

No. 44798-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JOHNSON BROS. CONTRACTING, INC.

Appellant

v.

SIMPSON TACOMA KRAFT COMPANY, LLC

Respondent

RESPONDENT'S OPENING BRIEF

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I. Introduction

Ultimately, Appellant Johnson Brothers Contracting Inc.'s ("Johnson Bros.") lawsuit is an attempt to enforce an alleged oral contract for the sale of goods. Its effort is squarely barred by the UCC's Statute of Frauds.

There is no dispute that the alleged agreement was for the purchase a sale of goods: hog fuel, ground wood that is used as fuel for burning. There is also no dispute that no written contract exists. There is no dispute that the sole content of the parties discussions were about the alleged "deal," and there is no allegation that any false statements were made by Simpson. As a result, Johnson Bros.' claims for breach of contract, promissory estoppel, and negligent misrepresentation were properly dismissed as a matter of law on summary judgment and this Court should affirm that dismissal.

II. Counter Statement of the Central Issues

1. Did the trial court properly dismiss Johnson Bros.' contract claim based on the absence of a writing under the UCC Statute of Frauds at RCW 62A.2-201 when the discussion was for the purchase and sale of goods? Yes.
2. Did the trial court properly dismiss Johnson Bros.' claim for promissory estoppel when controlling authority holds that a promissory estoppel claim may not circumvent the UCC Statute of Frauds? Yes.

3. Did the trial court properly dismiss Johnson Bros.' claim for negligent misrepresentation when there was no duty independent of the contract and when there were no false statements upon which Johnson Bros. reasonably relied? Yes.
4. Does the statute of limitations bar Johnson Bros. claims? Yes.

III. Counter Statement of the Case

A. There Was No Dispute of the Central Material Fact on Summary Judgment: No Written Contract for the Sale of Hog Fuel Exists.

Both sides agree. Appellant Johnson Bros. and Appellee Simpson Tacoma Kraft Company LLC ("Simpson") never entered into a written contract for the purchase and sale of hog fuel.¹ Johnson Bros. Brief, at p. 8; CP 29:19-26; CP 30:1-14; CP 34:11-15; 35:3-9; CP 71 at 31:17-21; CP 88 at 23:10-21; CP 131:7-15; CP 138:16-139:7.

Instead, in the spring of 2009, representatives from Simpson and from Johnson Bros. discussed three different potential business opportunities for a potential purchase of hog fuel and wood chips from Johnson Bros. CP 28-30. The bulk of these discussions took place in mid-March 2009 during a meeting between Steve Regelin, Simpson's then-Fiber Procurement Manager, Johnson Bros.' president Ernest Johnson, and Johnson Bros. Brent Deroo. CP 28-29. Following that meeting, Simpson entered into written agreements with Johnson Bros. with regard to two of these opportunities: the purchase of Yakima

¹ "Hog fuel" is a wood product made up of a processed mix of bark and wood fiber that is used as fuel for wood boilers. See Fry Dec. at ¶ 2.

orchard hog fuel for a term of two months, and the purchase of wood chips for the term of twelve months, all at set prices. CP 35-41.

The third potential opportunity for Simpson and Johnson Bros. was the purchase of hog fuel from a site in Olympia that Johnson Bros. was developing at the time. CP 33:25-34:7. At the time of these discussions, Johnson Bros. did not have an operational site in Olympia for the production of hog fuel. *Id.*; CP 72 at 38:11-23; see also Johnson Bros.' Sublease Agreement for Olympia site at CP 49-66, dated April 2009.

B. Johnson Bros. Agrees that a March 23, 2009 Letter of Intent Was Not a Contract.

Following the March 2009 meeting, Johnson Bros. requested a letter from Simpson indicating Simpson's interest in a potential future agreement relating to the purchase of Olympia-produced hog fuel. Johnson Bros.' president indicated that this letter was in case he needed to show a letter of interest to his bank to obtain financing for equipment. CP 30; CP 32; CP 130:4-9. By letter dated March 23, 2009, Mr. Regelin provided the letter requested, indicating Simpson's general interest in further discussing potential sources of hog fuel in Olympia. CP 32. Neither Mr. Regelin nor Mr. Johnson intended this letter to form a written contract. CP 30; CP 87 at 17:2-17; CP 88:10-

21; CP 130:4-9. At any rate, Mr. Regelin would not have had the authority alone to execute a contract for the 18-month period Johnson Bros. claims was at issue. CP 29.

