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COURT OF APPEALS
STATE OF WASHINGTON
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No. 66071-3-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

SHARON HANKS, an individual,

Respondent,

v.

JAMES and JEANNIE GRACE, and the marital community comprised
thereof; EASTSIDE BROKERS, INC., d/b/a RE/MAX EASTSIDE
BROKERS, a Washington limited liability company,

Appellants.

OPENING BRIEF OF APPELLANTS

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ASSIGNMENTS OF ERROR

Assignment of Error No. 1. The trial court erred in denying Appellants' revised motion for summary judgment.

Issue: Should the trial court have dismissed Respondent's claim that Appellants failed to disclose that the buyers' offer was contingent upon the sale of their present house based on waiver?

Issue: In the alternative, should the trial court have limited Respondent's damages to the amount she would have received had the earnest money been forfeited by the buyers to her?

Assignment of Error No. 2. The trial court erred in granting Respondent's motion for partial summary judgment.

Issue: Did Appellants owe a duty to give legal advice to Respondent before she signed a waiver?

Issue: Was there a genuine issue of material fact as to whether Respondent intentionally and voluntarily waived any claims against Appellants?

Issue: Is consideration an essential element of waiver?

Issue: If consideration is required, was there a genuine issue of material fact as to whether there was consideration for the waiver?

Assignment of Error No. 3. The trial court erred in denying Appellants' motion for judgment as a matter of law and in entering judgment in Respondent's favor.

Issue: Is there substantial evidence to support the jury's verdict that Appellants' negligence was a proximate cause of Respondent's damages?

Issue: Are non-economic damages for emotional distress recoverable in a professional negligence case?

NATURE OF THE CASE

The seller of a home seeks damages from the listing agent and broker alleging negligence and legal malpractice. The seller contends that the agent (1) failed to deal “appropriately” with a prospective buyer who expressed interest in the property, but who never made a written offer, and (2) failed to disclose that a purchase and sale agreement was contingent upon the sale of the buyers’ home. The buyers were unable to sell their present home or complete the transaction, but the seller released the buyers and agreed to refund the earnest money to them.

STATEMENT OF THE CASE

Appellant James Grace [“Grace”] was a real estate salesperson licensed with Appellant Eastside Brokers, Inc., d/b/a RE/MAX Eastside Brokers [“RE/MAX”]. Respondent Sharon Hanks [“Hanks”] was the seller of a home listed for sale through Grace and RE/MAX.

On March 1, 2008, Hanks listed her home at 457 243rd Place Southeast, in Sammamish, Washington for sale with Grace and RE/MAX.

The listing agreement provided in part as follows:

“In the event Seller retains earnest money as liquidated damages on Buyer’s breach, any costs advanced or committed by Broker on Seller’s behalf shall be paid therefrom and the balance divided equally between Seller and Broker.”

Ex. 2.

Shortly after listing the property for sale, Grace was preparing the

home to market when a prospective buyer (later identified as Robert Alia) stopped-by while looking at houses for sale in the neighborhood. RP 288-305. Although Grace and Alia have vastly different recollections of their several conversations over the week that followed, it is undisputed that Alia never made a written offer to purchase the property. RP 304-05, RP 327-38.

On March 10, 2008, Robert and Norma Jean Grimes [“Grimes”] made a written offer to purchase the home for \$530,000.00, which was accepted by Hanks. The resulting Real Estate Purchase and Sale Agreement [“REPSA”] was conditioned upon Grimes’ satisfaction with a home inspection, their ability to obtain financing, and upon the sale of Grimes’ present home. In addition, Grace specifically told Hanks before she accepted the offer that Grimes had to sell their present home before they could obtain financing to purchase Hanks’ home. RP 315.

Grimes deposited with the closing agent earnest money of \$5,000.00. The REPSA provided in part as follows:

“In the event Buyer fails, without legal excuse, to complete the purchase of the Property, then . . . the Earnest Money . . . shall be forfeited to the Seller as the sole and exclusive remedy available to Seller for such failure.”

Ex. 5.

Grace even offered to waive his commission on the sale of Grimes house, so they could afford to reduce the price. RP 319. However, Grimes

were unable to sell their present home by the agreed closing date, so they were unable to obtain financing to purchase the Hanks' home and the transaction failed to close. RP 321-22. Grimes, Hanks and Grace signed a "Rescission of Purchase & Sale Agreement," which provided in part as follows:

"The parties agree that the Agreement between them and all other agreements or undertakings between them in respect to the Property are hereby rescinded; and each releases the other and all real estate brokers and licensees involved with this sale from any and all present or future liability thereunder and/or in connection with said sale. . . .

"The party holding the earnest money is authorized and directed to immediately disburse the earnest money as follows:

"Return to Buyer."

Ex. 7. Pursuant to the rescission agreement, the earnest money was refunded to Grimes. RP 357-58.

Grace and his wife then attempted to purchase the home for their daughter, but they, too, were unable to obtain financing, due to a low appraisal caused by a general decline in the real estate market. RP 280-82. Hanks then cancelled Grace's listing and instructed him to take the home off the market. RP 366. During the period the home was listed for sale with Grace, no other written offers were presented.

On March 22, 2008, while the Grimes transaction was pending, Respondent's husband, who had been diagnosed with a brain tumor several years earlier, died. RP 16, 42. At trial, Respondent testified at

length about the stress caused by her husband's illness. RP 15-17, 98-99.

Appellants filed a motion for summary judgment. CP 19-36. The court granted partial summary judgment holding that Appellants owed no duty to prepare a written offer for Robert Alia, but denying Appellants' motion to dismiss the complaint. CP 94-95.

Respondent filed a motion for partial summary judgment to dismiss Appellants' affirmative defense of waiver, which the trial court granted. CP 127-28.

The case was tried before a jury. The jury found, among other things, that:

1. Appellants were not negligent in dealing with Robert Alia;
2. Appellants were negligent in the Grimes transaction; and
3. Appellants' negligence was a proximate cause of Respondent's damages.

CP 155-56.

