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SUPREME COURT OF THE STATE OF WASHINGTON

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PATRICK H. KOFMEHL, an individual,

*Petitioner/Plaintiff,*

vs.

BASELINE LAKE, LLC, a Washington limited liability company,

*Respondent/Defendant.*

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ANSWER TO PETITION FOR REVIEW

---

George M. Ahrend  
WSBA #25160

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### **I. IDENTITY OF RESPONDENT**

Respondent is Baseline Lake, LLC (Baseline Lake), defendant in the superior court and appellant in the Court of Appeals below. Baseline Lake asks the Court to deny the petition for review filed by Patrick H. Kofmehl (Kofmehl).

### **II. CITATION TO COURT OF APPEALS DECISION**

The Court of Appeals decision is attached to Kofmehl's petition for review as Appendix A, and is published in part as *Kofmehl v. Baseline Lake, LLC*, --- Wn. App. ---, 275 P.3d 328 (2012).

### **III. ISSUES PRESENTED FOR REVIEW**

Under *Schweiter v. Halsey*, 146 Wn.2d 707, 710-11, 359 P.2d 821 (1961); *Browne v. Anderson*, 36 Wn.2d 321, 217 P.2d 797 (1950); *Dubke v. Kassa*, 29 Wn.2d 486, 487, 187 P.2d 611 (1947); *Johnson v. Puget Mill Co.*, 28 Wash. 515, 520-21, 68 Pac. 867 (1902); and *Home Realty Lynnwood, Inc. v. Walsh*, 146 Wn.App. 231, 240, 189 P.3d 253 (2008), a buyer who avoids enforcement of a real estate purchase and sale agreement on grounds of the statute of frauds cannot obtain rescission or restitution from a vendor who is ready, willing and able to perform as agreed.

1. Does the mere existence of a dispute regarding the property conveyed, no matter how colorable, automatically confer a right of rescission and restitution on the buyer?

2. If not, does the buyer have the burden of proving that the vendor is not ready, willing and able to perform as agreed in order to obtain rescission and restitution?

#### IV. STATEMENT OF THE CASE

Baseline Lake incorporates the "Facts and Procedural Background" summarized by the Court of Appeals below, *see* Kofmehl Pet. for Rev., at A-2 to A-13; *Kofmehl*, 275 P.3d at 330-35; as well as Baseline Lake's statement of the case in its opening brief in the Court of Appeals, *see* Baseline Lake Br. at 3-14.

#### V. RESPONSE TO KOFMEHL'S STATEMENT OF THE CASE

**A. Kofmehl's statement of the case in his petition for review fails to account for the standard of review applicable to summary judgment proceedings, and ignores the evidence in the record regarding the property conveyed by the parties' agreement.**

This case involves summary judgment granted in Kofmehl's favor. As such, the evidence must be viewed in the light most favorable to Baseline Lake, which must also receive the benefit of all reasonable inferences therefrom. *See Bishop v. Miche*, 137 Wn.2d 518, 523, 973 P.2d 465 (1999). In his statement of the case, Kofmehl claims that he was

ready, willing and able to close on the transaction as set forth in the parties' purchase and sale agreement. *See* Kofmehl Pet. for Rev., at 6-7. However, he omits the fact that he did not, in fact, close on the transaction, as well as the evidence in the record regarding the nature and extent of the property conveyed by the parties' agreement. In both respects, his statement of the case does not properly reflect the standard of review.

With respect to the property conveyed, Kofmehl ignores the following evidence in the record:

- The admissions of Kofmehl's own broker, which contradicted Kofmehl himself, regarding the nature and extent of the property conveyed by the parties' agreement. CP 465-66. Kofmehl's broker told Kofmehl exactly what property was being conveyed by the agreement. CP 465.

- The initial survey (CP 74), the preliminary plat (CP 91), and the recorded plat (CP 98), all of which showed the metes, bounds, acreage and configuration of the property. Kofmehl's broker drafted the description of the property in the parties' agreement based in part on the survey map. CP 464-66.

