NO.

COURT OF APPEALS NO. 74510-7-I

SUPREME COURT

OF THE STATE OF WASHINGTON

KEN HATCH and CATHI HATCH,

Appellants,

v.

CARY FALK,

Respondent.

PETITION FOR REVIEW

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Table of Contents

Table of Authorities

Washington Cases

Court Rules

I. INTRODUCTION

Petitioners Ken and Cathi Hatch executed a real estate purchase and sale agreement with respondent Cary Falk to purchase a house from him. Neither party appeared at closing or tendered performance. The trial court ruled that the Hatches repudiated the agreement, and the Court of Appeals affirmed.

This Court has repeatedly reversed lower courts that found repudiation of a contract without sufficient evidence. Those opinions should suffice to prevent courts from repeating that mistake, but they haven't.

In *Wallace Real Estate Inv., Inc. v. Groves*, 124 Wn.2d 881, 898, 881 P.2d 1010 (1994), this Court was very clear and specific about the requirements to prove repudiation.

> A party's intent not to perform may not be implied from doubtful and indefinite statements that performance may or may not take place. *Lovric*, at 282, 567 P.2d 678. Rather, an anticipatory breach is a " '**positive statement or action by the promisor** indicating **distinctly and unequivocally** that he either **will not or cannot substantially perform** any of his contractual obligations.' " *Olsen Media,* 32 Wash.App. at 585, 648 P.2d 493 (quoting *Lovric,* 18 Wash.App. at 282, 567 P.2d 678).

A repudiation is a communication from one contracting party to the other that performance will not be forthcoming.

In this case, the contracting parties never communicated with each other at all. In fact, the entire record does not contain a single word of oral or written testimony of either party. The only evidence in the record is the statement of the Hatches' real estate agent that she told Falk that Mr. Hatch would "like to talk to you about a lease purchase." She said that she thought it was clear that the Hatches were not going to close, but she denied actually

saying that. What Falk heard or believed is a mystery because he presented no evidence of his understanding.

The Hatches did not repudiate the agreement as a matter of law. This Court should once again reverse an improvident finding of repudiation and remand for entry of judgement in favor of the Hatches.

II. IDENTITY OF PETITIONER

Petitioners Ken and Cathi Hatch request that the Court grant review of the decision of the Court of Appeals.

III. COURT OF APPEALS DECISIONS

On June 12, 2017, Division One of the Court of Appeals issued its unpublished decision affirming the trial court.

IV. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals decision conflicts with the requirements to prove contractual repudiation as set forth in the holding in *Wallace Real Estate Inv., Inc. v. Groves*, 124 Wn.2d 881, 898, 881 P.2d 1010 (1994).

2. Whether the Court of Appeals decision conflicts with the requirements for a seller to retain earnest money as set forth in the holding in *Wallace Real Estate Inv., Inc. v. Groves*, 124 Wn.2d 881, 898, 881 P.2d 1010 (1994).

V. STATEMENT OF THE CASE

A. Factual Background

The relevant facts in this case are few and undisputed. The case was decided on cross motions for summary judgment, and the totality of the evidence presented consists of less than seventy pages of documents and

transcripts. Neither party submitted a declaration, and the evidence consists of the parties' Agreement, email communications, and fourteen pages of deposition transcripts.

On November 6, 2014, the Hatches and Falk entered into a purchase and sale agreement for a home in Woodinville, Washington. CP 41-57. The Hatches' real estate broker was Toni Hoffman of Coldwell Banker Bain. CP 41.

The agreement provided for a closing date of January 5, 2015. *Id.* Paragraph l of the agreement provides that time is of the essence. CP 44.

Hoffman testified in her deposition that on December 26, 2014, she sent an email to Falk "telling him that Ken Hatch wanted to speak with him, and not referencing why." CP 27.

Either later that day or the next, Falk called Hoffman and asked if the Hatches were unable to close.