After trial, Appellants moved the trial court for judgment as a matter of law on the grounds that (a) there was no substantial evidence to support the jury verdict that Appellants' negligence was a proximate cause of Respondent's damages, and (b) non-economic damages for emotional distress are not recoverable in a professional negligence case. The trial court denied Appellants' motion and entered judgment on the verdict in

the Respondent's favor. Appellants then filed this appeal.

ARGUMENT

- 1. The standard of review of the trial court's orders denying Appellant's revised motion for summary judgment and granting Respondent's motion for partial summary judgment is de novo.**

"Summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. . . . When reviewing a grant of summary judgment, the appellate court engages in the same inquiry as the trial court, considering facts and reasonable inferences therefrom in the light most favorable to the nonmoving party and reviewing questions of law de novo."

Security State Bank v. Burk, 100 Wn. App. 94, 97, 995 P.2d 1272 (2000).

"Even where the evidentiary facts are undisputed, if reasonable minds could draw different conclusions from those facts, then summary judgment is not proper."

Chelan County Deputy Sheriffs' Ass'n v. County of Chelan, 109 Wn.2d 282, 295, 745 P.2d 1 (1987).

"The summary judgment procedure is intended to dispose of useless trials on formal issues that have no evidentiary basis, or which, even if factually supported, could not as a matter of law lead to a favorable result for the opposing party." WASHINGTON CIVIL PROCEDURE BEFORE TRIAL DESK BOOK § 39.30 (WASH. STATE BAR ASS'N 1981). "A trial is not useless but absolutely necessary where there is a genuine issue as to any material fact." *Preston v. Duncan*, 55 Wn.2d 678, 681, 349 P.2d 605

(1960). “A court will grant summary judgment only when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law.” *Hansen v. Friend*, 118 Wn.2d 476, 485, 824 P.2d 483 (1992). “A material fact is one upon which the outcome of the litigation depends.” *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). “One who moves for summary judgment has a burden of proving that there is no genuine issue of material fact, irrespective of whether he or his opponent would, at the time of trial, have the burden of proof on the issue concerned.” *Preston v. Duncan*, 55 Wn.2d 678, 682, 349 P.2d 605 (1960). “The moving party is held to a strict standard. Any doubts as to the existence of a genuine issue of material fact is resolved against the moving party.” *Atherton Condominium Ass'n v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). “Facts and all reasonable inferences therefrom are considered in the light most favorable to the nonmoving party, and summary judgment should be granted only if, from all the evidence, reasonable persons could reach but one conclusion.” *Swanson v. Liquid Air Corp.*, 118 Wn.2d 512, 518, 826 P.2d 664 (1992). “It seems obvious that in situations where, though evidentiary facts are not in dispute, different inferences may be drawn therefrom as to ultimate facts such as intent, knowledge, good faith, negligence, *et cetera*, a summary judgment would not be warranted.” *Preston v. Duncan*, 55 Wn.2d 678, 681-82, 349

P.2d 605 (1960). “A trial is not useless but absolutely necessary where there is a genuine issue as to any material fact.” *Preston v. Duncan*, 55 Wn.2d 678, 681, 349 P.2d 605 (1960).

2. The trial court should have granted Appellants’ revised motion for summary judgment.

a. The trial court should have dismissed Respondent’s claim that Appellants failed to disclose that the buyers’ offer was contingent upon the sale of their present house based on waiver.

Respondent contended at trial that Grace was negligent in failing to include in the REPSA a contingency for the sale of Grimes’ present home. CP 79-88. The REPSA did, however, contain a financing contingency. Ex. 5. For purposes of reviewing Appellants’ revised motion for summary judgment only, the court should assume that (a) Grace was negligent in failing to include in the REPSA an express provision making the REPSA contingent upon the sale of Grimes’ present home, and (b) Grace failed to disclose to Respondent that Grimes could not obtain financing to purchase the subject property without first selling their present home. Had Grace included a home sale contingency, then either (1) Respondent may not have accepted Grimes’ offer, or (2) Respondent may still have accepted Grimes’ offer, in which case Grimes would have been entitled to a refund

of their earnest money when they were unable to sell their present home by the closing date. In either case, Respondent would have had no sale and would have suffered no damages.

However, when Grimes was unable to obtain financing, they proposed a mutual rescission agreement, which Respondent accepted and signed. Ex. 7. In so doing, Respondent waived any claim against Grimes and Appellants.

b. In the alternative, the trial court should have limited Respondent's damages to the amount she would have received had the earnest money been forfeited by the buyers to her.

If the REPSA was not contingent on the sale of the Grimes' present home, the earnest money probably should have been forfeited by Grimes to Respondent, rather than refunded to Grimes. The REPSA expressly provided that forfeiture of the earnest money was the "sole and exclusive remedy" available to Respondent for the Grimes' default. The listing agreement provided that Respondent and RE/MAX would split any forfeited money equally. The total amount of the earnest money was \$5,000.00. Therefore, Respondent should have received \$2,500.00 and her damages should be limited to that amount. Otherwise, she would receive a windfall.

“The measure of damages in tort actions is that indemnity which will afford an adequate compensation to a person for a loss suffered or the injury sustained by him as the direct, natural, and proximate consequences of the wrongful act or omission. *Burr v. Clark*, 30 Wn.2d 149, 158, 190 P.2d 769 (1948). The purpose of awarding damages for injury to property in a tort case is to place the injured party in the condition in which he would have been had the wrong not occurred. *Wilson v. Brand S Corp.*, 27 Wn. App. 743, 745, 621 P.2d 748 (1980), *review denied*, 95 Wn.2d 1010 (1981). A party suffering compensable injury, therefore, although entitled to be made whole, should not be allowed to duplicate his recovery.”

Puget Power v. Strong, 59 Wn. App. 430, 798 P.2d 1162 (1990).

