

64353-3

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No. 64353-3-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

TERCEL CORPORATION,
a Washington corporation,

Respondent,

v.

DONALD A. RASMUSSEN and KAREN RASMUSSEN,
husband and wife,

Appellants.

APPEAL FROM THE SUPERIOR COURT
FOR WHATCOM COUNTY
THE HONORABLE IRA UHRIG

BRIEF OF APPELLANTS

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& GOODFRIEND, P.S.

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COURT OF APPEALS DIVISION I
STATE OF WASHINGTON
2010 FEB -8 PM 4:25

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I. INTRODUCTION

This case returns to this court following remand from a 2008 decision, in which this court reversed the trial court's summary judgment granting specific performance in favor of the purchaser under a real estate Purchase and Sale Agreement. ***Tercel Corp. v. Rasmussen***, No. 59007-3-I, 2008 WL 2640084 (2008) (App. D). This court held that parties' failure to include an accurate legal description of the property at issue rendered the agreement unenforceable under the statute of frauds, RCW 64.04.010.

Ignoring this court's mandate and the law of the case, the trial court nonetheless held on remand that the agreement was enforceable, this time, by awarding damages against the seller of \$265,000 for the purchaser's benefit of the bargain. The sellers, Donald and Karen Rasmussen, again appeal the trial court's enforcement of this invalid agreement, as well as the trial court's refusal to award them restitutionary damages under RAP 12.8 for the profits earned by Tercel upon its sale of the property to third parties.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering its August 22, 2006 order refusing to impound the proceeds of sale. (Sub. 126, Supp. CP __)

2. The trial court erred in denying the Rasmussens' motion for relief on remand (CP 203-05), and their motion to dismiss plaintiff Tercel's claim for damages. (RP 31)

3. The trial court erred in entering its Judgment following remand. (CP 24-25) (App. A)

4. The trial court erred in entering its Order Denying Rasmussens' Motion for Reconsideration. (CP 46-47)

5. The trial court erred in awarding Tercel damages, in holding that the Purchase and Sale Agreement is an "enforceable contract," and in entering those Findings of Fact and Conclusions of Law (CP 27-35) underscored in Appendix B.

6. The trial court erred in awarding Tercel attorney fees, and in entering those Findings of Fact and Conclusions of Law re: Attorney Fees (CP 36-41) underscored in Appendix C.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. May a purchaser enforce the benefit of the bargain by suing to recover damages under a real estate Purchase and Sale

Agreement that this court has previously held to be void and unenforceable under the statute of frauds?

B. Does RCW 58.17.205 allow the enforcement in a suit for damages of a contract for the sale of platted real estate that lacks a valid legal description and does not describe the location of the lots by reference to a recorded document?

C. In awarding restitution to the seller of real property under RAP 12.8, following reversal of a judgment for specific performance, did the trial court err in deducting from the purchaser's profits its overhead and expenses unrelated to protecting the value of the property, including those incurred after this court held that the purchaser was not entitled to the property?

D. Where a Purchase and Sale Agreement is unenforceable, may the prevailing parties recover their attorney fees in defending against its enforcement at trial and on appeal?

IV. STATEMENT OF THE CASE

The following statement of the case is based upon this court's prior decision, in this action, *Tercel Corp. v. Rasmussen*, No. 59007-3-I, 2008 WL 2640084 (2008) ("Op.", located at CP 252-

61 and Appendix D), the trial court's unchallenged findings of fact, and the evidence at trial.

A. Rasmussen And Tercel Entered Into A Purchase And Sale Agreement For Platted Property, But The Agreement Lacked A Sufficient Legal Description.

Donald and Karen Rasmussen ("Rasmussen") purchased an undeveloped parcel of property on Bakerview Road in Bellingham, Washington. Rasmussen applied to subdivide the property into a 21 lot subdivision, originally called Karen's Subdivision. (Op. at 1-2, CP 252-53; FF 3, CP 28) The City of Bellingham granted preliminary plat approval on August 23, 2004. (Op. at 1-2, CP 252-53; FF 3, CP 28) However, that approval was conditioned on Rasmussen re-engineering their drawings, changing the lot dimensions, and the corresponding legal descriptions of the lots.

Rasmussen solicited offers from local realtors for the sale of 20 lots on December 3, 2004. (Op. at 2, CP 253; FF 4, CP 28) Shortly thereafter, Tercel's principal Jason Ragsdale viewed the property with Rasmussen, and submitted as an offer a proposed Purchase and Sale Agreement for 15 of the lots. (Ex. 8; FF 5, CP 28; Op. at 2, CP 253) Ragsdale and Rasmussen anticipated that

Karen's subdivision would receive final plat approval in the spring of 2005. (FF 4, CP 28; Ex. 6)

Rasmussen signed the Purchase and Sale Agreement on January 13, 2005 (Ex. 8; FF 8, CP 29), three days after the City approved the engineering drawings of the lots in Karen's subdivision. (FF 9, CP 29) The Purchase and Sale Agreement contained the following description of the property:

4. Property Tax Parcel Nos.: to be assigned at final plat approval

(Whatcom County)

Street Address: XXX East Bakerview, Bellingham Washington 98226

Legal Description: Lots 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18 of Karen's sub-division which is currently located at 1711, 1785 & 1795 East Bakerview.

(Op. at 5, CP 256; Ex. 8)

The Purchase and Sale Agreement authorized the closing agent to attach the correct legal description of the property. However, the agent used the legal description of the entire three parcels that Rasmussen was platting as Karen's subdivision. As a result, it included land that was not being subdivided and was not

subject to Tercel's Purchase and Sale Agreement. (Op. at 5, CP 256)

After Rasmussen signed the Purchase and Sale Agreement, Tercel deposited \$30,000 into escrow. (FF 8, CP 29; Op. at 2, CP 253)

The configuration for the lots changed again in April 2005. (FF 11, CP 29; Op. at 2, CP 253) Although the trial court found such changes "minor," it is undisputed that the City directed Rasmussen to increase open space in the subdivision. As a result, Rasmussen decreased the size of seven lots and resubmitted the drawings to the City. (Op. at 2, CP 253; RP 330-33, 395-96)

In the mean time, Tercel began design work, modifying architectural plans that he had used on other projects to design homes and curb cuts on the 15 lots.¹ (FF 12, CP 30; RP 77; Ex. 11) However, Tercel's intention was not to build any homes in Karen's subdivision, but to market the lots with the approved plans. (RP 297-98)

¹ Tercel modified his standard architectural plans due to the City's requirement that front porches extend past the garages. (RP 77)

B. The Court Of Appeals Reversed The Trial Court's Summary Judgment Order Granting Specific Performance Because The Purchase And Sale Agreement Was Unenforceable Under The Statute of Frauds.

In July 2005, Tercel's principal Jason Ragsdale received information that Rasmussen was contemplating holding on to the lots, or selling them to another purchaser. Ragsdale's lawyer demanded that Rasmussen perform pursuant to the Purchase and Sale Agreement. (FF 13, CP 30; Ex. 12; Op. at 2, CP 253) Shortly thereafter, on July 25, 2005, Tercel filed the instant lawsuit for specific performance in Whatcom County Superior Court, amending his complaint to assert an alternative claim for damages. (FF 13, CP 30; Op. at 3, CP 254)

On cross-motions for summary judgment, the Honorable Ira Uhrig (the trial court") granted Tercel's motion for summary judgment, denied Rasmussen's motion, and entered an order requiring Rasmussen to convey the property to Tercel, denying reconsideration on December 9, 2005. (FF 14, CP 31; Op. at 3, CP 254)

Rasmussen appealed, but did not stay enforcement of the judgment. Rasmussen completed the subdivision work necessary

to obtain the final approval of the plat. In February 2006, the City accepted the project following completion of its punch list items, and the Bellingham City Council, after an initial postponement, approved the plat in September 2006.² (RP 168, 367; Ex. 38)

In July 2006, Rasmussen requested instructions from the trial court regarding their obligation to specifically perform (Op. at 3, CP 254; 312), and the trial court issued an order on September 22, 2006 instructing Rasmussen to tender closing documents with instructions to hold back from the escrow proceeds funds for Tercel's fees and expenses. (CP 301-02) Rasmussen conveyed the 15 lots to Tercel in compliance with the court's order on October 6, 2006 for \$80,000 per lot, or \$1.2 million. (FF 14, CP 31; Ex. 13) The trial court confirmed Rasmussens' specific performance and entered an award of attorney fees and costs in favor of Tercel on October 20, 2006. (CP 281-90) Rasmussen satisfied the fee award. (See CP 204)

² While the trial court found that the delay was due to Rasmussen's intentional delays (FF 15, CP 31), those findings are not material to Rasmussen's legal argument that the agreement was unenforceable and void, but relate solely to the trial court's assessment of damages against the Rasmussen for breach of the Purchase and Sale Agreement.

This court reversed the trial court's judgment in a July 2008 decision. *Tercel Corp. v. Rasmussen*, No. 59007-3-I, 2008 WL 2640084 (2008), *reprinted at* CP 252-61, (App. D). This court held that Rasmussen could not be liable for specific performance for repudiating the Purchase and Sale Agreement, because it was void and unenforceable under the statute of frauds for lack of an adequate legal description:

A valid legal description for platted property must include, or refer to a document which includes, the lot number(s), block number, addition, city, county, and state. *Martin v. Seigel*, 35 Wn.2d 223, 229, 212 P.2d 107 (1949). . . .

Th[e] description is insufficient on its face to satisfy *Martin*. The VLPSA authorized the closing agent to attach the correct legal description of the property. The agent attached the title information for the three parcels of land being platted as Karen's Subdivision. The attached title information contained legal descriptions and tax parcel numbers for the original three lots being subdivided, but also includes property not being subdivided or purchased by Tercel. This description, therefore, is overbroad and cannot serve as the legal description for the lots in the contract.

(Op. 4-5, CP 255-56).

This court also held that the reference to "Karen's Subdivision" in the Purchase and Sale Agreement did not incorporate by reference any specific document that provided a

complete legal description of the property being purchased by

Tercel:

If Tercel had provided a clear reference in the VLPSA to the re-engineered plat map approved by Public Works, or attached the drawings to the contract, we could rely on the specifically referenced document for the legal description. But, as the VLPSA stands, the reference to Karen's Subdivision in the VLPSA does not identify, with sufficient specificity, existing documents that contain a complete legal description without resort to parol evidence. Therefore, the legal description violates the statute of frauds.

