

NO. 64038-1-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

JOINT VENTURE FOURPLAY,

Appellant/Cross-Respondent

v.

VERONIKA E. LOISTL,

Respondent/Cross-Appellant

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COURT OF APPEALS
DIVISION ONE

REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT

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I. ARGUMENT IN SUPPORT OF REPLY

A. The Trial Court Erred by Refusing to Award Attorneys' Fees to Fourplay

The trial court entered judgment in favor of Fourplay and against Loistl in the amount of \$227,282.00. CP 114-115. Nevertheless, Loistl argues that the trial court correctly concluded that there was no prevailing party.

Loistl relies exclusively on *Smith v. Okanogan County*, 100 Wn.App. 7, 994 P.2d 857 (2000), an action under the public records portion of the Public Disclosure Act. At the time *Smith* was decided, the relevant statute stated:

(4) Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action.

RCW 42.17.340(4) (2000 version).¹ The statute at issue in *Smith* did not define “prevailing party” or what it means to “prevail.”

Over a 6-month period, the plaintiff Smith filed multiple requests with various Okanogan County departments under the Public Disclosure Act. *Smith*, 100 Wn.App. at 10. Smith brought an action under the Act, claiming that the County had inadequately responded to 11 of his requests.

¹ This statute was amended and recodified in 2005 as RCW 42.56.550. Laws 2005, ch. 274, § 103.

Id. The trial court granted summary judgment to the County. *Id.* Division III of the Court of Appeals affirmed with respect to the vast majority of Smith's requests. *Id.* at 13-24. It concluded, however, that the County had failed to respond properly to one of Smith's requests and to a small part of another. *Id.* at 16-17, 19-20. The *Smith* court reversed the trial court's decision on these two items.

Citing former RCW 42.17.340(4) (the attorneys' fee provision of the Public Disclosure Act), Smith sought attorneys' fees on appeal. 100 Wn.App. at 23-24. The court denied his request. In the language on which Loistl relies here, the court said: "If both parties prevail on major issues, there may be no prevailing party." *Id.* at 24. The court concluded that both parties had prevailed on major issues, and thus that there was no prevailing party. *Id.*

Smith does not control the outcome here, however. As Fourplay explained in its opening brief, RCW 4.84.330 applies in the present case because the promissory note signed by Loistl included a unilateral provision for an award of attorneys' fees to Fourplay.² *Singleton v. Frost*, 108 Wn.2d 723, 727-730, 742 P.2d 1224 (1987); *Wachovia SBA Lending*,

²The note provided that "In the event this note is in default, and placed with an attorney for collection," then Loistl would pay all reasonable attorneys' fees and costs of collection. Ex. 21. The note did not include a reciprocal provision authorizing Loistl to recover attorneys' fees. Loistl apparently concedes that RCW 4.84.330 applies here, as she makes no argument to the contrary.

Inc. v. Kraft, 165 Wn.2d 481, 489, 200 P.3d 683 (2009). The request for attorneys' fees in *Smith*, by contrast, was based on the Public Disclosure Act (former RCW 42.17.340(4), and had nothing to do with RCW 4.84.330.

The statute in question in *Smith* did not define "prevailing party." But the applicable statute here *does*. "As used in this section 'prevailing party' means the party in whose favor final judgment is rendered." RCW 4.84.330. In the present case the trial court entered final judgment in favor of Fourplay in the amount of \$227,282.00. CP 114-115. Under the plain meaning of RCW 4.84.330, Fourplay is "the party in whose favor final judgment [was] rendered."

In a case decided just last year, the Washington Supreme Court made it clear that the language of the applicable statute controls the determination of whether there is a prevailing party and, if so, the identification of that party. *Wachovia*, 165 Wn.2d at 489-492. The court noted that in the context of civil actions, several statutes in RCW Ch. 4.84 generally award attorney fees to the prevailing party. *Wachovia*, 165 Wn.2d at 488. "However, prevailing party is not defined in the same manner in every attorney fees statute. *See* RCW 4.84.250-.330." *Id.* at 488-489.

