IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

EDDIE M. RICHTER, LARRY J. RICHTER, CLOYCE E. SHANAHAN, and the WOGSLAND FAMILY TRUST, LLC, a Washington limited liability company, Appellants, v. PORT OF SEATTLE, a Washington municipal corporation, Respondent.	)	No. 68128-1-I DIVISION ONE UNPUBLISHED FILED: February 11, 2013

Cox, J. — An agreement to agree is "'an agreement to do something which requires a further meeting of the minds of the parties and without which it would not be complete.'"[1] An agreement to agree is unenforceable in Washington.[2] Moreover, every agreement for the conveyance of real property must contain a legal description of such property or it is void.[3]

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[1] Keystone Land & Dev. Co. v. Xerox Corp., 152 Wn.2d 171, 175-76, 94 P.3d 945 (2004) (quoting Sandeman v. Sayres, 50 Wn.2d 539, 541-42, 314 P.2d 428 (1957)).

[2] Id. at 176.

[3] Key Design, Inc. v. Moser, 138 Wn.2d 875, 881, 983 P.2d 653 (1999) (citing Martin v. Seigel, 35 Wn.2d 223, 229, 212 P.2d 107 (1949)).

Here, Eddie Richter, Larry Richter, Cloyce Shanahan, and the Wogsland Family Trust, LLC (collectively "Richter") appeal the summary dismissal of their claims against the Port of Seattle ("Port"). The letter agreement on which the claims are based lacks definite essential terms evidencing a present intent to agree. Thus, the agreement is unenforceable. Even if the letter agreement did constitute a contract, it violates the statute of frauds due to the lack of a legal description of the property to be conveyed. And this record does not support Richter's claim that part performance takes the letter agreement out of the statute of frauds. In sum, there is no genuine issue of material fact, and the Port was entitled to judgment as a matter of law. We affirm.

In the early 1990s, the Port began the Southwest Harbor Redevelopment Project in West Seattle to consolidate ownership of land and to construct a loading yard and container shipping terminal.[4] To consolidate ownership of property, the Port sought to arrange for the vacation of several streets within that area of West Seattle.

A "street vacation" is a process property owners can use to gain title to property.[5] This process is available to owners whose property abuts a street that is not vacated.[6] The property owner must petition the legislative authority of

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[4] See Greater Harbor 2000 v. City of Seattle, 132 Wn.2d 267, 269-70, 937 P.2d 1082 (1997) (providing background information for this project).

[5] Id. at 270 (citing RCW chapter 35.79).

[6] Id.

a city to begin this process.[7] A city cannot approve a street vacation unless it is in the public interest.[8]

The Port initially thought that one of the streets that would need to be vacated was a portion of 29th Avenue SW in West Seattle. Richter owns property immediately to the west of 29th Avenue SW. Birmingham Steel Corporation ("Birmingham Steel") also owned property abutting 29th Avenue SW at the time.

The Port and Richter engaged in preliminary negotiations, which led to the execution of a letter agreement dated June 22, 1996. Essentially, the Port agreed to acquire Richter's rights to approximately 4,908 square feet of real property that Richter would acquire if the City of Seattle approved a petition to vacate 29th Avenue SW. The underlying purpose was to construct a retaining wall and access road for the benefit of Birmingham Steel.

The parties took steps that were outlined in the letter agreement. But in 2002, Birmingham Steel filed for bankruptcy, and Nucor Steel bought all of its property. Nucor Steel did not take on any of Birmingham Steel's obligations, including its agreement with the Port. Accordingly, the Port abandoned this project.

In 2010, Richter commenced this action against the Port, claiming that the July 22, 1996 letter agreement was a binding contract that the Port breached.

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[7] Id.

[8] RCW 35.79.035(2)(d).

Richter sought specific performance for the alleged breach, damages, attorney fees, and costs.

The Port moved for summary judgment, arguing that the letter agreement was an agreement to agree, void under the statute of frauds, and void as being ultra vires for the Port. Richter made a cross-motion for summary judgment, arguing that the letter agreement was a bilateral contract supporting the award of specific performance.