- The original (CP 97) and amended (CP 99) listing agreements, describing the property subject to sale. Kofmehl's broker also drafted the description of the property conveyed by the parties' agreement

based in part on the listing agreement. CP 464-65. Kofmehl himself admits receiving a copy of the listing agreement. CP 440-42.

- The copy of the survey map highlighted by Kofmehl's broker to show the property conveyed by the parties' agreement. CP 371-72 & 465-70. The map was first highlighted incorrectly (CP 372), but it was corrected immediately (CP 371). The fact that the highlighting had to be corrected drew Kofmehl's attention to the exact boundaries of the property being conveyed. Kofmehl personally received a copy of the highlighted map. CP 493.

- The parties' agreement itself (CP 75-77), which describes the property in terms of acreage and lot configuration corresponding to the survey and plat maps (CP 74, 91 & 98). Kofmehl personally signed the agreement twice. CP 77.

- Kofmehl's internal profit projections prepared *before* the parties' agreement was signed, corresponding exactly the acreage and the price stated on the agreement. CP 380-81. These projections were prepared with Kofmehl's own input. CP 478.

- Kofmehl's internal profit projections prepared *after* the parties' agreement was signed, reflecting additional consideration that

would be required to alter the acreage stated on the agreement. CP 378.

These projections were prepared at Kofmehl's request. CP 473.<sup>1</sup>

- The addendum to the parties' agreement, which extended the closing date so that Kofmehl could negotiate for the purchase of additional acreage, among other things. CP 331. These negotiations were premised on the fact that Kofmehl's understanding of the parties' agreement was the same as Baseline Lake's understanding (and contrary to his position in this litigation). CP 72.

- The closing documents prepared by the title company at Kofmehl's broker's request and executed by Baseline. CP 72, 760, 764-74.

- The testimony of Baseline Lake's broker and principal, which are in agreement with the admissions of Kofmehl's broker. CP 68-102 & 214-27.

In light of the foregoing, especially the admissions of Kofmehl's broker, there can be no colorable dispute regarding the property conveyed by the parties' agreement.<sup>2</sup>

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<sup>1</sup> Kofmehl incorrectly claims that these after-the-fact profit projections were prepared "contemporaneously" with the parties' agreement and that they confirm Kofmehl's understanding of the property conveyed by the parties' agreement. *See* Kofmehl Pet. for Rev. at 6. Kofmehl cites the Court of Appeals decision rather than the Clerk's Papers for this claim. *See id.*

<sup>2</sup> On remand, the admissions of the broker are admissible, imputed to, and binding upon Kofmehl. *See* ER 801(d)(2) (regarding admissibility of admissions by agent); *Denaxas v. Sandstone Court of Bellevue, L.L.C.*, 148 Wn.2d 654, 665-66, 63 P.3d 125 (2003) (imputing knowledge of architect regarding square footage and binding property owner thereby).

**B. Kofmehl incorrectly claims that Baseline Lake unilaterally replatted the property subject to the parties' agreement on the day before closing; in actuality, Kofmehl had the preliminary plat and knew the legal description more than a year before closing.**

Kofmehl claims that "only one day before the scheduled closing, Baseline unilaterally recorded a short plat, which materially altered the legal description of the property[.]" Kofmehl Pet. for Rev., at 6. This repeats a claim made by Kofmehl in the Court of Appeals. *See* Kofmehl Resp. Br. at 5-6. In both instances, to support this claim, Kofmehl simply juxtaposes the description of the property in the parties' agreement with the description of the property in the closing documents. Those descriptions refer to the exact same property.

The parties' agreement expressly contemplated that the property conveyed would be short-platted before closing. CP 75. Accordingly, after obtaining preliminary plat approval, a copy of the plat map was faxed to Kofmehl's broker more than a year beforehand. CP 90-91. The preliminary short plat conforms exactly to the recorded short plat. CP 91 & 98. It conforms exactly to the original survey on which the preliminary and recorded plats were based. CP 74. It also conforms to the acreages stated in the original and amended listing agreements and the parties' agreement. CP 75-77, 97 & 99. Most significantly, it conforms to acreage and configuration of the survey map highlighted by Kofmehl's broker

during negotiations for the purchase of the property. CP 371. The broker's highlighted map is reproduced in the published portion of the Court of Appeals decision. *See Kofmehl*, 275 P.3d at 330. As above, Kofmehl does not acknowledge these facts.