> I had sent an e-mail to Cary telling him that Ken Hatch wanted to speak with him, and not referencing why, and could I give him his phone number?
> And Cary at that time called me and said basically, "What's the matter? Can't he close?"

CP 27 (Hoffman deposition). Hoffman responded to Falk's question by saying "He'd like to talk to you about a lease purchase." CP 27.

At Hoffman's deposition, counsel for Falk then pressed Hoffman further, asking "And you said he asked you 'Can't he close?' Is that what he asked?" Hoffman reiterated that all she said was "He'd like to talk to you about a lease purchase."

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

CP 27-28.

Those are literally the only words that Hoffman claims to have spoken to Falk. He did also testify to her opinion that "I think it was clear that the Hatchs weren't prepared to close on the house and that they wanted to find an alternative way of purchasing the home," but she never said that those words were spoken. CP 28.

While Hoffman's view of the conversation is known, Falk's is not. The record contains no evidence at all of his understanding of the conversation. For his own reasons, Falk chose not to submit a declaration of his own.

The closest thing to an indication of Falk's belief is an email from Hoffman to the Hatches sent on December 27, 2015 stating:

> I sent a one page document to sign electronically to your email. It really is simple. If that doesn't work for you, then I can send it via email and you can scan it back to me. Cary would like it as soon as possible so that he can get his house back on the market.

CP 111. Whatever that document was, it is not in the record, nor is it identified by any document in the record. Ken Hatch responded to the email by stating:

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

CP 111.

It is undisputed that neither party performed or tendered performance on the closing date. CP 2 at ¶¶ 11, 12 (Hatch); CP 106 (Falk). There is no evidence that either party set up escrow, ordered title, or took any other action to prepare for closing. The earnest money had been released to Falk during the transaction, and he retained it.

B. Trial Court Proceedings

The Hatches filed this action seeking the return of their earnest money. Their theory was that the purchase and sale agreement became defunct and expired when neither party tendered performance. The Hatches conceded their breach of the purchase and sale agreement, and argued that Falk breached it as well. Falk asserted that his failure to perform was excused by the Hatches' lack of performance.

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

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

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

Judge Benton later inquired of the Hatches' counsel, "is it true that you didn't plead that your client was ready to perform?" RP 19. Counsel responded, "Yes, it is." *Id.* Judge Benton then asked, "Well, don't you think that's a predicate?" and counsel responded, "No, it's not, Your Honor." *Id.* When asked why, counsel responded:

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

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

RP 20. Judge Benton responded, "I don't see it that way." *Id.*

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

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

> MR. DAVIS: Okay. Let me say this. There is no evidence before the Court, none, zero that Mr. Falk owned the house. There is no evidence -- you laugh, but this is summary judgment, Judge; your job is to do this on summary judgment.
> THE COURT: Mr. Davis.
> MR. DAVIS: Yes.
> THE COURT: Throwing up anything to see if it will stick --
> MR. DAVIS: No --
> THE COURT: -- insults the Court.
> MR. DAVIS: -- I am --
> THE COURT: And it insults you inferentially.
> MR. DAVIS: No, it does not, Your Honor. What it does is it shows that the law requires things to be proven, aka, he's ready, willing and able to perform. There's no evidence. The law requires him to show that he understood that the repudiation happened. There's no evidence of his understanding. There's evidence of the understanding of someone else who had a conversation with him, the terms of which we don't know that what she thinks was clear to him. But there's no testimony from him that it was.

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

hearing. *Id.*

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

C. Court of Appeals Procedures.

In the Court of Appeals, the Hatches again argued that the Agreement simply expired and became defunct when neither side performed. Falk agreed that the duties of the parties were concurrent, but he nonetheless argues that the Hatches' failure to perform excused his performance.