“In most situations, an agent’s negligence renders him or her liable only for the actual damages it causes the principal. . . . In *Mersky v. Multiple Listing Bureau of Olympia, Inc.*, [73 Wn.2d 225, 437 P.2d 897 (1968)], however, we recognized a limited exception to this rule in cases where agents negligently or intentionally fail to disclose to their principals facts bearing on their interests in the matters in which they are employed and their ability to maintain undivided loyalty to the principal. We held in *Mersky*, at page 233, that nondisclosure of a familial relationship between an agent and the person with whom he was dealing on the principal’s behalf rendered him liable for the full amount of the commission he received ‘[h]owever inadvertently this failure [to disclose] occurred.’

“*Mersky* was viewed as controlling by the trial court on the question of measure of damages in any case of nondisclosure by an agent, and its rule was applied to the facts here even though there was no potential conflict of interest by the agent involved. In so doing, the court misinterpreted *Mersky’s* holding. There we heavily emphasized that what was involved was nondisclosure of a fact that impugned the agent’s ability to exercise undivided loyalty in representing his principal’s interests.

‘It is of no consequence, in this regard, that the

broker may be able to show that the breach of his duty of full disclosure and undivided loyalty did not involve intentional or deliberate fraud, or did not result in injury to the principal, or did not materially affect the principal's ultimate decision in the transaction. The rule and the available remedies, instead, are designed as much to prevent fraud as to redress it, and follow directly upon the heels of the broker's deliberate or innocent failure to timely and fully disclose to his principal the fact of the interdicted relationship, for the reason that the very existence of the relationship may have corroded the broker's obligation of undivided loyalty, may have been a material circumstance to the principal, or may have affected his actions or decisions in the course of the transaction involved.'

Mersky v. Multiple Listing Bureau of Olympia, Inc., supra at 231. The nondisclosure there violated two duties the agent owed to his principal: the duty to exercise care and the duty of loyalty and corollary responsibility to disclose any facts which might bear on his ability to keep that loyalty undivided. Here no question of loyalty was involved. The trial court held specifically that petitioners acted in good faith, but did not adequately emphasize the significance of the restrictive covenants to respondents. In such circumstances the special rules of *Mersky* are not applicable.

“In *Tackett v. Croonquist*, 244 Cal. App. 2d 572, 53 Cal. Rptr. 388 (4th Dist. 1966), the court specifically held that damages for negligent nondisclosure were limited to the actual harm caused to the principal where no question of the undivided loyalty was involved. Although apparently no other courts have directly addressed the issue, the rule of *Tackett* has been assumed by the court and parties to fix the proper measure of damages in a number of similar nondisclosure cases. . . . We find it consistent with our previous cases involving negligence by agents in other aspects of their employment. We see no reason to expand the rule of *Mersky* to cases where the only duty breached is nondisclosure of a material fact. Failure to convey

information, where that information is not pertinent to the agent's loyalty to his or her principal, is simply one species of negligence, the penalty for which should be no greater than that for any other form of unintentional misfeasance by an agent.

“We therefore hold that petitioners were liable only for the actual damages caused by their negligent failure to inform respondents of the covenants and their significance. It appears to be undisputed that, after they received the \$680 settlement from the Petersons, respondents’ net loss due to their ignorance of the covenants was \$170. The award in their favor should have been limited to that amount.”

Monty v. Peterson, 85 Wn.2d 956, 540 P.2d 1377 (1975).

Under the express terms of the listing agreement, RE/MAX would have been entitled to \$2,500.00, if the earnest money had been forfeited to Respondent. Such a provision clearly is enforceable under Washington law. *Agranoff v. Jay*, 9 Wn.App. 429, 512 P.2d 1132 (1973); *Dryden v. Vincent D. Miller, Inc.*, 56 Wn.2d 657, 660, 354 P.2d 900, 901 (1960).

“It appears to be the law that an agent is entitled to no compensation for conduct which is disobedient or is a breach of his duty of loyalty; such conduct, if constituting a willful and deliberate breach of his contract of service, disentitles him to compensation. RESTATEMENT (SECOND), AGENCY § 469; *Kane v. Klos*, 50 Wn.2d 778, 314 P.2d 672 (1957); *Guy Stickney, Inc. v. Underwood*, 67 Wn.2d 824, 410 P.2d 7 (1966); *Rushing v. Stephanus*, 64 Wn.2d 607, 393 P.2d 281 (1964); *Farrell v. Score*, 67 Wn.2d 957, 411 P.2d 146 (1966).

“The trial court found nothing in the evidence to indicate that appellant was not at all times honestly attempting to further the respondents' best interests. There is not a scintilla of evidence of deliberate disloyalty or disobedience. There is no evidence that appellant was

attempting to cheat or defraud the respondents. It is true that appellant had an arrangement with the prospective buyers to sell their equity in their home for them, or, in the alternative, to buy it from them for a net figure to them of \$2,700. It is obvious, however, from the record that appellant was doing everything it could to promote the respondents' sale by trying to make it possible for the prospective buyers to finance the purchase. Respondents' cross-appeal is not well taken. Appellant has made 12 assignments of error, many of them interrelated to an extent that they can be discussed under four headings. Appellant argues that the trial court erred in holding that there was a completed 'deal' between the parties. The trial court found that there was a completely executed earnest money agreement between the respondents and their prospective buyers, and that respondents were fully justified in believing that appellant had in its possession the buyers' promissory note. There is substantial evidence to support this finding and it will not be disturbed. We are unable to follow appellant's argument that no rights or liabilities arose from the earnest money agreement because a sale was never completed. So far as respondents knew, the earnest money agreement was complete, and they had a right so to believe.

"If in connection with the foregoing assignment the appellant has reference to the time when respondents and the buyers met at the offices of the escrow agent to consummate the sale, when an agreement was reached between them 'to call the whole thing off,' it must be answered that the trial court found otherwise. We are unable to find any evidence that respondents ever consented to a return of earnest money to the purchasers.

...

"Appellant's principal remaining contention is that respondents failed to prove their damages. The respondents made out a prima facie case as to the amount of damages claimed by them, which was the amount of the note which should have been in existence and interest thereon, and the burden was then upon the appellant to show that the note, if

it had been produced, would not have been collectible at all or collectible only in part. The appellant is hardly in a position to show either where it had itself agreed to furnish the buyers with the money with which to pay it.

