



No. 29454-4-III

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

PRIME REAL ESTATE CLOSING & ESCROW INC. ET AL
Plaintiff/Respondents

v.

CRAIG R. HEBERLING
Appellant/Defendant,

Brief of Appellant HEBERLING

Dustin Deissner
Washington State Bar No. 10784
VAN CAMP & DEISSNER
1707 W. Broadway
Spokane, WA 99201
(509) 326-6935
Attorney for Appellants



No. 29454-4-III

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

PRIME REAL ESTATE CLOSING & ESCROW INC. ET AL
Plaintiff/Respondents

v.

CRAIG R. HEBERLING
Appellant/Defendant,

Brief of Appellant HEBERLING

Dustin Deissner
Washington State Bar No. 10784
VAN CAMP & DEISSNER
1707 W. Broadway
Spokane, WA 99201
(509) 326-6935
Attorney for Appellants

Table of Contents

Table of Authorities	iv
Assignments of Error	1
Issues Pertaining to Assignments of Error	2
STATEMENT OF THE CASE:	3
FACTS	3
PROCEDURE	6
ARGUMENT	6
1. Unjust Enrichment	6
a. No Proof of Benefit	8
b. No Proof of Knowledge or appreciation	9
c. No Inequity	9
1. Unclean hands	10
2. Mitigation of Damages	10
3. Equal Opportunity to Mitigate	11
d. Conclusion	11
2. A Question of Fact Exists as to Prime's Liability	12
a. Duties of Care owed by Prime to Heberling	12
b. Breach of Duty	13
1. Prime Failed to Follow Escrow Instructions	13
2. Prime Failed to exercise Due Care	

	When Faced with Knowledge of Possible Error	15
3. Proximate Cause		18
a.	No Intervening Cause can be Found Where a Party Sought to Mitigate Damages . . .	18
b.	Heberling was not Required to Accept Prime’s Settlement	21
c.	Heberling had no meaningful knowledge of the error	22
d.	Economic Loss Rule Inapplicable	23
4. Summary Judgment		24
CONCLUSION		25
CERTIFICATE OF SERVICE		26

Table of Authorities

Cases

<i>Alejandre v. Bull</i> , 159 Wash.2d 674, 682, 153 P.3d 864 (2007)	23
<i>Borish v. Russell</i> , 155 Wn.App. 892, 230 P.3d 646 (2010)	23
<i>Brothers v. Public School Employees of Washington</i> , 88 Wn.App. 398, 945 P.2d 208 (1997)	22
<i>Bullard v. Bailey</i> , 91 Wn.App. 750, 959 P.2d 1122 (1998)	19
<i>Butko v. Stewart Title Co.</i> , 99 Wn. App. 533, 991 P.2d 697 (2000)	12
<i>Cascade Timber Co. v. N. Pac. Ry. Co.</i> , 28 Wn.2d 684, 711, 184 P.2d 90 (1947)	10
<i>City of Seattle v. Blume</i> , 134 Wash.2d 243, 251, 947 P.2d 223 (1997)	19
<i>Cobb v. Snohomish County</i> , 86 Wn. App. 223, 935 P.2d 1384 (1997)	10, 19, 20
<i>Cox v. O'Brien</i> , 150 Wn.App. 24 , 36-37, 206 P.3d 682 (2009), <i>review denied</i> 167 Wn.2d 1006, 220 P.3d 208 (2009)	8
<i>Daugert v. Pappas</i> , 104 Wash.2d 254, 257-58, 704 P.2d 600	