The trial court granted the Port's motion for summary judgment and denied Richter's cross-motion for summary judgment.

Richter appeals.

LETTER AGREEMENT

Richter argues that the letter agreement dated July 22, 1996 was an enforceable contract. We disagree.

A motion for summary judgment may be granted when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law.[9] A material fact is one on which the outcome of the litigation depends.[1] This court reviews a summary judgment order de novo, viewing the facts and reasonable inferences in the light most favorable to the nonmoving party.[11]

The burden of proving the existence of a valid contract is on the party

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[9] CR 56(c).

[1] Greater Harbor 2000, 132 Wn.2d at 279.

[11] Lam v. Global Med. Sys., Inc., 127 Wn. App. 657, 661 n.4, 111 P.3d 1258 (2005).

asserting its existence.[12] For a contract to exist, there must be mutual assent to the essential terms of the agreement.[13] "'Mutual assent generally takes the form of an offer and an acceptance.'"[14] "An offer consists of a promise to render a stated performance in exchange for a return promise being given."[15]

"A promise is 'a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.'"[16] "But an intention to do a thing is not a promise to do it."[17] Thus, courts should take "great care" not to construe the conduct or declarations of a party as an offer when it is intended only as preliminary negotiations.[18]

An agreement to agree is "'an agreement to do something which requires a further meeting of the minds of the parties and without which it would not be complete.'"[19] An agreement to agree is unenforceable in Washington.[2]

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[12] Saluteen-Maschersky v. Countrywide Funding Corp., 105 Wn. App. 846, 851, 22 P.3d 804 (2001).

[13] Id.

[14] Id. (quoting Pac. Cascade Corp. v. Nimmer, 25 Wn. App. 552, 556, 608 P.2d 266 (1980)).

[15] Nimmer, 25 Wn. App. at 556.

[16] Havens v. C & D Plastics, Inc., 124 Wn.2d 158, 172, 876 P.2d 435 (1994) (quoting Restatement (Second) of Contracts § 2(1)).

[17] Meissner v. Simpson Timber Co., 69 Wn.2d 949, 957, 421 P.2d 674 (1966).

[18] Nimmer, 25 Wn. App. at 556 (quoting Coleman v. St. Paul & Tacoma Lumber Co., 110 Wash. 259, 272, 188 P. 532 (1920)).

Where parties evidence an intent to make a subsequent agreement, this intent is "'strong evidence to show that they do not intend the previous negotiations to amount to any proposal or acceptance.'"[21] In other words,

> "If the preliminary agreement is incomplete, it being apparent that the determination of certain details is deferred until the [subsequent] writing is made out; or if an intention is manifested in any way that legal obligations between the parties shall be deferred until the [subsequent] writing is made, the preliminary negotiations and agreements do not constitute a contract."[22]

In Plumbing Shop, Inc. v. Pitts, Division Two of this court considered whether a contract existed between Pitts, a general contractor, and The Plumbing Shop, Inc., a subcontractor.[23] There, Plumbing Shop submitted a bid to Pitts to complete mechanical work for a government project.[24] When Pitts believed the project would be awarded to him, Pitts asked Plumbing Shop to prepare a cost breakdown, and the parties discussed some details over the telephone and in person.[25] Later, Pitts refused to enter into a written contract

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[19] Keystone, 152 Wn.2d at 175-76 (quoting Sandeman, 50 Wn.2d at 541-42).

[2] Id. at 176.

[21] Nimmer, 25 Wn. App. at 556 (quoting Coleman, 110 Wash. at 272).

[22] Plumbing Shop, Inc. v. Pitts, 67 Wn.2d 514, 521, 408 P.2d 382 (1965) (quoting Restatement of Contracts § 26, comment a (1932)).

[23] 67 Wn.2d 514, 515, 408 P.2d 382 (1965).

[24] Id.

