

No. 64353-3-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DONALD A. RASMUSSEN and KAREN RASMUSSEN,
husband and wife,

Appellants,

vs.

TERCEL CORPORATION,
a Washington corporation,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR WHATCOM COUNTY
THE HONORABLE IRA UHRIG

2010 MAY 26 AM 11:43
COURT OF APPEALS
DIVISION I

REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION

In its previous decision, this court held that the parties' purchase and sale agreement was void under the statute of frauds because it did not contain an accurate legal description that identified the property being sold and rejected respondent Tercel Corporation's argument that platted property need not comply with the statute of frauds under RCW 58.17.205. This court should reject it again. Just as it could not enforce the agreement by an award of specific performance, the trial court erred in awarding Tercel damages for the breach of an unenforceable agreement.

By remanding to the trial court, rather than dismissing Tercel's claims outright, this court gave Tercel the opportunity to seek damages in restitution, but Tercel again insisted on obtaining from Rasmussen the benefit of an unenforceable bargain. This court should now reverse and dismiss Tercel's complaint as a matter of law, and award Rasmussen restitution and attorney fees.

II. REPLY IN SUPPORT OF STATEMENT OF CASE

Tercel's statement of the case ignores the salient facts that have not changed since this court's earlier decision. The facts that Tercel alleges to support the trial court's damages award for breach of contract – Rasmussen's anticipatory breach of the purchase and

sale agreement – are the same facts that were before this court when it held the agreement unenforceable in 2008. Moreover, Rasmussen’s delay in closing the sale after entry of the trial court’s erroneous specific performance order, which this court also noted in its previous opinion, cannot support the trial court’s enforcement of an unenforceable purchase and sale agreement.

While many of the facts found by the trial court and recited by Tercel are irrelevant to the legal issue before this court, Tercel’s statement of the case asserts as “fact” many allegations that the trial court failed to adopt in its findings, either because Tercel did not plead them (such as its current allegations of fraud), or because Tercel did not meet its burden of proof (such as its allegation that Rasmussen reaped an unfair profit at Tercel’s expense). See ***Ellerman v. Centerpoint Prepress, Inc.***, 143 Wn.2d 514, 524, 22 P.3d 795 (2001) (“The absence of a finding of fact in favor of the party with the burden of proof as to a disputed issue is the equivalent of a finding against the party on that issue.”) (internal quotation omitted). Those factual assertions that are unsupported by the record are discussed in the relevant argument sections below.

III. REPLY ARGUMENT

A. The Trial Court Disregarded This Court's Mandate And Erred In Enforcing An Agreement That Is Void Under The Statute Of Frauds By Awarding Damages For Benefit Of The Bargain.

1. A Court May Not Enforce An Agreement That Violates The Statute Of Frauds, Either By Granting Specific Performance Or By Awarding The Benefit Of The Bargain.

Terrel concedes that “a number of Washington cases hold that an agreement which fails to satisfy the statute of frauds will support neither an action for specific performance nor an action for damages.” (Resp. Br. at 19-20, citing *Schweiter v. Halsey*, 57 Wn.2d 707, 359 P.2d 821 (1961); *Trimble v. Donahey*, 96 Wash. 677, 165 Pac. 1051 (1917); *Chamberlain v. Abrams*, 36 Wash. 587, 79 Pac. 204 (1905), *overruled on other grounds by Miller v. McCamish*, 78 Wn.2d 821, 479 P.2d 919 (1971). See also *Williams v. Fulton*, 30 Wn. App. 173, 178 n.5, 632 P.2d 920, *rev. denied*, 96 Wn.2d 1017 (1981). Those cases are directly on point. As set forth in Rasmussen's opening brief, because this court has held that the parties' purchase and sale agreement is void under the statute of frauds, it may not be enforced, whether by a decree requiring its specific performance or by an award of damages for the benefit of the parties' unenforceable bargain. (App Br. at 17-20)

Tercel's dispositive concession substantially undermines its argument, adopted by the trial court, that "a contract which cannot be specifically enforced may nevertheless support an award of damages." (Resp. Br. at 19, *citing Hedges v. Hurd*, 47 Wn.2d 683, 688, 289 P.2d 706 (1955)) The *Hedges* Court held that a relatively simple earnest money receipt that contains the basic material terms of a transaction – a description of the real estate, price, date of closing, and allocation of closing costs – is an enforceable contract even though it lacks the thoroughness to enable a court of equity to specifically enforce its unstated terms. 47 Wn.2d at 687-88. By contrast, however, "an agreement containing an inadequate legal description is void." *Maier v. Giske*, 154 Wn. App. 6, 15, ¶ 17, 223 P.3d 1265 (2010); see *Schweiter v. Halsey*, 57 Wn.2d 707, 710, 359 P.2d 821 (1961); *Home Realty Lynnwood, Inc. v. Walsh*, 146 Wn. App. 231, 237-40, 189 P.3d 253 (2008).