(1985)	19
<i>Denaxas v. Sandstone Court of Bellevue, L.L.C.</i> , 148 Wn.2d 654, 63 P.3d 125 (2003)	13, 22
<i>Hogland v. Klein</i> , 49 Wn.2d 216, 221, 298 P.2d 1099 (1956)	11, 20
<i>Hurlbert v. Gordon</i> , 64 Wash.App. 386, 824 P.2d 1238 (1992)	12
<i>King v. City of Seattle</i> , 84 Wash.2d 239, 272, 525 P.2d 228 (1974)	19
<i>National Bank of Washington v. Equity Investors</i> , 81 Wash.2d 886, 506 P.2d 20 (1973)	13
<i>Stuart v. Coldwell Banker Commercial Group, Inc.</i> , 109 Wash.2d 406, 420-21, 745 P.2d 1284 (1987)	24
<i>Sutton v. Shufelberger</i> , 31 Wash.App. 579, 643 P.2d 920 (1982)	20
<i>Tulalip Shores, Inc. v. Mortland</i> , 9 Wash.App. 271, 511 P.2d 1402, 1404 (1973)	7
<i>Walker v. Transamerica Title Insurance</i> , 65 Wn. App. 399, 828 P.2d 621 (1992)	11
<i>Ward v. Coldwell Banker/San Juan Properties, Inc.</i> , 74 Wn.App. 157, 872 P.2d 69 (1994)	12, 24

Young v. Young, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008)
..... 7

Statutes and Other Authority

Black's Law Dictionary 1535-36 (6th ed. 1990)
..... 7

ER 408 22

Assignments of Error

Assignment of error No. 1:

The Court below erred granting summary judgment to PRIME CLOSING as to its claims against HEBERLING.

Assignment of Error No. 2:

The Court below erred in granting summary judgment dismissing CRAIG HEBERLING's counterclaims against PRIME CLOSING.

Issues Pertaining to Assignments of Error

Issue No. 1:

Is an individual unjustly enriched where a closing company pays off the wrong loan; the individual subsequently borrows money and rather than using that loan to correct the closing company error, uses it for other purposes, but is forced to default, and the closing company must pay off the default.

Issue No. 2:

Is a closing company at fault for paying off the wrong loan, where there is ample evidence that it should have known there was confusion as to the correct loan to pay off.

Issue No. 3:

Is an individual's decision to mitigate his damages under these circumstances by attempting to use borrowed funds for additional investment, an intervening cause precluding liability against the closing company?

STATEMENT OF THE CASE:

FACTS

CRAIG HEBERLING owned numerous properties; he often would refinance those properties as part of his ongoing process of management and acquisition of new properties. [CP 608-9] Mr. HEBERLING owned 2 particular properties, one on Decatur Street in Spokane, and one on Normandie street in Spokane. [CP 272-273]

Mr. HEBERLING did not show a lot of income as a result of his dealings, since he was accumulating equity, and had a hard time getting financing. [CP 608-9] When EMPIRE MORTGAGE told him there was funding available, Mr. HEBERLING decided to refinance the Decatur house. [Id.] The loan was obtained and PRIME CLOSING was instructed to close the transaction. [CP 608]

PRIME paid off the wrong loan. [CP 274] As a result Mr. HEBERLING was left with the Decatur Property, worth

about \$165,000, with 2 mortgages totaling \$224,000; and Normandie, worth \$150,000 but with no mortgages. [CP 273-4]

The problem is that Mr. HEBERLING was put into an unfavorable cash flow position by the mistake. [CP 274] He tried to get PRIME to fix the problem but they would not offer him a replacement loan on the same terms as the loan that was misapplied. [CP 274] So Mr. HEBERLING then attempted to mitigate his damages by borrowing \$112,000 from Option One.

Now Mr. HEBERLING was told by EMPIRE MORTGAGE that the loan market had dried up, and that the Option One loan was the last loan that would be available to Mr. HEBERLING in the foreseeable future. [CP 609] When he got the Option One money, Mr. HEBERLING decided that since this was his last chance to use the scarce resource of loan funding, rather than correct PRIME's error by paying off the Decatur loan – which was, in any case, more than the Option One loan [CP 274]– he would use the money to acquire new,

income-producing property. [Id.] Mr. HEBERLING was able, for several months, to generate sufficient cash flow to service both loans on the Decatur property. [CP 275, 609]

Unfortunately for Mr. HEBERLING, the best laid schemes of mice and men gang aft aglay. The economy tanked, his investment returned insufficient cash flow, and he ended up defaulting on the double mortgage on Decatur. [CP 275-6]Mr. HEBERLING had to forfeit on the Decatur property, which was foreclosed. [CP 39] GN Mortgage had been placed in second position due to the error: it sought indemnification from its Title Insurance provider, Pacific Northwest Title, which paid it \$108,000 and looked to PRIME for that amount, which PRIME paid. [CP 39] Mr. HEBERLING made payments about 6 months, then defaulted; the eventual payment by PRIME to Pacific Northwest occurred many months after Mr. HEBERLING used the Option One funds. [CP 274] So PRIME then sued HEBERLING for the \$108,000.00 it paid out tot he

title insurance company.

