

FILED

SEP 28 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 309622

**COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON**

CHERI ABEL JOHNSON,

Respondent,

v.

FRAME, LLC,

Appellant.

RESPONDENT'S BRIEF

MINNICK • HAYNER, P.S.

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I. INTRODUCTION

The issue before the court is: has the Right of First Refusal given by Cheri Johnson to Frame, LLC expired or is it still valid and enforceable?

On Motion for Summary Judgment, Judge David Frazier (acting as visiting judge in Columbia County) found and ruled that the Right of First Refusal signed by the parties on December 1, 2000 "has expired by its own terms and is no longer valid or enforceable." CP 100.

II. STATEMENT OF THE CASE

In 2000, Cheri Abel Johnson ("Johnson") sold Frame, LLC real property in Columbia County. The property sold to Frame, LLC is contiguous to property still owned by Johnson. CP 28. A member of Frame, LLC is David Frame. On behalf of the LLC, Mr. Frame asked Johnson for a Right of First Refusal to buy her property if she ever offered it to a third party. Johnson agreed. Frame, LLC had its attorney, Scott Marinella, of Dayton, draft the Right of First Refusal. CP 28-29.

The Right of First Refusal was signed by Johnson and David Frame, as a member of and for Frame, LLC, on December 1, 2000.

Both signatures were notarized by Scott Marinella. CP 29. In relevant part, the Right of First Refusal states:

Cheri Lynn Abel [Johnson] hereby grants to FRAME, LLC, in consideration of the terms and conditions negotiated between them, the Right of First Refusal to purchase any or all of the described real property, situated in Columbia County, State of Washington . . . at the same price and terms of any other legitimate prospective purchase offer, in accordance with the following provisions:

1. Time to Exercise First Refusal. . . . These rights shall be for a term of (1) ten years from the date hereof, or (2) for as long as David E. Frame and Harleen M. Frame are members of Frame, LLC and Frame, LLC owns land adjacent to lands owned by Cheri Lynn Abel . . . whichever is greater.

. . .

5. Binding. The Right of First Refusal granted herein accrue to and bind the successors, assigns and heirs of the parties.

Harleen M. Frame died in 2003 or 2004. She is no longer a member of Frame, LLC. CP 29.

III. FRAME, LLC ASSIGNMENTS OF ERRORS AND ISSUES
PERTAINING TO ASSIGNMENTS OF ERROR

Frame, LLC claims the trial court “erred in granting summary judgment to Johnson.” Frame, LLC Brief, page 5. It says there are six issues pertaining to its assignment of error. The first two, “scrivener’s error” and “mistake,” it argues separately. The last four

it lumps together and argues under the heading “Satisfaction or Excuse of Condition (Issues No. 3, 4, 5 and 6).” Frame, LLC Brief, pages 5-6. Johnson will address/respond to the three arguments made by Frame, LLC: (1) Scrivener’s error; (2) mistake; and (3) satisfaction or excuse of conditions.

IV. ARGUMENT

A. The Right of First Refusal expired by its express terms. It is no longer valid and enforceable.

Since Harleen Frame is no longer a member of Frame, LLC (and it is more than ten years since the Right of First Refusal was executed), the Right of First Refusal has expired by its own terms. It is therefore no longer enforceable and Johnson should be allowed to offer the property to whomever she wants without having to offer it to Frame, LLC.

A Right of First Refusal is not an interest in land.

We reject the view that a preemptive contract of any duration, long or short, creates an interest in land *at the time of its inception*. Even in an ordinary option contract, until the option is exercised, the optionee requires no equitable estate or interest in the optioned land. W. Walsh, *A Treatise on Equity*, §72, at 360-61 (1930); 77 Am.Jur. 2nd *Vendor and Purchaser*, §§27-29, at 201-11 (1975). The holder of a Right of First Refusal has far less of an interest in land than the holder of an ordinary option. The pre-emptioner has no power or right to affect the property in any way until its owner expresses a

desire and willingness to sell. At that point, the pre-emptioner has, for the contracted duration, an election . .

