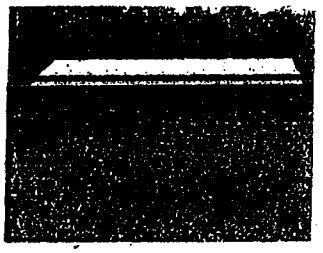
Reception	Book	Page	Grantor
860402016	1000	351	DUDONSKY RICHARD H GUARDIAN D
930106033	1136	702	BRUNER DUANE R
1071			BRUNER DUANE

Property Details: Short Plat/Large Lot #:

Model: DET_GAR_WD	FIRST	960
Model: SFR	FIRST	2026

Photographs:





Ex. A

Cowlitz Coun[illegible] Assessor's Parcel Search

Parcel: WK2713007 Site Address:

1/5/2015 11:46 AM

Account:	R050033
Owner:	BRUNER DUANE R
Mailing Address:	1176 CHAPMAN RD CASTLE ROCK, WA 98611
Jurisdiction:	COWLITZ COUNTY
Abbr Property Ref:	SECT,TWN,RNG:27-10N-2W DESC: T-8A-6,13D-1 PARCEL: WK2713007
Neighborhood:	66 - WK NORTH OF RIVER
Tax District:	650 Castle Rock (Rural/Outlying Area)
Levy Code:	650 = R-401-LV-#6-C1

Current Assessed Value	Assess Year	Tax Year	Type	Actual Value	Assess Value	Acres
	2014	2015	LAND	40,430	40,430	5.17

Conveyance History:	Reception	Book	Page	Grantor
	930405033	1136	702	

Property Details: Short Plat/Large Lot #:

Photographs:

Ex. B

1. Hearing

4

1.1 Date. This matter came on before the Court for trial on December 2, 2014.

1.2 Appearances. Plaintiff appeared with her attorney, MATTHEW J. ANDERSEN of WALSTEAD MERTSCHING PS. Defendant appeared with his attorney, WILLIAM P. KOGUT.

1.3 Purpose. Trial on the merits.

1.4 Evidence. The evidence presented by the parties and admitted by the Court.

2. Adjudication

Based on the evidence presented at trial, it is hereby ordered that Defendant shall convey the property described at Exhibits A and B hereto to the Plaintiff, free and clear of all encumbrances, for $295,000.00 within one hundred twenty days of the date of this judgment. Defendant shall preserve the condition of the property for the next 120 days. Plaintiff's title to the property described is hereby adjudicated free of any interest of Defendant. Defendant's counterclaim for quiet title is hereby dismissed with prejudice. Plaintiff is the prevailing party in this action is entitled to statutory fees and costs as set forth in the judgment summary herein.

Dated: March 29 2015.

JUDGE

Presented by:

MATTHEW J. ANDERSEN, WSBA #30052
Of Attorneys for Plaintiff

Approved as to form and notice of presentation waived:

WILLIAM P. KOGUT, WSBA # 14992
Of Attorneys for Defendant

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PO Box 1549
Longview, Washington 98632-7934
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FILED
SUPERIOR COURT
2015 APR 24 A 9 57
COWLITZ COUNTY
STACI L. MYKLEBUST, CLERK.
BY

SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

SANDRA J. KEATLEY,

Plaintiff,

v.

DUANE BRUNER,

Defendant.

No. 11 3 00095 2

AMENDED JUDGMENT

JUDGMENT SUMMARY

Judgment Debtor	:	DUANE BRUNER
Attorney for Debtor	:	William P. Kogut
Judgment Creditor	:	SANDRA KEATLEY
Attorney for Creditor	:	Matthew J. Andersen
Amount of Judgment	:	$ 0.00
Interest to date of judgment	:	0.00
Taxable Costs		
Filing fee	:	230.00
Service	:	65.00
Attorney fee	:	200.00
Witness fee	:	0.00
TOTAL JUDGMENT	:	$ 495.00
Post Judgment Interest:	:	Judgment accrues interest at the rate of 12% per annum.

15-9-00438-3

97

Walstead Mattsching, PS
Civic Center Building, Third Floor
1700 Hudson Street
PO Box 1549
Longview, Washington 98632-7934
(360) 423-3220

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APPENDIX E

1. Hearing

1.1 Date. This matter came on before the Court for trial on December 2, 2014.

1.2 Appearances. Plaintiff appeared with her attorney, MATTHEW J. ANDERSEN of WALSTEAD MERTSCHING PS. Defendant appeared with his attorney, WILLIAM P. KOGUT.