Johnson Bros.' principal, Ernie Johnson, testified under oath that this letter was not an agreement between Simpson and Johnson Bros. CP 87 at 18:2-20:10. Instead, both Johnson Bros.' representatives involved in the March meeting understood that there was no written contract for the Olympia site, and if anything, the parties had come to a "verbal contract" for the potential Olympia hog fuel production. CP 87 at 18:16-20 (the parties made their "deal" at the meeting), CP 88 at 23:10-24:5. (stating that for the Olympia site the parties "never did have a contract"); CP 71 at 31:1-21 (describing the meeting and the "verbal contract" between the parties), CP 78 at 75:6-22 (describing the letter as "in the realm of what was discussed in the prior meeting").

Contrary to Johnson Bros.' one sided perception of an "oral contract," Simpson would not have entered into a long term contract with Johnson Bros. without reducing it to writing. It was not the practice of Simpson, nor was it the practice of Simpson's agent at the time, Mr. Regelin. CP 29; CP 34-35. Instead, it was Simpson's understanding that once Johnson Bros. developed the site it was

planning to develop, Simpsons would then make a decision whether it wanted to enter into contract to buy hog fuel from that site CP 30:4-14; CP 33:25-34:10. In March 2009 at the time of the parties' discussions and the alleged agreement, Johnson Bros. did not have a lease for a site. CP. 50; see generally Lease for Johnson Bros. Olympia site commencing in April 2009 at CP 49:66.

C. Johnson Bros. Sold All of the Hog Fuel It Had Made at the Olympia Site to Another Buyer.

Following the parties' initial discussions about a potential Olympia hog fuel site, Mr. Fry visited the proposed location several times during the spring of 2009. CP 34:15-35:3. At the time of Mr. Fry's visits, the site was not yet fully operational, but based in part on the quality of materials present at the site, Simpson elected not to purchase any hog fuel from the Johnson Bros.' Olympia property. *Id.* During this time period, Simpson was purchasing hog fuel from several different suppliers. CP 35:21-26. The hog fuel Simpson purchased was not specially manufactured, but was readily available in the market. *Id.* Similarly, Johnson Bros. sold to multiple purchasers, and "didn't have a lot of problems moving the wood [Johnson Bros.] had." Deroo Dep. at CP 77 at 69:13-70:22; CP 76 at 68:1-9. After Simpson elected not to purchase any hog fuel from the Olympia site, Johnson Bros. made a sale from the Olympia site (in August 2009) to another

purchaser. CP 90 at 51:24-52:24; *see also* Invoices from Longview Fibre at CP 45-47.

D. Simpson Entered Into Two *Other* Written Contracts with Johnson Bros. for Purchases from Existing and Operational Sites.

Both Johnson Bros. and Simpson knew how to enter into a written contract when they wanted to do so. In fact, in March 2009, at the same time Johnson Bros. and Simpson were discussing the potential sales from an Olympia site, they also discussed actual sales from two other sites: one in Eatonville, Washington, and one in Yakima, Washington. CP 35:10-20. Both of those discussions resulted in executed written contracts for the purchase and sale of wood chips and hog fuel respectively. *Id.*; CP 38-41. Both of these written contracts are for a year or less. *Id.* Both sides agree that there is no written contract for the much longer term claimed by Johnson Bros. in the underlying lawsuit. Johnson Bros. Brief, at p. 8; CP 29:19-26; CP 30:1-14; CP 34:11-15; 35:3-9; CP 71 at 31:17-21; CP 88 at 23:10-21; CP 131:7-15; CP 138:16-139:7.

IV. Argument

A. Standard of Review

This Court reviews the trial court's summary judgment determination *de novo*, engaging in the same inquiry as the trial court.

Hearst Communications, Inc. v. Seattle Times Co., 154 Wn.2d 492, 501, 115 P.3d 262 (2005). Summary judgment is affirmed when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Greaves v. Med. Imaging Sys., Inc.*, 124 Wn.2d 389, 392, 879 P.2d 276 (1994) (quoting *Syrov v. Alpine Res., Inc.*, 122 Wn.2d 544, 548 n. 3, 859 P.2d 51 (1993)). (quoting CR 56(c)). All facts and inferences are considered in the light most favorable to the nonmoving party. *Id.* Once the moving party meets its initial burden of showing that no genuine issue of material fact exists, the burden shifts to the adverse party to set forth specific facts showing that there is a genuine issue for trial. CR 56(e); *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989) (citing *Celotex Corp. v. Catrett*, 447 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)). “A question of fact may be determined as a matter of law where reasonable minds could reach but one conclusion.” *Keystone Land & Development Co. v. Xerox Corp.*, 152 Wn.2d 171, 178 n.10, 94 P.3d 945 (2004) (citing *Ruff v. King Cty.*, 125 Wn.2d 697, 703-04, 887 P.2d 886 (1995) (quoting *Hartley v. State*, 103 Wn.2d 768, 775, 698 P.2d 77 (1985))).