Robroy Land Co. v. Prather, 95 Wn.2d 66, 71, 622 P.2d 367 (1980)¹ (emphasis in original).

In this case, “the contracted duration” was, as stated in the Right of First Refusal, “for a term of (1) ten years from the date hereof, or (2) for as long as David E. Frame and Harleen M. Frame are members of Frame, LLC . . . whichever is greater.” Right of First Refusal, §1.

Frame, LLC agrees that the Right of First Refusal says what it says. That is, the Right of First Refusal is for ten years or as long as David Frame and Harleen Frame are members of the LLC, whichever is longer. The Frame, LLC argument is that “David E. Frame *and* Harleen M. Frame” should have said “David E. Frame *and/or* Harleen M. Frame.” Frame, LLC argues that “and” was used rather than “and/or” due either to a scrivener’s error or a mutual mistake.

6.3 On November 30, 2000, Frame, by email, notified its then attorney, Scott Marinella, of the Nealy & Marinella Law Firm in Dayton, WA that by agreement with Cheryl Abel (now Cheryl Abel Johnson herein and also formerly known as Cheri Vining) one of the conditions of the subject Right of First Refusal would be that it would remain effective for so long as “Dave Frame *and/or*

¹ See further discussion re: Right of First Refusal being or not being an interest in land at section E, page 16.

Harleen Frame are members of Frame, LLC.” To which, Mr. Marinella replied, six minutes later, that same day, “okay, the Right of First Refusal and other documents will be ready for your signature at the settlement closing tomorrow.” . . . However, due to oversight, inadvertence or mutual mistake - - and contrary to the true intention of the parties - - or subsequent alteration then unknown by Frame, the Right of First Refusal dated December 1, 2000 and recorded on December 6, 2000, stated it will remain effective for, *inter alia*, “so long as Dave Frame and Harleen Frame are members of Frame, LLC.”

Frame, LLC Answer, CP 14-15.

The duty of a court regarding the interpretation of the language in the Right of First Refusal is “to declare the meaning of what is written, and not what was intended to be written.” *J.W. Seavey Hop Corp. v. Pollack*, 20 Wn.2d 337, 349, 147 P.2d 310 (1944).

B. Contract interpretation:

What Frame, LLC wants this court to do is consider extrinsic or parol evidence to change or modify the express language in the Right of First Refusal.

[Parol] or extrinsic evidence is not admissible to add to, subtract from, vary, or contradict written instruments which are contractual in nature and which are valid, complete, unambiguous, and not affected by accident, fraud, or mistake.

St. Yves v. Mid-State Bank, 111 Wn.2d 374, 377, 757 P.2d 1384 (1988).

There is no ambiguity in the language in the Right of First Refusal. Frame, LLC so admits. It clearly states: "These rights shall be for a term of (1) ten years from the date hereof, or (2) for as long as David E. Frame and Harleen M. Frame are members of Frame, LLC." With respect to this language, the Right of First Refusal is fully integrated. That is, it was intended as a final expression of the terms of the agreement between the parties. There is no need for this court to consider parol evidence regarding this language. As such, the parol evidence rule, quoted in *St. Yves v. Mid-State Bank* above, is applicable. No parol or extrinsic evidence should be admitted or considered by this court to subtract from, vary or contradict the express and unambiguous terms in the fully integrated Right of First Refusal signed by the parties.

Frame LLC argues that "David E. Frame *and* Harleen M. Frame" should have read "David E. Frame *and/or* Harleen M. Frame." In support, Frame attached to its Answer an email sent by Dave Frame to Scott Marinella on November 30, 2000 in which Mr. Frame said:

Cheri & I agreed to language in the First Refusal that requires Harleen and/or I to be a member of Frame LLC for it to be exercisable. Otherwise the language is OK.

C.P. 19, Exhibit 2, Frame LLC Answer.²

Frame LLC wants this court to change the language of the Right of First Refusal based on the email sent by Dave Frame to Scott Marinella. This the court should not do. Extrinsic evidence is admissible “for the purpose of aiding in the interpretation of what is an instrument, and not for the purpose of showing intention independent of the instrument.” *Berg v. Hudesman*, 115 Wn.2d 657, 669, 801 P.2d 222 (1990), quoting with approval *J.W. Seavey Hop Corp. v. Pollock*, 20 Wn.2d 337, 348-49, 147 P.2d 310 (1944).