[25] Id. at 515-16.

with Plumbing Shop.[26] Plumbing Shop sued Pitts for breach of contract.[27] The court concluded that there was no contract between the parties.[28] It based this conclusion on the fact that the parties had not agreed to essential terms such as manner of payment and work progress completion dates.[29] "[I]t can readily be seen that [Plumbing Shop] and [Pitts] must have intended to set out those particulars [or essential terms] in the written contract which was to be executed at a later date."[3]

Additionally, an agreement must have sufficiently definite terms to be enforceable.[31] "[I]f a term is so 'indefinite that a court cannot decide just what it means, and fix exactly the legal liability of the parties,' there cannot be an enforceable agreement."[32]

In 16th Street Investors LLC v. Morrison, Division Two of this court concluded that a written memorandum was an agreement to agree.[33] In reaching this conclusion, the court focused on the indefiniteness of the terms

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[26] Id. at 516.

[27] Id.

[28] Id. at 520.

[29] Id.

[3] Id.

[31] Keystone, 152 Wn.2d at 178.

[32] Id. (quoting Sandeman, 50 Wn.2d at 541).

[33] 153 Wn. App. 44, 55-56, 223 P.3d 513 (2009).

within the memorandum.[34] The memorandum stated, "Mr. Morrison ***would like*** an option to purchase a condominium if Buyer, at Buyer's election, decides to include residential units in the construction and development of the property."[35] The court explained that this language created an "undefined material term."[36] The parties had not yet defined the option terms when the written memorandum was "approved."[37] And the parties continued to negotiate these terms after the memorandum was "approved."[38]

Similar principles were applied in the supreme court's decision in Kruse v. Hemp.[39] There, the court concluded that the trial court's grant of specific performance of a purchase option in a lease was erroneous.[4] The court explained that "the standard practice in Washington is to attach, to an option agreement, a copy of a real estate contract form on which the parties have agreed."[41] But in that case, "the parties did not refer to or attach an agreed upon real estate contract form."[42] The court concluded that "[n]o 'meeting of the

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[34] Id. at 55.

[35] Id. (emphasis in original).

[36] Id.

[37] Id.

[38] Id. at 49-50.

[39] 121 Wn.2d 715, 853 P.2d 1373 (1993).

[4] Id. at 723.

[41] Id.

[42] Id.

minds' occurred as to material and essential terms, and thus, the trial court's grant of specific performance [was] erroneous."[43]

Here, the July 22, 1996 letter's reference to a future agreement and the indefiniteness of its terms demonstrate that it was an agreement to agree, and thus unenforceable.

First, the letter referenced a future agreement:

> The Offer ***shall be reflected*** in the form of a written Purchase and Sale Agreement ("Agreement") approved by the parties. The Agreement is ***subject to Port Commission approval*** at a regularly scheduled meeting of the Port Commission.[44]

The letter specifically states that the language of the future Purchase and Sale Agreement was still subject to further approval by the Port and Richter. Like Pitts and Kruse, the parties here engaged in preliminary negotiations regarding the conveyance of approximately 4,908 square feet, but the reference to a subsequent Purchase and Sale Agreement shows that the parties had not yet had a "meeting of the minds" regarding some of the essential terms of the deal.

Second, the letter contained indefinite terms. The letter stated:

> The Port will pay for all costs related to surveys, the creation of the easements and the transfer of real property to and for the benefit of Richter.
>
> The specific language to be used in the Agreement, the Indemnities, the first right of refusal and the easements will be subject to the approval of Richter. Such approval shall not be unreasonable [sic] withheld by Richter.

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[43] Id.

[44] Clerk's Papers at 265 (emphasis added).

> The exact square footage of the Subject Properties, the Port property and the Birmingham Property will be determined by survey.[45]

This language identified several indefinite terms that needed to be defined and clarified, including easements, indemnities, and the first right of refusal. Further, the "exact square footage" that would be conveyed in this transaction was not known at the time Richter signed the letter because it had to be determined by a survey.[46] As in 16th Street Investors, these indefinite essential terms also reflect the future nature of the agreement.[47]

In sum, the language of the letter agreement demonstrates that it was a mere agreement to agree and not enforceable as a contract.