(Op. at 8, CP 259)

This court reversed the summary judgment, vacated the award of attorney fees to Tercel and remanded “for further proceedings on the claim for damages and award of attorney fees.”

(Op. at 10, CP 261) In August 2008, the trial court refused to impound the proceeds of Tercel’s sales of the remaining lots, requiring only that Tercel’s “profits” be held pending further order of the court. (Sub. 126, Supp. CP __)

C. On Remand, The Trial Court Held That The Agreement Was Enforceable And Granted Tercel Damages For Benefit of The Bargain And Awarded Attorney Fees.

Although this court held that the Purchase and Sale Agreement violated the statute of frauds, the trial court nonetheless adhered to its earlier decision on remand, reasoning that “clearly

something enforceable remains, for even Defendant requested attorneys fees based on this very contract.” (CP 63) Denying Rasmussen’s motions to dismiss Tercel’s claims for damages under the contract before, during, and after trial, (RP 16-31; CP 47, 204), the trial court concluded that “[t]he PSA is an enforceable contract,” and that the failure to particularly identify the lots did not void the agreement because “the parties at all times understood what property was to be conveyed:”

The P&SA is an enforceable contract. The fifteen numbered lots conveyed to Tercel on October 6, 2006, are the same numbered lots identified in the P&SA. While the configuration of these lots underwent minor changes between drawing approval and final plat approval, the parties at all times understood what property was to be conveyed under the P&SA.

(CL 3, CP 32)

The trial court also held that the platting statute, RCW 58.17.205, authorizes the sale of platted real property by reference to lot number, notwithstanding the statute of frauds:

RCW 58.17.205 authorizes “performance of an ... agreement to sell ... a lot ... following preliminary plat approval.” This statutory language contemplates the sale of part, but not all, of the property in a plat, which cannot be done without referring to the numbered lots within the plat. The statute therefore contemplates exactly the kind of legal description

contained in the P&SA and authorizes performance of such an agreement. Any other conclusion would be inequitable and result in the unjust enrichment of the Rasmussens.

(CL 3, CP 33)

The trial court concluded that Rasmussen's delay in closing violated the provision of the PSA that made time "of the essence," in breach of the covenant of good faith and fair dealing:

An unreasonable delay in performing a contract entitles the non-breaching party to damages for the resulting delay. Seattle v. Dyad Construction, 17 Wn. App. 501 (1977) *rev. den.*, 91 Wn.2d. 1007 (1978). Here, Tercel is entitled to damages caused by the Rasmussens' bad faith delay and breach of contract.

(CL 4, CP 33-34)

The trial court awarded Tercel \$265,000, "representing the difference between the purchase price and the value of the lots in the fall of 2005." (CP 25; FF 16, CP 31) It offset from that amount \$17,046.10, representing the balance owed to Rasmussen for the original monetary judgment for fees that Rasmussen had satisfied, but Tercel had not paid back. (CP 24-25) In addition, the court awarded Tercel attorney fees and expenses at trial under the Purchase and Sale Agreement in the amount of \$62,445.50. (CL 3, CP 40) It offset from that award Rasmussen's attorney fees on

appeal of \$36,782.69, leaving a net judgment for attorney fees in favor of Tercel of \$25,762.81. (CL 5, CP 40)

Finally, the trial court recognized that Tercel was obligated under RAP 12.8's restitutionary remedy to restore to Rasmussen the value of the property Rasmussen conveyed to Tercel in 2006. However, as Tercel no longer owned the lots, it held that Rasmussen's remedy was limited to net the proceeds received by Tercel. The trial court found that Tercel incurred a loss on the lots, but only by deducting from Tercel's profits the overhead from operating his construction business, and therefore held that Rasmussen was not entitled to restitution. (FF 17, CP 31-32; see Ex. 29)

The trial court entered a net judgment in favor of Tercel of \$273,716.71. (CP 24-25) Rasmussen timely appealed. (CP 6)

V. ARGUMENT

A. This Court Reviews The Trial Court's Refusal To Apply The Law Of The Case And Its Conclusions Of Law De Novo.

The trial court's enforcement of the parties' Purchase and Sale Agreement is entitled to no deference on review. This court reviews de novo as a question of law whether the trial court correctly applied the law of the case. See *Ensley v. Pitcher*, 152

Wn. App. 891, 899, ¶ 10, ___ P.3d ___ (2009) (application of res judicata is legal issue reviewed de novo); **Lemond v. Dept. of Licensing**, 143 Wn. App. 797, 803, ¶ 8, 180 P.3d 829 (2008) (whether relitigation of issues precluded by collateral estoppel is question of law).

The trial court's conclusions of law are similarly reviewed de novo, including its conclusions regarding the application of the statute of frauds. **Clayton v. Wilson**, ___ Wn. App. ___, ___ P.3d ___, 2010 WL 185948, ¶ 8 (2010) (conclusions of law reviewed de novo); **Dickson v. Kates**, 132 Wn. App. 724, 733, ¶ 20, 133 P.3d 498 (2006) (reviewing de novo trial court's conclusion that covenants satisfied statute of frauds). Finally, while the trial court's award of damages in restitution is reviewed for abuse of discretion, whether the trial court employed the correct measure of damages is reviewed de novo as a question of law. See **Womack v. Von Rardon**, 133 Wn. App. 254, 263, ¶ 21, 135 P.3d 542 (2006).

B. The Trial Court Disregarded This Court's Mandate And Erred In Enforcing The Parties' Agreement By Awarding Tercel Damages For Benefit Of The Bargain Because The Purchase And Sale Agreement Is Void Under The Statute of Frauds.

1. The Trial Court Disregarded The Law Of The Case.

This court previously ruled that the Purchase and Sale Agreement violated the statute of frauds because it lacked a sufficient legal description. *Tercel Corp. v. Rasmussen*, No. 59007-3-I. (CP 252-61, App. D) The trial court erred in allowing Tercel to enforce a contract that is void under the statute of frauds by awarding damages for its breach. (CL 3, CP 32: "The P&SA is an enforceable contract.")

Under RAP 12.2, the "decision made by the appellate court is effective and binding on the parties to the review and governs all subsequent proceedings in the action in any court." This rule codifies the law of the case doctrine, under which "once there is an appellate court ruling, its holding must be followed in all of the subsequent stages of the same litigation." *State v. Schwab*, 163 Wn.2d 664, 672, ¶ 11, 185 P.3d 1151 (2008). See *Harp v. American Surety Co. of New York*, 50 Wn.2d 365, 368, 311 P.2d 988 (1957) ("mandate . . . is binding on the superior court, and must be strictly followed."); *Allyn v. Asher*, 132 Wn. App. 371, 378, ¶ 15,

131 P.3d 339 (2006) (“RAP 12.2 is a broad statement of the authority and binding power of the appellate decision.”).

In the previous decision in this action, this court held that neither the reference to the platted lot numbers, nor the “overbroad” legal description inserted by the closing agent satisfied the statute of frauds:

[A]s the VLPSA stands, the reference to Karen's Subdivision in the VLPSA does not identify, with sufficient specificity, existing documents that contain a complete legal description without resort to parol evidence. Therefore, the legal description violates the statute of frauds.

(Op. at 8, CP 259)

The trial court’s conclusion that the “PSA is an enforceable contract” because “the parties at all times understood what property was to be conveyed under the PSA” (CL 3, CP 32) is directly at odds with the law of the case. *Compare* Op. at 6, CP 257 (quoting original trial court’s oral ruling on summary judgment). The law of the case doctrine “seeks to promote finality and efficiency in the judicial process.” ***Roberson v. Perez***, 156 Wn.2d 33, 41, 123 P.3d 844 (2005). The trial court’s conclusion that this agreement was enforceable undermines these important policies and should be reversed.

2. The Trial Court Erred In Awarding Damages Under The Purchase And Sale Agreement Because It Was Unenforceable Under The Statute Of Frauds.

The equitable remedy of specific performance and the legal remedy of monetary damages are alternative means of enforcing an agreement for the purchase of real property. See *Crafts v. Pitts*, 161 Wn.2d 16, 27, ¶ 13, 162 P.3d 382 (2007) (“[T]he injured party in a land conveyance dispute always has a choice between specific performance and money damages,” citing *Kritzer v. Moffat*, 136 Wash. 410, 423, 240 Pac. 355 (1925). As a result, the Supreme Court has consistently held that a contract void under the statute of frauds may not be enforced in an action for damages. *Schweiter v. Halsey*, 57 Wn.2d 707, 714, 359 P.2d 821 (1961) (“Since the contract is in violation of the statute of frauds, it is void and cannot form the basis of an action at law to recover damages for the breach thereof, as such an action presupposes a valid contract.”). *Trimble v. Donahey*, 96 Wash. 677, 681, 165 Pac. 1051 (1917) (“Where a contract, void under the statute of frauds, will not be specifically enforced, an action for damages for breach thereof will not lie.”); *Chamberlain v. Abrams*, 36 Wash. 587, 591, 79 Pac. 204, 205 (1905) (“Nor does the fact that the appellant is

seeking to recover damages for a breach of the contract, rather than to enforce a specific performance, alter the case.”), *overruled on other grounds by Miller v. McCamish*, 78 Wn.2d 821, 829, 479 P.2d 919 (1971). See also *Williams v. Fulton*, 30 Wn. App. 173, 178 n.5, 632 P.2d 920 (“failure to establish that the elements of part performance have been met precludes not only specific performance but recovery of damages”), *rev. denied*, 96 Wn.2d 1017 (1981).³

In *Schweiter*, a pair of brothers contracted with a married couple to purchase part of the Halsey’s farm. 57 Wn.2d at 708. The parties executed an earnest-money receipt without a sufficient legal description. When Schweiter repudiated the contract, Halsey sued for damages. 57 Wn.2d at 709. The trial court held that the contract violated the statute of frauds because it lacked a sufficient legal description. The Supreme Court rejected Halsey’s argument that a contract void under the statute of frauds could support a claim for damages. 57 Wn.2d at 712.