In this case, the extrinsic/parol evidence offered by Frame LLC (i.e., the Dave Frame email to Nealey & Marinella) is offered to persuade this court to change the unambiguous language in the Right of First Refusal from “and” to “and/or.” The result of that change would be to substantially extend the operative term of the Right of First Refusal to comport with the unilateral subjective intent of Dave Frame. This the court should not do. “Admissible extrinsic evidence does *not* include (1) evidence of a parties’ unilateral or subjective intent as to the meaning of a contract word or term, (2) evidence that would show an intention independent of the contract, or (3) evidence that varies, contradicts, or modifies the written

² Johnson does not agree that she and Mr. Frame agreed on the “and/or” language. See her Declaration, CP 54.

language of the contract.” *Bort v. Parker*, 110 Wn. App. 561, 574, 42 P.3d 980 (2002) (emphasis in original).

An important case discussing parol evidence is *Berg v Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990). However, *Berg* is not the final word on that issue. In several cases since *Berg*, the Washington Supreme Court has clarified *Berg* with respect to the use of parol or extrinsic evidence.

Our holding in *Berg* may have been misunderstood as it implicates the admission of parol and extrinsic evidence. **We take this opportunity to acknowledge that Washington continues to follow the objective manifestation theory of contracts. Under this approach, we attempt to determine the parties’ intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties.** *Max L. Wells Trust v. Grand Cent. Sauna & Hot Tub Co. of Seattle*, 62 Wn. App. 593, 602, 815 P.2d 284 (1991). We impute an intention corresponding to the reasonable meaning of the words used. *Lynott v. Nat’l Union Fire Ins. Co. of Pittsburgh*, 123 Wn.2d 678, 684, 871 P.2d 146 (1994). **Thus, when interpreting contracts, the subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used.** *City of Everett v. Estate of Sumstad*, 95 Wn.2d 853, 855, 631 P.2d 366 (1981). We generally give words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent. *Universal/Land Constr. Co. v. City of Spokane*, 49 Wn. App. 634, 637, 745 P.2d 53 (1987). **We do not interpret what was intended to be written but what was written.** *J.W. Seavey Hop Corp. of Portland v. Pollock*, 20 Wn.2d

337, 348-49, 147 P.2d 310 (1944), *cited with approval in Berg*, 115 Wn.2d at 669.

Hearst Commc'ns, Inc. v. Seattle Times, 154 Wn.2d 493, 503-504, 116 P.3d 262 (2005) (emphasis added).

The undisputed fact is that Dave Frame, for and on behalf of Frame LLC, signed the Right of First Refusal with “and” rather than “and/or.” Until this lawsuit was filed, ten plus years after it was signed by the parties, Frame LLC never sought to change, modify, or alter the language in the Right of First Refusal. Frame LLC never contacted its attorney, Scott Marinella, or Johnson to state that there was an error or mistake in the Right of First Refusal.

The language in the Right of First Refusal is not ambiguous or susceptible of more than one meaning. As such, this court should apply the relevant basic principles governing contract interpretation:

Where the terms of the contract are plain and unambiguous, the intention of the parties shall be ascertained from the language employed. *Boeing Airplane Co. v. Firemen's Fund Indem. Co.*, 44 Wn.2d 488, 268 P.2d 654, 45 A.L.R. 2d 984 (1954); *Bellingham SEC. Syndicate, Inc. v. Bellingham Coal Mines, Inc.*, 13 Wn.2d 370, 125 P.2d 668 (1942); *Thomle v. Soundview Pope Co.*, 181 Wash. 1, 42 P.2d 19 (1935); *Camp v. Carey*, 152 Wash. 480, 278 PAC. 183 (1929). Words of a contract should be given their ordinary meaning unless context or definition require otherwise. *Mead v. Anton*, 33 Wn.2d 741, 207 P.2d 227, 10 ALR 2d 588 (1949); In

re *Garrity's Estate*, 22 Wn.2d 391, 156 P.2d 217 (1945). Nor should mistakes in grammar, spelling, or punctuation be permitted to alter, contravene, or vitiate the manifest intention of the parties as gathered from the language employed. *Wick v. Western Union Life Ins. Co.*, 104 Wash. 129, 175 PAC. 953 (1918).