PROCEDURE

There were actually two summary judgment motions.

The first, heard by Judge Cozza in January 2010, resulted in the dismissal of EMPIRE MORTGAGE from the lawsuit, and granted partial summary judgment to PRIME against HEBERLING on PRIME's claim based on unjust enrichment. [CP 345] The case was then set for trial on Mr. HEBERLING's counterclaims for offset.

A second summary judgment was decided in September, 2010, dismissing any further claims by Mr. HEBERLING against PRIME, [CP 662] resulted in a final judgment which is the subject of this appeal.

ARGUMENT

1. Unjust Enrichment

PRIME's primary argument on the First Summary Judgment, supporting its claims, is that Mr. HEBERLING was

unjustly enriched by PRIME's payment to Pacific Northwest Title, and HEBERLING should make restitution to PRIME. PRIME's argument is wrong and the Court erred as a matter of law granting summary judgment.

Generally Black's Law Dictionary 1535-36 (6th ed.

1990) defines the doctrine of unjust enrichment as the:

General principle that one person should not be permitted unjustly to enrich himself at expense of another, but should be required to make restitution of or for property or benefits received, retained or appropriated, where it is just and equitable that such restitution be made, and where such action involves no violation or frustration of law or opposition to public policy, either directly or indirectly.

Tulalip Shores, Inc. v. Mortland, 9 Wash.App. 271, 511 P.2d

1402, 1404 (1973). Washington has recently made a distinction

between unjust enrichment and quantum meruit, *Young v.*

Young, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008) and stated

the requirements for showing unjust enrichment:

Three elements must be established in order to sustain a claim based on unjust enrichment: [1] a benefit conferred upon the defendant by the plaintiff; [2] an appreciation

or knowledge by the defendant of the benefit; and [3] the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without the payment of its value.

There is no clear standard for when such a retention of benefits becomes “unjust.”

The obtaining of a benefit alone is not enough to justify restitution on the grounds that one party is enriched at the expense of another; **restitution is appropriate only when circumstances make retention of the benefit unjust unless the party who provided the benefit is compensated.** [Emphasis added]

A person has been unjustly enriched when he has profited or enriched himself at another's expense, contrary to equity. *Dragt, [v. Dragt/DeTray, LLC, 139 Wash.App. 560, 576, 161 P.3d 473 (2007)] 139 Wash.App. at 576, 161 P.3d 473.* But enrichment alone will not trigger the doctrine; rather, the enrichment must be unjust under the circumstances and as between the two parties to the transaction. *Id.*

Cox v. O'Brien, 150 Wn.App. 24 , 36-37, 206 P.3d 682 (2009), review denied 167 Wn.2d 1006, 220 P.3d 208 (2009).

A. No Proof of Benefit

The supposed benefit to HEBERLING here is that PRIME paid NW Title who paid GN Mortgage. But it is not

established that HEBERLING would have had to pay GN Mortgage. There is no proof in the record that GN could or would have sought a deficiency judgment against HEBERLING upon default of the Decatur House loans.

B. No Proof of Knowledge or appreciation

Critically HEBERLING obtained and used the Option One loan long *before* PRIME was required to pay the Title Company. The error in payoff occurred in mid-2007. [CP 139] Mr. HEBERLING borrowed money from Option One in August, 2007. [CP 169, declaration of Naomi Masuda] HEBERLING was first notified that PRIME would have to pay off Northwest Title in **March 2009**, [CP 50] almost two years later. Mr. HEBERLING had no knowledge that PRIME would or could face liability for almost 2 years while he sought, but failed, to profitably use the Option Proceeds to generate income to service all his loans.