Although Washington's real estate statute of frauds may be "the strictest in the nation," 18 William B. Stoebuck & John W. Weaver, *Washington Practice: Real Estate: Transactions* § 16.3, at 225 (2d Ed. 2004), it has been consistently enforced as a matter of public policy. See *Farley v. Fair*, 144 Wash. 101, 103-04, 256 Pac. 1031 (1927) (real estate "statute of frauds declares a public policy")

of the state precluding enforcement of contract containing inadequate legal description, even though agreement was executed elsewhere); 15 Karl B. Tegland, *Washington Practice: Civil Procedure* § 54.3, at 459 (2d Ed. 2009) (statute of frauds is a substantive rule of law based on Washington public policy).

Because the real estate statute of frauds is based on long-standing public policy, the Supreme Court specifically held that the **Hedges** rule allowing an award of damages under an indefinite contract, advanced by Tercel here, “has no application where the contract fails to satisfy the statute of frauds.” **Schweiter**, 57 Wn.2d at 712. The Court stated:

The rule contended for by appellants applies to those situations where the contract involved is too *indefinite* in its terms to be specifically enforced, but yet is certain enough to constitute a valid contract for breach of which damages may be recovered.

57 Wn.2d at 712 (emphasis in original) (See App. Br. at 19).

Tercel fails to address this distinction between a contract that is too indefinite to specifically enforce and one that is void under RCW 64.04.010, and his concession that an agreement that is void under the statute of frauds may not be enforced is dispositive. This court should vacate the trial court’s award of damages.

2. The Trial Court Violated The Law of The Case By Holding That The Parties' Agreement Was Enforceable And Awarding Damages For Its Breach.

Tercel's argument, that the trial court could award damages for breach of contract because this court in its mandate did not specifically "remand for dismissal of Tercel's damage claim" (Resp. Br. at 16), rests on a flawed understanding of the law of the case doctrine. This court specifically held that the parties' purchase and sale agreement violated the statute of frauds, and, as a consequence, could not be enforced. That is the law of the case which was ignored by the trial court. "Where there has been a determination of the applicable law in a prior appeal, the law of the case doctrine ordinarily precludes redeciding the same legal issues in a subsequent appeal." ***State v. Clark***, 143 Wn.2d 731, 745, 24 P.3d 1006, *cert. denied*, 534 U.S. 1000 (2001); *see also* Philip A. Trautman, *Claim and Issue Preclusion in Washington*, 60 Wash. L. Rev. 805, 810 (1985) (under law of the case doctrine "once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation.")

Citing isolated excerpts, Tercel argues that this court's previous decision "can only be read as having ruled on specific

performance, not damages.” (Resp. Br. at 16) This court did not previously rule on damages only because the trial court awarded Tercel specific performance on summary judgment. Tercel’s damages claim for breach of contract remained an unadjudicated alternative prayer for relief in his amended complaint. (CP 322 (praying, “[a]lternatively, for damages in an amount to be proven at trial for breach of contract.”)) This court’s decision addressed whether the parties had a valid agreement under the statute of frauds, not the availability of any particular remedy.

Tercel also argues that the trial court did not violate the law of the case in concluding that the platting statute, RCW 58.17.205, “contemplates exactly the kind of legal description contained in the P&SA and authorizes performance of such an agreement,” because this court’s “only mention of RCW 58.17.205 . . . is in a footnote in the ‘Facts’ section.” (Resp. Br. at 20 n.77; see Opinion at 2) But as pointed out in the opening brief, both “matters passed upon, or necessarily implicit in matters passed upon,” in the court’s prior decision are the law of the case. 14A Karl B. Tegland, *Washington Practice: Civil Procedure* § 35.55, at 591 (2d Ed. 2009) (App. Br. at 26) Tercel unsuccessfully argued in the first appeal that RCW 58.17.205 “authorizes performance of the parties’

agreement.” (CP 80-84) Because this court necessarily rejected that argument in the first appeal, it is necessarily barred by the law of the case.