Schauerman v. Haag, 68 Wn.2d 868, 873, 416 P.2d 88 (1966).

C. No scrivener's error.³

The Frame, LLC argument is that Dave Frame asked his attorney, Scott Marinella, to include in the Right of First Refusal "Dave Frame and/or Harleen Frame." For reasons unexplained, the Right of First Refusal said "Dave Frame and Harleen Frame." Frame, LLC claims this is a result of a scrivener's (i.e., Scott Marinella) error. The basis of this argument is that Dave Frame sent an email to Mr. Marinella in which he (Frame) said: "Cheri & I agreed to language in the First Refusal that requires Harleen and/or I [sic] to be a member of Frame, LLC for it to be exercisable. Otherwise, the language is okay." CP 19. The Right of First Refusal signed by the parties had "and" not "and/or."

Scott Marinella is alive, well and practicing law in Dayton. It would have been easy for Frame, LLC to have him file an affidavit

³ Johnson attended the hearing on the Motion for Summary Judgment. Her attorney was/is Tom Scribner. When Frame, LLC argued that there was a "scrivener's error," Johnson leaned over to her attorney, poked him in the ribs, and whispered, "Why did you make an error?" In response, Mr. Scribner took a page from his notepad and wrote: "S-C-R-I-V-E-N-E-R, a person who writes down what he is told. Not Scribner."

stating he made a mistake if that is, in fact, what happened. Frame, LLC did not. One wonders why. What we do know is that Mr. Marinella, as recently as July 26, 2011, said that the Right of First Refusal, which he drafted for Frame, LLC, "has expired by its very terms." CP 108. This was in a letter Mr. Marinella sent to Gary Snyder at Christy's Realty. The same Gary Snyder who Frame, LLC references in its Brief at page 10. Had Mr. Marinella made a mistake in the language which, if corrected, would extend the operative duration of the Right of First Refusal he undoubtedly would have so stated in his letter to Mr. Snyder. He did not.

Furthermore, in a letter dated August 4, 2011 sent by Mr. Marinella to Eric Johnson, husband of Johnson, Mr. Marinella said:

I disagree with Dave Frame's position that a Right of First Refusal still exists. The language in the document between Dave as member and Harleen as member does not say "and/or". That having been said, however, Dave has recently taken the position that he believes the Right of First Refusal exists and is in full force and effect. Dayton Title will not delete the Right of First Refusal as an exception to title unless Dave indicates, in writing, that it no longer is applicable. It may be that a declaratory judgment action will be necessary to bring this issue to a head unless it can be resolved directly in negotiations with Dave.

CP 110.⁴

⁴ It was in part because of this letter and the suggestion of Mr. Marinella that a declaratory judgment action be filed that Johnson filed her Complaint for Declaratory Relief.

This would have been an opportune time for Mr. Marinella to acknowledge that there was a mistake in the drafting of the Right of First Refusal if, in fact, there had been a mistake. He did not so state or imply. It would seem a simple thing for Mr. Marinella, the Frame, LLC attorney, to acknowledge a drafting error in order to benefit his client if such were factually warranted. Mr. Marinella said absolutely nothing about a mistake regarding the drafting of the Right of First Refusal.

In its Brief, Frame, LLC cites *Snyder v. Peterson*, 62 Wn. App. 522, 814 P.2d 1204 (1991) as support of its claim of scrivener's error. This case does not support Frame, LLC.