Richter argues that an enforceable bilateral contract is formed as soon as promises have been made, not when performance is complete.[48] While this is a correct statement of law, as discussed above, there was no enforceable bilateral contract in this case. Promises of future contractual intent only evidence a mere agreement to agree, not a contract.[49]

Richter also argues that the Port admitted the letter was a bilateral

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[45] Id.

[46] Id.

[47] See 16th Street Investors, 153 Wn. App. at 55.

[48] Appellant's Opening Brief at 14 (citing Wise v. City of Chelan, 133 Wn. App. 167, 135 P.3d 951 (2006); Flower v. T.R.A. Indus., Inc., 127 Wn. App. 13, 111 P.3d 1192 (2005)).

[49] See, e.g., Plumbing Shop, 67 Wn.2d at 521.

contract in its brief.[5] He cites the following sentence from the Port's brief: "'But describing a writing as a "unilateral" or "bilateral" contract does not address the central issues here . . . ***whether it was actually the final contract*** or merely an agreement to agree . . . .'"[51] Contrary to Richter's argument, this sentence is not some sort of binding admission to the legal effect of the letter agreement. It is a statement of the issue: whether the letter was an enforceable contract or an unenforceable agreement to agree.

Richter also contends that the Port Commission's authorization of the letter is evidence of a bilateral contract.[52] But Richter raises this argument for the first time in his reply brief, and he fails to cite any authority to support it.[53] Thus, we need not address this argument.[54]

Finally, Richter argues that Keystone Land & Development Co. v. Xerox Corp.[55] and the case it relies on, Sandeman v. Sayres,[56] are distinguishable from this case. In those cases, the supreme court determined that the parties entered

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[5] Appellant's Reply Brief at 2-3.

[51] Id. (quoting Respondent Port of Seattle's Brief at 24).

[52] Id. at 3-4.

[53] Id.

[54] See RAP 10.3(c); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992).

[55] 152 Wn.2d 171, 94 P.3d 945 (2004).

[56] 50 Wn.2d 539, 314 P.2d 428 (1957).

unenforceable agreements to agree because the terms were indefinite or uncertain.[57] Richter argues that, unlike those cases, the terms in the letter agreement were "certain." But the facts that Richter claims prove the "certainty" of the letter's terms actually reveal the uncertainty of the terms.

First, Richter argues that the square footage that the Port would have conveyed could have been determined by a surveyor, and these exact boundaries were in the sole determination of the Port. While this is true, it is also analytically irrelevant. Whether the Port or a surveyor could later determine the square footage does not change the fact that this term was not defined in the letter agreement. The indefiniteness of this term at the time Richter signed the letter agreement is the relevant time to consider when determining whether the letter agreement is an enforceable contract, not some undefined time thereafter.

Second, Richter points to the Port's draft of an unsigned Real Estate Exchange Agreement and states that the Port offered and Richter accepted this agreement. Again, this is analytically irrelevant. Richter argues that the Exchange Agreement makes the indefinite terms in the letter agreement definite because it described the easements and outlined Richter's right of first refusal. But the correct focal point is whether an enforceable contract existed at the time

[57] See Keystone, 152 Wn.2d at 179-80 ("[T]he parties began negotiations to enter into a purchase and sale agreement. In the absence of objective manifestations of mutual assent to definite terms supported by consideration, no contract was formed."); Sandeman, 50 Wn.2d at 543 ("In the case at bar, the minds of the parties did not meet upon a definite and certain agreement to pay a commission or bonus. Something further had to be done in order to consummate the agreement.").

Richter signed the letter agreement, not whether one existed thereafter based on what the parties may have done.

Third, Richter argues that the mediation provision in the letter shows that "the parties had a mechanism to address any disputes in language under the Contract as they had agreed to mediation." But, this mediation provision does not change the fact that the letter contained indefinite terms.

The trial court properly granted summary judgment on the basis that the letter agreement was merely an agreement to agree, not a binding contract.

STATUTE OF FRAUDS

Richter also argues that the statute of frauds is inapplicable to the letter agreement. Further, he argues that even if the statute of frauds is applicable, part performance takes the letter out of the statute of frauds. We disagree with both claims.