“The law appears to be that the measure of liability on the part of an agent for negligence in collecting claims is the amount of damages sustained by the principal, and this is prima facie the amount of the debt or claim. When a prima facie case has been made, the burden is on the agent to show facts relieving him from liability. *Green v. Bouton*, 101 Wash 454, 172 Pac. 576 (1918). After a plaintiff principal has made a prima facie showing, the burden then rests on the defendant agent to show that there was no damage or that the damage was less than claimed. 1 MECHEM, LAW OF AGENCY § 1320 (2d ed.); RESTATEMENT (SECOND), AGENCY § 401.

“Appellant has further argued on the damage question that respondents are entitled to recover only what they can prove they actually lost, namely, were out of pocket. The answer to this is that the respondents and their buyers, in entering into the earnest money agreement, expressly stipulated that the damages in the event the buyers forfeited, would be \$2,700 plus interest on a note.”

Merkley v. MacPherson's, Inc., 69 Wn.2d 776, 420 P.2d 205 (1966).

Accordingly, even if Appellants are liable to Respondent, the damages should be limited to the amount Respondent would have received but for Grace's negligence – one-half of the earnest money, or \$2,500.00.

3. The trial court should have denied Respondent's motion for partial summary judgment.

a. Appellants owed no duty to give legal advice to Respondent before she signed a waiver.

In her motion for partial summary judgment, Respondent urged that the rescission agreement she signed for the Hanks/Grimes transaction was unenforceable because it (a) was contrary to public policy, or (b) lacked consideration. Neither of these arguments have merit.

Under *Cultum v. Heritage House Realtors, Inc.*, 103 Wn.2d 623, 694 P.2d 630 (1985), it is true that

“a real estate broker or salesperson is *permitted* to complete simple printed standardized real estate forms, which forms must be approved by a lawyer, it being understood that these forms shall not be used for other than simple real estate transactions which arise in the usual course of the broker’s business and that such forms will be used only in connection with real estate transactions actually handled by such broker or salesperson as a broker or salesperson and then without charge for the simple service of completing the forms.” (Emphasis added.)

103 Wn.2d at 630.

It also is true that “licensed real estate brokers and salespersons, *when completing form earnest money agreements*, must comply with the standard of care of a practicing attorney.” (Emphasis added.) 103 Wn.2d at 631.

However, Respondent asks the court to jump to the illogical and unsupported conclusion that because real estate brokers are *permitted to complete standard forms* and are held to the standard of care expected of a practicing attorney *when completing the forms*, that real estate brokers *must give legal advice* to their clients. Basically, plaintiff argues that once

a real estate broker *completes a standard form*, as permitted under *Cultum*, the broker assumes *all duties* owed by an *attorney* to his/her client. There simply is no legal authority for this broad proposition. To the contrary, real estate brokers are not permitted to give legal advice to their clients.

Similarly, there is no duty to advise clients to seek legal advice in every transaction. If the Supreme Court had intended to impose such a duty, it easily could have done so in *Cultum*, as it did a year earlier as to Limited Practice Officers when it adopted APR 12. Instead, the court held that “if a broker or salesperson believes there may be complicated legal issues involved, he or she should persuade the parties to seek legal advice.” 103 Wn.2d at 630.

Here, as in *Cultum*, the rescission agreement is a standard form published by the multiple listing service.

“All agreements were prepared on standardized forms drafted by attorneys. . . . Both addendums [sic] were on forms drafted by an attorney. [The salesperson] merely inserted the desired modifications in a blank space. [The salesperson] did not select the form since her employer used a single standard form.”

103 Wn.2d at 625-26.

Likewise, Grace merely completed the standard form and presented to the parties for their signatures. He did not give any legal advice to Respondent nor did Respondent ask any questions about the rescission agreement. Grace testified in deposition as follows:

- “Q. So you first raised the possibility of purchasing Mrs. Hanks’ home after the Grimes had signed the rescission we’ve marked as Exhibit No. 6; is that correct?
- A. That's correct.
- Q. Did you take the rescission that had been signed by the Grimes to Mrs. Hanks?
- A. Yes, I did.
- Q. What did you tell her about this form?
- A. That their financing had failed. They were rescinding the offer.
- Q. Did you explain anything else?
- A. As to what?
- Q. As to this form.
- A. Went over the form with her.
- Q. When you say you went over the form, what do you mean?
- A. Reviewed the form with Mrs. Hanks.
- Q. So reviewed paragraph 1 and paragraph 2 and paragraph 3 with Mrs. Hanks?
- A. Yes.
- Q. So you specifically informed her that by signing this rescission the earnest money would be returned to the Grimes; is that correct?
- A. That is correct.
- Q. Did she have any concerns or questions about that?
- A. No.
- Q. Did she have questions or concerns about this form at all?

A. No.

...

Q. How long after Mrs. Hanks signed [the rescission agreement] did you discuss possibly purchasing her house?

A. To the best of my recollection within two or three days.”

Grace dep. at 75:10-77:3.

For purposes of Respondent’s motion for partial summary judgment, Respondent’s testimony must be taken as true. However, if Respondent had any questions or concerns about the rescission agreement, the burden was on her to seek legal advice. Grace had no duty to give legal advice to her or to advise her to consult an attorney, because there were no “complicated legal issues involved.” 103 Wn.2d at 630.

Respondent’s reliance on *Marshall v. Higginson*, 62 Wn.App. 212, 813 P.2d 1275 (1991), *review granted*, 118 Wn.2d 1008, 824 P.2d 491 (1992)¹, is misplaced. In *Marshall*, Marshall consulted his attorney, Higginson, for advice regarding the sale of a tavern he owned. Marshall entered into an agreement to sell the tavern, then decided not to honor the agreement and sold the tavern to other buyers. Higginson advised the client that Marshall was not obligated to honor the agreement. When

¹ The Supreme Court granted review of the court of appeals decision, but the parties settled the case before oral argument, so the appeal was dismissed.

Marshall failed to honor the agreement, the first buyers sued him for breach of contract. Higginson suggested that Marshall retain other counsel to defend him in the breach of contract action.