³ Tercel did not argue, and the trial court did not hold that the parties’ minimal performance prior to Rasmussen’s repudiation of the agreement satisfies the doctrine of part performance.

Here, the trial court adopted the same argument that the Court expressly rejected in **Schweiter**. Like Halsey, Tercel argued that “[a] contract which cannot be specifically enforced may nevertheless support an award of damages.” (CP 110, 123, *citing Hedges v. Hurd*, 47 Wn.2d 683, 289 P.2d 706 (1955)) However, the **Schweiter** Court held that while a contract that is too *indefinite* to support specific enforcement may support a claim for damages, a contract that does not comply with the statute of frauds is void and unenforceable:

The rule contended for by appellants applies to those situations where the contract involved is too *indefinite* in its terms to be specifically enforced, but yet is certain enough to constitute a valid contract for breach of which damages may be recovered. The rule has no application where the contract fails to satisfy the statute of frauds.

Schweiter, 57 Wn.2d at 712 (emphasis in original), *distinguishing Hedges*, 47 Wn.2d 683.

Because these parties had no enforceable agreement, the trial court similarly erred in holding that Rasmussen’s delay in obtaining final plat approval after contesting the validity of the Purchase and Sale Agreement violated the implied covenant of good faith and fair dealing. (CP 33) As this court has repeatedly

held, “there is no ‘free-floating’ duty of good faith and fair dealing apart from the terms of an existing contract.” ***Carlile v. Harbour Homes, Inc.***, 147 Wn. App. 193, 216, ¶ 60, 194 P.3d 280 (2008), *rev. granted in part*, 166 Wn.2d 1015 (2009). Absent a valid and enforceable contract, there is no implied duty of good faith. ***Johnson v. Yousoofian***, 84 Wn. App. 755, 762, 930 P.2d 921 (1996) (“If there is no contractual duty, there is nothing that must be performed in good faith.”), *rev. denied*, 132 Wn.2d 1006 (1997). Because the Purchase and Sale Agreement was void under the statute of frauds, the trial court erred in awarding damages for breach of the implied duty of good faith.⁴

This court has held that these parties’ agreement violates the statute of frauds. The trial court erred in awarding damages based on a contract that is unenforceable.

⁴ This court in its prior decision held that Rasmussen’s repudiation of the contract was irrelevant because the Purchase and Sale Agreement was unenforceable. The trial court’s conclusions regarding Rasmussen’s intent and state of mind in failing to perform are irrelevant in the absence of a contractual duty to perform. (CL 3, CP 33)

3. This Court's Previous Holding That The Purchase And Sale Agreement Violated The Statute of Frauds Followed Settled Law.

This court's previous holding that the parties' agreement violated the statute of frauds was binding on the trial court and on Tercel not just because it is the law of the case, but also because it is correct. While this court may, under RAP 2.5(c)(2), reconsider a previous decision "where the prior decision is clearly erroneous," or where there has been an intervening change in the law, Tercel did not argue and the trial court did not hold that either of these exceptions to the law of the case doctrine applied here. See. **Roberson**, 156 Wn.2d at 42.

This court followed settled law in holding that in order to satisfy the statute of frauds a contract to sell platted property "must include, or refer to a document which includes the lot number(s), block number, addition, city, county, and state." (Op. at 4, CP 255, citing **Martin v. Siegel**, 35 Wn.2d 223, 229, 212 P.2d 107 (1949)) See also **Pardee v. Jolly**, 163 Wn.2d 558, 567, ¶ 12, 182 P.3d 967 (2008); **Home Realty Lynnwood, Inc. v. Walsh**, 146 Wn. App. 231, 237, 189 P.3d 253 (2008). Under the trial court's holding, parties to a Purchase and Sale Agreement could describe real

property as “Lot 2 of ABC Subdivision” and wait until closing to verify the final configuration of the individual lots. This court correctly rejected this reasoning in the first appeal.

Thus, the trial court’s conclusion that “the parties at all times understood what property was to be conveyed” does not take the parties’ agreement outside the statute of frauds. (CL 3, CP 32) The Supreme Court has consistently rejected such attempts to avoid the operation of the statute of frauds, while recognizing that application of the statute may lead to inequitable results. See, e.g., **Key Design Inc. v. Moser**, 138 Wn.2d 875, 883, 983 P.2d 653, 993 P.2d 900 (1999) (“We do not apologize for the rule. We feel that it is fair and just to require people dealing with real estate to properly and adequately describe it”) quoting **Martin**, 35 Wn.2d at 228. Contrary to the trial court’s conclusions of law, the purpose of the rule has nothing to do with the parties’ expectations. The statute of frauds is instead enforced to avoid compelling courts “to resort to extrinsic evidence in order to find out what was in the minds of the contracting parties.” **Martin**, 35 Wn.2d at 228.

The trial court erred by granting Tercel the benefit of the bargain of an unenforceable contract “as if we had never brought a

specific performance suit.” (8/6 RP 20) This court should reverse the damages award of \$265,000, representing the difference between the purchase price of \$1.2 million and “the retail value of the lots in September 2005 (\$1,465,000).” (CP 65; FF 16, CP 31)

4. Tercel Waived Any Claim To Damages By Electing And Then Enforcing Rasmussen’s Specific Performance.

Even if this court declines to adhere to its prior decision holding the parties’ agreement unenforceable, the trial court’s decision allowing Tercel to obtain both the benefit of the bargain and specific performance must be reversed under the doctrine of election of remedies. Having elected specific performance, and insisting that Rasmussen complete the sale of the lots in 2006, Tercel is barred from also claiming monetary damages for being deprived of the benefit of the bargain on the same agreement. The trial court erred in rejecting this defense. (CL 6, CP 34)

The doctrine of election of remedies applies where (1) two or more remedies exist at the time of election; (2) the remedies are inconsistent with each other; and (3) the party to be bound chooses one of the remedies. The pursuit of one remedy to final conclusion

precludes any subsequent action. ***Birchler v. Castello Land Co., Inc.***, 133 Wn.2d 106, 112, 942 P.2d 968 (1997).

These elements are established here. A decree of specific performance and damages for benefit of the bargain are alternative means of enforcing performance of a contract. See ***Crafts v. Pitts***, 161 Wn.2d at 27. Tercel definitively chose one of the remedies, and not only pursued it to final judgment but insisted that Rasmussen perform by closing in 2006, one year after the contract was first entered into and after the market peaked. Having elected to take the land itself, Tercel cannot also pursue damages for benefit of the bargain because the remedies are inconsistent and duplicative.

Under principles of equity, Tercel was entitled to restitution of any amounts paid to Rasmussen to prevent an unjust enrichment following reversal. See ***Williams v. Fulton***, 30 Wn. App. 173, 178 n.5, 632 P.2d 920 (1981) (while damages unavailable under contract that is void under the statute of frauds, party may obtain restitution). See Arg. § D, *infra*. However, by seeking to enforce the benefit of its bargain, Tercel waived any claim to restitution. ***Williams***, 30 Wn. App. at 178 n.5 (“Because the Williamses did not

plead restitution and have not asserted that theory either at the trial court level or on appeal, we need not consider it.”). In any event, there was no evidence before the trial court that Rasmussen reaped any benefits at Tercel’s expense. See **Washington Co-op. Chick Ass’n v. Jacobs**, 42 Wn.2d 460, 464-65, 256 P.2d 294 (1953) (restitutionary remedy is “limited to an amount by which defendant is unjustly enriched.”).

C. The Trial Court Erred As A Matter Of Law And Ignored The Law Of The Case In Holding That RCW 58.17.205 Is An Exemption To The Statute Of Frauds.

The trial court similarly erred as a matter of law in concluding that the platting statute, RCW 58.17.205, exempts the parties’ agreement from the statute of frauds:

RCW 58.17.205 authorizes ‘performance of an . . . agreement to sell . . . a lot . . . following preliminary plat approval.’ This statutory language contemplates the sale of part, but not all, of the property in a plat, which cannot be done without referring to the numbered lots within the plat. The statute therefore contemplates exactly the kind of legal description contained in the P&SA and authorizes performance of such an agreement.

(CL 3, CP 33)

Tercel made this very argument to support the trial court’s decree of specific performance in the first appeal and this court necessarily rejected it in holding the parties’ Purchase and Sale

Agreement void under the statute of frauds. In any event, neither the text nor the legislative purpose of RCW 58.17.205 supports the trial court's conclusion that this platting statute validates an agreement that is otherwise void under the statute of frauds.

1. The Trial Court's Reliance On The Platting Statute Contravenes The Law Of The Case.

The trial court's reliance on the platting statute, RCW 58.17.205, to validate an unenforceable Purchase and Sale Agreement also ignores the law of the case and contravenes this court's mandate. The law of the case doctrine applies equally to all issues actually decided and those necessarily decided in the prior appeal. *Miller v. Sisters of St. Francis*, 5 Wn.2d 204, 206-07, 105 P.2d 32 (1940), *overruled on other grounds by Greene v. Rothschild*, 68 Wn.2d 1, 414 P.2d 1013 (1966). See Tegland, 14A Wash. Pract. § 35:55 (2nd Ed. 2009) ("Court will not in subsequent proceedings in the same case re-examine matters passed upon, or necessarily implicit in matters passed upon").

This court, in the first appeal, necessarily rejected Tercel's argument that RCW 58.17.205 validated an agreement that was otherwise void under the statute of frauds. Tercel specifically argued to this court in the prior appeal that "RCW 58.17.205 takes

agreements for the sale of a lot in a preliminary plat (such as the P&SA) out of the statute of frauds.” (CP 83; see 80-84 (relevant section of Tercel’s Brief of Respondent)) This court discussed RCW 58.17.205 in rejecting Tercel’s argument and holding that the contract violated the statute of frauds and was unenforceable. (Op. at 2, n.2, CP 253)

If the platting statute allowed the enforcement of agreements that described real property by lot number without incorporating a specific legal description by reference, there is no reason why the parties’ agreement would not have been specifically enforced by this court in the prior appeal. The trial court’s holding that RCW 58.17.205 “contemplates exactly the kind of legal description contained in the P&SA and authorizes performance of such an agreement,” (CL 3, CP 33), directly contravenes the law of the case.