C. No Inequity

HEBERLING believed in good faith when he took the Option One and used it, that he would be able to generate sufficient cash flow to service the GN Mortgage (2nd) on the Decatur property. Had his reasonable plan worked out PRIME would not have faced the expense. It didn't.

1. Unclean hands

On the other hand PRIME's exposure to this expense was due entirely to its own negligence in failing to pay off the correct loan, or to place the security where it belonged. As an equity doctrine PRIME must have clean hands. *Cascade Timber Co. v. N. Pac. Ry. Co.*, 28 Wn.2d 684, 711, 184 P.2d 90 (1947): PRIME fails to so present. It is not a fault-free plaintiff.

2. Mitigation of Damages

CRAIG HEBERLING was obligated to take reasonable steps to mitigate his damages. *Cobb v. Snohomish County*, 86 Wn. App. 223, 935 P.2d 1384 (1997). An injured party has a duty to use such means as are reasonable under the

circumstances to avoid or minimize the party's damages. The burden of proving that an injured party has failed to mitigate damages is on the party whose wrongful conduct was the cause of the injury.

If a choice of two reasonable courses presents itself, the person whose wrong forced the choice cannot complain that one rather than the other is chosen.

Hogland v. Klein, 49 Wn.2d 216, 221, 298 P.2d 1099 (1956). In order to show HEBERLING's actions gave rise to *unjust* enrichment, PRIME must show he was not acting reasonably to mitigate his actions – a showing it cannot make on summary judgment.

3. Equal Opportunity to Mitigate

PRIME mortgage was in an equal position to mitigate the damages: it could have taken steps to correct the error before it caused economic injury to Mr. HEBERLING. could have paid off correct loan and put Heberling in same position as to Normandie Loan, but did not. See *Walker v. Transamerica Title*

Insurance, 65 Wn. App. 399, 828 P.2d 621 (1992).

d. Conclusion

Judge Cozza erred as a matter of law: CRAIG HEBERLING cannot be found to have been unjustly enriched. He received no benefit that was ever under his control. He was unaware when he acted, that there might later arise a payment on his behalf. He acted legally, fairly and equitably to mitigate his damages, but was victim of unpredictable economic forces.

2. A Question of Fact Exists as to Prime's Liability

In the Second Summary Judgment, PRIME argued it was not liable to HEBERLING at all and so his counterclaim should be dismissed. There are fact questions as to this issue.

a. Duties of Care owed by Prime to Heberling

A closing and escrow agent owes a fiduciary duty to the parties to the escrow. *Butko v. Stewart Title Co.*, 99 Wn. App. 533, 991 P.2d 697 (2000). Fiduciary duties include:

- To follow escrow instructions. *Ward v.*

Coldwell Banker/San Juan Properties, Inc.,

74 Wn.App. 157, 872 P.2d 69 (1994);

Hurlbert v. Gordon, 64 Wash.App. 386, 824

P.2d 1238 (1992)

- To exercise ordinary skill, diligence and reasonable care. *Denaxas v. Sandstone Court of Bellevue, L.L.C.*, 148 Wn.2d 654, 63 P.3d 125 (2003); *National Bank of Washington v. Equity Investors*, 81 Wash.2d 886, 506 P.2d 20 (1973).

b. Breach of Duty

PRIME breached both duties in this case. An affidavit was presented to the Court by Ned Barnes, offering an expert opinion that PRIME was entirely at fault. [CP 34] Additionally,

1. Prime Failed to Follow Escrow

Instructions

PRIME argues “we did what we were told.” But there is

a question of fact whether Prime was told to pay off the wrong loan.

