

No. 35046-7-II

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

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HENRY DRAGT and JANE DRAGT, husband and wife,

Appellants,

v.

DRAGT/DETRAY, L.L.C., a Washington limited liability; E. PAUL  
DETRAY and PHYLLIS DETRAY, and their marital community,

Respondents.

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APPELLANTS' REPLY BRIEF

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RYAN, SWANSON & CLEVELAND, PLLC  
Kevin A. Bay, WSBA No. 19821  
Aaron M. Laing, WSBA No. 34453  
1201 Third Avenue, Suite 3400  
Seattle, Washington 98101-3034  
(206) 464-4224

Attorneys for Appellants

RYAN, SWANSON & CLEVELAND  
1201 Third Avenue, Suite 3400  
Seattle, Washington 98101-3034  
(206) 464-4224

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**A. Introduction.**

This case presents a relatively simple set of issues to this Court. What rights, if any, does an optionee or its principal have in real property after an option has been found to be invalid because it was too vague to be enforced? If such a right can be found, can it meet the same tests the original option failed (i.e., is it too vague to be enforced) as well as the normal requirements of the statute of frauds and community property law?

Realizing that his position is hopelessly violative of real property law, DeTray attempts to style his interest as a personal property right, conveyed to him personally by an oral or implied agreement after the invalid option was granted to the LLC. DeTray's desperate attempts to find a cause of action are without merit.

A wolf in sheep's clothing is still a wolf. DeTray's alleged interest in the Dragt's land, if it exists, is necessarily an interest in real property no matter what label it is given. As an interest in real property, it is even more vague than the invalid written option it replaces, violates the statute of frauds, and fails to comply with community property law. Even if it could be styled as a personal property right or license, it would still violate the statute of frauds for agreements lasting more than one year and would terminate upon sale.

DeTray's claims of oral or implied contract are equally weak. There is absolutely no evidence in the record that the parties recognized the written option was invalid until shortly before the sale. At all pertinent times, both parties acted as if the option was valid. Accordingly, there is

no evidence that the parties ever negotiated a replacement agreement for the invalid option, nor can such an agreement be inferred from their actions. To hold otherwise would mean there is an implied agreement behind every invalid option, rendering the invalid option valid, notwithstanding its undisputed flaws. This is simply not the law.

DeTray's response is accurate in one respect: reliance upon an invalid option can produce seemingly harsh results. The LLC lost its option and DeTray lost his investment in the LLC. The Dragts lost as well, since their property was off the market, delaying their retirement for nearly a decade. In the end, no value was added to the land and the Dragts sold it for the same amount they could have sold it for years earlier. *See*, Opening Brief at 7-8.

A harsh result, however, is not a reason to ignore established law, strain simple legal concepts to the breaking point or overlook a striking lack of evidence. Moreover, DeTray's dilemma is one of his own making. DeTray produced the LLC Agreement containing the invalid option, then failed to perform. The Dragts arranged to repay DeTray for the mortgage payments but DeTray refused,<sup>1</sup> preferring to seek a greater amount at trial based upon contract theories. Now that these theories have been shown to be unavailing, DeTray shifts from the oral contract theories he argued to

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<sup>1</sup> Although the Dragts were not legally obligated to do so, Henry Dragt felt morally obligated to repay DeTray for his contributions for the mortgage and even negotiated this into the sale contract with Tahoma Terra. RP 2/27/06 at 136:2-15; Ex. 176 at 11, ¶ 6. At trial, the Dragts even suggested methods by which the trial court could return portions of DeTray's capital contributions. CP 580. But DeTray wanted a home run and declined these efforts.

the trial court, to implied contract and even unjust enrichment, theories which DeTray expressly abandoned at trial. Simply put, there is no legal theory which allows DeTray to claim the lion's share of the proceeds from the sale of the Dragts' undeveloped land, and there is no evidence to support the flawed legal theories he has crafted. The trial court's decision was clearly flawed and should be reversed with instructions to dismiss DeTray's counterclaims with prejudice.

**B. DeTray fails to demonstrate that the Dragts gave him any enforceable interest in their land or the sale proceeds thereof.**

1. The Dragts' alleged obligation to "hold their property" is unenforceable as a matter of law regardless of whether it is an interest in real property or personal property.

"The term 'interest' is the most general word that can be used to denote any property right in land or chattels." *Robroy Land Co. v. Prather*, 95 Wn.2d 66, 69, 622 P.2d 367 (1980).