2. RCW 58.17.205 Provides No Exemption To The Requirements Of The Statute Of Frauds.

Even if this court had not previously rejected Tercel’s argument, neither the text of RCW 58.17.205, the legislative intent behind the platting statute, nor principles of statutory construction support the enforcement of a Purchase and Sale Agreement of

platted property that violates the statute of frauds. The trial court's contrary holding is wrong as a matter of law.

The platting statute, RCW ch. 58.17, governs "the process by which land is divided." RCW 58.17.010. RCW 58.17.205 allows agreements to sell land following preliminary plat approval, conditioned upon final approval, provided that all payments are deposited in an escrow or trust account:

If performance of an offer or agreement to sell, lease, or otherwise transfer a lot, tract, or parcel of land following preliminary plat approval is expressly conditioned on the recording of the final plat containing the lot, tract, or parcel under this chapter, the offer or agreement is not subject to RCW 58.17.200 or 58.17.300 and does not violate any provision of this chapter. All payments on account of an offer or agreement conditioned as provided in this section shall be deposited in an escrow or other regulated trust account and no disbursement to sellers shall be permitted until the final plat is recorded.

RCW 58.17.205.

By its terms, RCW 58.17.205 does not address the manner in which platted property must be described, and certainly does not address "the long-established" interpretation of RCW 64.04.010:

[T]o comply with the statute of frauds, the writing must contain a legal description of the property by lot, block number, addition, city, county, and state [and] contain a description sufficient to locate the land without

recourse to oral testimony or contain a reference to another instrument which does contain a sufficient description.

Home Realty Lynnwood, Inc. v. Walsh, 146 Wn. App. 231, 237, ¶ 10, 189 P.3d 253 (2008).

The trial court's holding that the platting statute "contemplates exactly the kind of legal description contained in the P&SA and authorizes performance of such an agreement," (CL 3, CP 33), finds no support in the text of RCW 58.17.205. Under the trial court's reasoning, the Legislature would have necessarily repealed the statute of frauds in enacting the platting statute, without mentioning RCW 64.04.010 or its "long standing" interpretation. ***Home Realty***, 146 Wn. App. at 237. Repeal by implication is strongly disfavored in Washington because "[t]he legislature is presumed to be aware of its own enactments." ***Amalgamated Transit Union Legislative Council of Wash. State v. State***, 145 Wn.2d 544, 552, 40 P.3d 656 (2002). See ***Tollycraft Yachts Corp. v. McCoy***, 122 Wn.2d 426, 439, 858 P.2d 503 (1993). Similarly, "the legislature is presumed to be aware of

judicial interpretations” of RCW 64.04.010.⁵ ***Amalgamated Transit Union***, 145 Wn.2d at 554.

The trial court’s reliance on RCW 58.17.205 violates other principles of statutory construction. RCW 58.17.205 contains express exemptions to other provisions of the platting statute, yet omits any exemption from the statute of frauds. For instance, RCW 58.17.205 exempts sales of preliminary plats conditioned on final plat approval from RCW 58.17.200 and RCW 58.17.300. Under the doctrine of *expressio unius est exclusio alterius*, “to express one thing in a statute implies the exclusion of the other.” ***In re Det. of Williams***, 147 Wn.2d 476, 491, 55 P.3d 597, 604 (2002). Had the Legislature intended to provide an exemption from the statute of frauds to agreements to sell platted land, it would have said so. The trial court erred as a matter of law in holding that RCW 58.17.205 provided a basis to enforce a Purchase and Sale Agreement that was void under the statute of frauds.

⁵ The statute of frauds, RCW 64.04.010, provides “Every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed....” The interpretation of the statute to require a legal description is based on “a long line of decisions.” ***Key Design***, 138 Wn.2d at 881.

Additionally, the legislative purpose of RCW ch. 58.17 directly undermines the trial court's conclusion that the Legislature intended to provide an exception to the statute of frauds in the case of platted property. See RCW 58.17.010 (Legislature's statement of the purpose of RCW ch. 58.17). Among those purposes is "requir[ing] uniform monumenting of land subdivisions and conveyancing by accurate legal description." RCWA 58.17.010 (emphasis added). The purpose of the statute of frauds is to prevent fraud and further certainty by ensuring that conveyances of land include an accurate legal description without resort to extrinsic evidence. See *Martin*, 35 Wn.2d at 228. The platting statute and the statute of frauds thus have similar goals – the conveyancing of land by accurate legal description.

"When the various provisions of a chapter can be harmonized there is no repeal or amendment by implication." *In re Detention of R.S.*, 124 Wn.2d 766, 774, 881 P.2d 972 (1994). The trial court erred in relying on the platting statute to enforce an agreement that is void under the statute of frauds.

D. The Trial Court Adopted An Incorrect Measure Of Restitution In Allowing Tercel To Deduct His Construction Business Overhead From The Proceeds of Sale.

By electing specific performance, Tercel paid \$1.2 million for 15 lots worth between \$1,465,000 and \$1,675,000 at the time of closing in 2006, according to the competing appraisals before the trial court. (Ex. 26, 27, 30)⁶ While correctly acknowledging that RAP 12.8 limited Rasmussen to Tercel's actual proceeds of sale as restitution prior to reversal of judgment of specific performance, the trial court erred as a matter of law in allowing Tercel to deduct all of his construction business overhead from the proceeds of sale due Rasmussen, as well as the out-of-pocket losses he sustained after this court's decision in July 2008. This legal error allowed the trial court to turn Tercel's profit on the lots into a \$245,000 loss. (Ex. 29; FF 17, CP 31-32)

Where a judgment is not superseded, but satisfied, and the judgment is reversed on appeal, the party satisfying the judgment is entitled to either specific restitution, or if specific restitution is no

⁶ Tercel's expert valued the lots as of 2005 (Exs. 26, 27), but testified that the market was unchanged between the date of valuation and the date of closing. (RP 247) The trial court's finding that market "plummeted" during this time is not supported by substantial evidence. (FF 17, CP 231)

longer feasible, “the amount received by the judgment creditor with interest.” **State v. A.N.W. Seed Corp.**, 116 Wn.2d 39, 46, 802 P.2d 1353 (1991), *quoting Restatement Restitution* § 74, comment d. The purpose of the rule enunciated in **A.N.W. Seed**, is one of fairness, based on the right of a party to act on a valid trial court judgment that has not been stayed pending appeal. 116 Wn.2d at 47-48, *citing* RAP 7.2(c).

Where restitution is required under a judgment that has been reversed, the judgment creditor is entitled to offset from the proceeds of sale only those expenditures made in good faith as necessary to preserve its value. See **Malo v. Anderson**, 76 Wn.2d 1, 6, 454 P.2d 828 (1969) (judgment creditor entitled to credit for “the expenditures on the house [that] were made with the good faith intention of making it inhabitable”); **Cooley v. Fredinburg**, 146 Or. App. 436, 934 P.2d 505 (1997) (distinguishing between “necessary expenditures to protect the value of the property on behalf of the rightful owner” and those “in anticipation of unfettered ownership.”) Moreover, where a party’s expenditures and improvements are no longer based on a reasonable expectation of ownership, that party is deemed to be acting as a “mere volunteer” because the

claimant's expectation of retaining ownership is no longer reasonable. See *Ellensburg v. Larson Fruit Co. Inc.*, 66 Wn. App. 246, 251-52, 835 P.2d 225, *rev. denied*, 120 Wn.2d 1011 (1992); *Restatement Restitution (Third)* § 27, comment f (Tentative Draft No.3 2004)

Tercel originally intended to sell undeveloped lots, and only began constructing homes on the property in early 2008 when he was unable to sell lots because the market had soured. (RP 205, 298) Tercel's initial sales of lots reaped profits. Tercel sold seven vacant lots before this court's July 7, 2008 decision, and a house on July 15, 2008. (CP 189-90; Ex. 29) Tercel showed a net profit before overhead of \$153,275 in 2007, and \$36,702 in 2008. (Ex. 29)

Tercel only started showing losses in 2009, *after* this court reversed the decree of specific performance in 2008, and then only by deducting his construction expenses, business financing, and overhead from the proceeds of sale. (Ex. 29) But the only costs necessarily associated with owning the property were the property taxes and the interest paid on Tercel's purchase of the property. (RP 273)

The trial court erred in allowing Tercel to deduct Tercel's additional expenditures made *after* July 7, 2008, which by no means could be considered to have been made in good faith under "a presumptively valid judgment," **A.N.W. Seed**, 116 Wn.2d at 47-48, and limiting Rasmussen's recovery to Tercel's "profits." (Sub 126, Supp. CP __) The trial court should have awarded Rasmussen Tercel's actual proceeds (net of overhead and other unrelated expenses) that Tercel had received before this court reversed the judgment granting him title. To the extent Tercel incurred losses after this court's 2008 decision, he did so as a volunteer and on his own account, not Rasmussen's.

In any event, no authority supports the trial court's deduction of Tercel's construction business overhead, including the interest unconnected with the lots that Tercel still owned. (RP 274-79) See **Cooley**, 934 P.2d at 512. In **Cooley**, the Oregon Court of Appeals held that party requiring to make restitution for rents received prior to the reversal of a judgment was not entitled to offset a management fee that it never actually paid out of pocket because it had negative cash flow. Allowing a deduction of expenses that a party would otherwise incur, such as overhead, is inconsistent with

the principles of restitution. See *In re Lloyd*, 369 B.R. 549, 562 (Bankr.N.D.Cal. 2007) (refusing to allow as setoff to purchaser of property expenses, including “\$45,000 in management fees payable to himself for leasing the Residence” because such amounts “do not represent value transferred”), *aff’d*, 2008 WL 298820 (N.D. Cal. 2008), *aff’d*, 572 F.3d 999 (9th Cir. 2009); ***Yugoslav-American Cultural Center, Inc. v. Parkway Bank and Trust Co.***, 327 Ill.App.3d 143, 763 N.E.2d 360, 367 (2001) (allowing restitution only to the extent “improvements and repairs enhanced the value of the property”).