Tercel’s other attempts to support the trial court’s damages award merit little discussion. Tercel contends that “nowhere does the [previous] Opinion hold that the P&SA is unenforceable. . .” (Resp. Br. at 20 n.77) But this court expressly adopted Rasmussen’s argument “that the VLPSA violates the statute of frauds which renders the agreement tentative and non-binding.” (Opinion at 4) It held that the VLPSA violated the statute of frauds and therefore could not be enforced:

[T]he legal description violates the statute of frauds. Without a sufficient legal description, the court cannot order specific performance of the contract.

(Opinion at 8) As discussed, *supra* at subsection 1, an agreement that violates the statute of frauds is void and unenforceable.

Tercel also asserts that when this court remanded “for further proceedings on the claim for damages,” (Op at 10), it expressly authorized the trial court on remand to enforce the parties’ agreement by awarding Tercel damages for its breach. (Resp. Br. at 16) Because the viability of a damages claim was not at issue, this court’s passing reference to a remand for damages

cannot have authorized the trial court to disregard settled precedent precluding an award of damages for breach of an agreement that is void under the statute of frauds. See Trautman, 60 Wash. L. Rev. at 811 (“matters not discussed or otherwise involved in an appellate decision are not barred by the law of the case doctrine from consideration in a subsequent appeal of the same litigation.”); 18B Charles Alan Wright & Arthur R. Miller, *Fed. Pract. & Proc.* § 4478 & n.38 (2d ed.) (“dictum is not the law of the case.”) (citing cases).

This court’s reference to damages must instead be viewed as the court’s recognition that Tercel had an equitable right to restitution, not a right to enforce the agreement by suing for the benefit of the bargain. Tercel could have returned the lots to Rasmussen and recovered as damages any unjust benefit that Rasmussen would have reaped by benefitting from Tercel’s intervening improvements. But Tercel abandoned any such claim when he insisted on keeping the property and suing for expectation damages. While restitutionary damages are recoverable where an agreement is void under the statute of frauds, they are waived where a party insists on enforcing the benefit of the bargain:

Recovery of damages, however, must be distinguished from a theory of restitution, which may exist even though a contract is void under the statute

of frauds. Because the Williamses did not plead restitution and have not asserted that theory either at the trial court level or on appeal, we need not consider it.

Williams v. Fulton, 30 Wn. App. 173, 178 n.5, 632 P.2d 920 (1981) (citations omitted). See *Restatement (Second) of Contracts* § 375 (1981).

Tercel also erroneously relies on the commissioner's denial of discretionary review as authority for the proposition that this court authorized Tercel's damages claim. (Resp. Br. at 28-29) However, "the denial of discretionary review of a superior court decision does not affect the right of a party to obtain later review of the trial court decision *or the issues pertaining to that decision.*" RAP 2.3(c) (emphasis added). Commissioner Ellis's decision denying interlocutory review on the eve of a trial that would include Rasmussen's RAP 12.8 claim regardless of whether Tercel's claim was barred, has no bearing on whether the trial court was authorized to award damages on an unenforceable agreement.

Notably, Tercel has not asked this court to reconsider its original holding, nor has it argued that its decision was clearly erroneous under RAP 2.5(c)(2). See **Greene v. Rothschild**, 68 Wn.2d 1, 10, 414 P.2d 1013 (1966) (law of case does not preclude

subsequent reviewing court from overruling prior holding if it is clearly erroneous). The law of the case precludes the trial court's decision awarding damages for the benefit of the bargain under an unenforceable contract.

3. This Court's Previous Holding That The Purchase And Sale Agreement Violated The Statute of Frauds Followed Settled Law.

Without expressly stating that this court was wrong in holding that the parties' agreement violated the statute of frauds, Tercel nonetheless argues that the parties' agreement was valid because the legal description of "Lots 3-12 & 14-18 of Karen's Subdivision adequately described the property at issue and made the agreement "an enforceable contract." (Resp. Br. at 23-25, *citing* CL 3, and ***Geonerco, Inc. v. Grand Ridge Properties IV LLC***, 146 Wn. App. 459, 191 P.3d 76 (2008)) Tercel's argument provides no basis for this court to reverse its prior holding.