DeTray concedes that if his right to the Dragts' land constitutes an interest in real property, the conveyance of that interest is unenforceable because it did not satisfy the statute of frauds and community property laws. Resp. Br. at 18; *see also, Bartlett v. Betlach*, \_\_\_ Wn. App. \_\_\_, 146 P.3d 1235, 1237-38 (2006). Accordingly, DeTray argues the Dragts' obligation to hold their land for DeTray's benefit is not an interest in real property but a personal property interest excepted from the statute of frauds and community property law. *Id.* at 18-19. DeTray is wrong.

First, DeTray fails to explain how the Dragts could simultaneously give an option to the LLC and a contract right for the same land to DeTray

without one or both of them violating their obligations to the LLC. The fact is that DeTray was never granted an interest in or right to the Dragts' land. Both parties proceeded under the mistaken belief the option in the LLC Agreement was valid (*see, e.g.*, RP 2/27/06 at 80:7-18), and there is no evidence the Dragts granted any interest in their land other than that option.

Second, the Dragts' obligation to hold their land for DeTray, if it existed, was an option. As DeTray describes it, the Dragts were obligated to hold their land for him, he had the exclusive right to acquire the land, and upon acquisition, he was to pay the Dragts a certain amount per acre. Resp. Br. at 10, 21, 42. What DeTray is describing is an option. *See, McFerran v. Heroux*, 44 Wn.2d 631, 638-39, 269 P.2d 815 (1954). Moreover, it is an option which suffers from the same defects as the original option and is unenforceable as a matter of law.

Third, if the Dragts' obligation to hold their land for DeTray is not an option, it is, as DeTray claims, an encumbrance: “[t]he Dragts could have sold the property to anyone<sup>2</sup> subject to DeTray’s retention of an exclusive right to proceed with development.” Resp. Br. at 21. *See, Snohomish Cy. v. Seattle Disposal Co.*, 70 Wn.2d 668, 672, 425 P.2d 22 (1967), quoting *Hebb v. Severson*, 32 Wn.2d 159, 167, 201 P.2d 156 (1948) (an encumbrance is any “burden upon land depreciative of its value,...which, though adverse to the interest of the landowner, does not

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<sup>2</sup> One wonders how the Dragts breached the alleged agreement by selling their land if they “could have sold the property to anyone.” Resp. Br. at 21.

conflict with his conveyance of the land in fee”). An encumbrance constitutes an interest in real property which must satisfy the statute of frauds. RCW 64.04.010, .020; *Berg v. Ting*, 125 Wn.2d 544, 551, 886 P.2d 564 (1995). Moreover, if the land is community property, the encumbrance must be granted by both spouses, an event which did not occur in this case.<sup>3</sup> *See*, RCW 26.16.030(3).

Fourth, even if DeTray’s rights to the Dragts’ land are merely “development rights” as he argues (Resp. Br. at 21), such rights constitute an interest in real property. “Although less than a fee interest, development rights are beyond question a valuable right in property.” *Louthan v. King County*, 94 Wn.2d 422, 428, 617 P.2d 977 (1980), citing *Penn Cent. Transp. Co. v. New York*, 438 U.S. 104, 57 L. Ed. 2d 631, 98 S. Ct. 226 (1978). Accordingly, such rights may only be acquired by compliance with the statute of frauds.

Fifth, the Dragts’ alleged obligation to hold their land was an interest in real property because it restrained alienation. In Washington, any restraint on alienation conveys an interest in real property. *Alby v. Banc One Fin.*, 156 Wn.2d 367, 372, 128 P.3d 81 (2006).

No matter what label is attached to it, the Dragts’ alleged obligation to hold their land for DeTray is an interest in real property. The conveyance of that interest was unenforceable as a matter of law because it did not satisfy the statute of frauds, was impermissibly vague and did

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<sup>3</sup> The trial court’s ruling obliterates a wife’s rights in community property, leaving Jane Dragt with little of her retirement asset though she agreed to give nothing away.

not comply with community property law. The supreme irony of this case is that DeTray seeks to replace an invalid option in real property with a “contract right” affecting real property which is even more vague, lacks even more terms and is not memorialized in any writing. There is no escaping the fact that DeTray’s alleged interest is in land, and therefore must meet all the requirements he failed to address in the LLC Agreement.