Here, Tercel’s overhead in running a construction business, was not an out-of-pocket expense paid in connection with its purchase of these lots, but would have been incurred in any event and did not add value to the property. Tercel would have incurred Jason Ragsdale’s \$35,000 annual salary, its business liability insurance, utilities and payroll taxes for its staff, whether or not Tercel had opted to close on the purchase of Rasmussen’s lots. (RP 275-79, 294) Moreover, in addition to overhead, the trial court allowed Tercel to deduct not just the interest incurred on his \$1.2 million purchase of the lots, but all of the interest paid by Tercel to

finance his construction of homes. (RP 272, 287-88) The trial court adopted an incorrect legal standard in its determination that no restitution was owed to Rasmussen. This court should reverse and, at a minimum, remand with instructions to award Rasmussen the proceeds of sale received by Tercel, without deducting for overhead.

E. Rasmussen, Not Tercel, Is Entitled To Attorney Fees At Trial And On Appeal.

This court should also reverse the trial court's award of attorney fees to Tercel at trial, and award Rasmussen their fees in the trial court and on appeal. As discussed in the previous sections, the trial court erred in holding that Tercel prevailed in its damages lawsuit. As a result the fees awarded to Tercel must be reversed and Rasmussen be deemed the prevailing party at trial. See **16th Street Investors v. Morrison**, __ Wn. App. __, __ P.3d __, ¶ 30, 2009 WL 3823336 (2009) (reversing award of attorney fees and awarding fees to seller following reversal of decree of specific performance).

Rasmussen is the prevailing party in this court. Rasmussen is entitled to an award of attorney fees under the Purchase and Sale Agreement, Ex. 8 at ¶ q. RAP 18.1.

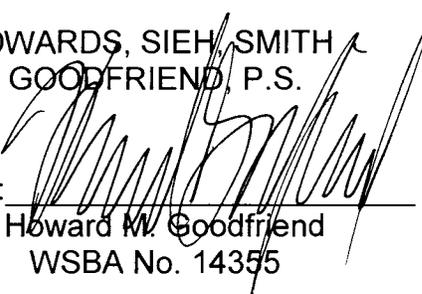
VI. CONCLUSION

The trial court ignored the law of the case, this court's mandate and established law in holding that a Purchase and Sale Agreement that is void under the statute of frauds is nonetheless enforceable in a lawsuit for damages for benefit of the bargain.

This court should reverse the judgment for damages in favor of Tercel, and reinstate the unsatisfied restitutionary award for attorney fees of \$17,046.10 in favor of Rasmussen, and direct the trial court to award Rasmussen restitution in the amount Tercel actually received, with interest, plus \$17,046.10 in attorney fees and costs paid by Rasmussen that have not been refunded by Tercel. Rasmussen should be awarded attorney fees in the trial court and on appeal.

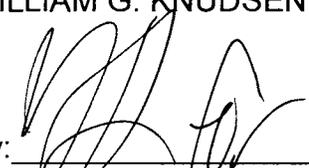
Dated this 8th day of February, 2010.

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

By: 

Howard M. Goodfriend
WSBA No. 14355

WILLIAM G. KNUDSEN, P.S.

By: 

William G. Knudsen
WSBA No. 6064

Attorneys for Appellants

DECLARATION 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 February 8, 2010, I arranged for service of the foregoing Brief of Appellants, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
John C. Belcher Belcher/Swanson Law Firm PLLC 900 Dupont Street Bellingham WA 98225	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
William Knudsen Attorney at Law 119 N. Commercial St., Suite 1410 Bellingham WA 98225-4450	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail

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 STATE OF WASHINGTON
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DATED at Seattle, Washington this 8th day of February, 2010.



 Tara D. Friesen

APPENDIX

- App. A: Judgment, dated October 19, 2009 (CP 24-25)
- App. B: Findings of Fact and Conclusions of Law, dated October 19, 2009 (CP 27-35)
- App. C: Findings of Fact and Conclusions of Law Regarding Award of Attorney's Fees and Expenses Following Trial, dated October 19, 2009 (CP 36-41)
- App. D: Opinion in *Tercel Corp. v. Rasmussen*, No. 59007-3-1, dated July 7, 2008. (CP 252-261)

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WASHINGTON
BY _____

SUPERIOR COURT OF WASHINGTON, FOR WHATCOM COUNTY

TERCEL CORPORATION, a
Washington corporation,

Plaintiff,

vs.

DONALD A. RASMUSSEN and
KAREN RASMUSSEN, husband and
wife,

Defendants.

No. 05-2-01677-5
(Judge Ira Uhrig)

JUDGMENT

JUDGMENT SUMMARY

1. Cause Number: 05-2-01677-5
2. Judgment Creditor(s): Tercel Corporation
3. Judgment Debtor(s): Donald A. Rasmussen and Karen Rasmussen
4. Principal Judgment: \$ 247,953.90
5. Interest: None.
6. Attorney's fees & expenses: \$25,762.81 *WJK*
7. Judgment Interest: Both principal judgment and the attorney's fees and expenses to draw interest at the statutory rate from date of entry.
8. Attorney for Judgment Creditor: John C. Belcher

JUDGMENT

Findings of fact and conclusions of law having been previously entered,
judgment is hereby entered as follows:

1. Tercel Corporation is awarded judgment against Donald A.

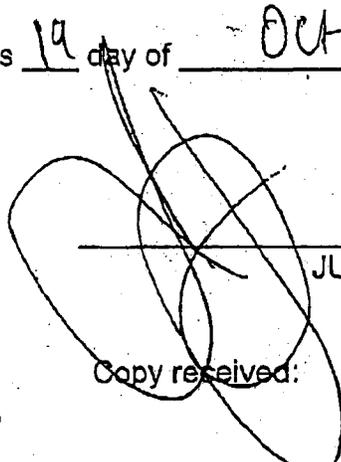
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Rasmussen, Karen Rasmussen and the Rasmussen marital community in the amount of \$265,000 plus attorney's fees and expenses in the amount of \$ 25,762.81 ^{wk}

2. The Rasmussens' counterclaims are dismissed with prejudice.

3. The balance owed on the Rasmussens' Judgment entered against Tercel on November 26, 2008, is \$17,046.10. This amount is hereby offset against the \$265,000 awarded under paragraph 1, leaving a balance of \$ 247,953.90. The 11/26/08 Judgment is hereby vacated ^{wk} and satisfied in full.

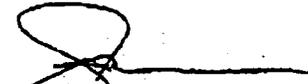
DONE IN OPEN COURT this 19 day of Oct 2009.



JUDGE

Copy received:

Presented by:
BELCHER SWANSON LAW FIRM,
PLLC

By: 
JOHN C. BELCHER, WSBA #5040
Lawyer for Plaintiff

By: 
WILLIAM KNUDSEN, WSBA #6064
Lawyer for Defendants

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FILED IN OPEN COURT
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WHATCOM COUNTY CLERK

By [Signature] Deputy

SUPERIOR COURT OF WASHINGTON, FOR WHATCOM COUNTY

TERCEL CORPORATION, a
Washington corporation,

Plaintiff,

vs.

DONALD A. RASMUSSEN and KAREN
RASMUSSEN, husband and wife,

Defendants.

No. 05-2-01677-5
(Judge Ira Uhrig)

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

This case was tried to the bench on August 4-6, 2009. The Court took testimony, admitted exhibits, read the trial briefs submitted by the parties and heard argument. The Court filed a Letter Opinion dated September 15, 2009. Based on this record, the Court makes the following:

FINDINGS OF FACT

1. At all times material to this suit, plaintiff Tercel Corporation ("Tercel"), has been a Washington corporation in good standing. At all times material to this suit, Jason Ragsdale ("Ragsdale") has been the president of Tercel and has acted on behalf of Tercel.

2. At all times material to this suit, defendants Donald A. Rasmussen and Karen Rasmussen ("the Rasmussens") have been married, and have lived in Whatcom County, Washington. All acts referred to in these findings as having been

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 1**

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performed by either spouse were performed on behalf of the Rasmussen marital community.

3. At all times material to this suit, the Rasmussens have been the owners of property located on Bakerview Road in Bellingham, Whatcom County, Washington. The Rasmussens developed this property into a 21-lot residential subdivision,¹ which received preliminary plat approval from the City of Bellingham on August 23, 2004.

4. On December 3, 2004, Mr. Rasmussen sent a letter to local realtors soliciting offers on lots in Karen's Subdivision.² The letter stated that the Rasmussens "anticipate[d] drawing approval within the next few weeks" and "hope[d] to have final plat approval by the end of April 2005..."

5. In response, Ragsdale contacted Mr. Rasmussen and went out to the site with him in early December 2004. The parties negotiated and eventually reached agreement with regard to the purchase of 15 lots.³

6. Prior to entering into the Purchase and Sale Agreement ("P&SA"), Tercel arranged for financing through Horizon Bank.⁴ Tercel was at all times ready, willing and able to close on the 15 lots identified in the P&SA as soon as practicable, and it was important to Tercel's business to do so.

7. Prior to entering into the P&SA, the parties discussed the fact that Tercel was going to finish its current project in early spring 2005 and that Tercel

¹ Originally called "Karen's Subdivision" and later called "Karen's Bakerview Subdivision."
² Ex 6.
³ Exs 7&8.
⁴ Ex. 9.

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was anxious to begin work on the Karen's Subdivision project by spring/summer 2005. The parties agreed that time was of the essence, and this condition was incorporated into the P&SA.⁵

8. The parties signed the P&SA during the period January 7-13, 2005. Tercel paid \$30,000 earnest money into escrow on January 7, 2005.⁶

9. While the P&SA was being signed, the City of Bellingham Department of Public Works gave drawing approval to Karen's Subdivision.⁷ Mr. Rasmussen notified Ragsdale of this on January 10, 2005, and furnished Ragsdale copies of the engineered drawings approved by the City of Bellingham on or shortly after January 10, 2005.⁸

10. At the time the P&SA was executed, the parties clearly understood which lots were being sold. The P&SA refers to "Lots 3-12 & 14-18 of Karen's Subdivision,"⁹ and these lots are described on the engineered scale drawings approved by the City of Bellingham.¹⁰

11. The configuration of the 15 lots changed in relatively minor respects between drawing approval and final plat approval.¹¹ These changes were of the kind which normally occur during the subdivision platting process and were contemplated in the 8/23/04 preliminary plat approval.¹² These changes were

⁵ Ex. 8, third page, paragraph I.
⁶ Ex 8, last page.
⁷ Ex. 5.
⁸ Ex. 10.
⁹ Ex. 8, first and fifth pages.
¹⁰ Ex. 5, sheets 4 and 6.
¹¹ Compare sheet 4 of Ex. 5 with page 18 of Ex. 30.
¹² Ex. 4.