In *Wachovia* the issue was whether the defendant was a “prevailing party” under RCW 4.84.330 where the plaintiff voluntarily dismissed its case and the court dismissed the action without prejudice. 165 Wn.2d at 484, 488-489. To answer the question, the court held that it was required to apply the particular definition of “prevailing party” used in that statute. *Id.* at 489-492. The *Wachovia* court further concluded that cases not involving RCW 4.84.330 and its particular statutory definition of “prevailing party” were not controlling. *Id.* at 490-491. Again, RCW 4.84.330 defines “prevailing party” as “the party in whose favor final judgment is rendered.” Concluding that a voluntary dismissal without prejudice is not a *final* judgment, the court held that the defendant was not a “prevailing party” under RCW 4.84.330. 165 Wn.2d at 492.

Here, there is a party – and only one party – “in whose favor final judgment is rendered.” And that party is Fourplay. The judgment grants Fourplay the right to collect \$227,282.00 from Loistl. CP 114-115. It grants no relief whatsoever to Loistl. *Id.*

Fourplay does not lose its status as the prevailing party under RCW 4.84.330 merely because the judgment rendered in its favor was for an amount less than the amount it sought. In *Silverdale Hotel Associates v. Lomas & Nettleton Co.*, 36 Wn.App. 762, 773-774, 677 P.2d 773 (1984), for example, the plaintiff sued the defendant for breach of

contract, and the trial court entered judgment in the plaintiff's favor for over \$600,000. The contract included an attorneys' fee clause to which RCW 4.84.330 applied, but the trial court refused to award fees to the plaintiff. 36 Wn.App. at 773-774.

The Court of Appeals reversed the trial court's decision on the issue of attorneys' fees, holding that the plaintiff was indeed the "prevailing party" as that term is defined in RCW 4.84.330. *Silverdale*, 36 Wn.App. at 773-774. The defendant argued on appeal that neither party prevailed, apparently on the theory that the plaintiff recovered less than the amount it sought. *Id.* at 774. The court rejected that argument.

[Defendant] did not prevail on the contract dispute, except in the sense that damages were not as high as prayed for. A party need not recover its entire claim in order to be considered the prevailing party.

Id.

The trial court erred by concluding that there was no prevailing party and by failing to conclude that Fourplay was the prevailing party.³

³ Fourplay acknowledges that some of the language in *Sardam v. Morford*, 51 Wn.App. 908, 756 P.2d 174 (Div. III 1988), suggests that despite RCW 4.84.330's definition of "prevailing party" as the party in whose favor judgment is rendered, the court may properly rule that there is no prevailing party in cases governed by RCW 4.84.330 where both parties have prevailed on a major issue. 51 Wn.App. at 911-912. But in *Sardam* the party making the claim for attorneys' fees also relied on a statute from the Landlord Tenant Act, RCW Ch. 59.18, which did not define "prevailing party." 51 Wn.App. at 910. As the concurring opinion in *Sardam* pointed out, RCW 4.84.330 did not apply because the contract containing the attorneys' fee clause had expired. *Id.* at 912. The case was decided solely on the basis of the applicable provisions of the Landlord Tenant

B. Fourplay Was Entitled to Recover Its Lost Profit

As Fourplay pointed out in its opening brief, the trial court found that the sums advanced by Fourplay on Ms. Loistl's behalf in 2003, along with interest, "were to be paid back from the proceeds of the sale of the property or from rental income." CP at 117 (part of Finding of Fact No. 4). Since there was no rental income, *Id.*, payment was to come from the sale.

Loistl does not challenge this finding. Unchallenged findings of fact are treated as verities on appeal. *State v. Valdez*, 167 Wn.2d 761, 767, 224 P.3d 751 (2009). For the purposes of this appeal, therefore, it is established that Loistl had a duty under the contract to sell the property.