B. Johnson Bros.' Breach of Contract Claim is Barred by the Statute of Frauds under Either of Appellant's Theories.

Johnson Bros.' primary claim in the underlying lawsuit was that Simpson breached a contract for the sale of hog fuel. CP 3 at ¶ 3.4. When Johnson Bros. filed its Complaint on March 21, 2012 (CP 7), its claim was based on the allegation that a March 23, 2009 letter of intent constituted a binding written contract for the sale of goods, i.e. "hog fuel materials." CP 3 at ¶ 3.4. However, through the course of discovery, Johnson Bros.' principal, Ernie Johnson, and its hog fuel broker, Brent Deroo, both stated unequivocally that the March 23, 2009 letter (at CP 32), was not intended to be a written contract, and they did not believe that it was. These statements are echoed in the testimony of Simpson personnel who were involved in the discussions at the time. CP 29:19-26; CP 30:1-14; CP 34:11-15; 35:3-9; CP 71 at 31:17-21; CP 88 at 23:10-21; CP 131:7-15; CP 138:16-139:7. In its opening brief to this Court, Johnson Bros. does not dispute that no written contract exists. Johnson Bros. Brief, at p. 8.

Instead, Johnson Bros. was used to operating without a contract in its hog fuel sales and in deposition Mr. Johnson stated that he was not concerned about doing so with regard to its Olympia site. CP 88 at 23:10-24:5. The trial court considered the undisputed facts that the "deal" claimed by Johnson Bros. was for the sale of goods, i.e. hog fuel.

CP 87 at 19:3-5. Later in opposition to summary judgment, Johnson Bros. stated that it believed it had an oral contract for the sale of the goods for an 18 month term. However, under either the UCC or the general statute of frauds, the claimed “deal” by Johnson Bros. fails due to the absence of a written contract.

1. The UCC Statute of Frauds Bars Johnson Bros.’ claim.

Article 2 of Washington’s Uniform Commercial Code (“UCC”), RCW 62A.2-102, *et seq.*, applies to contracts for the sale of goods.² Under Article 2, “a contract for the sale of goods for the price of five hundred dollars or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker.” RCW 62A.2-201.

The trial court reviewed undisputed evidence that there was no written contract for the purchase and sale of the hog fuel at issue. Johnson Bros. recognizes these undisputed facts and concedes that there is no written contract. Johnson Bros. brief at p. 29. Instead,

² RCW 62A.2-105(1) defines “[g]oods” as “all things (including specially manufactured goods) which are moveable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action,” including “growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (RCW 62A.2-107).”

Johnson Bros.' sole basis for its breach of contract claim in this case is a claim that an oral contract was made during a conversation that occurred in a restaurant in March 2009.

Q. Okay. And so is it your understanding that, you know, I understand in this lawsuit you are saying an agreement was made and that your belief is that Simpson broke that agreement and that's what this lawsuit is primarily about?

A. Yes.

Q. And are you telling me that the agreement was made at that early March meeting at Crazy Carl's in 2009?

A. Yes.³

The trial court considered Mr. Johnson's further testimony that he did not believe the language of the letter — in addition to its purpose— constituted a contract (“if this was the agreement I was going to go by I would have had to go back to him and ask him to change those things.”⁴) This is consistent with the language of the letter itself.⁵ In

³ CP 86-87 at 16:19-17:1.

⁴ CP 87 at 19:24-20:1.

⁵ The language of the letter simply expresses Simpson's desire to enter into a *future* contract: “This letter is to confirm Simpson Tacoma Kraft Company's *desire* to enter into an agreement with Johnson Bros. Contracting, Inc. to purchase hog fuel.” CP 32 (emphasis added).⁵ At best, the letter reflects “an agreement to agree,” an agreement “to do so something which requires a further meeting of the minds of the parties and without which it would not be complete.” *Keystone Land & Development Co.*, 152 Wn.2d at 175-76, 94 P.3d 945 (2004) (quoting *Sanderman v. Sayres*, 50 Wn.2d 539, 541-42, 314 P.2d 428 (1957)). “Agreements to agree are unenforceable in Washington.” *Id.*

addition, it is undisputed that the discussed sale of goods was to total more than \$500. See CP 32 (discussing 90 truckloads per week at \$53 per bone dry ton for 18 months).

a. Johnson Brothers' claims are for the sale of goods, not services.