"A valid legal description for platted property must include, or refer to a document which includes, the lot number(s), block number, addition, city, county, and state." (Opinion at 4, *citing* ***Martin v. Siegel***, 35 Wn.2d 223, 229, 212 P.2d 107 (1949)) The description of Lots 3-12 and 14-18 of Karen's subdivision "is

insufficient on its face to satisfy *Martin*,” (Opinion at 5), for two reasons:

First, the real estate agent, who was authorized to attach the correct legal description, “attached title information contain[ing] legal descriptions and tax parcel numbers for . . . property not being subdivided or purchased by Tercel.” (Opinion at 5) By contrast, in *Geonerco*, the agent was not only authorized to insert a legal description, but actually did so, 146 Wn. App. at 469, ¶ 30. Here, the agent attached an incorrect and overbroad description that did not satisfy the statute of frauds. (Opinion at 5)

Second, the reference to Karen’s Subdivision did not incorporate by reference a specific public record that would allow identification of the property to be conveyed because “the plat had to be re-engineered to provide a corrected description of the lots as approved.” (Opinion at 7) Tercel relies on the trial court’s findings that the configuration of the lots changed “in relatively minor respects,” and that such changes were “contemplated” by the parties (Resp. Br. at 25; FF 10, 11, CP 29-30), but this court already held that because the parties’ agreement does not “specifically refer to the re-engineered drawings,” it violated the statute of frauds. (Opinion at 7) The parties’ mutual understanding

or contemplation of the boundaries is irrelevant. See *Herrmann v. Hodin*, 58 Wn.2d 441, 442, 364 P.2d 21 (1961) (agreement describing “sufficient land to clear the barn to the west” inadequate under statute of frauds notwithstanding parties’ mutual understanding).

4. RCW 58.17.205 Does Not Authorize Enforcement of An Agreement That Violates The Statute of Frauds.

The platting statute does not save a purchase and sale agreement that is void under the statute of frauds. Tercel argues that RCW 58.17.205 authorizes the sale of lots prior to final plat approval, citing *Geonerco, Inc. v. Grand Ridge Properties IV*, 146 Wn. App. 459, 191 P.3d 76 (2008), but fails to respond to Rasmussen’s argument that the statute does not address the manner in which platted property must be described and therefore does not modify in any way the requirements of the real estate statute of frauds. (Rep. Br. at 22-23)

Geonerco provides no support for Tercel’s argument that the platting statute dispenses with the requirements of the statute of frauds. In *Geonerco*, Division Two rejected a seller’s argument that its agreement was unenforceable because the final plat of the subdivision had not yet been recorded. 146 Wn. App. at 469-70, ¶

31-34. The court noted that RCW 58.17.205 provides an exception to the platting statute's prohibition against the sale or transfer of parcels, "without having a final plat of such subdivision filed for record." RCW 58.17.200; see 146 Wn. App. at 469, ¶ 32. Because the sale was "expressly conditioned on the recording of the final plat" as authorized in RCW 58.17.205, the parties' contract did not run afoul of the platting statute. 146 Wn. App. at 470, ¶ 33.

The legislative history of RCW 58.17.205 similarly fails to support Tercel's contention that "the context of the 1981 amendments" to the platting statute in which the statute was adopted, authorizes enforcement of a purchase and sale agreement that violates the statute of frauds. Tercel argues that by authorizing the sale of lots prior to preliminary plat approval in order to "adequately provide for the housing and commercial needs of the citizens of the state," the legislature intended not only to overrule decades of case law interpreting the requirements of RCW 64.04.010, but also to repeal *sub silentio*, the other express purpose of RCW ch. 58.17 – "to require . . . conveyancing by accurate legal description." RCW 58.17.010. The legislative history of this 1981 statute provides not a shred of evidence of such

an intent.¹ No principle of statutory construction supports the trial court's conclusion that RCW 58.17.205 allows enforcement of the agreement in this case.

Tercel's argument that the sale of lots without an adequate legal description "is authorized by RCW 58.17.205" (Resp. Br. at 24) is without merit. It does not matter that "the fifteen numbered lots conveyed to Tercel on October 6, 2006, are the same numbered lots identified in the P&SA," if the P&SA did not adequately describe those lots. (Resp. Br. at 24, *quoting* CL 3, CP 32) RCW 58.17.205 does not save an agreement that is otherwise invalid under the statute of frauds.