Loistl argues, however, that Fourplay is not entitled to its share of the profit that would have been generated by a timely sale because Fourplay did not seek this specific relief in its complaint. When issues not raised by the pleadings are tried by the "implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." CR 15(b). Mr. Ebert, Fourplay's manager, testified without objection about the profit that Fourplay hoped to derive from the transaction by way of a sale of the property at its highest price. I RP at 130-131, 133-135, 137. Fourplay also presented expert evidence

Act. 51 Wn.App. at 912-914. The language concerning RCW 4.84.330 in *Sardam* is dictum.

concerning the value of the property. Ex 49; CP 118. There was no objection to this evidence. I RP at 5-6. Fourplay's claim for lost profit was tried by the implied consent of the parties. CR 15(b).

Loistl also argues that Fourplay had no right to a share of the profits from the contemplated sale because Fourplay never demanded that Loistl sell the house. Again, however, the trial court found that under the contract, the sums that Fourplay had advanced to Loistl, plus interest, were to be paid back from the proceeds of the sale of the property. CP 117. And again, since Loistl has not challenged this finding, it is an established fact that Loistl had a duty to sell the house.

It is true that none of the documents expressly required Loistl to sell the house at the peak of the real estate market and that Fourplay did not demand that she do so. But as Fourplay explained in its opening brief, the evidence indicated that the parties wished to maximize the profit that would be produced by the sale. For example, the Contract for Improvement of Property stated that the purpose of the improvements was "to increase the value of the property." Ex. 19. And Mr. Ebert testified that the plan was to sell the property at its highest price. I RP at 130-131.

Finally, Loistl contends that the Statute of Frauds bars Fourplay from recovering the profit it would have earned if Loistl had sold the house in a timely fashion. She argues (1) that a contract requiring her to

sell the property would be governed by the Statute of Frauds, RCW Ch. 19.36; and (2) that the Statute wasn't satisfied because there was no writing requiring the sale. Br. of Resp./Cross-App. at 16.

Loistl apparently relies on RCW 19.36.010. But that statute does not apply here.

In the following cases, specified in this section, any agreement, contract and promise shall be void, unless such agreement, contract or promise, or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized, that is to say: (1) Every agreement that by its terms is not to be performed in one year from the making thereof; (2) every special promise to answer for the debt, default, or misdoings of another person; (3) every agreement, promise or undertaking made upon consideration of marriage, except mutual promises to marry; (4) every special promise made by an executor or administrator to answer damages out of his own estate; (5) an agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or a commission.

RCW 19.36.010. The contract at issue in this case does not fall within any of the five subsections of RCW 19.36.010.

Even if RCW 19.36.010 were applicable, it would not preclude Fourplay from recovering the profit it lost through Loistl's failure to sell the property. The Promissory Note (Ex. 21) is a writing, signed by Loistl – i.e., the party to be charged. And it provided that the money advanced

by Fourplay was to be repaid, with interest, “From the proceeds received by the borrower for the sale of said property.”

C. The Alleged Statements of Frank Colacurcio, Sr.

Loistl correctly notes that a joint venture, at least with regard to the relationships among its members, is in the nature of a partnership. *Penick v. Employment Sec. Dept.*, 82 Wn.App. 30, 40-41, 917 P.2d 136 (1999) (holding that truck drivers were not in a joint venture with the company that employed them). It is also true that one of the elements of a joint venture is a right, equal to that of the other members, to a voice in the control of the venture’s business affairs. *Id.* It does not follow, however, that any statement made by Mr. Colacurcio to a third party (including Loistl) was necessarily an admission by Fourplay.

D. The Trial Court Erred by Finding that Fourplay “Would Not Cooperate” When Ms. Loistl Tried to Refinance in 2006

Loistl asserts in her brief that she “had one or more loans in place” in 2006. Br. of Resp./Cross-App. at 14. The record does not support this assertion. Loistl testified that she had “loan commitments.” I RP at 116. When Fourplay’s counsel pointed out that a “loan commitment” was simply “a promise to entertain whether to loan to you,” Loistl then revised her testimony to say “I had loan documents in front of me.” *Id.* Fourplay had no obligation to provide precise pay-off information until such time as

a lender indicated that it was actually prepared to make a loan to Loistl. There is no evidence that any lender ever did so.