In *Snyder v. Peterson* the trial court granted a motion for summary judgment to reform a deed due to a scrivener's error. 62 Wn. App. at 524. The Court of Appeals affirmed. *Id.* In that case, the parties all agreed that the subject deed left the section, township, range and meridian off the deed. 62 Wn. App. at 526. This mutual mistake was sufficient to justify reformation of the deed. As stated by the court:

All of the parties admittedly intended that the specific parcel in question pass to the four siblings equally. There was no ambiguity requiring application of the parol evidence rule. Nor was there any evidence of fraud or overreaching, and the circumstances clearly show the

grantor's intent. As stated in *Platts v. Arney*, 46 Wn.2d 122, 278 P.2d 657 (1955), "[i]t is apparent from the instrument itself that the mistake is one of the scrivener, adopted by both parties when they signed the real-estate contract." *Platts*, at 28. When considering the circumstances at the time of execution and the intent of the parties, it is apparent that the trial judge's ruling allowing reformation was proper.

62 Wn. App. at 527 (*footnote omitted*).

This is not what happened in this case. On the contrary, Johnson disputes that there was a mistake. Scott Marinella, in 2011, based on the language in the Right of First Refusal that he drafted as the Frame, LLC attorney, said it had expired. Had he made a mistake in the Right of First Refusal, it is assumed he would have so stated. Particularly since he was the Frame, LLC attorney and drafted the Right of First Refusal for and on behalf of Frame, LLC.

There was no scrivener's error. The Right of First Refusal should not be reformed based thereon or therefor.

D. No mutual mistake.

A mutual mistake occurs "when the parties, although sharing an identical intent when they formed a written document, did not express that intent in the document." *Halbert v. Forney*, 88 Wn. App. 669, 674, 945 P.2d 1137 (1997). There was no "identical

intent” in this case. Further, a person asserting mutual mistake must prove, by clear, cogent and convincing evidence, that both parties to the contract were mistaken. *Rigos v. Cheney Sch. Dist.*, 106 Wn. App. 888, 892-893, 26 P.3d 304 (2001).

Frame, LLC cites *Estate of Harford*, 86 Wn. App. 259, 936 P.2d 48 (1997) in support of its argument that there was a mutual mistake. In *Estate of Harford* a party to a written settlement agreement sought relief on the basis of mistake. 86 Wn. App. at 260. The trial court agreed that there was a mistake and vacated the stipulated order. 86 Wn. App. at 262. The Court of Appeals reversed.

The Court of Appeals found on review of the record that Harford’s attorney “made an editing mistake in drafting the final agreement.” *Id.* That was not, however, the “real question.” According to the Court of Appeals: “The real question is whether this sort of error justifies the vacation of an order based on a settlement agreement.” *Id.* Regarding which “real question,” the Court of Appeals said:

The principles of the law of contracts apply to review of settlement agreements. Under contract principles, a mutual mistake may justify vacation of a settlement agreement. In *Haller v. Wallis*, a case involving a mistake regarding the extent of injuries, the court found

that mutual mistake was necessary to set aside a stipulated agreement:

If [the judgment] conforms to the agreement or stipulation, it cannot be changed or altered or set aside without the consent of the parties unless it is properly made to appear that it was obtained by fraud or mutual mistake or that consent was not in fact given, which is practically the same thing. It will not be set aside on the ground of surprise and excusable neglect. . . . Erroneous advice of counsel, pursuant to which the consent judgment was entered is not ground for vacating it.

Here, there was no conclusive evidence of a mutual mistake, rather the evidence was contested. Most significantly, the trial court did not make a finding that Birchfield intended to have a settlement agreement that only addressed the administration of the estate. Such silence must be interpreted as a finding that there was not a mutual mistake since Harford had the burden of proving this point.

Estate of Harford, 86 Wn. App. at 262-263 (footnotes omitted).

In this case there is/was no mutual mistake, certainly no conclusive evidence of such. As Johnson said in her Declaration:

I do not remember exactly, since it was more than ten years ago, but it is my recollection that I met at Scott Marinella's office with Dave Frame to sign the December 2000 Right of First Refusal. At that time, it is my recollection that I told Scott and Dave that I did not want the Right of First Refusal to continue for an indefinite or too long a period. I remember saying that I wanted the Right of First Refusal to say that it would continue only so long as Dave "and" Harleen were members of the LLC. I did not agree to any "and/or" language as stated by Mr. Frame in the referenced email that he sent to me & Marinella.