5. Tercel Has Waived Any Claim To Restitution By Twice Seeking Enforcement Of the Parties' Agreement

Tercel's contends that the trial court should be affirmed under a fraud theory, or Rasmussen would otherwise "profit from his wrongdoing." (Resp. Br. at 24) This argument is also without merit. Tercel did not plead fraud or any other tort theory, and the trial court's findings do not establish all nine elements of intentional

¹ See, 47th Leg. (1981 Reg. Session), *House of Representatives Bill Analysis, HB 320* (Feb. 12, 1981) (purpose of 1981 law is to resolve conflicting practices among different counties, some of which allow an agreement to sell lots conditioned on final plat approval, while others do not).

fraud. Moreover, Tercel did not assert any equitable claim for rescission and restitution, but instead sought and obtained both specific performance, and then damages for the benefit of the bargain. As argued in the opening brief, Tercel, having elected to affirm the transaction by obtaining specific performance, cannot also obtain damages for benefit of the bargain.

However, regardless whether Tercel's damages claim was barred by the election of remedies doctrine, Tercel has now disavowed any reliance or restitution damages, which are alternative remedies available for a breach of contract. ***Williams v. Fulton***, 30 Wn. App. at 178 n.5; ***Family Medical Bldg., Inc. v. Dept. of Social and Health Services***, 37 Wn. App. 662, 672-74, 684 P.2d 77 (1984), *aff'd* 104 Wn.2d 105, 702 P.2d 459 (1985); *Restatement (Second) of Contracts* § 349 (reliance damages as alternative to expectation damages). By keeping the lots and refusing to make specific restitution to Rasmussen following reversal of specific performance, Tercel has disavowed the restitutionary remedy to which he would have otherwise been entitled had the transaction been unwound. *See Restatement (Second) of Contracts* § 375.

Tercel's contention that he "never obtained specific performance" is without merit. (Resp. Br. at 28) He did not invoke an "unavailable remedy," (Resp. Br. at 29), but actually obtained the property by requiring Rasmussen to close in October 2006, pursuant to the trial court's specific performance decree. (CP 287-88) Then, following reversal in 2008, rather than reconveying the remaining property to Rasmussen, Tercel again enforced the agreement by obtaining damages on the ground that the lots had lost value between the fall of 2005 and the closing in 2006. (FF 16, 17)²

The trial court's finding that its damages award was necessary to prevent "Rasmussen to profit from his wrongdoing" cannot be supported by this record. (Resp. Br at 27, *citing* CP 63) As this court held, Tercel failed to establish part performance to take the parties' agreement out of the statute of frauds. (Opinion at 4) Tercel's reliance on ***Miller v. McCamish***, 78 Wn.2d 821, 828, 479 P.2d 919 (1971), to argue for a recovery "in equity" is therefore misplaced. Moreover, as Tercel kept the lots, then sold them or

² Tercel's damages of \$265,000 was increased by Tercel's attorney fees on remand of \$62,445.50, and reduced only by Rasmussen's attorney fees on the first appeal of \$36,782.69. (CL 5, CP 40)

developed them, there is no evidence in the record that Rasmussen reaped any unfair benefit at Tercel's expense.

Because Tercel chose to enforce an agreement long after Rasmussen put him on notice that it was unenforceable in 2005, (Opinion at 2-3; FF 13, CP 30), Tercel has no claim for damages based on reliance, restitution, fraud, or any other equitable theory of recovery.

B. The Trial Court Adopted An Incorrect Measure Of Restitution In Allowing Tercel To Deduct His Construction Business Overhead From The Proceeds of Sale.

In granting restitution to Rasmussen the trial court was authorized to deduct from Tercel's sale proceeds those expenses that were incurred because Tercel developed, and sold the property at issue, not the expenses incurred in running a construction business. This court should reverse the trial court's refusal to grant restitution and, in order to prevent further litigation, remand with specific instructions that Tercel's proceeds of sale may not be reduced by the fixed overhead expenses reflected in Tercel's own documentary evidence. (Ex. 29)

Tercel defends the trial court's refusal to restore to Rasmussen any of the value of the property sold by Tercel under

principles of restitution, arguing that he acted reasonably in the face of a weakening market. That is irrelevant, however, because Rasmussen seeks only the actual proceeds of Tercel's sale. Instead, the issue is whether the law of restitution allows Tercel to deduct from his proceeds of sale the fixed costs of running a business. (RP 278-79) Tercel argues that Rasmussen "would have incurred overhead in the course of developing and marketing lots similar to" Tercel's overhead expenses, (Resp. Br. at 32) but cites nothing in the record to support the trial court's finding that Rasmussen's costs of running his construction business would have increased had Rasmussen kept the property. (FF 17, CP 32)

Allowing a party to claim as an expense of improving property the fixed costs of running a business, including a portion of its principal's salary, is inconsistent with principles of restitution. See *Malo v. Anderson*, 76 Wn.2d 1, 6, 454 P.2d 828 (1969) (restitutionary remedy allows judgment creditor to offset expenditures on real property awarded under trial court judgment "made with the good faith intention of making it inhabitable"). Contrary to Tercel's argument that RAP 12.8 modifies these principles, the Supreme Court has held that the rule codifies the

common law of restitution following reversal of a judgment. **State v. A.N.W. Seed Corp.**, 116 Wn.2d 39, 47, 802 P.2d 1353 (1991).