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contemplated by the parties when they signed the P&SA and were acceptable to both parties.

12. During the approximately 6 month period following the signing of the P&SA, Tercel made arrangements to build on the 15 lots being purchased in Karen's Subdivision. Tercel designed houses for each of the 15 lots which conformed to the requirements imposed by the preliminary plat approval.¹³ Tercel also worked with the Rasmussens to satisfy conditions imposed under the preliminary plat approval. For example, Tercel designed driveway curb-cuts for the 15 homes designed by Tercel.¹⁴ Tercel also obtained appraisals on each of the 15 lots with the proposed homes so that buyers could readily obtain financing.

13. In July 2005, Ragsdale learned that the Rasmussens were attempting to sell the 15 lots being purchased by Tercel to third parties. Ragsdale discussed this with Mr. Rasmussen and, receiving no satisfaction, had Tercel's lawyer write the Rasmussens to inform them that Tercel was insisting on performance of the P&SA.¹⁵

The Rasmussens indicated that they were not bound by the P&SA and did not intend to honor it. Tercel then sued the Rasmussens for specific performance and later amended the complaint to sue for damages as an alternative remedy.

¹³ Ex. 4, third page. "Single-family residence shall be designed with front porches and garages set back from the porches."
¹⁴ Ex. 11.
¹⁵ Ex. 12.

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14. The Rasmussens were ordered to close the sale called for under the P&SA by order entered October 14, 2005. However, the sale was not closed until October 6, 2006.

15. The infrastructure for Karen's Subdivision was completed by summer 2005 except for a few minor items. The Rasmussens could have completed the subdivision and obtained final plat approval by late fall 2005.

This delay was unreasonable in length and was not within the contemplation of the parties at the time the P&SA was signed. Both parties understood that time was of the essence and incorporated that condition into the P&SA.

The delay resulted from the Rasmussens' obfuscation, intentional delay and erection of false barriers to obtaining final plat approval. In this regard, the Rasmussens acted in bad faith and contrary to their agreement.

16. The Rasmussens' bad faith failure to close the sale in the fall of 2005 caused Tercel to sustain damages in the amount of \$265,000, representing the difference between the purchase price and the value of the lots in the fall of 2005.

17. Between the fall of 2005 and the fall of 2006, the market for residential lots such as those in Karen's Subdivision plummeted. The 15 lots purchased by Tercel lost part of their value as a result of Tercel's not being able to get the lots to market during the one year delay caused by the Rasmussens.

Following the 10/6/06 closing, Tercel marketed and sold the 15 lots in a commercially reasonable manner. Tercel took all steps necessary to maximize profits, including building on some of the lots in order to stimulate interest in

1
2 potential purchasers. Nevertheless, Tercel has incurred, and will incur as a result of
3 the sale of the remaining lots, losses totalling \$245,890.23 on Karen's Subdivision.
4

5 Tercel's loss on these 15 lots would have been sustained by any buyer or by
6 the Rasmussens themselves had they chosen to market the lots. All the
7 expenditures and expenses incurred by Tercel in marketing and selling the lots
8 would have been incurred by any buyer or by the Rasmussens themselves.
9

10 From the foregoing findings of fact, the Court makes the following:

11 **CONCLUSIONS OF LAW**

- 12 1. The Court has jurisdiction of the parties and of the subject matter.
13 2. Pursuant to the July 7, 2008 Opinion and October 10, 2008 Mandate

14 from the Court of Appeals, this court's summary judgment ordering specific
15 performance of the P&SA must be vacated. Pursuant to RAP 12.8 and State v.
16 A.N.W. Seed Corporation, 116 Wn.2d 39 (1991), Tercel is obligated to make
17 restitution to the Rasmussens for the proceeds from the sale of the 15 lots. Since
18 the sale of the 15 lots has resulted in a substantial loss, there are no proceeds from
19 the sale, so the Rasmussens are not entitled to any recovery by way of restitution.
20

21 3. The P&SA is an enforceable contract. The fifteen numbered lots
22 conveyed to Tercel on October 6, 2006, are the same numbered lots identified in
23 the P&SA. While the configuration of these lots underwent minor changes between
24 drawing approval and final plat approval,¹⁶ the parties at all times understood what
25 property was to be conveyed under the P&SA.
26

27 ¹⁶ As discussed in Finding 11 below.

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RCW 58.17.205 authorizes "performance of an... agreement to sell... a lot... following preliminary plat approval." This statutory language contemplates the sale of part, but not all, of the property in a plat, which cannot be done without referring to the numbered lots within the plat. The statute therefore contemplates exactly the kind of legal description contained in the P&SA and authorizes performance of such an agreement. Any other conclusion would be inequitable and result in the unjust enrichment of the Rasmussens.

4. The P&SA reads in part:

10. Closing Date: within 14 days of final plat approval and assignment of Tax I.D. numbers

I. Computation of Time ...Time is of the essence in this Agreement.

In addition, every contract contains an "implied duty of good faith and fair dealing" which "obligates the parties to cooperate with each other so that each may obtain the full benefit of performance." *Badgett v. Second State Bank*, 116 Wn. 2d. 563, 569 (1991).

Here, the parties agreed that time was of the essence and that the transaction should close within 14 days of final plat approval. The Rasmussens breached this agreement by delaying final plat approval in bad faith for about one year. As a result, the market changed, and Tercel sustained damages.

An unreasonable delay in performing a contract entitles the non-breaching party to damages for the resulting delay. *Seattle v. Dyad Construction*, 17 Wn. App.

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501 (1977) rev den 91 Wn. 2d. 1007 (1978). Here, Tercel is entitled to damages caused by the Rasmussens' bad faith delay and breach of contract.

5. Following remand, this Court vacated Tercel's 10/20/06 award of \$47,295 in attorney's fees and expenses by Order on Rasmussens' Motion for Relief on Remand entered November 14, 2008. Judgment in favor of the Rasmussens in the amount of \$47,295 with interest at 12% from 10/20/06 was entered on November 26, 2008.

Tercel partially satisfied this judgment with payments of \$20,000 on January 21, 2009, another \$20,000 on February 2, 2009 and \$4,646.89 on March 23, 2009. The remaining balance on the 11/26/08 Judgment should be offset against the award to Tercel.

6. The Rasmussens' counterclaim should be dismissed with prejudice. The Rasmussens' defenses, including merger, estoppel, res judicata, election of remedies and failure to mitigate, do not bar Tercel's breach of contract action.

7. The P&SA contains an attorney's fee provision, which reads in part: If Buyer or Seller institutes suit against the other concerning this Agreement the prevailing party is entitled to reasonable attorney's fees and expenses.¹⁷

Such a provision entitles the prevailing party to recover its attorney's fees and litigation expenses. Tacoma North Park v. NW, 123 Wn.App. 73, 96 P.3d 454 (2004).

¹⁷ Ex. 8, third page, paragraph q.

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The 7/7/08 Opinion of the Court of Appeals states:

We reverse the summary judgment, vacate the award of attorney's fees, and remand to the trial court for further proceedings on the claim for damages and award of attorney's fees... The prevailing party at both the trial court and on appeal should receive reasonable attorney's fees and expenses at the conclusion of the litigation.¹⁸

Tercel prevailed at trial and is entitled to reasonable attorney's fees and expenses incurred at the trial court level. The Rasmussens prevailed on appeal and are entitled to reasonable attorney's fees and expenses incurred on appeal.
The amounts to be awarded will be determined by separate motion.

DONE IN OPEN COURT this 19 day of October, 2009.

JUDGE
(Handwritten signature)
Copy received:

Presented by:
BELCHER SWANSON LAW FIRM,
PLLC

By: *(Signature)*
JOHN C. BELCHER, WSBA #5040
Lawyer for Plaintiff

By: *(Signature)*
WILLIAM KNUDSEN, WSBA #6064
Lawyer for Defendants

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¹⁸ 7/7/08 decision at 10, emphasis supplied.

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WHATCOM COUNTY
WASHINGTON

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SUPERIOR COURT OF WASHINGTON, FOR WHATCOM COUNTY

TERCEL CORPORATION, a
Washington corporation,
Plaintiff,
vs.

No. 05-2-01677-5
(Judge Ira Uhrig)

DONALD A. RASMUSSEN and KAREN
RASMUSSEN, husband and wife,
Defendants.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
REGARDING AWARD OF
ATTORNEY'S FEES AND
EXPENSES FOLLOWING TRIAL

Hearing. Plaintiffs' Motion for Attorney's Fees, Costs of Investigation and
Litigation Related Expenses and Plaintiffs' Motion for Entry of Findings of Fact,
Conclusions of Law and Judgment Regarding Attorney's Fees and Expenses were
heard on October 19, 2009.

Appearances. All parties appeared through their counsel of record.

Record. The court considered the entire file, all previous hearings and trial
of this case in determining the reasonableness of plaintiffs' fees. In addition, the
following documents bearing upon the Motion for Approval of Attorney's Fees and
Costs of Investigation and Litigation-Related Expenses were specifically reviewed:
(1) Plaintiff Tercel's Motion for Award of Attorney's Fees and Costs dated July 10,
2006; (2) Declaration of John C. Belcher Regarding Attorney's Fees dated July 5,
2006 (with attachments consisting of bills); (3) Declaration of Timothy W. Carpenter

FINDINGS OF FACT AND CONCLUSIONS
OF LAW REGARDING AWARDING OF
ATTORNEY'S FEES AND COSTS
FOLLOWING TRIAL - 1

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2 in Support of Defendants' Responsive Memorandum to Plaintiff's Request for Award
3 of Attorney's Fees dated July 18, 2006; (4) Defendants' Responsive Memorandum
4 to Plaintiff's Request for Award of Attorney's Fees dated July 18, 2006; (5)
5 Declaration of Jack Swanson Regarding Additional Attorney's Fees and Replying to
6 Rasmussens' Response Regarding Attorney's Fees dated September 14, 2006
7 (including attachments); (6) Declaration of John Belcher Regarding Additional
8 Attorney's Fees and Replying to Rasmussens' Response Regarding Attorney's
9 Fees dated September 14, 2006 (including attachments); (7) Second Supplemental
10 Declaration of John Belcher dated October 5, 2006 (including attachments); (8)
11 Declaration of Hal Thurston in Support of Plaintiff's Request for Attorney Fee Award
12 dated September 26, 2006; (9) Reply to Defendants' Responsive Memorandum to
13 Plaintiff's Request for Award of Attorney's Fees dated October 5, 2006; (10)
14 Declaration of John C. Belcher dated September 29, 2009; (11) Plaintiff's
15 Memorandum in Support of Attorney's Fees and Expenses Following Trial dated
16 September 29, 2009; (12) Memorandum of Law in Support of Rasmussens' Motion
17 for Award of Attorney's Fees dated October 14, 2009; (13) Declaration of Timothy
18 W. Carpenter Regarding Attorney's Fees and Costs re Specific Performance Claim
19 dated October 13, 2009; (14) Declaration of Philip Buri Regarding Attorneys' Fees
20 on Appeal dated October 12, 2009; (15) Memorandum in Response to
21 Rasmussens' Memorandum dated October 16, 2009; and (16) Supplemental
22 Declaration of John C. Belcher Regarding Attorney's Fees and Expenses dated
23 October 16, 2009.