Just before trial, Higginson learned that she would be subpoenaed by the first buyers to testify in the case against Marshall. It had become apparent to Higginson, however, that Marshall was likely to sue her if he lost at trial. Higginson, therefore, asked Marshall to sign an agreement releasing her from liability for any damages sustained in relation to her representation of Marshall in the sale of the tavern.

Marshall consulted her trial attorney about the release. The trial attorney explained that he had not been hired to evaluate any potential malpractice claims against Higginson. He advised Marshall that a release agreement would prevent him from suing Higginson in the future, but said that it was in Marshall's best interest to have Higginson as a friendly witness. Just before Higginson testified, Marshall signed an agreement releasing Higginson from liability. Marshall lost the case, then sued Higginson for malpractice.

The trial court granted summary judgment in Higginson's favor based on the release. The court of appeals set aside the release on the grounds that it was induced by Higginson's misleading representation that she would not testify on Marshall's behalf unless Marshall signed the

release. However, Higginson already had been subpoenaed by the buyers and had a duty to testify. “[I]t is well established that an agreement to do that which one is already obliged to do does not constitute consideration to support a contract.” *Boardman v. Dorsett*, 38 Wn. App. 338, 685 P.2d 615 (1984).

There are at least four important distinctions between *Marshall* and the present case: (1) Higginson made misleading representations to induce Marshall to sign the waiver, whereas Grace did not make any misrepresentations to Respondent; (2) Higginson had a duty to testify, regardless of whether Marshall signed the waiver, whereas Grace had no duty to buy Respondent’s house; (3) Higginson rendered no further services to Marshall after the waiver was signed, whereas Grace continued to represent Respondent and render real estate brokerage services to her based on the waiver; and (4) Higginson anticipated that Marshall would sue her, if Marshall lost the breach of contract claim, whereas Hanks had not threatened nor did Grace believe that a malpractice claim against him existed at the time of the waiver.

- b. There was a genuine issue of material fact as to whether Respondent intentionally and voluntarily waived any claims against Appellants.**

Respondent initially denied signing the rescission agreement and

claimed that Grace had forged her signature. However, when confronted with the original document in deposition, Respondent admitted that she signed the rescission agreement. Respondent accepted the benefits of the rescission agreement and cannot now avoid the burdens. The rescission agreement signed by Respondent provides in part as follows:

1. RELEASE. The parties agree that the [Purchase and Sale] Agreement between them and all other agreements or undertakings between them in respect to the Property are hereby rescinded; and each releases the other *and all real estate brokers and licensees* involved with this sale from any and all present or future liability thereunder and/or in connection with said sale." (Emphasis added.)

The language of the release is crystal clear and could not be misunderstood by a person of ordinary intelligence. "[A] party to a contract which he has voluntarily signed will not be heard to declare that he did not read it, or was ignorant of its contents." *Nat'l Bank of Wash. v. Equity Investors*, 81 Wn.2d 886, 912, 506 P.2d 20 (1973). "[A] party who signs an instrument manifests assent to it and may not later complain about not reading or not understanding." J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* §376 (4th ed.1998).

By signing the rescission agreement, Respondent waived any claim against Appellants relating to the Grimes transaction. "A waiver is the intentional and voluntary relinquishment of a known right." *Bowman v. Webster*, 44 Wn.2d 667, 669, 269 P.2d 960 (1954). Respondent intentionally and voluntarily waived any claims against Appellants

relating to the Grimes transaction. In the context of Respondent's motion, all reasonable inferences from the evidence must be viewed in a light most favorable to Appellants. In the absence of fraud or coercion, she is bound by her waiver. At a minimum, there was a genuine issue of material fact as to whether Respondent intentionally and voluntarily signed the rescission agreement and thereby waived any claims against Appellants.

c. Consideration is not an essential element of waiver.

“It has been said there are few principles in law with vaguer boundaries than those applied under the name of waiver. 1 W. JAEGER, WILLISTON ON CONTRACTS §203, 755 (3d ed. 1957). ‘It is a flexible word, with no definite and rigid meaning in the law, and, since it may be used in many senses, it is often of equivocal significance.’ (Footnotes omitted.) *United States v. Chichester*, 312 F.2d 275, 281 (9th Cir. 1963), *citing* 92 C.J.S. WAIVER p. 1041 (1955). The requirements for a waiver differ greatly in various states.

“The law is unclear in Washington, but there is some indication that a waiver may be based on estoppel (actually a different concept altogether) or on consideration. *See Voelker v. Joseph*, 62 Wn.2d 429, 383 P.2d 301 (1963). As a waiver in Washington is unilateral (*Bowman v. Webster*, 44 Wn.2d 667, 269 P.2d 960 (1954), *Kessinger v. Anderson*, 31 Wn.2d 157, 196 P.2d 289 (1948)), there can be a waiver without consideration as well.”

Gorge Lumber Co. v. Brazier Lumber Co., 6 Wn.App. 327, 335-36, 493 P.2d 782 (1972).

d. If consideration is required, there was a genuine issue of material fact as to whether there was consideration for the waiver.

“[T]here is a consideration if the promisee, in return for the promise, does anything legal which he is not bound to do, or refrains from doing anything which he has a right to do, whether there is any actual loss or detriment to him or actual benefit to the promisor or not.” *Browning v. Johnson*, 70 Wn.2d 145, 149, 422 P.2d 314 (1967).

Here, Grace did at least two things he was not bound to do – he continued to represent Respondent in the sale of her house and he offered to buy the house personally. Although his attempted purchase also failed, as held in *Browning*, the requirement for consideration is satisfied regardless of whether a benefit actually accrues to the promisor. At a minimum, there was a genuine issue of material fact as to whether Respondent intentionally and voluntarily waived any claims against Appellants.

4. The trial court should have granted Appellants’ motion for judgment as a matter of law and entered judgment in Appellants’ favor.

a. There is no substantial evidence to support the jury’s verdict that Appellants’ negligence was a proximate cause of Respondent’s damages.