## VI. ARGUMENT

Under RAP 13:4(b), review is warranted if

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

While Kofmehl claims that the decision below conflicts with "decisions and policies expressed in prior Supreme Court and Court of Appeals decisions," he does not identify a single case in conflict. *See Kofmehl Pet. for Rev.*, at 11. He further claims that the decision below involves issues of substantial public policy, but he does not provide any explanation or argument in this regard. *See id.* In actuality, the decision below is entirely consistent with, and mandated by, over a century's worth of cases from this Court.

**A. A Court of Appeals decision on a narrow issue of first impression does not satisfy the criteria for review.**

There is no dispute regarding the rule of law applicable to this case. As stated by the Court of Appeals, “a purchaser who relies on the statute of frauds to avoid [a real estate purchase and sale agreement] may not obtain restitution if the vendor is ready, willing and able to perform as agreed.” *Kofmehl*, at 330. Instead, the dispute centers on the placement of the burden of proof regarding whether the vendor is ready, willing and able to perform as agreed. *See id.* *Kofmehl* emphasizes the Court of Appeals’ statement that the placement of the burden of proof has not been “explicitly addressed in prior cases” applying the rule. *See Kofmehl Pet. for Rev.*, at 1-2 (quoting Court of Appeals). However, the fact that the issue has not been explicitly addressed before does not warrant review by this Court. *See* RAP 13.4(b).

**B. The Court of Appeals’ decision regarding placement of the burden of proof is consistent with this Court’s decisions in *Johnson v. Puget Mill Co.* and *Browne v. Anderson.***

The placement of the burden of proof has been already been addressed, albeit implicitly, in two decisions of this Court. In *Johnson*, 28 Wash. at 521, the Court denied restitution of down payments paid under a real estate contract that did not comply with the statutes of frauds, on grounds that “[t]here is no proof whatever that the respondent [vendor] was not at all times, during the period covered by the terms of the contract,

able, ready and willing to fully perform its part thereof[.]” The only reasonable interpretation of the Court’s statement is that the buyer failed to meet its burden of proof.

Placement of the burden of proof on the buyer is also implicit in *Browne*, 36 Wn.2d 321, involving a claim for restitution of earnest money under a real estate lease that did not comply with the statute of frauds. The Court affirmed denial of restitution in the absence of any finding by the superior court regarding whether the lessors’ were ready, willing and able to perform under the terms of the lease. *See id.* at 322-24. The Court interpreted the absence of such a finding as “inferentially recognizing that the building was ready for occupancy, and that the leases were tendered within a reasonable time.” *Id.* at 323-24. *Browne* thus appears to involve an application of the rule that the absence of a finding is deemed to be a finding against the party having the burden of proof. *See, e.g., In re Welfare of A.B.*, 168 Wn.2d 908, 926 & n.42, 232 P.3d 1104 (2010).

An implicit holding is still a holding, and the Court of Appeals’ placement of the burden of proof is entirely consistent with, if not mandated by, both *Johnson* and *Browne*. *See Department of Labor & Indus. v. Landon*, 117 Wn.2d 122, 126, 814 P.2d 626 (1991) (relying on implicit holding); *Bolin v. Kitsap County*, 114 Wn.2d 70, 72, 785 P.2d 805

(1990) (same); *State v. Larkins*, 75 Wn. 2d 377, 381, 450 P.2d 968 (1969) (same).

**C. Kofmehl does not identify any decisions in conflict with the Court of Appeals' decision below.**

In his petition for review, Kofmehl does not identify a single case from this Court or the Court of Appeals that conflicts with the decision below, placing the burden of proof on him as the party seeking rescission and restitution. *See* Kofmehl Pet. for Rev. at 11-18. Instead, he argues that the decision below "renders the Statute of Frauds moot," *id.* at 13, and that it requires a buyer seeking rescission and restitution "to prove of a breach of contract, something which would completely disregard the Statute of Frauds," *id.* at 17.