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27 *FINDINGS OF FACT AND CONCLUSIONS
OF LAW REGARDING AWARDING OF
ATTORNEY'S FEES AND COSTS
FOLLOWING TRIAL - 2*

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Based upon this record and upon the arguments of counsel, the Court makes the following:

FINDINGS OF FACT

1. Written Agreement. Tercel and defendants Rasmussen entered into a Vacant Land Purchase and Sale Agreement on January 7-13, 2005 ("P&SA"). This Agreement contains the following attorney's fee provision:

Attorneys' Fees. If Buyer or Seller institutes suit against the other concerning this Agreement the prevailing party is entitled to reasonable attorneys' fees and expenses.¹

2. Remand from Court of Appeals. In its 7/7/08 Decision, the Court of Appeals ruled as follows:

We reverse the summary judgment, vacate the award of attorney fees, and remand to the trial court for further proceedings on the claim for damages and award of attorney fees. Both parties request fees on appeal under RAP 18.1 and the VLSPA. The prevailing party at both the trial court and on appeal should receive reasonable attorney fees and expenses at the conclusion of the litigation.

Tercel prevailed at trial, and the Rasmussens prevailed on appeal. The Rasmussens should be awarded their attorney's fees and expenses incurred on appeal.

3. Proportionality Approach. However, Tercel should not be awarded all of its fees at trial, since it did not prevail upon specific performance. The

¹ Copy of agreement attached to 8/31/05 Declaration of Jason Ragsdale filed 9/2/05.
FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING AWARDING OF ATTORNEY'S FEES AND COSTS FOLLOWING TRIAL - 3

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2 Rasmussens should be awarded fees and the expenses incurred defending against
3 specific performance pursuant to Marassi v. Lau, 71 Wn.App. 912 (1993).

4
5 4. Award to Tercel. Tercel is not entitled to attorney's fees and expenses
6 incurred in pursuing specific performance. After subtracting the time spent on the
7 specific performance claim, Tercel's lawyers spent 192.5 hours on the case. The
8 reasonable value of these attorney's fees is \$48,125.00. After subtracting expenses
9 incurred on the specific performance claim, the reasonable amount of expenses
10 necessary in this case amounts to \$14,320.50.

11
12 5. Award to the Rasmussens. The reasonable attorney's fees incurred
13 by the Rasmussens on appeal amount to \$13,896.75. The reasonable expenses
14 incurred on appeal come to \$1,175.14.

15 The reasonable attorney's fees incurred by the Rasmussens in defending
16 against specific performance at the trial court level amount to \$21,433.00. The
17 reasonable expenses incurred defending against specific performance come to
18 \$277.80.

19
20 6. Lodestar Factors. The Court finds that the hours claimed and the
21 hourly rates charged by the respective parties' attorneys as set forth in their
22 declarations are reasonable and necessary for the work performed and the results
23 obtained. There are no other lodestar factors which have not already been taken
24 into account, so no further adjustment needs to be made.

25 From the foregoing findings of fact, the court makes the following:
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27 **FINDINGS OF FACT AND CONCLUSIONS
OF LAW REGARDING AWARDING OF
ATTORNEY'S FEES AND COSTS
FOLLOWING TRIAL - 4**

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CONCLUSIONS OF LAW

1. Plaintiff Tercel prevailed at trial, and Defendants Rasmussen prevailed
on appeal. The Rasmussens should be awarded their reasonable attorney's fees
and expenses on appeal.

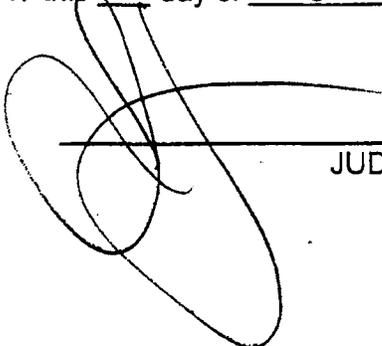
2. However, Tercel should not be awarded all of its fees at trial, since it
did not prevail on specific performance. The Rasmussens should be awarded fees
and the expenses incurred defending against specific performance pursuant to
Marassi v. Lau, 71 Wn.App. 912 (1993).

3. Tercel is entitled to an award of attorney's fees and expenses totaling
\$62,445.50.

4. The Rasmussens are entitled to an award of attorney's fees and
expenses totaling \$36,782.69.

5. Offsetting these amounts leaves \$25,762.81 to be awarded to Tercel
in attorney's fees and expenses, which should be added to the judgment entered in
this case.

DONE IN OPEN COURT this 19 day of Oct, 2009.



JUDGE

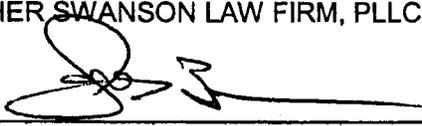
FINDINGS OF FACT AND CONCLUSIONS
OF LAW REGARDING AWARDING OF
ATTORNEY'S FEES AND COSTS
FOLLOWING TRIAL - 5

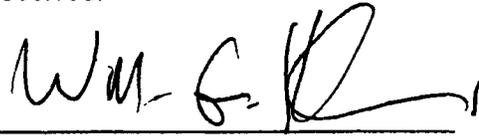
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Presented by:
BELCHER SWANSON LAW FIRM, PLLC

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By: 
JOHN C. BELCHER, WSBA #5040
Lawyer for Plaintiff

By: 
WILLIAM KNUDSEN, WSBA #6064
Lawyer for Defendants

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**FINDINGS OF FACT AND CONCLUSIONS
OF LAW REGARDING AWARDING OF
ATTORNEY'S FEES AND COSTS
FOLLOWING TRIAL - 6**

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

TERCEL CORPORATION, a)	
Washington corporation,)	No. 59007-3-1
)	
Respondent,)	DIVISION ONE
)	
v.)	UNPUBLISHED OPINION
)	
DONALD A. RASMUSSEN and KAREN)	
RASMUSSEN, husband and wife,)	
)	FILED: July 7, 2008
Appellants.)	
)	

APPELWICK, J. — A reference in a Vacant Land Purchase and Sale Agreement to specific lots in Karen's Subdivision, a preliminary plat, was insufficient to satisfy the statute of frauds. Summary judgment and specific performance were improperly ordered against the seller on the facts of this case, despite the seller's alleged anticipatory breach of the agreement. We reverse the summary judgment and specific performance, and remand for determination of damages and award of attorney's fees.

Facts

Donald and Karen Rasmussen applied to subdivide their three lots into approximately 20 lots in a development called Karen's Subdivision.¹ On August

¹ Donald's brother, Duane was also an owner of one of the lots but he later executed a quitclaim deed transferring all ownership to Donald and Karen Rasmussen.

23, 2004, Karen's Subdivision received preliminary plat approval. On December 3, 2004, Donald Rasmussen notified realtors of 20 lots for sale immediately.² On December 8, 2004, Jason Ragsdale, President of Tercel Corporation, offered \$1.2 million for 15 of the lots in Karen's Subdivision. On January 10, the City of Bellingham Department of Public Works approved the engineered plans for Karen's Subdivision, revised to conform to the terms of the preliminary plat approval. Ragsdale received copies of these plans soon after. Ragsdale and the Rasmussens completed a Vacant Land Purchase and Sale Agreement (VLPSA) on January 13, 2005.³ Ragsdale deposited \$30,000 of earnest money in escrow.

The Rasmussens undertook the work necessary to obtain final plat approval. In April 2005, the Rasmussens' plans for the subdivision changed. According to Donald Rasmussen, third parties, including utility companies delayed final plat approval. And, due to a change in circumstances, the Rasmussens intended to keep the lots and undertake development of the lots, themselves. They no longer planned to sell the property to Tercel. Citing the Rasmussens' anticipatory breach of the contract, Tercel filed a lawsuit in July

² RCW 58.17.205 authorizes the sale of lots following preliminary plat approval conditioned on final plat approval. "If performance of an offer or agreement to sell, lease, or otherwise transfer a lot, tract, or parcel of land following preliminary plat approval is expressly conditioned on the recording of the final plat containing the lot, tract, or parcel under this chapter, the offer or agreement is not subject to RCW 58.17.200 or 58.17.300 and does not violate any provision of this chapter. All payments on account of an offer or agreement conditioned as provided in this section shall be deposited in an escrow or other regulated trust account and no disbursement to sellers shall be permitted until the final plat is recorded."

³ The VLPSA was signed initially by Ragsdale (of Tercel) on January 7, 2007, and faxed to Rasmussen. Donald and Karen Rasmussen signed it on January 10, 2007 and faxed it back to Ragsdale. When Ragsdale learned there was a Mrs. Rasmussen, he added Karen Rasmussen to the contract as a seller and faxed the changes to the Rasmussens for approval. The Rasmussens faxed their approval of this change on January 13, 2007.

2005 seeking specific performance of the contract, and later amended to include a request for damages.