The alleged "deal" that Johnson Bros. asks this court to enforce is for the sale of combustible wood products referred to as hog fuel: goods. Johnson Brothers' Complaint claims that "the deal was for Plaintiff to supply hog fuel to Defendant." CP 2. The March 23, 2009 letter that Johnson agrees relates the parties' conversation discusses a potential future deal only for the sale of goods: hog fuel. CP 32. Johnson Bros.' president Ernie Johnson testified in deposition that the "deal" was for the sale of hog fuel. CP 87 at 19:3-5.

However, after Johnson Brothers' president and then employee Brent Deroo both stated under oath in deposition that the letter was not a contract and that no written contract existed, Johnson Bros. has attempted to avoid the UCC by characterizing its claim as contract for services. This characterization simply doesn't fit either the undisputed facts or the law.

Brent Deroo and Ernest Johnson both testified in their depositions and declarations that the "terms" of the alleged oral "deal"

were for Simpson to “buy a minimum of 90 loads of hog fuel per week...” CP 130 at ¶ 5; *see also* CP 137-8 at ¶ 7. There is no mention of services. Even under Johnson Brothers’ own understanding of the “deal,” Simpson did not agree to compensate Johnson Brothers for any services in producing the goods at issue. *Id.*

As the authority cited by Johnson Brothers’ in its Opening Brief demonstrates, a contract is for the purchase of goods even if that purchase involves some amount of “service” to accomplish the purchase or sale. *See Tacoma Athletic Club, Inc. v. Indoor Comfort Sysys. Inc.*, 79 Wn. App. 250, 902 P.2d 175 (1995)¹. This is not surprising because nearly all goods require some level of labor to produce. For Johnson Brothers to argue that this somehow removes them from the UCC is contrary to both logic and law.⁶

To begin with, as the *Tacoma Athletic* court recognized, the UCC “shall be liberally construed and applied to promote its underlying purposes and policies” *Id.* at 257. The court then went on to uphold the trial court’s conclusion that the contract at issue in that case, for

⁶ The analysis is whether the “predominant factor” of the contract is for goods. *Tacoma Athletic Club, Inc. v. Indoor Comfort Sysys. Inc.*, 79 Wn. App. 250, 257, 902 P.2d 175 (1995). As a typical example of a “services” contract, the court referenced a contract with an artist to produce a painting, where the focus of the contract was on the specific service of the artist’s work. *Id.*

the sale and installation of a dehumidification system, was a sale of goods because

[t]he negotiations leading up to the contract focused on the goods, not the services, aspect of the sale. Comfort Systems recommended a specific product to the Club, Dri-Aire dehumidifiers. The Club president insisted on viewing other facilities at which Dri-Aire dehumidifiers had been installed. The written contract predominantly lists the goods being sold, although it also refers to services...

Tacoma Athletic, 79 Wn. App. at 258.

Johnson Brothers also attempts to rely on *Smith v. Skone & Connors Produce, Inc.*, 107 Wn. App. 199, 26 P.3d 981 (2001). However, *Smith* explicitly dealt with services, not goods, and is inapplicable here. In *Smith*, the contract at issue was for agricultural brokering services, as the court succinctly described the deal “The farmer does not sell the products to the commission merchant, but relies on the commission merchant’s expertise in brokering those products. There is an agreement to provide and accept a service.” *Id.* at 205. Here, Johnson Bros. was hoping to sell its end product, hog fuel, to Simpson and never contemplated providing a service.

Both the discussions and the contract alleged by Johnson Brothers were for the delivery of hog fuel, a type of material that

Simpson regularly purchased from multiple sources, and which Johnson Brothers regularly sold to multiple different purchasers. Johnson Brothers does not raise any fact to the contrary. See generally CP 128-140. There was no discussion or additional consideration identified by Johnson Brothers for the local production of hog fuel. *Id.*, see also CP 32. Aside from the incidental actions required to deliver the goods to Simpson, there were no services discussed and Johnson Brothers' post-hoc effort to turn this alleged contract into one for services cannot change the fact that the parties' negotiations only discussed a potential sale of hog fuel. Any alleged contract between the parties was therefore a contract for goods for more than \$500, required to have been in writing under Washington's statute of frauds provision of the UCC.⁷

2. **No Exception removes Johnson's claims from the writing requirement of the UCC.**
 - a. **Hog fuel is not a "specially manufactured good" under RCW 62A.2-201(3) (a).**

Johnson Bros. argues that its ground wood hog fuel was specially manufactured for Simpson because it put a grinder and generator on an available site in Olympia so that it could sell to Simpson's plant in Tacoma. This argument fails because there are no facts to support it.