For purposes of this appeal, Appellants concede that Grace was negligent in failing to include a house-sale contingency (NWMLS Form

22B) in the Grimes' offer, reporting the sale as "pending inspection," and removing the "for sale" sign from Respondent's home. However, the evidence at trial showed that:

1. Alia bought another house sometime *before* 9:40 p.m. on Monday, March 10, 2008;
2. The Grimes sale was published as "pending inspection" in NWMLS at 10:01 p.m. on Monday, March 10, 2008;
3. The "for sale" sign was removed from Respondent's home sometime *after* Monday, March 10, 2008; and
4. Respondent offered no evidence of any other prospective buyers, between March 10, 2008 and May 26, 2008 (when the Grimes' sale was rescinded).

RP 177, RP 350-51.

"Proximate cause" requires that "(1) the cause produced the event in a direct sequence unbroken by any superseding cause, and (2) the event would not have happened in the absence of the cause." WPI 15.01.01. The evidence here does not support a finding of proximate cause. The jury found that Grace was negligent in the Grimes transaction. The Grimes transaction was pending from March 10, 2008 to May 26, 2008. Respondent's theory was that Grace was negligent in failing to include a house-sale contingency in the Grimes' offer, reporting the sale to

NWMLS as “pending inspection,” and removing the “for sale” sign, and that such negligence caused Respondent to lose other buyers. But, the only evidence Respondent produced of another buyer was Alia and the jury found that Grace was not negligent in dealing with Alia. In any event, Alia had serious concerns about Respondent’s home and bought another house before Grace’s negligence occurred. Therefore, Grace’s negligence in the Grimes transaction could not possibly have caused Respondent’s damages.

“A judgment [as a matter of law] is proper when, viewing the evidence and reasonable inferences therefrom most favorably to the nonmoving party, the court can say as a matter of law that there is no substantial evidence supporting the verdict.” *Cowsert v. Crowley Maritime Corp.*, 101 Wn.2d 402, 405, 680 P.2d 46 (1984). “Substantial evidence is evidence which ‘would convince an unprejudiced, thinking mind of the truth of the declared premise.’” *Cowsert*, at 405, 680 P.2d 46. *Nord v. Shoreline Sav. Ass’n*, 116 Wn.2d 477, 805 P.2d 800 (1991).

A recent Court of Appeals decision is on point and addresses the same type of proximate cause question presented here. In *Boguch v. Landover Corporation*, 153 Wn.App. 595, 224 P.3d 795 (2009), the seller claimed that his agent’s inaccurate depiction of the boundary “proximately caused him to suffer an identifiable financial loss on the eventual sale of the property.” In affirming summary judgment in the broker’s favor, the

court held as follows:

“In analyzing whether [the seller] has met his burden of production on the element of proximate cause, we are guided by the reasoning in cases involving clients’ claims of professional negligence against their attorneys. . . . In those cases, the clients alleged that they would have obtained results more favorable than the actual outcomes in their legal proceedings but for their attorneys’ breaches of their duties of professional care. Similarly, *[the seller] alleges that he would have been able to sell his property sooner and for a higher price than he eventually did, but for his realtors’ negligence.*

“Our Supreme Court has recognized that ‘[t]he principles of proof and causation in a legal malpractice action usually do not differ from an ordinary negligence case.’ . . . Proof only of an attorney’s negligence is insufficient for malpractice liability to attach. A client must show that, if the client’s attorney had not committed the alleged malpractice, the client ‘would have prevailed or at least would have achieved a better result’ than that actually obtained. . . . Similarly, *[the seller] must show that, if the realtors had not posted the photograph erroneously depicting his property’s boundary lines on the Internet, he would have sold the property on more favorable terms than he eventually did.*

“[The seller] has not met this burden. There is no evidence that, in the absence of the inaccurate photograph, the property would have sold within a certain price range, much less that a particular individual would have purchased the property for a particular price. The evidence in the record shows that, other than the eventual buyers, only one individual, Bennett, expressed even the slightest interest in purchasing the property. Although the record indicates that Bennett lost interest in the property, in part, because of the inaccurate boundary depiction, the record also makes clear that his lack of interest was based on ‘several reasons,’ including the property’s general location, the direction of the view, and the slope of the land. The record also indicates that Bennett remained uninterested in the property

even after being apprised that the depiction was inaccurate. As we have recognized in an analogous context, *'it is difficult [for a plaintiff] to escape the realm of speculation when trying to prove' that an agent's negligence caused an unfavorable outcome when many variables may have affected the outcome. . . .* The multiple reasons for Bennett's lack of interest in purchasing the property illustrate that many factors might have influenced a prospective buyer's decision concerning [the seller's] property. Therefore, *not only is it speculative as to whether there was in fact a prospective buyer who would have purchased [the seller's] property, but it is also speculative as to whether such a prospective buyer was dissuaded from purchasing the property because of the inaccurate posting.*

“[The seller's] theory rests on the assumption that unknown prospective buyers who would have purchased the property either never considered it because their agents decided not to show it to them or must have had misgivings about the property based on the length of time it was on the market, similar to those misgivings harbored by the eventual buyers. However, the evidence in the record does not support this assumption. Although multiple witnesses testified that buyers may negatively perceive a residential property that has been on the market for a relatively long period of time, the record does not show that this generalized belief was in fact held by any identified prospective buyer who considered [the seller's] property or by such a prospective buyer's agent. *[The seller's] theory would require a trier of fact to infer that some person actually existed who was willing to pay a higher price for the property than the eventual buyers paid for it but who was otherwise deterred from doing so.* This theory might be plausible in light of the collection of circumstantial evidence that [the seller] submitted. However, the evidence submitted does not create the logical chain leading inexorably to the conclusion that [the seller] asserts. Anderson's testimony about agents' and buyers' attitudes generally, other witnesses' testimony about the potential negative effects of listing a property for a long period of time, [the seller's] realtors' concurrent sales records, and

the eventual buyers' concerns expressed during sales negotiations are all consistent with [the seller's] theory and may even be suggestive of his conclusion. *But the evidence in the record, even when viewed in [the seller's] favor, would not allow a rational trier of fact to reasonably infer that [the seller] would have obtained a result different from the terms of the eventual sale without speculating about other essential facts.*