In an unpublished opinion, the Court of Appeals agreed with Falk. The court stated that "Hoffman later testified that she was"not certain"she told Falk during the December 26 phone conversation that Hatch "couldn't get a loan."1 But Hoffman testified she believed it was "clear" to Falk on December 26 that Hatch could not get a loan, and Falk told her he was not interested in discussing a lease purchase." Opinion at 4. The Court also stated that on December 27, "Hoffman told Falk that Hatch was not going to purchase the house" even though there was no evidence to that effect.

The Court went on to say that the parties had concurrent duties under the Agreement, but ruled that "the uncontroverted testimony of Hoffman establishes that on December 27, Hoffman unequivocally told Falk that Hatch was "not going to close on the transaction." Opinion at 9. Although the Court of Appeals implied that Hoffman actually said those words, she did not. The only place they appear in the record was in a deposition question.

> Q. And had it been expressed to Cary Falk at that point that they were not going to close on the transaction?

A. Yes.

CP 37. As set forth above, the only thing that Hoffman testified that she actually said was “"He'd like to talk to you about a lease purchase."

The Court of Appeals then discussed the fact that the Hatches rented another house before the closing date. Opinion at 9. However, it was undisputed that Falk knew nothing about the rental until after this case was filed.

For these reasons, the Court of Appeals held that “the uncontroverted evidence shows Hatch repudiated the REPSA before the scheduled closing date on January 5, 2015.” Opinion at 10.

The Court of Appeals never addressed the Hatches’ argument that repudiation is a communication between contracting parties, and that the parties never communicated at all. It likewise refused to consider Falk’s failure to prove that he was ready, willing and able to perform.

VI. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The Court of Appeals decision in this case is completely at odds with this Court’s decision in *Wallace Real Estate Inv., Inc. v. Groves*, 124 Wn.2d 881, 898, 881 P.2d 1010 (1994). Review should be granted under RAP 13.4(b)(1).

Wallace sets forth two important rules that the Court of Appeals failed to follow. First, because the duties of the parties to a real estate purchase and sale agreement are concurrent, “A vendor selling land may not put the buyer in default until the vendor has offered to perform.” *Id.* at 898. A corollary rule is that a seller who is ready, willing and able to perform need not tender performance if the buyer repudiates the agreement. *See Dubke*

v. Kassa, 29 Wn.2d 486, 486–87, 187 P.2d 611, 611–12 (1947); *Schweiter v. Halsey*, 57 Wn.2d 707, 709, 359 P.2d 821, 823 (1961). However, *Wallace* sets forth specific requirements to prove repudiation.

> A party's intent not to perform may not be implied from doubtful and indefinite statements that performance may or may not take place. *Lovric*, at 282, 567 P.2d 678. Rather, an anticipatory breach is a " '**positive statement or action by the promisor** indicating **distinctly and unequivocally** that he either **will not or cannot substantially perform** any of his contractual obligations.' " *Olsen Media*, 32 Wash.App. at 585, 648 P.2d 493 (quoting *Lovric*, 18 Wash.App. at 282, 567 P.2d 678).

Id. at 898.

In this case, the Court of Appeals found repudiation on the basis of evidence that did not satisfy the requirements of *Wallace*, and it failed to require proof that Falk was ready, willing and able to perform. The Court of Appeals decision in this case completely rewrites the law of repudiation.

A. The Court of Appeals Erred in Finding Repudiation.

Wallace required a statement or conduct "**by the promisor**" manifesting its intent not to perform the contract. *Id.* at 898. In this case, it is undisputed that the contracting parties never communicated at all. Similarly, there is no evidence of any kind that Falk was aware of any conduct of the Hatches that would support repudiation.

The statement or conduct must **"distinctly and unequivocally"** manifest that the party will not perform. Even if one accepted the argument that Hoffman's testimony was relevant, the only words that she claims to have spoken to Falk were "He'd like to talk to you about a lease purchase." CP 27. Beyond that, Hoffman testified that "I think it was clear that the Hatchs weren't prepared to close on the house."

The statement must manifest **to Falk** that the Hatches would not perform. The only person who could testify to what was manifested to Falk is Falk himself, and he never testified. Hoffman testified about what she thought Falk understood.