Real Estate Transactions

Richter contends that the statute of frauds is inapplicable because the letter is a contract to perform acts over time, not a real estate purchase and sale agreement leading to an immediate deed. But there is no authority for this novel proposition.

"Every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed . . . ."[58] In Key Design, Inc. v. Moser,[59] our supreme court reaffirmed the

[58] RCW 64.04.010.

[59] 138 Wn.2d 875, 881-82, 983 P.2d 653 (1999).

well-established rule announced in Martin v. Seigel[6] that further explains this requirement: "'[E]very contract or agreement involving a sale or conveyance of platted real property must contain, in addition to the other requirements of the statute of frauds, the description of such property by the correct lot number(s), block number, addition, city, county, and state,'" which is the "'legal description'" of the property.[61] In other words, "'[I]n order to comply with the statute of frauds, a contract or deed for the conveyance of land must contain a description of the land sufficiently definite to locate it without recourse to oral testimony . . . .'"[62]

Here, the letter agreement is not an enforceable contract for the reasons we previously explained in this opinion. But if it were a contract, it is for the conveyance of real property between Richter and the Port following the vacation of the street by the City of Seattle. As such, the statute of frauds requires a legal description of the property. There is no such legal description in the letter agreement.

The letter describes the subject property as "a portion (approximately 4,908 square feet) of the western half of 29th Avenue S.W. . . . that will revert to Richter . . . ." This description is patently insufficient to fulfill the requirements of the statute of frauds.

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[6] 35 Wn.2d 223, 229, 212 P.2d 107 (1949).

[61] Key Design, 138 Wn.2d at 882 (quoting Martin, 35 Wn.2d at 229).

[62] Howell v. Inland Empire Paper Co., 28 Wn. App. 494, 495, 624 P.2d 739 (1981) (alteration in original) (quoting Bigelow v. Mood, 56 Wn.2d 340, 341, 353 P.2d 429 (1960)).

Richter argues that the supreme court's holding in Key Design has questionable precedential value because of the presence of dissenting and concurring opinions. But, as the Port points out, Key Design had a five justice majority.[63] And it expressly reaffirmed the rule in Martin.[64] Thus, it controls this case.

Richter also argues that the purpose of the statute of frauds is to prevent fraud. He contends that none of the parties needed protection from fraud because the parties understood the properties involved in the deal. He cites Justice Sanders' concurrence in Key Design to support the notion that the statute of frauds should not apply to an agreement to convey.[65] The reasoning of the concurrence in this case was rejected by the majority.[66] Thus, it has no binding effect.[67] Thus, this argument is not persuasive.

Richter contends that the letter agreement was not a conveyance or an encumbrance on real property, so the statute of frauds does not apply. He describes the letter as "a contract requiring a series of acts of performance prior to the preparation and recordation of a document or documents which would

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[63] See Key Design, 138 Wn.2d at 889.

[64] Id. at 883-84.

[65] Id. at 892 (Sanders, J., concurring).

[66] Id. at 883-84.

[67] See id. at 892 ("Because Martin is both incorrect and harmful, I would overrule it. But since a majority of this court will not overrule Martin, I reluctantly concur.").

satisfy the Statute of Frauds."[68] But Richter does not cite any authority to support his argument that the letter does not fall within the category of "every contract or agreement involving a sale or conveyance of platted real property," which requires a legal description.[69] Thus, we need not address this argument.[7]

Finally, Richter points to two factual circumstances that allegedly distinguish this case from Key Design and Martin. Neither is persuasive.

First, Richter stresses that the Port is "no ordinary real estate transaction participant." Then, Richter explains that because the Port built a retaining wall, the exact size of the "portion" of 29th Avenue SW that the Port wanted to acquire is now certain. But Richter fails to provide any legal authority supporting the notion that these factual differences would allow for an exception to the general rule.

In sum, the letter agreement violated the statute of frauds because it did not contain a correct legal description of the property.

Part Performance

Richter argues that the doctrine of part performance takes the letter out of the statute of frauds. We disagree.