CP 54, ¶12 in Declaration of Cheri Abel Johnson Regarding Motion for Summary Judgment.

Frame, LLC admits there was not mutual mistake regarding “and/or” rather than “and.” With regard to the Dave Frame to Scott Marinella email, Frame, LLC states:

The above noted e-mail exchanges between Frame and Mr. Marinella, the day before closing, showed that the expectation, at least to Frame, was that the duration of right of first refusal would include the language “for so long as Dave Frame and/or Harleen Frame are members of FRAME, LLC.”

Frame, LLC Brief, page 12, *emphasis added*.

Frame’s unilateral/subjective intent is not and should not be adequate to vacate the clear language of the Right of First Refusal. Mutual mistake means “mutual” (i.e., done or felt by each toward the other). There was not a mutual mistake in this case.

E. No satisfaction or excuse of conditions.

The Right of First Refusal, CP 6-12, was given by Johnson to Frame, LLC.

Cheri Lynn Abel [Johnson] hereby grants to FRAME, LLC, in consideration of the terms and conditions negotiated between them, the right of first refusal to purchase any or all of the described real property, situated in Columbia County, State of Washington, as shown on attached Exhibit “B” at the same price and terms as any other legitimate prospective purchase offer, in accordance with the following provisions:

CP 6-7.

Frame, LLC claims that “A right of first refusal is an interest in land.” Frame, LLC Brief, page 17. In support, it cites *Manufactured Housing Communities of Washington v. State*, 142 Wn.2d 347, 13 P.3d 183 (2000). That case is distinguishable from this case for two reasons. First, *Manufactured Housing Communities of Washington* involved a challenge to the constitutionality of Chapter 59.23 RCW, the mobile home parks-resident ownership act, which gave qualified tenants a right of first refusal to purchase a mobile home park. 142 Wn.2d at 350-351. Second, the “interest in land” issue in that case dealt with the grantor of the right (Johnson in this case) not the grantee (Frame, LLC in this case).

Relying on *Robroy Land Co. v. Prather*, 95 Wn.2d 66, 622 P.2d 367 (1980), the State attempts to avoid the inevitable conclusion that the right of first refusal in the hands of the property owner is a valuable property right. The State’s reliance on *Robroy* is erroneous for three reasons. First, unlike the present case, the right of first refusal in *Robroy* was voluntary and given for consideration. 95 Wn.2d at 67. Second, the holding of *Robroy* deals with the definition of property for purposes of the rule against perpetuities. 95 Wn.2d at 69-70. It is inapplicable to a takings question. Third, *Robroy* analyzes the right of first refusal in the hands of the *grantee*, which is inapplicable when analyzing the grantor’s property rights.

Manufactured Housing Communities of Washington v. State, 142 Wn.2d at 366-367.

In this case, Johnson, the grantor, voluntarily and for consideration, gave Frame, LLC the right. Frame, LLC, as was the situation in *Robroy Land Co. v. Prather*, is the grantee and has only a preemptive right to the Johnson property. That right is personal to Frame, LLC.⁵

The language at issue in this case (“These rights shall be for a term of (1) ten years from the date hereof, or (2) for as long as David E. Frame and Harleen M. Frame are members of Frame, LLC . . .”) defines for how long Frame, LLC could exercise its preemptive right to buy Johnson’s property were she to offer it to a third party. Frame, LLC argues that it could assign its right “to Boise Cascade or other company.” Frame, LLC Brief, page 20. Johnson does not disagree. The Right of First Refusal specifically states that “The Right of First Refusal granted herein accrue to and bind the successors, assigns and heirs of the parties.” CP 7. However, this language does not alter or change the duration of the Right. Whoever held the Right had it only for the length of time

⁵ See section A, *supra*, page 3.

specified in the document: for ten years or “for as long as David E. Frame and Harleen M. Frame are members of Frame, LLC.” *Id.*

Frame, LLC argues that “Harleen Frame’s membership in the LLC is settled in her trust and solely administered by Dave Frame as Trustee.” Frame, LLC Brief, page 18. There was no evidence before the trial court, nor is there evidence before this court, other than such conclusory statements as quoted, regarding the probate of the Harleen Frame estate. There was no evidence before the trial court, and no evidence before this court, regarding what assets of Harleen Frame (her interest in Frame, LLC, for example) went into the trust. Frame, LLC cites no authority for its argument that the existence of a trust in her name satisfies the requirement that both Dave and Harleen continue to be members of the LLC for the Right of First Refusal to continue.