The conduct identified by the Court of Appeals was the Hatches' rental of a new home. No explanation was given why that conduct necessarily means that the Hatches would not perform, and there was no evidence that Falk was aware of it until after this action was filed. The Court of Appeals relied on conduct that was never manifested to Falk.

This Court should grant review and hold that repudiation cannot be proven with opinion testimony of third parties about what was clear to them from conversations with contracting parties, but instead requires evidence of actual communications or conduct of the contracting party.

B. The Court of Appeals Erred in Not Requiring Proof that Falk Could Have Performed.

The duties of the parties to a purchase and sale agreement are concurrent. *Willener v. Sweeting*, 107 Wn.2d 388, 394–95, 730 P.2d 45, 50 (1986). A consequence of that rule is that when neither party performs at closing, the agreement becomes defunct and expires. *Nadeau v. Beers*, 73 Wn.2d 608, 610, 440 P.2d 164, 166 (1968) ("There is no forfeiture involved, for the agreement, by operation of its time provisions, became legally defunct."); *Mid-Town Ltd. Partnership v. Preston*, 69 Wn.App.. 227, 235, 848 P.2d 1268, 1273 (1993) ("once a termination date expires, in the absence of an existing waiver or estoppel the agreement is dead"); *Vacova Co. v. Farrell*, 62 Wn.App.. 386, 407, 814 P.2d 255, 267 (1991) ("when an agreement makes time of the essence, fixes a termination date, and there is

no conduct giving rise to estoppel or waiver, the agreement becomes legally defunct upon the stated termination date if performance is not tendered").

A party's performance will be excused by a repudiation. *Wallace*, 124 Wn.2d 898. However, the party still be ready, willing and able to perform. *Dubke v. Kassa*, 29 Wn.2d 486, 486–87, 187 P.2d 611, 611–12 (1947); *Schweiter v. Halsey*, 57 Wn.2d 707, 709, 359 P.2d 821, 823 (1961). A seller who could not have performed an agreement is not entitled to retain earnest money even if the buyer defaults.

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

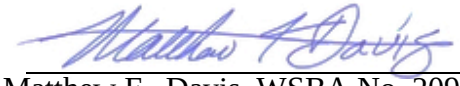
Wallace, 124 Wn.2d at 897.

In its recent decision in *Kofmehl v. Baseline Lake, LLC*, 177 Wn.2d 584, 595, 305 P.3d 230, 236 (2013), this Court reaffirmed the principle when it held that a buyer may not recover its earnest money because a purchase and sale agreement lacks a legal description if the seller "did not repudiate the Agreement but remained ready, willing, and able to perform." *Id.* at 596. *Kofmehl* further held that the buyer had the burden to prove that the seller failed to perform or was not ready, willing and able to perform. *Id.* Here, it is disputed that Falk failed to perform. In the absence of repudiation, Falk's failure to perform entitles the Hatches to the return of their earnest money.

VII. CONCLUSION

This Petition presents a simple and straightforward issue. The Court of Appeals decision contradicts every aspect of *Wallace*, and this Court should grant review to make clear once and for all the requirements to prove repudiation.

Dated this 18th day of July, 2017.



Matthew F., Davis, WSBA No. 20939

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KEN HATCH and CATHI HATCH, husband and wife, and the marital community composed thereof,	)	No. 74510-7-I
	)	DIVISION ONE
Appellants,	)	
v.	)	UNPUBLISHED OPINION
CARY FALK,	)	
Respondent.	)	FILED: June 19, 2017

SCHINDLER, J. — Ken and Cathi Hatch (collectively, Hatch) appeal summary judgment dismissal of the lawsuit against Cary Falk to recover the real estate purchase and sale agreement (REPSA) earnest money. We affirm dismissal of the lawsuit.