“[The broker's] alleged statements that the photograph caused the property to remain on the market for an extended period are insufficient to create a genuine issue on the element of proximate cause. *Even viewing them in the light most favorable to [the seller], they do not establish the essential element of [the seller's] claim: that he would have sold his property for a higher price than he eventually did.* Although [the seller] is correct that circumstantial evidence can be as probative as direct evidence and may create a chain of facts from which the jury may draw reasonable inferences of ultimate facts, *Attwood v. Albertson's Food Ctrs., Inc.*, 92 Wn.App. 326, 330-31, 966 P.2d 351 (1998), circumstantial evidence establishing proximate cause must still ‘rise above speculation, conjecture, or mere possibility.’ *Attwood*, 92 Wn.App. at 331 (citing *Reese v. Stroh*, 128 Wn.2d 300, 309, 907 P.2d 282 (1995)). *In the absence of evidence that some person would have likely purchased the property on terms more favorable to [the seller] than those of the eventual sale, [the seller's] assertion, based on circumstantial evidence, that his realtors' alleged negligence was the proximate cause of his purported financial loss does not rise above speculation.*

...

“As discussed above, *nothing shows that any identified prospective buyer was actually dissuaded from considering the property because of the inaccurate depiction.* That an alternative outcome might have been possible or that [the seller's] theory may appear plausible in the abstract is insufficient to create a genuine issue on the element of proximate cause in this context. *[The seller] is required to*

produce evidence tending to show that a transaction different from the eventual conveyance would have occurred in the absence of the realtors' error. . . . He has failed to put forth evidence establishing this element. His theory relies upon requiring a trier of fact to engage in speculation or conjecture. Accordingly, the realtors were entitled to summary judgment as a matter of law. The trial court did not err.” (Emphasis added; some citations omitted.)

Boguch v. Landover Corporation, 153 Wn.App. 595, 224 P.3d 795, 803-05 (2009).

Here, as in *Boguch*, Respondent alleges that she would have been able to sell her property sooner and for a higher price than she eventually did, but for Grace's negligence. But, also as in *Boguch*, Respondent did not produce evidence of any prospective buyer who was actually dissuaded from considering the property because of the Grimes transaction. “In the absence of evidence that some person would have likely purchased the property on terms more favorable to [the seller] than those of the eventual sale, [the seller's] assertion, based on circumstantial evidence, that his realtors' alleged negligence was the proximate cause of his purported financial loss does not rise above speculation.” 224 P.3d at 805.

The standard applicable to a motion for summary judgment (*Boguch*) is the same as a motion for judgment as a matter of law (here).

“When reviewing a trial court's decision to deny a motion for judgment as a matter of law the appellate court applies the same standard as the trial court. Granting a motion for

judgment as a matter of law is appropriate when, viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party.

Sing v. John L. Scott, Inc., 134 Wn.2d 24, 29, 948 P.2d 816 (1997).

In reversing the trial court's denial of the broker's motion for judgment as a matter of law, the Supreme Court held in *Sing* as follows:

"[The buyer] never proffered a written offer indicating he would pay the purchase price or more for the property. If this was his intention he could have made a written offer to the [sellers]. Instead, [the selling agent] testified that [the buyer] directed him to offer \$41,000 to the [sellers]. Additionally, although [the buyer] states that when he viewed the [seller's] property he told [the selling agent] he would pay full price or more for the [sellers'] property, [the selling agent] testified that he did not remember such a statement by [the buyer].

"The only information [the listing agent] had was that [the buyer] would 'probably' accept the counteroffer when he returned. Both [the listing and selling agents] testified that only a signed offer is a legal contract and that it is not uncommon for potential purchasers to say they will purchase a piece of property and then never follow through. In this case, [the buyer] could have signed the counteroffer on Friday and he would have had the property. By waiting, he took a risk of someone else making a better offer that could be accepted by the [sellers].

...

"[V]iewing the evidence in the light most favorable to the nonmoving party, we do not find any set of facts which [support the jury's verdict]. We reverse the decision of the Court of Appeals and find the motion for judgment as a matter of law should be granted."

Id. at 33-34.

b. Non-economic damages for emotional distress are not recoverable in a professional negligence case.

The only evidence of non-economic damages offered by Respondent was “[t]he emotional distress suffered by Mrs. Hanks as a result of defendant’s negligence.” Plaintiff’s Trial Brief at 10. However, damages for emotional distress are not recoverable in a professional negligence case.

“(1) Where plaintiff suffers mental or emotional distress which is caused by some *negligent* act of the defendant, there is no right of action, even although the mental condition in turn causes some physical injury; unless the act causing the mental fright or emotional distress also threatens an immediate physical invasion of plaintiff’s personal security, that is, threatens immediate bodily harm. (2) But where mental suffering or emotional distress is caused by a *wilful* act, recovery is permitted.” (Emphasis in original.)

Kloepfel v. Bokor, 149 Wn.2d 192, 200, 66 P.3d 630 (2003) (*quoting Smith v. Rodene*, 69 Wn.2d 482, 418 P.2d 741, 423 P.2d 934 (1966)).

Here, Respondent did not allege or prove any intentional act by defendants, but simply professional negligence. In addition, none of the alleged conduct by Grace rises to the level of outrageous behavior necessary to award damages for emotional distress.

“[E]motional distress must be predicated on behavior ‘so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized

community.”

Kloepfel v. Bokor, 149 Wn.2d 192, 196, 66 P.3d 630 (2003) (quoting *Grimsby v. Samson*, 85 Wn.2d 52, 59-60, 530 P.2d 291 (1975)).

In *Kloepfel v. Bokor*, 149 Wn.2d 192, 199-200, 66 P.3d 630 (2003), the Supreme Court resolved conflicting decisions in the Courts of Appeals as to whether objective symptomatology required for a plaintiff to recover damages for emotional distress. *Kloepfel* is a Supreme Court decision decided *after* the Court of Appeals’ decision in *Whaley v. State*, 90 Wn.App. 658 (1998), relied upon by plaintiff. *Kloepfel* holds that objective symptomatology is not required for a plaintiff to recover damages for *intentional* torts, but is required for *negligence*.