Frame, LLC argues that the law abhors a forfeiture. Frame, LLC Brief, page 19. Johnson does not disagree. However, the trial court’s grant of the motion for summary judgment does not, and this court’s affirmation thereof would not, constitute or be a forfeiture. We are dealing here with a Right of First Refusal that both parties agree is of a specific duration: ten years or as long as Dave and Harleen are members of Frame, LLC. This is not a forfeiture case,

it is a case involving the determination of the length of time of the viability of a right of first refusal. Frame, LLC admits that at some point it would no longer have the preemptive right to buy Johnson property. At issue is not the forfeiture of that right, only a determination of its end point.

Yes, the Frame, LLC Right is assignable and potentially Johnson could have to sell to someone other than Frame, LLC. But the duration of the period during which Frame, LLC or whomever could exercise the right is “the question” before this court.

Frame, LLC argues that the decision of the court to grant the motion for summary judgment “was the result of misguided reliance on a technicality without regard for the good faith and fair dealing components present in every contract.” Frame, LLC Brief, page 18. The decision of the trial court was not based on or misguided by reliance on a “technicality.” The decision of the trial court was based on the clear and unambiguous language in the Right of First Refusal. Applying general principals of contract construction, the trial court held the parties to the express language of their written and signed agreement. “In applying these principles, the reviewing court strives to ascertain the meaning of what is written in the contract, and not what the parties intended to be written.” *Go2Net*,

Inc. v. C I Host, Inc., 115 Wn. App. 73, 85, 60 P.3d 1245 (2003).

Johnson did not intend the Right of First Refusal to continue for so long as Dave Frame and/or Harleen Frame were members of the LLC. As stated in her Declaration, "I remember saying that I wanted the Right of First Refusal to say that it would continue only so long as Dave 'and' Harleen were members of the LLC. I did not agree to any 'and/or' language as stated by Mr. Frame." CP 54. The trial court was not, as claimed by Frame, LLC, "misguided" by "reliance on a technicality." The trial court applied relevant and basic principles of contract interpretation: (1) where the terms of the contract are plain and unambiguous, the intention of the parties shall be ascertained from the language employed; (2) words of a contract should be given their ordinary meaning unless context or definition require otherwise; (3) mistakes in grammar, spelling, or punctuation should not be permitted to alter, contravene or vitiate the manifest intention of the parties as gathered from the language employed. *Schauerman v. Haag*, 68 Wn.2d at 873.

IV. CONCLUSION

The Right of First Refusal drafted by the Frame, LLC attorney and signed by the parties is clear and unambiguous with regard to the length or duration of the Right of First Refusal ("for as

long as David E. Frame and Harleen M. Frame are members of Frame, LLC"). It was not the result of a scrivener's error or mutual mistake.

That there is a Harleen Frame trust does not satisfy the requirement that Harleen Frame be a member of Frame, LLC for the Right to continue. There has been no forfeiture of the Right, it has simply expired by its expressed terms.

This Court should affirm the decision of the trial court.

DATED this 25 day of September, 2012.

MINNICK • HAYNER, P.S.

By: 

TOM SCRIBNER, WSBA #11285
of Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of September, 2012, I caused to be served a true and correct copy of **RESPONDENT'S BRIEF** by the method indicated below, and addressed to the following:

Michael Hubbard
Hubbard Law Office, P.S.
145 Main -PO Box 67
Waitsburg, WA 99361

U.S. Mail, Postage Prepaid



JUDY LIMBURG
Signed this 26 day of September, 2012
at Walla Walla, Walla Walla County, WA