Yet, even if DeTray’s alleged rights in the Dragts’ land were personal property, those rights would still be unenforceable. First, all contracts to be performed over more than one year must be in writing. RCW 19.36.010. Since DeTray claims the Dragts were obligated to hold the land from 1996 until at least 2004 (Resp. Br. at 27), the alleged oral agreement was unenforceable pursuant to RCW 19.36.010.<sup>4</sup>

Second, if DeTray’s right to the Dragts’ land was personal property, it was a license. *Bakke v. Columbia Valley Lumber Co., Inc.*, 49 Wn.2d 165, 170, 298 P.2d 849 P.2d (1956) (a license is an authorization to carry out an act or series of acts on another’s property without a possessory interest in that property). A license terminates as a matter of law when the licensor sells the land.<sup>5</sup> *Granston v. Callahan*, 52 Wn. App.

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<sup>4</sup> The written LLC Agreement does not supply the necessary writing. DeTray claims that the Dragts’ obligation to hold their land is distinct from the LLC Agreement (Resp. Br. at 17, 24, 30), and there is no evidence the parties intended to incorporate the terms of the LLC Agreement into the oral agreement between the Dragts and DeTray.

<sup>5</sup> If DeTray’s interest did not terminate when the Dragts sold their land, then it was necessarily an interest in land which was unenforceable because it failed to satisfy the statute of frauds. *Bakke v. Columbia Valley Lumber Co., Inc.*, 49 Wn.2d at 170-71. Either way, DeTray had no enforceable interest in the proceeds of the sale of the Dragts’ land.

288, 295, 759 P.2d 462 (1988). Thus, if DeTray's "exclusive right to develop" the Dragts' land was personal property (Resp. Br. at 21), it was a license that terminated as a matter of law when the land was sold to Tahoma Terra.

Regardless of how DeTray's interest is characterized – an option, an encumbrance, development rights or personal property – the conveyance of that interest is unenforceable as a matter of law. Conclusion of Law No. 4 is therefore in error and the resulting judgment should be reversed.

2. The Dragts' alleged obligation to hold their land indefinitely is an unreasonable restraint on alienation and violates the rule against perpetuities.

In defense of Conclusion 4, DeTray contends (a) that the Dragts' obligation to hold their land is not a restraint upon alienation, or (b) if it is a restraint, it is reasonable. Resp. Br. at 19-21. Neither claim has merit.

The Dragts alleged obligation to hold their land for DeTray was necessarily a restraint on alienation. If the obligation were not a restraint, DeTray could not claim a breach based on the sale. *See, Robroy Land Co. v. Prather*, 95 Wn.2d 66, 70-71 (a restraint upon alienation is any interest or right that fetters the marketability of land or deters an owner from selling).

The key question, therefore, is whether the restraint was reasonable. A restraint is unreasonable, and therefore unenforceable, if it is unlimited in duration, lacks procedures for exercising the restraint, prohibits alienation to a large number of persons, or runs in favor of one

who has no interest in the land or merely serves to create profit for that person. *Girard v. Myers*, 39 Wn. App. 577, 584-86, 694 P.2d 678 (1985); *Lawson v. Redmoor Corp.*, 37 Wn. App. 351, 354, 680 P.2d 69 (1984).

These factors establish that the Dragts' obligation to hold their land is an *unreasonable* restraint. The obligation is of unlimited duration, prohibits the Dragts from alienating their land to anyone but DeTray, sets no procedures for exercising DeTray's right to the land, runs in favor of DeTray, who contends in this appeal that he has no interest in the Dragts' land (Resp. Br. at 19), and functions only to preserve a profit for DeTray whether earned or not. Conclusion of Law 4 enforcing the restraint on alienation is therefore contrary to applicable law and should be reversed.

3. The terms of the parties' alleged oral agreement are too indefinite to be enforced.

DeTray insists that the terms of the alleged oral agreement between the Dragts and DeTray are definite. However, there is no evidence that the parties ever met and agreed to a new agreement to replace or modify the invalid written option. Moreover, the only terms DeTray can identify are the Dragts' obligation to hold their land and pay DeTray for his capital contributions. Resp. Br. at 27. There is no evidence the parties agreed on the duration of the obligation to hold the land; how or when DeTray was to exercise his right to acquire the land; who was to insure, maintain, and pay the taxes on the land and for how long; whether and to what extent the land could be encumbered and how much, if any, the Dragts were to be paid when DeTray developed the land. In other words, the alleged oral

agreement contained almost none of the requirements of an enforceable contract. *See, King County v. Taxpayers of King Co.*, 133 Wn.2d 584, 600, 949 P.2d 1260 (1997) (absent sufficient definiteness, a contractual promise is essentially illusory and unenforceable).