In addition, as Fourplay has explained above, the trial court found that under the contract Loistl's debt was to be repaid from the *sale* of the property. CP at 117. This unchallenged finding of fact establishes that Loistl had a contractual duty to sell the property. Even if Loistl had demonstrated that she had a loan "in place," Fourplay had no duty to accept a refinancing arrangement. Since Fourplay had no such duty, it cannot be said to have refused to cooperate with whatever refinancing efforts Loistl might have made.

II. ARGUMENT IN RESPONSE TO CROSS-APPEAL

A. The Trial Court Properly Ruled That Payment Was Due and Owing, and That Fourplay Was Entitled to \$227,282 in Unpaid Principal And Accrued Interest

In her cross-appeal, Loistl contends that the trial court erred by concluding that the unpaid principal and interest under the promissory note (Ex. 21) was due and owing as of the time of trial.⁴ Loistl argues that payment under the note is not due until the house is sold, and that because the note does not state a specific date by which the sale must occur, she has no obligation to pay anything under the note until she, in her sole

⁴ With regard to this issue, Loistl inadvertently assigns error to Conclusions of Law number 3. The trial court's conclusion that \$227,282 was due and owing and that Fourplay was entitled to a judgment in that amount actually appear in Conclusions of Law 2 and 4. CP 120-121.

discretion, chooses to sell the house. In effect, Loistl argues that by refusing to sell the house, she may indefinitely postpone any obligation to repay any of the funds that Fourplay advanced on her behalf or any accumulated interest.

At trial Fourplay responded by pointing out that where a contract fails to specify a particular time for a party's performance, the law will presume that the parties intended a reasonable time. CP at 154-155, 157-162. Since the trial court concluded that \$227,282 in principal and interest was due and owing under the note, it necessarily accepted Fourplay's argument that Loistl was required to perform within a reasonable time. Implicit in the trial court's conclusion on this issue was a finding of fact that by the time of trial a reasonable time for Loistl's performance had expired.

- 1. The trial court properly applied the principle that where the contract clearly requires a party to perform a certain act, but omits a specific time for that performance, the law will supply a reasonable time**

Loistl argues that courts have no authority to add a term – such as a reasonable time for performance – to an existing contract. For this proposition, she cites *SPEEA v. Boeing Co.*, 92 Wn.App. 214, 221, 963 P.2d 204 (1998); and *Willis v. Champlain Cable Corp.*, 109 Wn.2d 747, 758, 748 P.2d 621 (1988). *SPEEA* contains the general observation that

“we are not at liberty, under the guise of construing the contract, to disregard contract language or revise the contract.” 92 Wn.App. at 221. In *Willis* the court rejected an employee’s invitation to recognize a new cause of action against an employer for recovery of sales commissions if, although the employment was terminated in accordance with the terms of the employment contract, the employee can establish that the employer was motivated by bad faith. 109 Wn.2d at 752.

Neither *SPEEA* nor *Willis* involved the question presented here – i.e., whether the court, when faced with a contract that fails to specify a particular time for a party’s performance, should presume that the parties intended a reasonable time.

In the cases that *have* addressed this issue, however, Washington courts have held for over a century that the absence of a specified time for a party’s performance of a contractual duty does not allow that party to postpone its performance indefinitely. Instead, the law will presume that the parties intended a reasonable time. E.g., *McCartney v. Glassford*, 1 Wash. 579, 581, 20 P. 423 (Wash. Terr. 1889); *Valley Fruit Co. v. Swash*, 134 Wash. 697, 700, 236 P. 273 (1925); *Robinson v. Davis*, 158 Wash. 556, 559, 291 P. 711 (1930); *Foelkner v. Perkins*, 197 Wash. 462, 466-467, 85 P.2d 1095 (1938); *Brower Co. v. Garrison*, 2 Wn.App. 424, 428-429, 468 P.2d 469 (1970); *Smith v. Smith*, 4 Wn.App. 608, 612, 484 P.2d

409 (1971); *Cromwell v. Gruber*, 7 Wn.App. 363, 366-367, 499 P.2d 1285 (1972); *Pepper & Tanner, Inc. v. Kedo, Inc.*, 13 Wn.App. 433, 435, 535 P.2d 857 (1975).