REPSA

Falk owned a house in Woodinville. In 2014, Falk listed the house for sale with Skyline Properties Inc. On October 29, 2014, Hatch made an offer through Coldwell Banker Bain real estate agent Toni Hoffman to purchase the house for $1,050,000. On November 6, Falk submitted a counteroffer for $1,156,000. Hatch accepted the counteroffer.

On November 7, Hatch and Falk entered into a REPSA. The REPSA states that Hatch will pay Falk the purchase price at the closing scheduled on January 5, 2015, and

Falk will convey title by statutory warranty deed. Under the terms of the REPSA, Hatch agreed to deposit $35,000 in earnest money with his real estate agent.

The liquidated damages provision of the REPSA states that if Hatch "fails, without legal excuse, to complete the purchase of the Property," the earnest money "shall be forfeited to the Seller." The REPSA states, in pertinent part:

> **Default.** In the event Buyer fails, without legal excuse, to complete the purchase of the Property, then the following provision . . . shall apply:
>
> i. **Forfeiture of Earnest Money.** That portion of the Earnest Money that does not exceed five percent (5%) of the Purchase Price shall be forfeited to the Seller as the sole and exclusive remedy available to Seller for such failure.

On November 11, Hatch delivered a $35,000 check for the earnest money to Hoffman and Coldwell Banker Bain.

After inspections of the house, Hatch requested a $17,000 reduction in the purchase price. In a November 23 e-mail to Hoffman, Falk agreed to reduce the purchase price on condition that Hatch either release $20,000 of the earnest money and agree to a December 5 closing date or release the entire $35,000 in earnest money and keep the January 5, 2015 closing date. The November 23 e-mail states the agreement to the $17,000 reduction in the price is "subject to" Hatch agreeing to one of the two following options:

> a. That the $20,000 be released non-refundable upon acceptance of this concession as previously agreed and that [Hatch] close on the house by December 5th or;
>
> b. That [Hatch] release, non-refundable, the entire $35,000 earnest money upon acceptance of this concession.
>
> [Hatch] want[s] to insure [he is] getting funds to have a perfect house. The seller, me, wants to insure that the house will close as agreed.
> If either of the two options above are agreeable to [Hatch], [my real estate

agent] or you can write up the necessary paperwork and I will sign it.

On November 24, Hoffman sent Falk an e-mail informing him that in exchange for a reduction in the purchase price and keeping the January 5 closing date, Hatch agreed to release the $35,000 in earnest money. Later that same day, Hoffman sent an e-mail to Hatch with an "Inspection Response for Form 35" (Inspection Response Form). The Inspection Response Form states, in pertinent part:

> Purchase price shall be $1,139,000. Seller to provide access to property until close date
> Earnest monies of $35,000 to be released to seller, non refundable to buyer, once inspection response is agreed upon.

Hatch signed the Inspection Response Form. Coldwell Banker Bain released the earnest money deposit of $35,000 to Falk.

In late December, Hatch told Hoffman that he was not able to get a loan and wanted to talk to Falk "[a]bout a lease purchase." At 2:47 p.m. on December 26, Hoffman sent Falk an e-mail. The e-mail states Hatch "would like to speak with [y]ou directly about the purchase of the house" and asks for Falk's phone number.

> Q. You're asking for his phone number and you state that, "[Hatch] would like to speak to you directly about the purchase of the house." What specifically, if you know, did [Hatch] want to speak to Mr. Falk about?
> A. About a lease purchase.
> Q. Why did he want to speak about a lease purchase?
> A. Because he wasn't getting a loan through Banner Bank.
> Q. How do you know he wasn't getting a loan through Banner Bank?
> A. Because he told me that.

According to Hoffman, after she sent the e-mail at 2:47 p.m. on December 26, Falk called her.

> Q. Did you express to Mr. Falk or his wife, who was his

agent, that [Hatch] couldn't get a loan?