DeTray's argument that the alleged oral agreement is sufficiently definite because the trial court identified "behavior that constitutes a breach" begs the question. Resp. Br. at 22. The evidence must establish that the parties' agreement existed and is sufficiently definite *before* a court can determine there was a breach. It cannot be assumed an agreement is sufficiently definite merely because a court believes there was a breach. The law requires there be evidence of all the essential terms of a contract, including a time for performance and price, elements which are notably missing from the record here. *See, e.g., Setterlund v. Firestone*, 104 Wn.2d 24, 25-26, 700 P.2d 745 (1985).

Nor can DeTray rely on the LLC Agreement to provide the missing terms. As DeTray claims, the Dragts' obligations to DeTray are "distinct" from the LLC Agreement. Resp. Br. at 17, 24, 30. The LLC Agreement contains the duties and obligations the Dragts owe *to the LLC*. *See*, Ex. 178. There is no evidence that the Dragts granted the same rights or undertook the same responsibilities to DeTray personally.

It is uncontested that the written option the Dragts granted to the LLC lacked the necessary terms of an enforceable contract. The alleged oral agreement found by the trial court is even more vague, is unsupported by the evidence and therefore is unenforceable as a matter of law.

**C. DeTray cites no evidence or legal grounds to support the trial court's erroneous finding that the parties orally modified the LLC Agreement.**

The trial court erroneously found that the Dragts orally agreed to modify the LLC Agreement, adding new obligations directly to DeTray to replace the invalid option in the LLC Agreement. CP 883-88 (FF 17-20, CL 3, 4); Ex. 178. This finding is not supported by any evidence. There is no evidence the parties know the option was invalid, that they ever discussed a modification of the LLC Agreement, or agreed to new terms.

To avoid defending the indefensible, DeTray attempts to argue that the parties' modified agreement can be implied. Resp. Br. at 27. According to DeTray, the trial court properly found the Dragts and DeTray had an *unspoken* multi-million deal to develop 220 acres of land. *Id.* at 9, 26. However, there is no support in the record for either an oral or implied agreement, warranting reversal of the trial court's conclusions.

1. DeTray identifies no evidence in the record that the Dragts "orally agreed" to any new contractual obligations not contained in the original LLC Agreement.

In their opening brief, the Dragts demonstrated DeTray's unambiguous belief that the Dragts agreed to "hold" their property *from the time they entered into the LLC Agreement* and challenged DeTray to identify any evidence that the parties subsequently agreed to new terms. Opening Brief at 26-29.

Although DeTray contends the contract modification is evidenced by the words of Dragts and DeTray (Resp. Br. at 26), the testimony DeTray cites relates to the option in the LLC Agreement and the parties'

mistaken belief that it was enforceable. *See, e.g.*, RP 2/27/06 at 80:7-13 (DeTray always understood the Dragts would hold their land). DeTray can identify no “words” of agreement to support a new or modified agreement. In fact, the words “we agreed” or their equivalent cannot be found in the record, nor is there evidence the parties ever discussed new terms.

Lacking evidence of any oral discussion, DeTray raises a new argument on appeal, contending the “oral agreement” was actually an “implicit” agreement. Resp. Br. at 27. This argument should not be considered since it was not raised below and the trial court made no findings of an implied agreement. *Wingert v. Yellow Freight Systems, Inc.*, 146 Wn.2d 841, 853, 50 P.3d 256 (2002). If it is considered, it is meritless. According to DeTray, the trial court could infer an unspoken contract for a \$40 million development project from two innocuous events: (1) DeTray’s contribution of capital to the LLC in 1997 and (2) his guarantee of the mortgage in 2003. Resp. Br. at 9, 26. The fact that these events were six years apart negates any inference that they were given in exchange for a new promise by the Dragts. In fact, there is no evidence that either act was done in exchange for a new promise by the Dragts.

Henry Dragt testified, for example, that both parties knew before they signed the LLC Agreement that the Dragts had insufficient money to continue paying their mortgage and that the LLC would have to take on that expense if the land was to be available for its option. RP 2/27/06 at 124:14-18; 134:6-21; CP 223:20-25. DeTray agreed, admitting that the

LLC's payment of the Dragts' mortgage was "one of the many considerations and benefits which [the Dragts] received almost immediately." CP 189:22-23; *see also*, 202:24-26. DeTray further admitted that he contributed the capital to pay the Dragts' mortgage because he was required to by the LLC Agreement, not in exchange for a new promise from the Dragts. RP 2/27/06 at 81:18-25.

There is simply no evidence that DeTray contributed capital in exchange for a new interest in the Dragts' land or that the Dragts agreed to give a new interest in their land in exchange for the capital contributions. Nor can such an intent be inferred given the parties' uncontradicted testimony that they were acting in conformity with their understanding of the original LLC Agreement. *See, e.g.*, RP 2/27/06 at 80:7-18; 81:18-25; 78:18-25; 84:10-25.