- The initial closing instructions dated 5/17/07, not signed by Heberling, [CP 628, Telleson Decl. Exh. F p. 1 of 5] requires “property address must match loan documents;” [Id.] “Closing agent has compared legal description on Deed, Mortgage Title Commitment and Survey and is assuring lender they are accurate and consistent;” [Id.] “All funds have been disbursed per the closing statement.” [Id.]
- A Supplement dated 5/18/07, *but signed by Heberling on 5/21/07*, [CP 628, Telleson Decl. Exh. F p. PRIME 108] states that the Title policy is approved, the settlement statement is accurate and disbursements are per the closing statement. This document did not include instructions to pay off the Wells Fargo loan.
- Prime’s instructions included forms 1003. Prime

however received multiple 1003's with different numbers.

[CP 145, McGrath Dep. P. 17 line 4 - 7.] The last (chronological) 1003 supposedly had an asterisk to denote which loan to pay off. Here is a picture of the document:

Acct. No. [S Name and address of Bank, S&L, or Credit Union	Acct. No. 709014133482 Name and address of Company WELLS FARGO HOME MORTG	(1,203)	82,680
Acct. No. [S Name and address of Bank, S&L, or Credit Union	Acct. No. 7285140801044 Name and address of Company WELLS FARGO HOME MORTG	(1,203)	83,731

Asterisk

- Prime employees claim they called Empire for clarification, but Empire employees dispute this. [CP 145, McGrath Dep. P. 17 line 8; CP 139, Grim Dep. P. 21 line 15; CP 122, 126, Campbell Dep. p. 33, 67; CP 140, Grim dep. P. 23; CP 149, Phillips dep. P. 40] No one at Prime spoke to Mr. Heberling about the confusion and Heberling denied receiving calls from Prime. [CP 58, Heberling Dep. P. 8]

Prime's instruction set was therefore unclear: Prime certainly had a duty to determine what it was in fact supposed to do before actually doing it.

2. Prime Failed to exercise Due Care When Faced with Knowledge of Possible Error

Prime was aware that there was confusion over the correct loan to pay off, but did not exercise the degree of care its own policies demanded to resolve the question.

- Prime received its instructions from Empire in the form of a loan application (form 1003) indicating what loan to pay off. [CP 145, McGrath Dep. P. 14 line 20] However Prime received multiple 1003's with inconsistent instructions of different loans to pay off. [CP 145, McGrath Dep. P. 17 line 4 - 7.]
- Prime was confused about which loan to pay off. McGrath testified that Prime was unable to get accurate payoff information from the lender. [CP 146, McGrath P.

20 line 16] Becky Phillips at Empire testified she spoke to Trina at Prime and discussed the two loans. [CP 149, Phillips Dep. P. 41 line 14] She recommended Trina call Heberling to make sure of the correct number. [CP 150, Id. P. 42 line 14] James Olson admits there was confusion. [CP 155, Olson Dep. P. 44 line3]

- The loan number paid off did not correlate to the address of the house being refinanced [CP 157, Azevedo Dep. Pp. 20-21]; a fact that could have been noted from the deed of trust [CP 147, McGrath p. 36] which was not ordered. A title report was ordered; it showed inconsistent legal descriptions. [CP 29 Olson Dep. P. 19]
- Cynthia Azevedo, Prime employee, testified that Prime's practice, if there was confusion about the loan number to pay off, was:

We would follow up with the person that provided it to us and find out what the right number is, either by calling the customer, the mortgage broker, or a seller in a sale transaction. [CP 157, Azevedo Dep.

P. 19 line 21]

- McGrath [CP145, McGrath Dep. P. 17 line 8] and Grim [CP 139, Grim Dep. P. 21 line 15] say they spoke to Steve Campbell at Empire, he told them to pay off the wrong loan and they then received another "1003" and relied on that document to determine which loan to pay off. Campbell denies this. [CP 122, Campbell Dep. p. 33, 67] It is also disputed whether Phillips gave incorrect information to Grim. [CP 139, Grim dep. P. 23; CP 149, Phillips dep. P. 40]
- No one at Prime spoke to Mr. Heberling about the confusion. Heberling received no calls from Prime. [CP 58, Heberling Dep. P. 8]
- James Olson admits at least one error:

I think Prime committed one error, and that error was not double-checking the address on the payoff, the property address being refinanced. [CP 31-32, Olson Dep. 48 line 25 - 49 lines 1 - 2]

Olson also wrote in a letter of August 8, 2007 [CP 615],

Mr. Heberling is essentially blameless in this, even though he did not supply us with his loan number. My guess is that he did not know he should give it to us and believed that giving it to his loan officer was sufficient. As we now know, it was not. However I do not believe that Mr. Heberling should suffer any loss from this.