A. Yes.

Q. What did you tell them?

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

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

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

Hoffman later testified that she was "not certain" she told Falk during the December 26 phone conversation that Hatch "couldn't get a loan."[1] But Hoffman testified she believed it was "clear" to Falk on December 26 that Hatch could not get a loan, and Falk told her he was not interested in discussing a lease purchase.

On December 27, Hatch sent an e-mail to Hoffman asking her to find a "high end luxury home" to rent with a "minimum of 4,000 square feet." That same day, Hoffman told Falk that Hatch was not going to purchase the house. At 12:59 p.m. on December 27, Hoffman sent Hatch a "release form." The e-mail states Falk "would like it as soon as possible so that he can get his house back on the market."

The closing on the house scheduled for January 5, 2015 did not occur.

Lawsuit for Earnest Money

On May 11, 2015, Hatch filed a lawsuit to recover the $35,000 in earnest money. The complaint asserts that "[i]n accordance with the terms of the Agreement," Coldwell

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[1] Hoffman testified, in pertinent part:

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

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

Q. Why were you asking about a lease purchase?

A. Because I'd been told they couldn't get a loan.

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

A. I don't believe so.

Banker Bain released the $35,000 earnest money deposit to Falk. Hatch alleged that because neither party tendered performance on the January 5, 2015 closing date, the REPSA "terminated by its terms," and Hatch was entitled to recover the earnest money.

Falk filed a motion for summary judgment dismissal of the lawsuit. Falk argued Hatch repudiated the agreement before the closing date and therefore, he had no duty to tender performance. Falk asserted the undisputed evidence established Hatch did not comply with the terms of the REPSA and under the liquidated damages provision, he was entitled to retain the earnest money.

In support, Falk submitted a copy of the REPSA, a number of e-mails, and excerpts from the deposition testimony of Hoffman. Hatch did not move to strike Hoffman's deposition testimony or any of the other evidence Falk submitted in support of his motion for summary judgment.[2] Hatch submitted no evidence in opposition to Falk's motion for summary judgment.

Hatch filed a cross motion for summary judgment. Hatch argued that because neither party tendered performance on the January 5 closing date, as a matter of law the REPSA "expired" and Falk was not entitled to retain the earnest money. Hatch conceded that if he repudiated before the closing date, Falk's "performance was excused, and [Falk] is entitled to the earnest money." But Hatch argued there was no evidence of a clear or unequivocal "statement or action" that he repudiated the REPSA before the January 5, 2015 closing date.

The court granted Falk's motion for summary judgment and dismissed the lawsuit. For the first time in a motion for reconsideration, Hatch argued "[q]uestions of fact may be present" as to whether Hoffman's statements to Falk constituted

[2] The attorney conceded at oral argument that Hatch did not move to strike the evidence.

repudiation. The court denied the motion to reconsider.

Appeal of Summary Judgment Dismissal

Hatch asserts the court erred in dismissing his lawsuit on summary judgment.[3] Hatch argues that because Falk did not tender performance by delivering the deed on the January 5, 2015 closing date, as a matter of law Falk is not entitled to retain the earnest money under the REPSA. Falk contends the uncontroverted evidence establishes Hatch repudiated the REPSA before the closing date.

We review an order of summary judgment dismissal de novo and engage in the same inquiry as the trial court. Kofmehl v. Baseline Lake, LLC, 177 Wn.2d 584, 594, 305 P.3d 230 (2013). Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); Kofmehl, 177 Wn.2d at 594. We consider all facts and make all reasonable factual inferences in the light most favorable to the nonmoving party. Young v. Key Pharms., Inc., 112 Wn.2d 216, 226, 770 P.2d 182 (1989). But "if reasonable minds could reach only one conclusion from the evidence presented," summary judgment should be granted. Estate of Becker v. Avco Corp., 187 Wn.2d 615, 621, 387 P.3d 1066 (2017), Allen v. State, 118 Wn.2d 753, 760, 826 P.2d 200 (1992).