Likewise, there is no evidence the Dragts agreed to give DeTray anything in exchange for his guarantee or that DeTray signed the guarantee in exchange for a promise by the Dragts. Nor is there evidence that the Dragts "requested" DeTray guarantee the loan as DeTray claims. Resp. Br. at 9, 10, 28. The only evidence is that the Dragts were not aware that DeTray had been asked by the bank to guarantee the loan. RP 2/27/06 at 135:1-6. If the Dragts were unaware of the guarantee, they could not have agreed to give DeTray something in exchange.

The trial court erred. Findings 17 – 20 are unsupported by any evidence and Conclusions 3 and 4 should be reversed.

2. DeTray can point to no evidence of a meeting of the minds with the Dragts to modify the LLC Agreement.

The Dragts also challenged DeTray to identify evidence of a meeting of the minds subsequent to the original LLC Agreement. No evidence was cited. And there is nothing to support an inference that the parties granted a new option when they both erroneously believed for years that the original option was valid. Opening Brief at 29-30.

Lacking evidence of a meeting of the minds, DeTray raises a new, heretofore unexpressed, theory of why the parties agreed to the second option. The theory is the Dragts *may have* agreed to hold their land for DeTray personally “as a fall-back, alternative provision for the event that the LLC should choose not to acquire the Property by exercising the option.” Resp. Br. at 30. DeTray’s conclusion is that the trial court could infer a meeting of the minds from the parties’ *possible* motives, even though the parties themselves never actually discussed the alleged agreement, and never discussed their motives.

This argument should not be considered since it is raised for the first time on appeal and there are no findings or conclusions to support it. *See, Wingert v. Yellow Freight Systems, Inc.*, 146 Wn.2d at 853. If the argument is considered, it is nonsense. Mutual modification of a contract by subsequent agreement requires a meeting of the minds. *Wagner v. Wagner*, 95 Wn.2d 94, 103, 621 P.2d 1279 (1980). “Mutual assent is the modern expression for the concept of ‘meeting of the minds.’” *Swanson v. Holmquist*, 13 Wn. App. 939, 942, 539 P.2d 104 (1975). Mutual assent

requires an offer and acceptance, a promise to render a stated performance in exchange for a return promise. *Yakima County Fire Dist. 12 v. Yakima*, 122 Wn.2d 371, 388-89, 858 P.2d 245 (1993). “It is essential to the formation of a contract that the parties manifest to each other their mutual assent to the same bargain at the same time.” *Id.* at 388.

There is no evidence of mutual assent to any new or modified contract terms anywhere in the record. DeTray could not even testify whether the alleged agreement occurred in 1997, when he contributed capital, or in 2003 when he signed the guarantee. *See*, Resp. Br. at 9, 26. The fact is that neither party even contemplated modifying the LLC Agreement. There was no need to as DeTray always understood the Dragts would hold their land. RP 2/27/06 at 80:7-13. As DeTray insisted, the LLC Agreement “at all times...remained and continues to be the Agreement between the parties and neither of the [Dragts] ever made any demand upon DeTray for its revision or rescission in any respect.” CP 404:7-10. There is simply no evidence of a meeting of the minds to support the trial court’s Findings 17 – 20 or Conclusions 3 and 4. The judgment should therefore be reversed.

3. DeTray identifies no new consideration to support the alleged modification of the LLC Agreement.

It is axiomatic that any modification of a contract must be supported by consideration. *See*, Opening Brief at 30. DeTray points to his capital contributions to the LLC in 1997 and his guarantee in 2003 as

new consideration.<sup>6</sup> However, there is no evidence DeTray contributed capital as part of a modification of the LLC Agreement. Rather, DeTray admitted that he contributed capital because he was required to by paragraph 5.4 of the LLC Agreement. RP 2/27/06 at 81:18-25. He further admitted that those contributions were “one of the considerations” the Dragts received under the LLC Agreement. CP 189:22-23.

Similarly, there is no evidence that DeTray asked for or expected anything in return for signing the guarantee or that he was signing it for any reason other than to keep the Dragts’ land available for the LLC. RP 2/27/06 at 80:15-18. Thus, if new consideration was received from the guarantee, it was intended to benefit the LLC.

Findings 17 – 20 and 24 are unsupported and Conclusions 3 and 4 should be reversed.

4. DeTray’s response demonstrates how the trial court’s analysis violates the objective manifestation theory of Washington contract law.