⁷ Johnson Bros. acknowledges that the alleged deal it seeks to enforce was for more than \$500. Johnson Bros.' Opening Brief at p. 4-5.

Johnson Bros. may have hoped to capitalize on some savings in transportation costs by grinding the raw wood for hog fuel at an Olympia, but there is no evidence in the record that the goods were any way specially manufactured for Simpson. In fact the opposite is true. Johnson Bros. was selling to a number of buyers, and was in fact selling to Simpson from two different locations—Eatonville and Yakima, Washington. When Johnson Bros. eventually did sell the limited amount of hog fuel that it did manufacture, it sold all of its product to another company, Longview Fibre, in two shipments totaling nearly \$10,000. CP 90. Moreover, there is evidence that the material in fact was not of the type that Simpson was buying. Simply put, it didn't meet their specs. CP 86 at 15:4-8.

b. There is no “part performance” under RCW 62A.2-201(3) (c).

It is unclear whether Johnson Bros. is arguing that it partially performed its alleged oral contract with Simpson, and this partial performance removes the parties' contract from the writing requirement of the statute of frauds under UCC 62A.2-201(3)(c). If Johnson Bros. is making such an argument, it fails because there is no dispute that Johnson Brothers did not deliver any goods, and Simpson did not accept and pay for any goods. *See* RCW 62A.2-201(3).

The statute of frauds is clear, an oral contract for the sale of goods over \$500 in value may be enforceable “with respect to goods for which payment has been made or accepted or which have been received and accepted.” RCW 62A.2-201(3)(c). Comment 2 to Washington’s Uniform Commercial Code further clarifies that the meaning of subsection (c): “Partial performance as a substitute for the required memorandum can validate the contract only for the goods which have been accepted or for which payment has been made or accepted.” In this case, it is undisputed that Johnson Brothers never made any delivery of hog fuel to Simpson under the terms of the parties’ alleged oral contract, nor did Simpson ever make any payment to Johnson Bros. for hog fuel from the Olympia site. CP 35 at ¶ 6; CP 86 at 14:24-15:15; CP 90 at 50:19-21; 52:8-24.

Johnson Brothers did not take any action sufficient to constitute partial performance on the alleged contract to sell hog fuel to Simpson. No delivery of hog fuel was ever made by Johnson Brothers from the new Olympia site, and Simpson did not make any payments to Johnson Brothers under the terms of the parties’ alleged oral contract. The requirements of RCW 62A.2-201 were not met.

3. The Statute of Frauds Expressed in RCW 19.36.010(1) Similarly Bars Johnson Bros.’ claim.

RCW 19.36.010(1) provides that all contracts, agreements, or promises that cannot be performed within one year are void unless in writing. RCW 19.36.010(1).⁸ “The statute of frauds is not a doctrine in equity, it is a positive statutory mandate which renders void and unenforceable those undertakings which offend it.” *Smith v. Twohy*, 70 Wn.2d 721, 725-726, 425 P.2d 12, 15 (1967) (internal citations omitted). To satisfy the requirements of the statute, the writing must not only be signed by the party it is to be enforced against, but it must also be so complete in itself that any reliance on parol evidence is unnecessary to establish any material element. *Id.* Liability cannot be imposed if it is necessary to look for elements of the agreement outside the writing. *Smith v. Twohy*, 70 Wn.2d 721, 725-726, 425 P.2d 12, 15 (1967).

Here, Johnson Bros.’ opening brief sets out the precise reason that the alleged oral contract is barred by the general statute of frauds: “because [the alleged] agreement was for a minimum of 18 months of shipments of hog fuel with termination option on six months [sic] notice available only after the first 12 months.” Johnson Bros.’ Opening Brief, at p. 35. Johnson Bros. is right. The requirement that the shipments continue for more than one year place any agreement

⁸ This statutory provision would only apply if the Court were to determine that the UCC was not applicable.

squarely within the general statute of frauds. Johnson Bros.' argument that Simpson is a big company that often makes purchases on a purchase order basis without long term written contracts is irrelevant. There may be very good business reasons why Simpson chose not to enter into long term contracts on specific types of purchases, including a reluctance to enter into a long term contract with Johnson Bros. until after Johnson Bros. was operational and after it had the chance to review and inspect the product that was being offered. It is not surprising that Simpson did not enter into a long-term contract with a company that did not even have a lease to the land it hoped to operate on and could not presently perform.