In *Pepper*, for example, a radio production company contracted to provide production services to a radio broadcasting station over a five-year period. 13 Wn.App. at 433-434. The consideration supplied by the station consisted of two parts. First, it agreed to make monthly “rental” payments. *Id.* Second, the station agreed to broadcast 2600 one-minute advertising spots at the production company’s request. *Id.* While the contract stated a 5-year term for the production company’s performance, it did not identify a particular period during which the station was to make the advertising spots available. *Id.* at 433-435. Instead, the contract stated that the advertising spots were “valid until used.” *Id.*

During the first two years, the production company did not request any advertising spots. *Pepper*, 13 Wn.App. at 434-435. A dispute then arose over the number of spots that the station was still obligated to provide. *Id.* at 434. The production company sued, claiming that it was still entitled to the full number of unused spots. *Id.* The trial court rejected this argument. *Id.* It held that since the contract contained no time for the station’s performance, the production company was required to request the broadcasting spots within a reasonable time. *Id.* The trial

court ruled that a reasonable interpretation was that the parties intended 520 spots to be ordered each year (the 2600 total spots divided by the 5 years over which the production company was to provide its services). *Id.* Because the production company had not ordered any spots for the first two years, the court held that the production company had lost its claim to 1040 spots. *Id.*

The court of appeals affirmed. *Pepper*, 13 Wn.App. at 435-436. It noted that the interpretation urged by the production company would have allowed “for potentially infinite duration” of the station’s obligation. *Id.* at 435. Moreover, the time for the station’s performance was left completely within the control of the production company, since the station was to provide the spots only as the production company requested them. *Id.* The court concluded that it would be unreasonable for the station’s duty of performance to continue indefinitely. *Id.* at 435-436.

Where a contract is silent as to duration or states time for performance in general and indefinite terms, the court is to impose a reasonable time. A reasonable time is to be determined by the nature of the contract, the positions of the parties, their intent, and the circumstances surrounding performance.

Id. at 435. Considering the entire contract and the surrounding circumstances, the court of appeals held that the trial court had properly determined the reasonable time for performance. *Id.* at 435-436.

Here, it is undisputed that Loistl was obligated to repay the funds that Fourplay advanced to her, plus interest at the rate of 6% per annum. II RP at 10. Loistl does not contend that the funds were a gift. Moreover, the trial court found as a fact that under the contract the advances that Fourplay made on Ms. Loistl's behalf in 2003, along with interest, "were to be paid back from the proceeds of the sale of the property or from rental income." CP at 117 (part of Finding of Fact No. 4).⁵ Loistl does not challenge this finding. As a result, it is a verity on appeal. *State v. Valdez*, 167 Wn.2d 761, 767, 224 P.3d 751 (2009). Thus, Loistl had an undisputed obligation to repay the money, plus interest, that she had received from Fourplay and to accomplish that repayment by selling the house.

Since Loistl had a definite duty to repay the principal of \$178,702, plus interest, the only question is when that duty matured. As the cases cited above require, where a contract fails to specify a particular time for a party's performance, the law will presume that the parties intended a reasonable time. It is simply not reasonable to conclude, as Loistl would have the Court do, that she could indefinitely postpone the performance of her duty to sell the property and repay the money she owed to Fourplay.

⁵ There wasn't any rental income, CP at 117 (Finding of Fact No. 4), so payment was to come from the sale proceeds.

The law compels the conclusion that she was required to perform this part of the agreement within a reasonable time.

Since the contract does not specify the time for Loistl's performance, there are two possible interpretations. One is that she was required to sell the property and repay the money she owed to Fourplay within a reasonable time. The other interpretation, advanced by Loistl, is that she was entitled to postpone the sale and the payment of the debt to Fourplay indefinitely.⁶ If accepted, Loistl's position would allow her to wait 30, 40, or 50 years before paying any of her debt to Fourplay, all the while continuing to live in the house for free. "Where one construction would make a contract unreasonable, and another, equally consistent with its language, would make it reasonable, the latter more rational construction must prevail." *Messersmith v. Messersmith*, 68 Wn.2d 735, 739, 415 P.2d 82 (1966). There is only one reasonable conclusion here: Ms. Loistl was required to sell the property and to repay her debt to Fourplay within a reasonable time.⁷

⁶ Loistl testified, however, that even in her mind the arrangement was "temporary." II RP at 10.