The statute of frauds hardly seems "moot" when it serves as the basis for avoiding a contract, as it did in this case. The questions presented for review focus on the consequences of avoiding a contract based on the statute of frauds. Under *Johnson* and its progeny, rescission and restitution are unavailable if the vendor is ready, willing and able to perform as agreed.<sup>3</sup> In this sense, the existence of a breach of contract is necessary to obtain such relief based on the statute of frauds.

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<sup>3</sup> *Johnson*, 28 Wash. at 520-21, appears to be the seminal Washington case on the subject. *See Schweiter*, 57 Wn.2d at 711-12 (quoting *Johnson*); *Browne*, 36 Wn.2d at 324 (same); *Dubke*, 29 Wn.2d at 487 (citing *Johnson*).

What Kofmehl seems to be arguing is that the decision below conflicts with unspecified "policies" underlying the statute of frauds and/or prior case law. *See* Kofmehl Pet. for Rev., at 11. This is not one of the criteria for review under RAP 13.4(b). In any event, the judicially recognized policies underlying the rule stated in *Johnson* are entirely consistent with the decision below.

First, as a matter of mutuality and fairness, a party who avoids enforcement of a contract on grounds of the statute of frauds should not be entitled to recover money advanced or acts performed in reliance on the contract:

It may be asserted with confidence that a party who has advanced money or done an act in part performance of an agreement, and then stops short, and refuses to proceed to the ultimate conclusion of the agreement, the other party being ready and willing to proceed and fulfill all his stipulations according to the contract, has never been suffered to recover for what has been thus advanced or done. The plaintiffs are seeking to recover the money advanced on a contract every part of which the defendant has performed as far as he could by his own acts, when they have voluntarily and causelessly refused to proceed, and thus have themselves rescinded the contract. It would be an alarming doctrine to hold that the plaintiffs might violate the contract, and, because they chose to do so, make their own infraction of the agreement the basis of an action for money had and received. Every man who makes a bad bargain, and has advanced money upon it, would have the same right to recover it back that the plaintiffs have.

*Johnson*, at 520; accord *Schweiter*, at 711-12 (quoting *Johnson*); *Browne*, at 324 (same); see also *Home Realty*, at 240 (stating “[t]he rationale is that ‘a purchaser should not be allowed to use his own breach to escape his contractual obligations—in effect, to have an election not to perform what he has agreed to do’”).

Second, the purpose of the statute of frauds is to protect the vendor rather than the buyer:

It has been said that the purpose of the statute, so far as it relates to the sale of land, is to protect the vendor only, and that the vendee, seeking to recover purchase money, cannot set up the statute against a vendor who is ready and willing to perform, and the contract cannot be considered void so long as the vendor, for the protection of whose rights the statute exists, is willing to treat and consider the contract good.

*Home Realty*, at 240 (quotation omitted). Related to, and perhaps underlying, both of these policies is an element of unclean hands on the part of a buyer who asserts the statute of frauds as a defense to his or her obligations under a real estate purchase and sale agreement, and then seeks rescission and restitution from the vendor. See 18 William B. Stoebeuck & John W. Weaver, *Wash. Prac., Real Estate: Transactions* § 16.9 (2d ed. 2010) (stating “since a contract within the statute is only voidable on the motion of a party, it would violate the equitable principle of unclean hands

to allow a purchaser who seeks equitable restitution to assert the statute against his own contract”).

Placing the burden of proof on Kofmehl is consistent with these policies of mutuality and fairness and protection of the vendor. Placing the burden of proof on the buyer ensures that there is, in fact, something more than a mere refusal to perform before rescission and restitution is granted. Otherwise, the buyer could obtain rescission and restitution based on nothing more than a failure of proof by the vendor. Moreover, placing the burden of proof on the buyer also protects the vendor, ensuring that the statute of frauds is used to prevent rather than perpetrate a fraud.