None of the cases relied on by Johnson Brothers' support Johnson Bros' argument that it somehow partially performed. *See Klinke v. Famous Recipe Fried Chicken*, 94 Wn.2d 255, 260 n.5, 616 P.2d 644 (1980) ("the sale or lease-option of real property may be 'removed' from the general statute of frauds where there has been 'part performance.'"); *Miller v. McCamish*, 78 Wn.2d 821, 826, 479 P.2d 919 (1971) ("an agreement to convey an estate in real property ... may be proved without a writing, given sufficient part performance."); *Richardson v. Taylor Land & Livestock Co.*, 25 Wn.2d 518, 527, 171 P.2d 703 (1946) (finding part performance of a

“contract for the sale or exchange of real estate removes the contract from the operation of the general statute of frauds.”); *McDonnell v. Coeur D’Alene Lumber Co.*, 56 Wash. 495 (1910) (contract for logging not enforceable because the parties did not reach a final written agreement but were “[a]t most ... negotiating upon the terms of the agreement to be entered into between them.”); *In re Estate of Nelson*, 85 Wn.2d 602 (1975) (part performance of an agreement to convey real property excepted agreement from general statute of frauds).⁹

Johnson and cites no authority that would allow it to circumvent the statute of frauds in this case.¹⁰

C. Johnson Bros. Cannot Circumvent the Statute of Frauds by Invoking the Doctrine of Promissory Estoppel.

The Washington Supreme Court has clearly and unequivocally held that “promissory estoppel cannot be used to overcome the statute of frauds in a case which involves the sale of goods.” *Lige Dickson Co. v. Union Oil Co. of California*, 96 Wn.2d 291, 299, 635 P.2d 103 (1981).

⁹Johnson Bros. relies on Nelson to argue that a promise to reduce an agreement to writing is sufficient to avoid the statute of frauds. This is not the holding in Nelson. Although Nelson discusses that factual scenario, ultimately its legal holding is based on the fact that part performance of an agreement to convey real property had occurred. Johnson Bros. can point to no fact in this case that indicates there was an agreement to reduce an oral contract to writing. Even if it could, the authority it relies on does not allow an exception from the Statute of Frauds on that basis.

¹⁰ *Berg v. Ting*, 125 Wn.2d 544 (discussing part performance of an agreement to convey real property and finding no part performance occurred) is also simply inapplicable because it addresses only the exception related to part performance of an agreement to convey real property. It goes without saying that no such agreement is alleged by Johnson Bros.

See Arango Const. Co. v. Success Roofing, Inc., 46 Wn. App. 314, 319, 730 P.2d 720 (1986) (citing *Lige* and explaining the court's holding that "the doctrine of promissory estoppel could not be used to render enforceable a contract that violates RCW 62A.2-201.").¹¹

Noting that the UCC contains its own exceptions to the statute of frauds, *see* RCW 62A.2-201(3), the court said, "If we were to adopt s 217A [of the Restatement (Second) of Contracts]¹² as applicable in the context of the sale of goods, we would allow parties to circumvent the U.C.C." *Lige Dickson Co.*, 96 Wn.2d at 299-300. Foreseeing "increased litigation and confusion as being the necessary result of the eroding of the U.C.C.," the court "join[ed] the other courts which limit the doctrine of promissory estoppel from overcoming a valid defense based on the statute of frauds contained within the Uniform Commercial Code." *Id.* at 300. In light of *Lige Dickson Co.*, Johnson Bros.' claim for promissory estoppel fails as a matter of law. *See also Greaves v. Medical Imaging Systems, Inc.*, 124 Wn.2d 389, 399, 879

¹¹ Johnson Bros. conflates the two distinct concepts promissory estoppel and the doctrine of part performance as an exception to the general statute of frauds expressed in RCW 19.36.010(1). The reasoning and facts of the case law in support of one does not support the other. However, ultimately neither theory can circumvent the UCC requirement of a writing that operates here.

¹² The Restatement (Second) of Contracts § 217A (now § 139) provides: "(1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise."

P.2d 276 (1994) (“We have consistently declined to adopt § 139” of the Restatement (Second) of Contracts, “although we have considered it in several prior cases.”).¹³ As a matter of settled law, Johnson Bros. cannot use a claim of promissory estoppel to circumvent the UCC Statute of Frauds.