The parties filed cross motions for summary judgment. After two hearings, the trial court granted summary judgment for Tercel, denied summary judgment for the Rasmussens, and ordered the Rasmussens to specifically perform the purchase and sale agreement. The court retained jurisdiction to enforce the specific performance. On December 9, 2005, the trial court denied reconsideration of the summary judgment and ordered the Rasmussens to finish the work necessary for plat approval. In July 2006, the Rasmussens requested instructions that detailed their obligations to satisfy specific performance. The court issued those instructions on September 22, 2006. The Rasmussens obtained final plat approval and completed the transaction with Tercel. On October 20, 2006, the court awarded attorney fees and costs to Tercel and issued an order confirming the Rasmussens' compliance with the order of specific performance. The Rasmussens then appealed all the orders issued by the trial court pertaining to the transaction.

Discussion

When reviewing a summary judgment order, the appellate court undertakes the same inquiry as the trial court. Thompson v. Peninsula Sch. District No. 401, 77 Wn. App. 500, 504, 892 P.2d 760 (1995). Summary judgment is proper when there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c). The moving party bears this burden of proof. LaPlante v. State, 85 Wn.2d 154, 158, 531 P.2d

299 (1975). All facts and inferences are considered in the light most favorable to the non-moving party. Ashcraft v. Wallingford, 17 Wn. App. 853, 854, 565 P.2d 1224 (1977).

The Rasmussens argue that because the sale of lots in a preliminary plat is clearly conditioned on final plat approval, there is no final contract, no breach and nothing to specifically perform. Rasmussens further assert that the statute of frauds precludes specific performance of this VLPSA. We reject the assertion that breach is impossible prior to satisfaction of the condition of final plat approval. We also reject the notion that specific performance is never available to cure such a breach. Donald Rasmussen does not dispute that he renounced his intent to sell the lots to Tercel under the terms of the VLPSA. Assuming the renunciation constituted an anticipatory breach as alleged, the question is whether on these facts it may be cured by specific performance.

The Rasmussens contend that the VLPSA violates the statute of frauds which renders the agreement tentative and non-binding. The alleged violation of the statute of frauds arises from an inadequate legal description. A valid legal description for platted property must include, or refer to a document which includes, the lot number(s), block number, addition, city, county, and state. Martin v. Seigel, 35 Wn.2d 223, 229, 212 P.2d 107 (1949).

[1]in order to comply with the statute of frauds, a contract or deed for the conveyance of land must contain a description of the land sufficiently definite to locate it without recourse to oral testimony, or else it must contain a reference to another instrument which does contain a sufficient description.

Bigelow v. Mood, 56 Wn.2d 340, 341, 353 P.2d 429 (1960) (citing Bingham v. Sherfey, 38 Wn.2d 886, 234 P.2d 489 (1951); Martin, 35 Wn.2d 223; Fosburgh v. Sando, 24 Wn.2d 586, 166 P.2d 850 (1946); Barth v. Barth, 19 Wn.2d 543, 143 P. 2d 542 (1943); Martinson v. Cruikshank, 3 Wn.2d 565, 101 P.2d 604 (1940)).

The parties do not dispute that this longstanding rule applies here.

The VLPSA contained the following property description:

4. Property Tax Parcel Nos.: to be assigned at final plat approval (Whatcom County)
Street Address: XXX East Bakerview, Bellingham Washington 98226
Legal Description: Lots 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18 of Karen's sub-division which is currently located at 1711, 1785 & 1795 East Bakerview.

This description is insufficient on its face to satisfy Martin. The VLPSA authorized the closing agent to attach the correct legal description of the property. The agent attached the title information for the three parcels of land being platted as Karen's Subdivision. The attached title information contained legal descriptions and tax parcel numbers for the original three lots being subdivided, but also includes property not being subdivided or purchased by Tercel. This description, therefore, is overbroad and cannot serve as the legal description for the lots in the contract. Berg v. Ting, 125 Wn.2d 544, 553-54, 886 P.2d 564 (1995). The VLPSA contains the state, county, city, lot numbers, and reference to a subdivision. In the absence of an attached legal description, Tercel relies on incorporation by reference to the subdivision. The question, then, is whether this reference to Karen's Subdivision, which is a preliminary plat, is sufficiently specific to satisfy the statute of frauds.

The trial court believed that the description in the VLPSA and attached legal description provides all the essential information to direct someone to the city documents which contain the preliminary plat approval and documentation on Karen's Subdivision. "[C]an't somebody or could somebody take that document, look at it, see that it's situated in Whatcom County, see an address on Bakerview and then run down to the city and find that document?" In the court's opinion, parol evidence was unnecessary to acquire the legal description of the land to be sold under the VLPSA. "Those documents are filed with the city. I don't think you need parol evidence to find those documents. I think you need to go to the city to look for them, but I don't think you need to resort to parol evidence." Based on this conclusion, the trial court found that the agreement satisfies the statute of frauds through incorporation by reference.

Washington case law only has one example of incorporation by reference. See, Bingham, 38 Wn.2d at 889. In Bingham, the Court held a reference to a tax parcel number adequate because a tax parcel number was statutorily required on the assessor's public record. "[A] reference to this public record furnishes the legal description of the real property involved with sufficient definiteness and certainty to meet the requirements of the statute of frauds." Id. The assessor had a statutory duty to maintain public record of the tax parcels and corresponding properties.

Similarly, the county maintains publicly accessible records of plat applications, which may include information about the deed or other instrument of title for the property involved. We agree with the trial court that a VLPSA

reference to a public file, relating to a subdivision, found at a government office is allowable and can satisfy the statute of frauds. But, we disagree that the reference in this VLPSA was sufficient to satisfy the statute of frauds. Unlike in Bingham, where the tax number led to a specific document without resort to parol evidence, the reference in this contract failed to identify a specific document or instrument.

The subdivision had received preliminary plat approval at the time the Rasmussens offered the lots for sale. The approval of the plat was based on findings which required changes from the application and altered the dimensions and numbering of the lots. The plat had to be re-engineered to provide a corrected description of the lots as approved. The city had not approved the re-engineered drawings when the offer of sale was made. They were approved on January 10, the date the Rasmussens signed the VLPSA.

As evidence that the lots in the VLPSA conformed to the lots on the approved re-engineered drawings, Tercel introduced the Rasmussens' letter offering the lots for sale. The letter contains lot numbers and corresponding square footages. They do not match the lot numbering or lot size in the preliminary plat application. The lot numbering and lot size do fit the re-engineered lot lines that brought the subdivision into compliance with the preliminary plat approval conditions. But, the VLPSA does not specifically refer to the re-engineered drawings in the file and approved on January 10. We cannot infer that the parties intended to reference that document nor can we infer a proper legal description, based on the other documents in the file, testimony of

city staff, or the Rasmussens' offer letter. All such evidence violates the extrinsic evidence prohibition of the statute of frauds. Martin, 35 Wn.2d at 228-29.

If Tercel had provided a clear reference in the VLPSA to the re-engineered plat map approved by Public Works, or attached the drawings to the contract, we could rely on the specifically referenced document for the legal description. But, as the VLPSA stands, the reference to Karen's Subdivision in the VLPSA does not identify, with sufficient specificity, existing documents that contain a complete legal description without resort to parol evidence. Therefore, the legal description violates the statute of frauds. Without a sufficient legal description, the court cannot order specific performance of the contract. Herrmann v. Hodin, 58 Wn.2d 441, 443, 364 P.2d 21 (1961). The trial court erred in granting specific performance.

Tercel requests an opportunity to argue additional grounds for specific performance—namely reformation and part performance. Courts have reformed defective property descriptions resulting from mutual mistake. See, Lofberg v. Viles, 39 Wn.2d 493, 236 P.2d 768 (1951); Tenco Inc. v. Manning, 59 Wn.2d 479, 486, 368 P.2d 372 (1962); Bergstrom v. Olson, 39 Wn.2d 536, 236 P.2d 1052 (1951). But, “[r]eformation is not appropriate if the agreement expresses the intent of the parties but the legal description is merely incomplete.” Key Designs, Inc. v. Moser, 138 Wn.2d 875, 888, 983 P.2d 653 (1999) (citing Williams v. Fulton, 30 Wn. App. 173, 176-77, 632 P.2d 920 (1981); Halbert v. Forney, 88 Wn. App. 669, 673, 945 P.2d 1137 (1997)). Since this VLPSA reflects the intent of both the Rasmussens and Tercel, but contains a flawed

legal description, reformation does not take the contract out of the statute of frauds. Reformation is not available as a matter of law.

Tercel attempts to invoke part performance to remove the VLPSA from the statute of frauds, relying on Dunbabin v. Allen Realty Co., 26 Wn. App. 660, 613 P.2d 570 (1980). “[A] contract for the sale of land which does not satisfy the statute of frauds is enforceable by the part performance of the parties when the purchaser takes exclusive possession of the property in reliance of the contract with the assent of the seller, tenders payment of the purchase price and makes substantial improvements in the property.” Id. at 665. In Dunbabin, the seller of a building alleged that the closing agent lacked authority to close the sale and a violation of the statute of frauds. The Dunbabin court found significance in the fact that the parties clearly knew the property at issue because “[t]he legal description appeared in several documents prepared subsequent to the earnest money contract, including the real estate contract, and the notice of intention to declare a forfeiture.” Id. at 665-66. Also, the purchaser made a series of payments on the real estate contract, paid real estate taxes following the closing of the sale, and made substantial improvements on the property. Id. at 663, 665.

Tercel prepared a curb cut map and site-specific plans for the homes it intended to develop. It offered these plans as evidence that both parties clearly knew the lots which were intended for sale under the VLPSA. These documents do evidence general intent, but they do not contain a legal description of the lots. Unlike the purchaser in Dunbabin, Tercel did not take exclusive property of the lots, and, except for the escrow funds in trust, did not perform on the contract.

Terrel's reliance on Dunbabin is misplaced. We see no basis to hold that part performance removes this VLPSA from the statute of frauds.

We reverse the summary judgment, vacate the award of attorney fees, and remand to the trial court for further proceedings on the claim for damages and award of attorney fees. Both parties request fees on appeal under RAP 18.1 and the VLPSA. The prevailing party at both the trial court and on appeal should receive reasonable attorney fees and expenses at the conclusion of the litigation.

Appelwick, J.

WE CONCUR:

Cox, J.

Grosse, J.