There is clearly a fact question whether Prime was aware of the discrepancy in loan payoff numbers, had the ability to clarify the issue, and did not.

3. Proximate Cause

a. No Intervening Cause can be Found Where a Party Sought to Mitigate Damages

Prime argues the Heberling's decision to use the "Option One" loan for purposes other than paying off the Decatur property was an intervening cause of his damages and a failure to avoid consequences of the tort.

This used to be called the "Independent Business Judgment Rule" and has been rejected by the Washington

Supreme Court. *City of Seattle v. Blume*, 134 Wash.2d 243, 251, 947 P.2d 223 (1997).

Proximate cause requires cause in fact, which is inherently a fact question, *Daugert v. Pappas*, 104 Wash.2d 254, 257-58, 704 P.2d 600 (1985). Then Legal Causation has to be determined based on “logic, common sense, justice, policy, and precedent,” *Bullard v. Bailey*, 91 Wn.App. 750, 959 P.2d 1122 (1998). An intervening or superseding cause “is one which comes into active operation in producing the result after the negligence of the defendant.” *King v. City of Seattle*, 84 Wash.2d 239, 272, 525 P.2d 228 (1974).

But Heberling was *obligated* to take reasonable steps to mitigate his damages. *Cobb v. Snohomish County*, 86 Wn. App. 223, 935 P.2d 1384 (1997). The duty to mitigate – avoidable consequences – is not absolute but consists of what is reasonable under the circumstances. The burden of proof is on the party alleging that mitigation should have occurred to show

its efficacy. *Sutton v. Shufelberger*, 31 Wash.App. 579, 643 P.2d 920 (1982).

An injured party has a duty to use **such means as are reasonable under the circumstances to avoid or minimize the party's damages.**

If a choice of two reasonable courses presents itself, the person whose wrong forced the choice cannot complain that one rather than the other is chosen.

Cobb v. Snohomish County, 86 Wash.App. 223, 230, 935 P.2d 1384 (1997) citing *Hogland v. Klein*, 49 Wn.2d 216, 221, 298 P.2d 1099 (1956).

Mr. Heberling faced an economic loss due to the error by Prime. He then had a chance to borrow from Option One, but was told that this type of financing would no longer be available to him. Heberling had little income showing on his tax returns, and this type of finance was drying up. Option One was his last chance. Heberling made money by borrowing and refinancing, getting properties that returned enough rent to provide cash flow

while deferring profits into property appreciation.

Faced with the choice of losing his last opportunity to borrow and create additional income-producing opportunities, or use his last loan to fix Prime's error, Heberling decided to use the Option One money for additional income production which he hoped would then cover the double loan on Decatur.

Instead the property market tanked with the economy, he couldn't sustain his enterprise and he lost several properties. It is at least a fact question whether his decision to use the Option One loan was reasonable mitigation.

**b. Heberling was not Required to Accept
Prime's Settlement**

Prime made a settlement offer Heberling refused because it did not make him whole. It was an offer for a 5 year call loan, and would have left Heberling hanging when it came due since credit was drying up for persons situated like Heberling.

Such evidence of settlement offers may be admissible

under ER 408 relative to mitigation. *Brothers v. Public School Employees of Washington*, 88 Wn.App. 398, 945 P.2d 208 (1997). But the full impact of the evidence is that a settlement offer was made that did not return Heberling to status quo ante: it merely goes to the fact question whether Heberling acted reasonably.

c. Heberling had no meaningful knowledge of the error

Prime argues that because Heberling signed a settlement statement showing the amount of the payoff he is charged with knowledge that the payment was in error.