D. Johnson Bros. Tort Claim for Negligent Misrepresentation Also Fails as a Matter of Law.

Finally, Johnson Bros. attempts to assert a tort claim against Simpson based on the breach of the alleged “deal.” Johnson Bros.’ claims are based on allegations that Simpson breached its obligations under the parties’ contract; having pleaded and alleged a breach of contract claim, Johnsons Bros. cannot now assert the same conduct and claim relief under tort law. *See, e.g., Affiliated FM Insurance Company v. LTK Consulting Services, Inc.*, 170 Wn.2d 442, 243 P.3d

¹³ In attempting to avoid *Lige*, Johnson Bros. cites a number of cases. None of these cases address a claim for promissory estoppel in the face of a contract for the sale of goods under the UCC. All of them deal with the issue of enforceability of a lease for real property based on part performance under the general statute of frauds. *See, e.g., Tiegs v. Boise Cascade Co.*, 84 Wn. App. 411 (1996) (part performance on breach of contract for lease of real property removed oral agreement from general statute of frauds); *Franklin v. Fischer*, 34 Wn.2d 342 (1949) (payment on lease modification constituted consideration and this part performance removed the lease modification from the general statute of frauds); *Mobley v. Harkins*, 14 Wn.2d 276 (1942) (taking possession of property and payment on lease constituted part performance of oral lease contract sufficient to avoid the general statute of frauds); *Haggen v. Burns*, 48 Wn.2d 611 (1956) (taking possession of store on lease and purchasing inventory was sufficient part performance on lease to avoid the general statute of frauds); and *Family Medical v. Social Health and Services*, 104 Wn.2d 105 (1985) (holding that language in a written lease agreement that allowed the parties to negotiate a new rent price upon renewal of the lease was a sufficient written contract under the general statute of frauds). These cases do nothing to undermine the holding of *Lige Dickson Co. v. Union Oil Co. of California*, 96 Wn.2d 291 (1981).

521 (2010), and *Eastwood v. Horse Harbor Foundation, Inc.*, 170 Wn.2d 380, 241 P.3d 1256 (2010). The parties do not dispute that the current state of the law is the independent duty doctrine. Yet under that law, Johnson Bros. has failed to show that any independent duty existed.

When a party's economic loss potentially implicates contract and tort relief, the economic loss rule limits the party to contract remedies unless an independent tort duty exists separate and apart from the contract. See e.g., *Eastwood v. Horse Harbor*, 170 Wn.2d 380 (2010); *Donatelli v. D.R. Strong Consulting Engineers, Inc.* 163 Wn. App. 436, 439-440, 261 P.3d 664, 666 (2011). In *Donatelli*, the court held that an engineer had a duty to his clients independent of contract to perform his engineering services with reasonable care. *Id.* at 443. In reaching finding that a tort duty existed, the court discussed the special relationship between a professional engineer and his clients that is defined by statute. *Id.* at fn 47. In *Jackowski v. Borchelt*, 174 Wn.2d 720 (2012), the court found a duty not to commit fraud existed independent of contract in a sale of real estate, but expressly stated that for a claim of negligent misrepresentation, the independent duty exists *only* to the extent the duty to not commit negligent misrepresentation is independent of the contract. *Id.* at 738.

In the case before this Court, Johnson Bros.' negligent misrepresentation claim collapses into its contract claim. The only statements Johnson Bros. claims are made are the alleged contractual promises that the Plaintiff seeks to enforce in its contract claim. See Johnson Bros. opening brief, at pgs. 24-5. Therefore there is no independent duty, and the independent duty doctrine bars Johnson Bros.' claim.

Moreover, Johnson Bros. fails to point to any fact that would support a cause of action for negligent misrepresentation. Johnson Bros. acknowledged that it did not ask for a written contract (CP 87 at 23:13-24:2) and that the March 23, 2009 letter reflected the parties' discussions, but not a contract. CP 130, lines 11-14; 137, lines 15-20. "The crux of a negligent misrepresentation claim is the conveying of and reliance on *false information*."¹⁴ *Borish v. Russell*, 155 Wn. App. 892, 905, 230 P.3d 646 (2010) (emphasis added). Johnson Bros.

¹⁴ To prevail on a claim of negligent misrepresentation, a plaintiff must prove by clear, cogent, and convincing evidence that: (1) the defendant supplied information for the guidance of others in their business transactions that was false; (2) the defendant knew or should have known that the information was supplied to guide the plaintiff in business transactions; (3) the defendant was negligent in obtaining or communicating false information; (4) the plaintiff relied on the false information supplied by the defendant; (5) the plaintiff's reliance on the false information was justified; and (6) the false information was the proximate cause of damages to the plaintiff. *Lawyers Title Ins. Corp. v. Baik*, 147 Wn.2d 536, 545, 55 P.3d 619 (2002) (citing *ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 827-28, 959 P.2d 651 (1998)).

cannot identify any false information conveyed by Simpson on which it reasonably relied.