⁷ At trial, Fourplay did not seek an order compelling Loistl to sell the house. Instead, it sought damages for Loistl's breach of contract.

2. There was no violation of the parol evidence rule

Loistl also argues that by concluding that the contract required her to perform within a reasonable time, the trial court violated the parol evidence rule. But if Loistl's position were correct, then no court could ever supply a reasonable time for a party's performance. In so doing, a court would necessarily "add a term to a contract which is not contained therein," and in Loistl's view would thereby violate the parol evidence rule. Br. of Resp./Cross-App. at 12.

Washington courts have repeatedly held, however, that where a written contract clearly imposes a duty on a party, but omits a specific time by which that duty must be performed, the court should impose a reasonable time for performance. See cases cited above. Loistl's argument, if accepted, would gut this well-established principle. Loistl cites no case holding that this principle must yield to the parol evidence rule.

Moreover, as Loistl acknowledges, the parol evidence rule applies only to contractual writings that are, among other things, *complete*. Br. of Resp./Cross-App. at 11 (citing *Berg v. Hudesman*, 115 Wn.2d 657, 670, 801 P.2d 222 (1990)). If the writing is not a complete expression of all the terms agreed upon, additional terms may be proven by parol evidence as long as they are not inconsistent with the writing.

Where a contract is only partially integrated, *i.e.*, the writing is a final expression of those terms which it contains but not a complete expression of all terms agreed upon, the terms not included in the writing may be proved by extrinsic evidence provided that the additional terms are not inconsistent with the written terms. *Emrich*, [v. *Connell*, 105 Wn.2d 551, 716 P.2d 863 (1986)] at 556, 716 P.2d 863.

Berg, 115 Wn.2d at 670.

Loistl suggests that the Promissory Note (Ex. 21) is a fully integrated document because it contains a clause stating that it may not be modified without a subsequent written agreement. Such a clause, however, has nothing to do with the issue of whether a writing is fully integrated. The Promissory Note includes no language indicating that it was intended to be a complete or fully integrated expression of the parties' agreement. Ex. 21. It is the Promissory Note, of course, that reflects Loistl's obligation to repay the bulk of her total debt to Fourplay (\$173,144.81 out of a total of \$178,702.95 advanced). Exs. 21, 45.

Although there is an integration clause in the Contract for Improvement of Property,⁸ the clause describes that document as the complete agreement of the parties only with regard to "all aspects of *its* [i.e., the document's] contents." Ex. 19 (emphasis supplied). The Contract for Improvement of Property does not even attempt to set forth

⁸ "Fully Integrated Agreement. This document represents the whole agreement between the parties regarding all aspects of its contents. Any previous oral or written agreements are made void by this document." Ex. 19.

the terms on which Fourplay advanced the \$173,144.81 to pay off Loistl's mortgage. Thus, the integration clause in the Contract for Improvement of Property does not transform the Promissory Note into a fully integrated agreement. Moreover, the presence of an integration clause does not necessarily establish that the parties intended a writing to be the complete expression of their agreement. *S.D. Deacon Corp. of Wash. v. Gaston Bros. Excavating, Inc.*, 150 Wn.App. 87, 93, 206 P.3d 689 (2009).

The question of whether a document was intended as the complete expression of the parties' agreement is a question of fact. *S.D. Deacon Corp.*, 150 Wn.App. at 93. Here, the trial court made no finding that any of the written documents was a fully integrated contract. On the contrary, the court found that "There are missing terms in the agreements." CP at 118 (Part of Finding of Fact No. 6). Loistl does not assign error to this finding.

Both the Promissory Note and the Contract for Improvement of Property called for Loistl to repay the sums that Fourplay had advanced to her, plus interest, at the time of the contemplated sale of the property. Ex. 19, 21. But the specific date by which the sale must occur was a term that was missing from both documents. A writing from which such an important term is obviously missing is not a complete expression of the parties' agreement. See Restatement (Second) of Contracts § 210,

comment c. (It is often clear from the face of a writing that it is incomplete and cannot be more than a partially integrated agreement).