Real estate closings are bewildering even to experienced laymen – for that matter, to lawyers and judges. Heberling relied on Prime to “get it right” for him: that is why he hired a closing agent. *Denaxas v. Sandstone Court of Bellevue, L.L.C.*, 148 Wn.2d 654, 63 P.3d 125 (2003) merely holds that the escrow agent’s duty does not go beyond the instructions: it

doesn't say that the client's potential ability to spot a single error in hundreds of pages absolves the closing agent of the duty to carry out its instructions correctly.

d. Economic Loss Rule Inapplicable

The economic loss rule:

Washington plaintiffs who are parties to a contract are prohibited from recovering "economic losses" in a tort action arising out of the contract because "tort law is not intended to compensate parties for losses suffered as a result of a breach of duties assumed only by agreement."... If the economic loss rule applies, the party will be held to contract remedies, regardless of how the plaintiff characterizes the claims. . . . The key inquiry is the nature of the loss and the manner in which it occurs, i.e., are the losses economic losses, with economic losses distinguished from personal injury or injury to other property. If the claimed loss is an economic loss and no exception applies to the economic loss rule, then the parties will be limited to contractual remedies.

Borish v. Russell, 155 Wn.App. 892, 230 P.3d 646 (2010).

This doesn't prevent recovery, it just limits the damages to economic losses. The goal of contract law is to place the plaintiff where he or she would be if the defendant had performed." *Alejandro v. Bull*, 159 Wash.2d 674, 682, 153 P.3d

864 (2007). Tort law redresses physical harm injuries whereas contract law protects expectation interests. *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wash.2d 406, 420-21, 745 P.2d 1284 (1987). Here Heberling is only seeking contract remedies: to be placed where he would have been, economically, had Prime performed its contract competently.

4. Summary Judgment

In a summary judgment proceeding, all the facts submitted and all the reasonable inferences from the facts are considered most favorably toward the nonmoving party. Summary judgment is not proper if reasonable minds could draw different conclusions from undisputed facts or if all of the facts necessary to determine the issues are not present. *Ward V. Coldwell Banker*, 74 Wn. App. 157, 872 P.2d 69 (1994).

Here the escrow instructions were ambiguous. Prime did not exercise reasonable care to clarify its instructions thereby breaching its fiduciary duty of due care. Heberling elected to

mitigate his damages by attempting to use the last loan he was going to be able to get to further his business rather than fix Prime's mistake: whether this was reasonable is a fact question. Summary judgment is inappropriate.

CONCLUSION

The Court below erred in granting both summary judgment motions. This court should reverse the first, finding that HEBERLING was not unjustly enriched as a matter of law; and reverse the second since there was a question of fact as to HEBERLING's counterclaims. The matter should then be remanded for trial.

January 3, 2011

Van Camp & Deissner



Dustin Deissner WSB# 10784
Attorney for Appellants

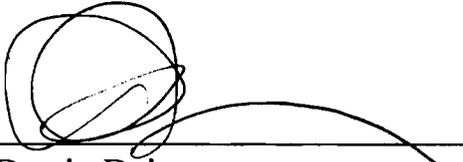
CERTIFICATE OF SERVICE

DUSTIN DEISSNER certifies upon penalty of perjury:

I have on this date served the foregoing document upon the following parties by the following means:

TO:	BY:
Elizabeth Telleson Winston & Cashatt 601 W. Riverside Ste. 1900 Spokane WA 99201	<input type="checkbox"/> US Mail 1 st Class Postage Prepaid <input checked="" type="checkbox"/> Delivery Service <input checked="" type="checkbox"/> Facsimile to: <input type="checkbox"/> Email <input type="checkbox"/> Hand Delivery
Everett Coulter Evans Craven & Lackey 818 W. Riverside Ste. 250 Spokane WA 99201	<input type="checkbox"/> US Mail 1 st Class Postage Prepaid <input checked="" type="checkbox"/> Delivery Service <input checked="" type="checkbox"/> Facsimile to: <input type="checkbox"/> Email <input type="checkbox"/> Hand Delivery

January 3, 2011


Dustin Deissner