The part performance doctrine may apply when a written agreement for the conveyance of land fails to satisfy the statute of frauds.[71]

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[68] Appellant's Opening Brief at 17.

[69] See Key Design, 138 Wn.2d at 882 (quoting Martin, 35 Wn.2d at 229).

[7] See Johnson, 119 Wn.2d at 171.

[71] Kruse, 121 Wn.2d at 724.

> Part performance removes a contract from the statute of frauds if a party is able to show: "(1) delivery and assumption of actual and exclusive possession [of real property]; (2) payment or tender of consideration; and (3) the making of permanent, substantial and valuable improvements [to the real property], referable to the contract."[72]

"These three factors serve an evidentiary function allowing the court to be certain the contract existed and its terms."[73] This test is aimed at the courts' "'overriding concern,'" which is fraud.[74]

In a case where none of the three factors are present, there is insufficient part performance, and the contract is not removed from the statute of frauds.[75]

Here, none of the three factors were present. While the Port took possession and improved 29th Avenue SW by building a retaining wall, rail line, and road, the street is still in the ***City of Seattle's*** control. And the street will remain in the City's control until it is vacated. Thus, there was insufficient part performance to remove the letter agreement from the statute of frauds.

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[72] Pardee v. Jolly, 163 Wn.2d 558, 567, 182 P.3d 967 (2008) (quoting Powers v. Hastings, 93 Wn.2d 709, 717, 612 P.2d 371 (1980); Berg v. Ting, 125 Wn.2d 544, 555, 886 P.2d 564 (1995)).

[73] Losh Family, LLC v. Kertsman, 155 Wn. App. 458, 466, 228 P.3d 793 (2010).

[74] Berg, 125 Wn.2d at 558 (quoting Miller v. McCamish, 78 Wn.2d 821, 828-29, 479 P.2d 919 (1971)).

[75] See Richardson v. Taylor Land & Livestock Co., 25 Wn.2d 518, 529, 171 P.2d 703 (1946) ("There is a wide diversity of opinion, as shown by the adjudicated cases, regarding the relative importance of these three elements. Where all three of them are united in a given instance, the strongest kind of case is thereby generally presented and, conversely, where none is shown, there is little to warrant a court of equity in decreeing specific performance."(footnote omitted)).

Richter argues that the parol evidence rule's allowance for extrinsic evidence proves that the letter agreement was a contract. Richter points to a fax from Richter, a preliminary title report, and a Port memorandum. But Richter provides no persuasive authority and no argument as to how this evidence furthers his part performance argument. Thus, we need not address this portion of his argument.[76]

Richter also argues that the doctrine of part performance is equitable in nature and is aimed at preventing "a wrong or fraud upon one of the parties if the other party were allowed to escape performance of the contract after reliance on the agreement."[77] Richter contends that he suffered a "wrong" because he permitted the Port to enter his property and build a "massive" retaining wall. But, as noted above, the City of Seattle controlled the street at the time the Port built the wall, and the City granted the Port permission to build the wall.

Additionally, Richter lists several ways that Richter relied upon the actions of the Port, but he provides no citation to the record. Thus, his argument is not persuasive.

ESTOPPEL

Richter contends that the Port should be estopped from claiming that there was no contract under the theory of equitable estoppel. We disagree.

Richter relies on two unpublished cases to support this argument. It is

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[76] See Johnson, 119 Wn.2d at 171.

[77] Appellant's Opening Brief at 21.

improper for a party to cite unpublished cases as authority under General Rule 14.1 because such cases do not provide precedential authority. Given the fact that Richter relies exclusively on these unpublished cases to support his argument, we need not address his contentions.[78]

SPECIFIC PERFORMANCE

Richter argues that there is no genuine issue of material fact and he is entitled to specific performance under the July 22, 1996 letter agreement. We need not address this issue. Because we conclude that the letter agreement is unenforceable, specific performance is not available.

We affirm the summary judgment order dismissing the claims.

Cox, J.

WE CONCUR:

[78] See Johnson, 119 Wn.2d at 171.