Where, as here, a defendant files a motion for summary judgment, the defendant bears the initial burden to show the absence of genuine issues of material fact. Young, 112 Wn.2d at 225. If the defendant makes this initial showing, the burden shifts to the

[3] Hatch also appeals the order denying his motion for reconsideration. However, Hatch does not assign error to the order or present any argument addressing the order in his briefing. Failure to assign error or provide argument precludes appellate consideration. RAP 10.3(a)(4), (6); Ang v. Martin, 154 Wn.2d 477, 486-87, 114 P.3d 637 (2005) (court will not consider alleged error where appellant does not assign error or present argument or citation to authority pertaining to issue); Riley v. Iron Gate Self Storage, 47905-2-II, 2017 WL 1381911, at *10 (Wash. Ct. App. Apr. 18, 2017) (declining to consider challenge to denial of motion for reconsideration where appellant did not present any argument or supporting authority in his appellate brief).

plaintiff to set forth specific evidence establishing a genuine issue of material fact. Young, 112 Wn.2d at 225 (citing Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). The plaintiff cannot meet its burden by relying on speculation or "mere allegations, denials, opinions, or conclusory statements" to establish a genuine issue of material fact. Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co., 122 Wn. App. 736, 744, 87 P.3d 774 (2004) (citing CR 56(e)); Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988); Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986). If the plaintiff fails to make a showing sufficient to establish the existence of a material issue of fact, summary judgment is proper. Young, 112 Wn.2d at 225.

In a contract for the sale of real estate, payment of the purchase price and delivery of the deed are concurrent obligations. Wallace Real Estate Inv. Inc. v. Groves, 124 Wn.2d 881, 897, 881 P.2d 1010 (1994); Willener v. Sweeting, 107 Wn.2d 388, 395, 730 P.2d 45 (1986); Bendon v. Parfit, 74 Wash. 645, 648, 134 P. 185 (1913). As a general rule, the seller is not entitled to liquidated damages for the buyer's breach of the purchase and sale agreement unless the seller tenders the deed or the buyer repudiates the agreement. Willener, 107 Wn.2d at 395-96; Wallace, 124 Wn.2d at 897-98. If the buyer repudiates the agreement, the seller's failure to "concurrently perform under the purchase and sale agreement" is "irrelevant." Wallace, 124 Wn.2d at 897, 899.

Repudiation "must occur before the other party's performance is due." Grant County Port Dist. No. 9 v. Wash. Tire Corp., 187 Wn. App. 222, 231, 349 P.3d 889 (2015). Repudiation is a " 'positive statement or action by the promisor indicating

distinctly and unequivocally that he either will not or cannot substantially perform any of his contractual obligations.' " Wallace, 124 Wn.2d at 898[4] (quoting Olsen Media v. Energy Scis., Inc., 32 Wn. App. 579, 585, 648 P.2d 493 (1982)); Grant County, 187 Wn. App. at 232; VersusLaw, Inc. v. Stoel Rives, L.L.P., 127 Wn. App. 309, 321, 111 P.3d 866 (2005). " 'An intent to repudiate may be expressly asserted or circumstantially manifested by conduct.' " Grant County, 187 Wn. App. at 231-32 (quoting CKP, Inc. v. GRS Constr. Co., 63 Wn. App. 601, 620, 821 P.2d 63 (1991)); VersusLaw, 127 Wn. App. at 321. But a party's " 'doubtful and indefinite statements' suggesting only that it may not perform do not demonstrate repudiation." Grant County, 187 Wn. App. at 232 (quoting Wallace, 124 Wn.2d at 898). Although repudiation of a contract is generally a question of fact, repudiation may be decided on summary judgment if " 'reasonable minds can reach only one conclusion.' " VersusLaw, 127 Wn. App. at 321 (quoting Alaska Pac. Trading Co. v. Eagon Forest Prods., Inc., 85 Wn. App. 354, 365, 933 P.2d 417 (1997)).