DeTray contends the trial court was free under the “context rule” to write new contract terms for the parties based on the court’s view of mutual intent. Resp. Br. at 26. In support, he cites a Virginia opinion. *Id.* Washington law is to the contrary.

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<sup>6</sup> Logically, since these events were six years apart, only one could be consideration for a reciprocal promise by the Dragts. For example, if the Dragts gave DeTray an interest in their land in 1997 in exchange for the capital contributions, they could not later give the same interest in exchange for the guarantee. The fact that DeTray cannot explain whether the alleged oral agreement was reached in 1997 or 2003 demonstrates the lack of an agreement.

Washington adheres to the objective manifestation theory of contract interpretation. Under that theory, the court determines intent by examining the *objective manifestation* of the parties' mutual intent. *Hearst Comm., Inc. v. Seattle Times*, 154 Wn.2d 493, 503, 115 P.2d 262 (2005). The context rule applies only if a specific contract provision requires interpretation. *Id.* In that instance, the context rule allows the court to consider extrinsic evidence of intent, including the parties' conduct, to interpret the term. *Id.* at 502. If there are no ambiguous terms, however, there is no need to consider extrinsic evidence. *Id.* at 503. In no event is the trial court allowed to employ extrinsic evidence to modify the written terms of the parties' agreement. *Id.*; *U.S. Life Credit Life Ins. Co. v. Williams*, 129 Wn.2d 565, 571, 919 P.2d 594 (1996) (context rule cannot be used to emasculate the parties' written terms).

The trial court ignored the objective manifestation doctrine and the limited use of extrinsic evidence.<sup>7</sup> The court never identified a provision of the LLC Agreement that needed to be interpreted; accordingly, resort to extrinsic evidence was inappropriate. Despite the absence of any ambiguity, the trial court not only considered extrinsic evidence but used it *to create* – not interpret – contract terms the parties did not write or agree upon themselves. In essence, the trial court wrote a new contract for the

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<sup>7</sup> Even if it was proper to consider course of conduct as extrinsic evidence of mutual intent, the Dragts are aware of no authority for the proposition that acts consistent with the parties' original understanding of their contract can be relied upon to alter the contract.

parties based upon its view of what should have happened. This was error. Conclusion 3 should be reversed.

5. DeTray cannot support the trial court's refusal to enforce the integration clause and the parties' prohibition against oral amendments.

The Dragts appealed Conclusion 2 that the prohibition against oral modification was unenforceable. In response, DeTray claims the court could “infer” an intent to waive the prohibition. Resp. Br. at 30-31. However, the trial court did not find the provision was waived, nor did DeTray plead or argue waiver as a defense. *See*, CP 880-88; CP 402-08. Instead, the trial court erroneously concluded that paragraph 15.3 of the LLC Agreement was unenforceable *as a matter of law*. CP 888 (CL 2).

Even if waiver were at issue, there was no evidence from which the trial court could infer paragraph 15.13 was waived. An implied waiver requires unequivocal acts or conduct evidencing an intent to waive and cannot be inferred from doubtful or ambiguous factors. *Jones v. Best*, 134 Wn.2d 232, 241, 950 P.2d 1 (1998). There was no evidence of any act indicating an intent to waive the prohibition against oral amendments.

The Dragts also appealed the trial court's failure to enforce the integration clause (paragraph 15.13) of the LLC Agreement. Ex. 178 at 25. DeTray's argument that the integration clause does not apply to “subsequent agreements and conduct” misses the point. Resp. Br. at 32. The parties knew before they signed the LLC Agreement that DeTray would have to contribute capital for the LLC to pay the Dragts' mortgage and keep the land available for the LLC. RP 2/27/06 at 124:14-18; 134:6-

21; CP 223:20-25; CP 189:22-23; CP 202:24-26. Thus, the parties could have included a provision requiring DeTray to make those contributions or giving him some additional interest in the Dragts' land in exchange. The parties chose not to. Ex. 178. Under those circumstances, the integration clause prohibits subsequently adding the same terms to the Agreement.

Even more significant is the parties' pre-agreement negotiations. DeTray proposed a joint venture where the Dragts would give DeTray an interest in their land. RP 2/27/06 at 32:12-13; 34:10-15; Ex. 179 at 3. The Dragts rejected the proposal because they were only willing to grant an option. RP 2/27/06 at 32:16-19; 77:20-78:1; 34:10-17; 35:2-6; 101:7-11; 102:24-103:3. The new agreement created by the trial court is precisely the deal the parties rejected: a joint venture that gives DeTray rights to the Dragts' land. The integration clause specifically prevents resuscitating terms the parties previously rejected. *Lopez v. Reynoso*, 129 Wn. App. 165, 171, 118 P.2d 398 (2005), *review denied*, 157 Wn.2d 1003 (2006).