1.3 Purpose. Trial on the merits.

1.4 Evidence. The evidence presented by the parties and admitted by the Court.

2. Adjudication

Based on the evidence presented at trial, it is hereby ordered that Defendant shall convey the property described at Exhibits A and B hereto to the Plaintiff, free and clear of all encumbrances, for $295,000.00 within one hundred twenty days of the date of this judgment. Defendant shall preserve the condition of the property for the next 120 days. Plaintiff's title to the property described is hereby adjudicated free of any interest of Defendant. Defendant's counterclaim for quiet title is hereby dismissed with prejudice. Plaintiff is the prevailing party in this action is entitled to statutory fees and costs as set forth in the judgment summary herein. wpk

Dated: 4/22, 2015.

JUDGE

Presented by:

MATTHEW J. ANDERSEN, WSBA #30052
Of Attorneys for Plaintiff

Approved as to form and notice of presentation waived:

WILLIAM P. KOGUT, WSBA # 14992
Of Attorneys for Defendant

wpk The RAP 5.2 time allowed to file notice of appeal shall begin to run upon entry of the stipulation, order & amended judgment. The 120 days to close shall run from the time of entry of the stipulation, order & amended judgment.

Walstead Mertsching PS
Civic Center Building, Third Floor
1700 Hudson Street
PO Box 1549
Longview, Washington 98632-7934
(360) 423-5220

Cowlitz Cou Assessor's Parcel Search

Parcel: WK2713006 Site Address: 1176 CHAPMAN RD , CASTLE ROCK 98611

1/5/2015 11:45 AM

Account:	R016063
Owner:	BRUNER DUANE R
Mailing Address:	1176 CHAPMAN RD CASTLE ROCK, WA 98611
Jurisdiction:	COWLITZ COUNTY
Abbr Property Ref:	SEC/T,TWN,RNG:27-10N-2W DESC: T-13D EXC RD R/W FEE 771223 EXC ESMT TO COUNTY FEE 8404022036 EXC T-8A-8,13D-1 OWN SEG 1071 PARCEL: WK2713006
Neighborhood:	98 - WK NORTH OF RIVER
Tax District:	650 Castle Rock (Rural/Outlying Area)
Levy Code:	650 = R-401-LV-98-C1

Current Assessed Value

Assess Year	Tax Year	Type	Actual Value	Assess Value	Acres
2014	2015	IMPROVEMENTS	229,200	229,200	0
2014	2015	LAND	95,850	95,850	5

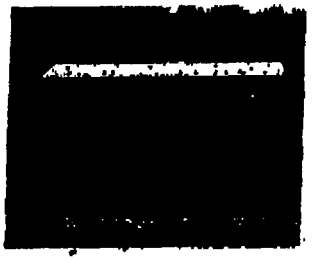
Conveyance History:

Receipt	Book	Page	Grantor
8404022016	1000	351	DUDONSKY RICHARD H GUARDIAN D
9301050033	1136	702	BRUNER DUANE R
1071			BRUNER DUANE

Property Details: Short Plat/Large Lot #:

Model: DET_GAR_WD	FIRST	960
Model: SFR	FIRST	2028

Photographs:



Ex. A

Cowlitz Cou Assessor's Parcel Search

Parcel: WK2713007 Site Address:

1/5/2015 11:46 AM

Account:	R050033
Owner:	BRUNER DUANE R
Mailing Address:	1178 CHAPMAN RD CASTLE ROCK, WA 98611
Jurisdiction:	COWLITZ COUNTY
Abbr Property Ref:	SECT,TWN,RNG:27-10N-2W DESC: T-8A-6,13D-1 PARCEL: WK2713007
Neighborhood:	66 - WK NORTH OF RIVER
Tax District:	650 Castle Rock (Rural/Outlying Area)
Levy Code:	650 = R-401-LV-66-C1

Current Assessed Value	Assess Year	Tax Year	Type	Actual Value	Assess Value	Acres
	2014	2015	LAND	40,430	40,430	5.17

Conveyance History:	Recording	Book	Page	Grantor
	6304060033	1136	702	

Property Details: Short Plat/Large Lot #:

Photographs:

I, STACI MYKLEBUST, Clerk of the Superior Court of Cowlitz County, State of Washington, hereby certify that this instrument is a true and correct copy of the original on file in my office. MAY 05 2015

By Lacie DeWitt, Deputy

Ex. B

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

DUANE BRUNER, Appellant, vs SANDRA J. KEATLEY, Respondent.	NO. (Court of Appeals, Div. I No. 48491-I) DECLARATION OF SERVICE

The undersigned declares that I am over the age of 18 years, not a party to this action, and competent to be a witness herein. I caused this Declaration and the following documents:

1. PETITION FOR REVIEW

was served on July 25, 2016 on the following parties and in the manner indicated below:

Matthew J. Andersen
Walstead Mertsching PS
PO Box 1549
Longview, WA 98632-7634
Email: mjandersen@walstead.com

[X] by United States First Class Mail
[X] by Electronic Mail
[ ] by ABC Delivery

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

Dated this 25th day of July 2016 at Tacoma, Washington.

Deena Pinckney, Legal Assistant

ORIGINAL