Tercel ran a development business and would have paid its president's salary, rent for its corporate office and expenses of owning and operating equipment whether or not it chose to enforce this agreement. While real estate taxes and improvements made in good faith may meet the definition of recoverable expenses under **Malo**, Tercel would have incurred its overhead and salary expenses whether or not Tercel took possession of this property. The fact that Tercel's accountant was able to pro-rate Tercel's fixed costs by allocating a share of overhead to each lot sold does not validate Tercel's attempt to obtain restitution of business overhead that is unrecoverable as a matter of law.

Tercel's overhead expenses were reflected in Ex. 29, which the trial court used in finding that Tercel lost \$245,000 on the sale of the 15 lots. (FF 17, CP 31-32; see RP 255-57) The accountant's overhead calculation included all the costs in connection with Tercel's construction business, including the costs of running Tercel's office, equipment, tools, and commercial insurance unconnected with owning the property. (RP 272, 278-79) That overhead should be excluded, and Tercel should be credited

with only the direct costs of ownership and improvements made “under a presumptively valid judgment,” e.g., those expenditures made to benefit the property on or before July 7, 2008, when this court reversed the decree of specific performance. ***A.N.W. Seed***, 116 Wn.2d at 47-48. Tercel’s own exhibit, adopted by the trial court, established net profits before overhead of \$153,275 in 2007 and \$36,702 in 2008. (Ex. 29) The total – \$189,997 – is the proper restitutionary award due Rasmussen, even if Tercel is allowed to claim each and every non-overhead expense that its accountant allocated to the property, including interest.

Contrary to Tercel’s argument, Rasmussen did not acquiesce in Tercel’s continued disposition of the lots following this court’s decision, (Resp. Br. at 41), but specifically asked the trial court “for an order prohibiting the transfer or encumbrance of the affected real property,” and an order requiring Tercel to maintain any proceeds of previous sales. (CP 269) Rasmussen did not receive any unjust “benefit” from Tercel’s sales, (Resp. Br. at 41), as the only money Rasmussen received was the court-ordered reimbursement of the attorney fees Rasmussen was required to pay Tercel in the original specific performance judgment. (CP 198-201, 281-82) The restitution to which Rasmussen was entitled after

complying with the decree of specific performance was no different than the restitution to which he was entitled after satisfying the attorney fee award. RAP 12.8.

The trial court erred in allowing Tercel to claim expenses that were necessarily incurred in running his business in order to eliminate Tercel's obligation to make restitution to Rasmussen. This court should remand for the limited purpose of directing the trial court to enter a judgment in favor of Rasmussen for restitution of \$189,997. In light of the trial court's demonstrated hostility to Rasmussen and reluctance to follow this court's mandate, this court should direct entry of judgment of \$189,997, and limit the trial court's authority on remand to assess Rasmussen's reasonable attorney fees in the trial court.

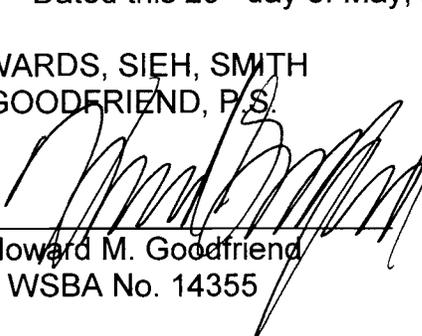
IV. CONCLUSION

The parties' agreement was void and unenforceable under the statute of frauds and cannot support an award of damages. This court should reverse the award of damages in favor of Tercel, award attorney fees on appeal to Rasmussen, and direct entry of judgment on remand for restitution in favor of Rasmussen. The trial court's discretion on remand should be limited to making an award of Rasmussen's attorney fees incurred in superior court.

Dated this 25th day of May, 2010.

EDWARDS, SIEH, SMITH
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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on May 25, 2010, I arranged for service of the foregoing Reply Brief of Appellants, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
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DATED at Seattle, Washington this 25th day of May, 2010.



Tara D. Friesen