The integration clause is highly relevant in this case. The trial court expanded the Dragts' duties and obligations under the LLC Agreement even though it was a fully integrated contract. This was error and the trial court should be reversed.

**D. DeTray does not and cannot defend the trial court's erroneous conclusion that the Dragts were required to give notice prior to selling their land.**

The trial court found the Dragts breached the LLC Agreement by selling their land "without prior notice to DeTray." CP 888 (CL 7). DeTray does not attempt to defend this conclusion. He cannot dispute that

paragraph 12.2 of the LLC Agreement applies only to a sale of the Dragts' share of the LLC, not to their land. Rather, DeTray side-steps the trial court's conclusion and claims the court was correct because it *could have* concluded the Dragts breached paragraph 12.2 by giving some documents to Tahoma Terra. Resp. Br. at 35-36. DeTray's argument is moot since the trial court made no such finding and even if it did, there was no evidence of resulting damages. The documents had no value to Tahoma Terra (RP 3/1/06 at 13:3-14:5), and there is no evidence that transferring plans for the LLC's abandoned development caused over \$2 million in damages.

As a matter of law, the Dragts did not breach paragraph 12.2 of the LLC Agreement by selling their land without notice. Conclusion 7 is erroneous and should be reversed.

**E. DeTray cannot support the trial court's improper use of the duty of good faith.**

DeTray defends the trial court's conclusions of law by summarily stating that the court did not add terms to the LLC Agreement. Resp. Br. at 38. DeTray is wrong again.

In Conclusion 5, the trial court used the duty of good faith to transform the LLC – the company structure the parties selected – into a general partnership. This was error. *In re Hadley*, 88 Wn.2d 649, 655, 565 P.2d 790 (1977) (when parties have purposefully selected a form of ownership of property for its tax or other attributes, they cannot later ask the court to disregard their selection and change the status of ownership).

Similarly, in Conclusion 6, the trial court used the duty of good faith to create a requirement that the Dragts give notice to DeTray prior to selling their land. This was error too. *Badgett v. Security State Bank*, 116 Wn.2d 563, 569-70, 807 P.2d 356 (1991). Further, under no circumstances can a duty of good faith owed to an LLC be used to create independent contractual obligations to another party.

Moreover, imposing a notice provision makes no sense. In order to avoid the statute of frauds, DeTray concedes he had no interest in the Dragts' land. How can the trial court impose, through the duty of good faith or otherwise, a requirement the Dragts give notice prior to the sale of their land if DeTray had no interest in that land? If DeTray had no interest in the Dragts' land, how could there be damages even if notice was not given? Without law to support its determination to find a breach and a remedy, the trial court's conclusions simply make no sense. Conclusions 5 and 6 should be reversed.

**F. DeTray's arguments illuminate the trial court's erroneous damages analysis.**

The trial court's desire to craft a remedy at all costs is even more pronounced in the context of damages.

Take expectancy damages for instance. The trial court concluded that the Dragts breached an obligation to "recompense DeTray for his capital expenditures" – a \$593,462 amount – and then found resulting damages of nearly \$2.1 million. CP 888 (CL 4, 8). DeTray calls these "expectancy damages." Resp. Br. at 40. But DeTray could not have

“expected” to receive more than his \$593,462 in contributions from his alleged oral agreement with the Dragts, unless he held an interest in the land, a fact which he denies. Therefore, even if the alleged oral agreement between the Dragts and DeTray existed (which it didn’t), DeTray’s expectancy damages are necessarily limited to the \$593,462 he contributed to the LLC and Conclusion 8 is in error.

The trial court also mistakenly applied Article 9.7 of the LLC Agreement to calculate damages flowing from the “oral agreement” between the Dragts and DeTray. CP 888 (CL 7). As DeTray concedes, Article 9.7 of the LLC Agreement applies only when and if the LLC owned the Dragts’ land: “Article 9.7 was clearly and unambiguously intended to govern the distribution of the proceeds of any sale of the property by the LLC.” Resp. Br. at 42 (emphasis added). But, as DeTray also concedes, the LLC had no interest in the Dragts’ land because its option was unenforceable. *Id.* at 19. The LLC, therefore, had no legal right to sell the Dragts’ land. Since the Dragts’ alleged breach did not prevent a sale by the LLC, Article 9.7 is inapplicable.