“The question posed in *Hunsley* was whether a plaintiff who suffered emotional distress when a negligently driven car crashed into her house could collect for negligent infliction of emotional distress when she suffered no physical impact and stood outside the zone of immediate danger. See *Hunsley*, 87 Wn.2d at 425, 553 P.2d 1096. *Hunsley* held that the plaintiff could recover if she proved negligence, *i.e.*, duty, breach, proximate cause, and damage, and proved the *additional requirement of objective symptomatology*. *Id.* at 435-36, 553 P.2d 1096.

“The court carefully placed this requirement within the framework of negligence law. The court was mindful of the ‘view that a negligent act should have some end to its legal consequences.’ *Hunsley*, 87 Wn.2d at 435, 553 P.2d 1096. Though it recognized defendants have a duty to avoid negligent infliction of emotional distress and plaintiffs are to be compensated for damages following a breach of that duty, the court balanced the plaintiff’s right of recovery against the policy in negligence cases that liability should be limited where a defendant’s act was merely negligent

and not reckless or intentional.

“*Hunsley* similarly limited its holding to cases of *negligence*, recognizing that ‘[i]ntentional or willful acts, even those involving no physical impact and leading only to mental stress, usually resulted in a cause of action.’ *Hunsley*, 87 Wn.2d at 427-28, 553 P.2d 1096 (citing *Gadbury v. Bleitz*, 133 Wash. 134, 233 P. 299, 44 A.L.R. 425 (1925)). This court in *Bleitz* said, ‘we have adopted the rule that if such [mental] suffering is the direct result of a wilful wrong as distinguished from one that is merely negligent, then there may be a recovery.’ *Bleitz*, 133 Wash. at 136, 233 P. 299. *Hunsley* added, ‘[f]rom early in its history, this court has allowed recovery of damages for mental distress, even without physical impact or injury, when the defendant’s act was willful or intentional.’ *Hunsley*, 87 Wn.2d at 431-32, 553 P.2d 1096. . . .

“The distinction in treatment between negligence and intentional torts is related to the difference in fault. Society through its courts has a ‘definite tendency to impose greater responsibility upon a defendant whose conduct was intended to do harm, or was morally wrong.’ *Prosser and Keeton on The Law of Torts* § 8, at 37 (W. PAGE KEETON *et al*, 5th ed.1984). Courts generally establish rules which make liability more likely to attach to intentional wrongdoers than to those who are merely negligent. *Id*. Washington is no exception to this rule. In *Smith v. Rodene*, 69 Wn.2d 482, 418 P.2d 741, 423 P.2d 934 (1966), this court stated:

‘We think that a fair summary of the holdings in such cases is as follows: (1) Where plaintiff suffers mental or emotional distress which is caused by some *negligent* act of the defendant, there is no right of action, even although the mental condition in turn causes some physical injury; unless the act causing the mental fright or emotional distress also threatens an immediate physical invasion of plaintiff’s personal security, that is, threatens immediate bodily harm. (2) But where mental suffering or emotional distress is caused by a *wilful*

act, recovery is permitted.’

“*Id.* at 488-89, 418 P.2d 741”

Kloepfel v. Bokor, 149 Wn.2d 192, 199-200, 66 P.3d 630 (2003).

Here, Respondent testified at trial as follows:

Q Sharon, what effect has this had on your life?

A To say that it’s devastating is understating. I don’t even know how to express. I have no financial stability. I have no emotional stability. It’s a nightmare that I live daily from the time I get up. I live it all day until I go to bed wondering how I’m going to survive this. I did everything I was supposed to do. I planned it. I prepared it. I just happened to trust the wrong person to pursue my dream. I was just looking for security and to move on with my life, and my husband died. That was my goal. I didn’t want my life -- I knew it wasn’t going to be the same. I knew it wouldn’t be easy, but I just wanted to move on. I wanted it to be simple. I just didn’t want it to be so hard.

Q Sharon, have there been any physical manifestations of the stress you have been under due to your situation?

A February of this year, my mother took me to the emergency room.

Q Why did she do that?

A I was having chest pains and dizziness, and I sincerely thought I was having a heart attack. The emergency room physician hooked me up to the monitor and told me *I was having a panic attack.*” (Emphasis added.)

RP 98:3-99:3.

Although the issue of damages for emotional distress was submitted to the jury, the court may correct errors of law at any time prior to final judgment. *Anderson v. Farmers Ins. Co. of Washington*, 83

Wn.App. 725, 923 P.2d 713 (1996) (“Until a formal order has been entered, the court may change its mind”).

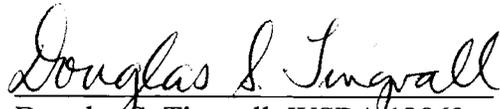
Here, because the jury found negligence only and not an intentional tort, and Respondent offered no evidence of objective symptomatology, she cannot recover damages for emotional distress, such that Appellants’ motion for judgment as a matter of law should be granted at least as to “non-economic damages,” if not as to all claims.

CONCLUSION

Respondent seeks to blame Appellant for the housing market crash. It is unfortunate for Respondent, as well as many other homeowners, that the housing market crashed. But, it is not Appellants’ fault.

This court should reverse the trial court’s orders (a) denying Appellants’ revised motion for summary judgment, (b) granting Respondent’s motion for partial summary judgment, and (c) denying Appellants’ motion for judgment as a matter of law. Alternatively, this court should set aside the jury’s award of non-economic damages.

Respectfully submitted on February 11, 2011.


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DECLARATION OF SERVICE

I certify that I successfully emailed and mailed a copy of this Opening Brief of Appellants to Craig Blackmon, respondent's attorney, at 2033 6th Ave Ste 990, Seattle WA 98121, postage prepaid, on February 11, 2011 at Newcastle, Washington.

Douglas S. Ingwall