Hatch concedes that if he repudiated the REPSA, Falk is entitled to retain the $35,000 in earnest money. But Hatch contends there is no evidence that he made a clear or unequivocal statement to repudiate or not perform before the closing date. On appeal, Hatch relies on Hoffman's deposition testimony about the December 26 telephone conversation with Falk to argue there is no proof of repudiation. Hatch specifically points to the testimony that although Hoffman did not remember exactly what was said, she believed it was "clear" to Falk that Hatch was not "going to buy the home and close."

Q. Did you tell [Falk] why you were asking about a lease

[4] Internal quotation marks omitted.

purchase?

A. I honestly don't remember every single word of that conversation. I think it was clear that [Hatch] w[as]n't prepared to close on the house and . . . wanted to find an alternative way of purchasing the home.

Q. When you say "w[as]n't prepared to close on the house" what do you mean by "w[as]n't prepared"?

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

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

. . . .

[A.] It was clear to him that [Hatch] w[as]n't going to buy the home and close.

Although Hoffman's testimony about the telephone conversation on December 26 does not clearly establish repudiation, the uncontroverted testimony of Hoffman establishes that on December 27, Hoffman unequivocally told Falk that Hatch was "not going to close on the transaction."[5] Hoffman testified that after Hatch instructed her on December 27 to find a house to rent, she told Falk that Hatch was "not going to close on the transaction."

Q. . . . So at this point, this is December 27, 2014, had you been instructed to start searching for rentals?

A. Yes.

Q. Why was it that you were searching for rentals for the Hatch[e]s?

A. Because they weren't going to purchase the Falk home.

Q. How did you know that they weren't going to purchase the Falk home?

A. Because they told me they couldn't get a loan.

Q. At this point in time that they were searching for rentals, were they still under contract with the Falks?

A. Yes.

Q. And had it been expressed to Cary Falk at that point

[5] In his reply brief, Hatch argues Hoffman exceeded the scope of her authority by telling Falk that he could not close on the sale of the house. We decline to consider an argument made for the first time in a reply brief. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); In re Marriage of Sacco, 114 Wn.2d 1, 5, 784 P.2d 1266 (1990); Jackson v. Quality Loan Serv. Corp. of Wash., 186 Wn. App. 838, 845, 347 P.3d 487 (2015); Conrad v. Alderwood Manor, 119 Wn. App. 275, 297, 78 P.3d 177 (2003).

that they were not going to close on the transaction?
A. Yes.

Because the uncontroverted evidence shows Hatch repudiated the REPSA before the scheduled closing date on January 5, 2015, the court did not err in dismissing the lawsuit to recover the earnest money.

Attorney Fees

The REPSA provides for attorney fees to the substantially prevailing party on appeal. The REPSA states, in pertinent part:

> **ATTORNEYS FEES.** In any dispute related to this Agreement or the Property, regardless of the legal theory upon which any claim is based, the substantially prevailing party shall be entitled to its reasonable attorneys fees and costs incurred prior to, during and in lieu of any proceeding (litigation, meditation, arbitration, bankruptcy, etc.) on appeal and in the collection of any award.

We affirm summary judgment dismissal of the lawsuit to recover the earnest money. Upon compliance with RAP 18.1, Falk is entitled to an award of reasonable attorney fees on appeal.

WE CONCUR:

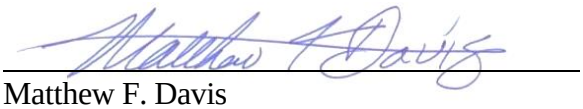
DECLARATION OF SERVICE

I, Matthew Davis, hereby declare as follows:

1. I have personal knowledge of the facts set forth herein and am competent to testify thereto.
2. On July 18, 2017, I served the foregoing document on the parties identified in paragraph 3.
3. The documents identified in paragraph 2 were served on the following persons at the email addresses stated pursuant to agreement of counsel.

   Nathan Neiman Nneimail@aol.com

DATED this 18th day of July, 2017 at Seattle, Washington.



Matthew F. Davis

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