The damages, if any, flowing from the Dragts’ alleged breach are those suffered by DeTray personally. The trial court found that the Dragts breached an obligation they owed to DeTray personally (CL 7), an obligation that DeTray insists was “distinct” from the duties the Dragts owed to the LLC. Resp. Br. at 17, 24, 30. Since Article 9.7 applies only where the LLC had a right to sell the Dragts’ land, it is irrelevant to the calculation of damages flowing from a breach of the Dragts’ obligations to

DeTray. The damages flowing from that obligation are, as set out above, limited to the amount of DeTray's capital contributions.

Finally, if the trial court were correct in applying Article 9.7 to the determination of damages, the trial court erred in not awarding \$18,000 per acre to the Dragts. As DeTray concedes, Article 9.7 applies only if the Dragts' land is sold by the LLC. Resp. Br. at 42. For the LLC to sell the Dragts' land, it must own it. If the Dragts' land is "owned or leased" by the LLC, the Dragts are entitled to \$18,000 per acre for their contribution of land. Ex. 178 at 15, ¶ 9.7.

DeTray's argument about part performance is misplaced as well. According to DeTray, the parties did not partly perform under the original LLC Agreement. Rather, they partly performed the "oral agreement" whereby the Dragts were to repay DeTray for certain capital contributions. Resp. Br. at 40-41. The proper measure of damages for part performance of that agreement is repayment of some or all the capital contributions. *Dravo Corp. v. L.W. Moses Co.*, 6 Wn. App. 74, 90-91, 492 P.2d 1058 (1971). It does not matter whether DeTray is awarded expectancy damages or restitution, his damages are limited to the amount of his capital contributions.

As the Dragts' advised the trial court, there were methods, such as mutual mistake, by which it could have returned a portion of the capital contributions to DeTray. CP 580. Those methods would require an analysis of the value the expenditures added to the Dragts' land, if any, as well as the losses, if any, caused by the LLC's failure to develop the

property. The trial court, however, did not do that analysis nor did DeTray present evidence in that regard.

Regardless, in no event is the trial court's damages analysis sustainable. Article 9.7 does not apply at all to the calculation of damages because the LLC had no right or interest in the Dragts' land and the Dragts did not breach an obligation to the LLC. And if Article 9.7 did apply, the Dragts were entitled to \$18,000 per acre. Either way, the trial court erred and should be reversed.

**G. Conclusion.**

The findings of fact fundamental to the trial court's breach of contract theory, Findings 17-20, are not only unsupported by any evidence in the record but, in fact, are unanimously contradicted by the evidence. Without Findings 17-20, Conclusions 3 and 4, that there was an oral agreement, fail. Conclusions 3 and 4 also fail as a matter of law because the alleged oral agreement dealt with an interest in land and the conveyance of that interest did not satisfy the statute of frauds or community property law.

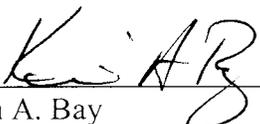
Conclusions 2 and 5 – 8 fail as well, either as a matter of law and/or because they are not supported by a finding of fact with substantial evidence.

Accordingly, the Dragts respectfully request that the judgment be reversed with instructions that all counterclaims be dismissed with prejudice.

Finally, if this Court is sympathetic to DeTray's plea to accept his previously abandoned unjust enrichment claim, the trial court should be instructed to determine the amount by which the Dragts were unjustly enriched. Further, since the basis for the unjust enrichment theory is the absence of a contract, there is no contractual basis for an award of attorneys' fees.

DATED this 5th day of January 2007.

RYAN, SWANSON & CLEVELAND, PLLC

By  \_\_\_\_\_  
Kevin A. Bay  
WSBA #19821  
Attorneys for Plaintiffs

1201 Third Avenue, Suite 3400  
Seattle, Washington 98101-3034  
Telephone: (206) 464-4224  
Facsimile: (206) 583-0359  
bay@ryanlaw.com

**DECLARATION OF SERVICE**

I declare that on the 5<sup>th</sup> day of January 2007, I caused to be served the foregoing document on counsel for Appellant, as noted, at the following addresses:

R. Alan Swanson, Esq.  
R. Alan Swanson, PLLC  
908 5<sup>th</sup> Avenue SE  
Olympia, WA 98501

David John Corbett, Esq.  
Robert G. Casey, Esq.  
Eisenhower & Carlson, PLLC  
1201 Pacific Avenue, Suite 1200  
Tacoma, WA 98402

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STATE OF WASHINGTON  
BY DEPUTY

  
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Marcia M. Jacobson

Dated: January 5, 2007

Place: Seattle, WA