Since the writings here were not a complete expression of the agreement between Fourplay and Loistl, the parol evidence rule did not preclude the trial court from concluding that the agreement included an additional term, so long as the additional term was not inconsistent with the writings. *S.D. Deacon Corp*, 150 Wn.App. at 93; *Berg*, 115 Wn.2d at 670. The writings were silent on the question of when the sale and the related payment must take place. A term requiring those events to occur within a reasonable time is not inconsistent with the writings.

3. The rule concerning construction of ambiguities against the drafter did not bar the trial court from supplying a reasonable time for Loistl's performance

Finally, Loistl argues that because Fourplay's counsel drafted the written documents, the trial court erred in concluding that any amount of money was due and owing from Loistl to Fourplay. Loistl bases this argument on the principle that ambiguous contract language should be construed against the drafter. This argument fails for several reasons.

First, the concept of "ambiguity" refers to particular provisions in a written contract. "A contract provision is ambiguous when its terms are uncertain or when its terms are capable of being understood as having more than one meaning." *Shafer v. Board of Trustees of Sandy Hook*

Yacht Club Estates, Inc., 76 Wn.App. 267, 275, 883 P.2d 1387 (1994) (the phrase “subject to,” as used in the document, was not ambiguous). With regard to the time by which Loistl was to sell the property and repay the debt, there was *no* provision in the Promissory Note. This term was missing. Thus, with regard to the time of Loistl’s performance, there was no “ambiguity” to construe.

Second, even if there was an ambiguity, the rule calling for construction of a contract against the drafter is a rule of last resort. There is no need to resort to that rule if the court can determine the intent of the parties “by viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.” *Roberts, Jackson & Associates v. Pier 66 Corp.*, 41 Wn.App. 64, 69, 702 P.2d 137 (1985). Having apparently considered all these factors, the trial court implicitly found that the parties intended that Loistl’s performance occur within a reasonable time.

Third, as Fourplay has explained, this case comes squarely within the rule that where the contract clearly requires a party to perform a certain act, but omits a specific time for that performance, the law will supply a reasonable time. Loistl cites no authority for the proposition that

this rule does not apply where the party invoking it drafted the written portions of the contract.

B. Loistl's Defense of Usury Fails

Loistl contends that if Fourplay is entitled to recover its lost profit based on a sale of the property in January of 2006, the effect will be a rate of interest that violates Washington's usury laws. Br. Resp./Cross-App. at 16-17. To make this argument, Loistl characterizes as interest the \$125,702.32 of profit that Fourplay would have earned from the transaction if the property had been sold in January of 2006. Br. Resp./Cross-App. at 2, 17; Br. App. at 18.

But potential profit from a transaction is not "interest" that should be considered in determining whether the interest rate on a loan is usurious. *Colagrossi v. Hendrickson*, 50 Wn.2d 266, 271, 310 P.2d 1072 (1957) ("if the evidence discloses that the amount, over and above the actual cash advanced, represented anticipated profit to be realized from a particular transaction, it is not usury"). Fourplay presented evidence that the transaction was an investment, from which it hoped to derive a profit. I RP at 130-131, 133-135. Because Fourplay's share of the potential profit from the sale of the property "represented anticipated profit to be realized from a particular transaction," it is not interest for the purpose of the usury

laws. *Colagrossi*, 50 Wn.2d at 271. The only true interest was the rate of 6% per annum stated in the Promissory Note.

In addition, an agreement under which a lender receives a share of potential profit from the transaction instead of or in addition to a stated rate of interest is not usurious unless it is *certain* that the total return will be in excess of the legal rate. *Beeler v. H & R Block of Colo., Inc.*, 487 P.2d 569, 572-573 (Colo. App. 1971). “An agreement is not *ipso facto* usurious because of the mere possibility that more than the legal interest will be paid.” *Id.* at 572. Here, there was no guarantee that sale of the property would produce for Fourplay an amount of profit which would bring the total return to more than 12% per annum. Indeed, there might have been no profit at all.⁹ Because the amount and even the existence of a profit were uncertain at the time the parties entered into the agreement, the *possibility* that plaintiff might ultimately receive a return of more than 12% per annum on its investment does not render the agreement usurious.