While Kofmehl does not address these policies, the position he advocates would undermine them by either granting rescission and restitution automatically, or forcing a vendor to prove that a buyer is not entitled to such remedies, even though it is the buyer who refused to perform the contract and avoided liability based on the statute of frauds.<sup>4</sup>

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<sup>4</sup> It is not clear whether Kofmehl is claiming that *Park v. McCoy*, 121 Wash. 189, 208 Pac. 1098 (1922), conflicts with the decision below. It does not. *See* Kofmehl Pet. for Rev., at 15-16. *Park* involved an earnest money receipt and a contract that contained differing legal descriptions. The Court held that the vendor could not collect payment of the earnest money draft because the vendor was unwilling to convey the property described in the earnest money receipt. *See* 121 Wash. at 192. Although *Park* did not cite *Johnson*, it appears to be a relatively straightforward application of the same rule, i.e., the buyer was entitled to rescission and restitution because the vendor was *not* ready, willing and able to perform as agreed.

**D. The decision below does not involve an issue of substantial public interest that should be determined by this Court.**

Kofmehl does not explain why or how the decision below involves an issue of substantial public interest. *See* RAP 13.4(b)(4). If anything, the relatively small number of cases raising this issue in Washington over the past 100 years demonstrates a lack of public interest or need for this Court to accept review. Such cases as there are do not appear to involve any dispute whether the vendor is ready, willing and able to perform. *See Johnson*, at 521 (noting absence of evidence); *Park*, at 192 (noting absence of serious dispute); *Browne*, at 323 (noting buyer appeals on other grounds); *Dubke*, *supra* (no indication of dispute); *Schweiter*, *supra* (same); *Home Realty*, at 241-42 (noting absence of record). As is evident from this case, involving subdivision of property after sale but before closing, such disputes are unlikely to arise in the future.

The inherent implausibility of Kofmehl's position further militates against any substantial public interest or further review by this Court. Kofmehl appears to be arguing that the rule of *Johnson* and its progeny can be avoided by the mere existence of a dispute regarding the property subject to conveyance under a real estate, regardless of whether the dispute is colorable, and regardless of whether the vendor is, in fact, ready, willing and able to perform as agreed.

**E. The Court should award attorney fees and costs to Baseline Lake pursuant to the parties' agreement.**

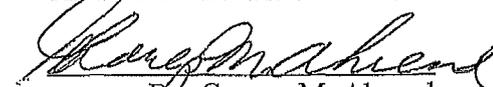
Pursuant to RAP 18.1(b) and the parties' agreement (CP 77), Baseline Lake asks for an award attorney fees and costs incurred in connection with all proceedings in this Court.

#### **VII. CONCLUSION**

Based on the foregoing, Baseline Lake asks the Court to deny Kofmehl's petition for review.

Dated this 13th day of June, 2012.

AHREND ALBRECHT PLLC



By: George M. Ahrend  
WSBA #25160

Attorneys for Respondent

**CERTIFICATE OF SERVICE**

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On June 13, 2012, I served the Petitioner-Plaintiff with the document to which this is annexed as follows:

By  facsimile transmission to (509) 455-8734,  email to [mtucker@dunnandblack.com](mailto:mtucker@dunnandblack.com),  First Class Mail, and/or  hand delivery, to:

Michael R. Tucker  
Dunn & Black, P.S.  
N. 111 Post, Ste. 300  
Spokane, WA 99201

Signed at Moses Lake, Washington this 13th day of June, 2012.

  
\_\_\_\_\_  
Shari M. Canet, Paralegal

## OFFICE RECEPTIONIST, CLERK

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**To:** George Ahrend  
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To: OFFICE RECEPTIONIST, CLERK  
Cc: Mike Tucker; Shari M Canet  
Subject: Kofmehl v. Baseline Lake LLC (S.C. #87395-0)

Dear Mr. Carpenter,

On behalf of Baseline Lake, LLC, an answer to the petition for review is attached to this email for filing with the Court. Counsel for the petitioner is being served simultaneously by copy of this email as well as by US Mail in accordance with the certificate of service.

Respectfully submitted,

--

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