There is nothing on the record, nor can Johnson Bros. put forth any evidence or even inference supporting the notion that Simpson made a representation of any information that Simpson knew at the time to be false. The parties' discussion was in March of 2009, Simpson was interested in purchasing hog fuel from the Olympia site if and when it was developed and Simpson found the product to be of acceptable quality.

When these discussions occurred in March 2009, there was no Olympia site, Johnson Bros. did not have a lease for the site in question, and the material observed by Simpson's representative coming from the site when it was later developed was not of the quality Simpson was interested in purchasing at the asking price. Johnson Bros. knew it did not have a written contract and did not ask for one. Even if as Johnson Bros. claims, Simpson said it wanted Johnson Bros. to "go ahead" with the site, there is no evidence that this was false. Ultimately, Simpson made no misrepresentations, negligent or otherwise, to Johnson Bros. during the course of the parties' negotiations.

E. Johnson Bros.' Claims are Barred by the Statute of Limitations.

Johnson Bros.' causes of action are barred by the three-year statute of limitations on oral contract, promissory estoppel and negligent misrepresentation claims. See RCW 4.16.080(3) ("action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument")¹⁵; RCW 4.16.080(4) ("action for relief upon the ground of fraud"); *Central Heat, Inc. v. Daily Olympian, Inc.*, 74 Wn.2d 126, 132, 443 P.2d 544 (1968) (three-year statute of limitations applicable to promissory estoppel); *Sabey v. Howard Johnson & Company*, 101 Wn. App. 575, 5 P.3d 730 (2000) (three-year statute of limitations applicable to negligent misrepresentation). RCW 23B.15.020(1) provides that "a foreign corporation transacting business in this state without a certificate of authority may not maintain a proceeding in any court of this state until it obtains a certificate of authority."

When Johnson Bros., a foreign corporation, filed suit on March 21, 2012, it did not possess a certificate of authority and, therefore, was prohibited from "maintain[ing] a proceeding in any court in this state."¹⁶ RCW 23B.15.020(1). The three-year statute of limitations

¹⁵ Any oral contract claim, were it not barred under the UCC Statute of Frauds would fail on the same grounds.

¹⁶ See McNeely Dec. Ex. E.

expired before Johnson Bros. obtained the requisite certificate of authority. The alleged promises or misrepresentations, if they occurred, occurred in February or early March, before the letter written by Regelin. *See* Johnson Dep. at 30:18-23. Moreover, they should have been discovered at a minimum when Johnson Brother's received the March 23, 2009 letter and determined that it did not set out what Johnson Bros.' believed the "deal" to be, based on oral discussion. *Id.* Johnson Bros. did not obtain a certificate of authority that would allow it to maintain suit, however, until June 28, 2012,¹⁷ by which point any oral contract claims (assuming they were somehow not barred by the UCC Statute of Frauds) as well as the promissory estoppel and negligent misrepresentation claims had expired.

Johnson Bros.' failure to obtain a certificate of authority prior to filing suit deprived it of its capacity to sue. *See North Star Trading Co. v. Alaska-Yukon-Pacific Exposition*, 68 Wash. 457, 459-60, 123 P. 605 (1912). Johnson Bros. might have cured that defect by obtaining a certificate before the statute of limitations expired. Indeed, RCW 23B.15.020(3) authorizes a court to "stay a proceeding commenced by a foreign corporation," instead of dismissing the suit, "until the foreign corporation ... obtains the certificate." Johnson Bros. waited,

¹⁷ *See* McNeely Dec. Ex. F.

however, until *after* the statute of limitations had run to obtain the certificate. Thus, Johnson Bros.' claims are untimely.

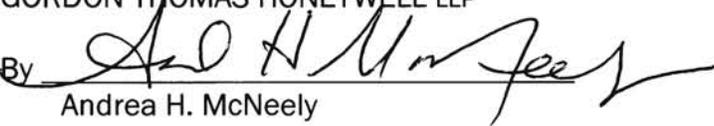
V. Conclusion

Johnson Bros.' first cause of action is barred by the statute of frauds for want of a written contract, its second cause of action by the inapplicability of promissory estoppel to the sale of goods, its third cause of action by the absence of false information and all three by the statute of limitations. Simpson, therefore, respectfully asks this court to affirm the trial court's summary judgment order dismissing Johnson Bros.' claims.

Dated this 1st day of November, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Leslee E. Hooper, declare that on November 1, 2013, I caused the foregoing Respondent's Opening Brief to be served on counsel for the Appellant, via first class mail and via email as follows:

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

DATED this 1st day of November, 2013.



Leslee E. Hooper
Legal Assistant
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