Finally, Washington courts follow a rule of construction under which a contract will not be regarded as usurious as long there is any other hypothesis by which the arrangement may be explained.

⁹ So far, of course, the arrangement has been a financial disaster for Fourplay and immensely profitable to Loistl. Fourplay loaned Loistl almost \$180,000 seven years ago, and to date has received only a little over \$20,000. Loistl, meanwhile, had her underlying mortgage paid off, benefited from the repairs and improvements that Fourplay made to the property, and for most of the last 6 years has lived on the property for free.

Since usury laws are quasi-penal, the courts will not hold a contract to be in violation of the usury laws unless upon a fair and reasonable construction of all of its terms, in view of the dealings of the parties, it is manifest that the intent of the parties was to engage in such a transaction as is forbidden by those laws. If two reasonable constructions are possible, by one of which the contract will be legal and valid, while by the other it will be usurious and invalid, the court will always adopt the former. In short the general rule of interpretation and construction of such contracts may be said to be that the contract is not usurious when it may be explained on any other hypothesis.

Simpson v. C. P. Cox Corp., 167 Wash. 34, 37, 8 P.2d 424 (1932). It simply cannot be said that the only possible construction of the contract in this case is one under which it must be considered usurious. A share of “anticipated profit to be realized from a particular transaction” is not usury. *Colagrossi*, 50 Wn.2d at 271. There might not have been any profit. Real estate values might have started plummeting in 2003, as they actually began doing in 2007 and 2008. There was no usury.

C. Post-Judgment Interest Rate

Fourplay agrees with Loistl that the trial court erred in setting the post-judgment interest rate at 12 percent. The judgment should bear interest at the 6 percent rate set forth in the Promissory Note. RCW 4.56.110(1).

III. CONCLUSION

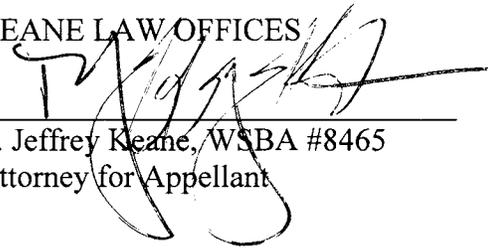
This Court should affirm the trial court conclusion that Loistl's debt was due and owing. It should affirm the judgment to the extent that the judgment awarded Fourplay \$227,282, representing the funds that Fourplay had advanced to Loistl and the interest accrued as of the time of trial.

This Court should reverse the trial court's refusal to award Fourplay its reasonable attorneys' fees and costs. The case should be remanded to the trial court for a determination of the appropriate amount of Fourplay's fee award. This Court should also award Fourplay its reasonable attorneys' fees incurred on appeal.

In addition, this Court should reverse the trial court's conclusion that Fourplay's recovery of damages is limited to the \$227,282 in principal and interest owed by Loistl. The Court should hold that Fourplay is also entitled to recover damages for the profit it lost as a result of Loistl's refusal to sell the property at a commercially reasonable time. And it should hold that Loistl's claim of usury fails.

Respectfully submitted this 4 day of April, 2010.

KEANE LAW OFFICES



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Attorney for Appellant

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

JOINT VENTURE FOURPLAY,)
)
 Appellant,)
)
 vs.)
)
 VERONIKA E. LOISTL, a single person,)
)
 Respondent.)
 _____)

**CERTIFICATE OF
SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington that the following is true and correct:

That on April 14, 2010 I sent, via facsimile and U.S. Mail, postage prepaid, a true and correct copy of Reply Brief of Appellant/Cross-Respondent to:

Mr. James J. Jameson
3409 McDougall Avenue, Suite 201
Everett, WA 98201

DATED at Seattle this 14 day of April, 2010.



Donna M. Pucel

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STATE OF WASHINGTON
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