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No. 70525-3-I

**COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON**

**NORWOOD GLEN CONDO ASSOC.
(non party)**

vs.

**LINCOLN DAVID, et al
Third Party Plaintiff/Appellant**

vs.

**RICHARD G. NORD, GEORGEAN MADDY, and GENE BRYSON
Third Party Defendants/Respondents**

APPELLANT'S REPLY BRIEF (2nd revision)

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C. PREAMBLE

Essentially, the arguments by Maddy and Bryson miss the gravamen of the import of this case: that the unlawful practice of law is inherently a deceptive act. And when that deceptive act is combined with a pecuniary interest in the parties who engage in that conduct, it is simply bad public policy to allow such conduct because of the enormous harm that can occur to consumers without any corresponding benefit to society.

D. FACTUAL CORRECTIONS

There are a number of factual misstatements or failure to fully include all the testimony that in turn would leave a misimpression as to the evidence in the Respondents Maddy and Bryson's brief. At page 7 of their brief, they reference David as being at a sales meeting giving the instruction that if a family with children purchased a unit, they would have to pay the Arlington school impact fee. However, this is probably a typographical error where they intended to say "Nord" instead of "David".

At page 10, Respondents cite CP 199 for the proposition that the Davids did not ask Mr. Jessup to include any language regarding the interpretation of the statute in the agreement, but failed to include the following as to why:

A. No, I did not. They gave me their legal advice on that, and I accepted it as them being professionals. CP199, L 11-13

At page 12, Respondents cited CP 201 for the proposition that David made an independent interpretation of the statute. However, this creates a misimpression that is contradicted by David's testimony at CP 197:

A. And I read through that document.

Q. And did you have any questions or concerns?

A. Yes, I did.

Q. And what were those questions and concerns?

A. In there it alluded to the fact that the condominium project was primarily to be an adult community, not exclusively but primarily. I was not aware of that based on the representations or advertising at the condominium itself.

Q. So what did you do upon having some questions – did you believe – you’ve said it was an adult community but that could children live there, upon your reading?

A. It had remedies for children living there, yes. It did – it did have that. But I had questions about -- I wanted to verify that that was in fact, true.

Q. You wanted to verify that children could live –

A. Yes. So I -- I called Mr. Jessup, and he set up a meeting with myself and him and Ms. Maddy at the condominiums on the following day.

At page 15, Respondents cite CP 197 and 289 for the proposition that Mr. Bryson had no involvement in the pre-offering meeting with Mr. David where the statutory interpretation was communicated. This is contradicted, however, at CP 365-366, 270

“I specifically raised this issue (the interpretation of the statute) with my real estate agent, Brad Jessup of Arlington Windemere office. I told him I wasn’t interested in purchasing the unit because of the restriction. He then told me that he would ask Georgeann Maddy about the application of this statute. He then set up a meeting with Ms. Maddy (also of Arlington Windemere) at the Condominiums to discuss my concerns as to the impact of this Restrictive Covenant set out in the Public Offering Statement. In that meeting with Ms. Maddy, she specifically explained to me that 42 USC 3607(b)(2)(C) allowed for 20% of the units to have children, while 805 could not. As I wanted to make sure, I asked her to check with her broker (Bryson) to make sure that her interpretation of the statute and the application of the restrictive covenant contained in the Public Offering Statement was correct. She told me the next day that she had checked with her broker, Gene Bryson, and that the statute and restrictive covenant allowed for 20% of the units to have children.” CP 365-366

And further by Ms. Maddy's testimony that she confirmed with her broker and then conveyed to the Davids that confirmation. CP 270 L 1-10.

At page 29, Respondents cite CP 201 for the proposition that there wasn't a right to rely on Maddy as she was not an attorney. However, Respondents only cite the court to lines 4-12 and not line 3 where Mr. David testified: "She has the ability to give me legal advice." Which is confirmed by the fact that Ms. Maddy testified to having received training on the Federal Fair Housing Act from attorney, Doug Tingvall. CP 277-279. And further Mr. David's testimony at CP 516 L 20-25 that he thought Ms. Maddy had the ability to give him legal advice.

At page 42, Respondents cite CP 196 for the proposition that there was no conflict of interest because the Davids knew that Maddy and Jessup were from the same office. However, the uncited portion of Mr. David's testimony indicates an opposite conclusion:

Q. So it's safe to say that them being from the same office was not an issue as far as you were concerned?

A. No.

Q. No, it was a concern, or no, it wasn't a concern? And I apologize, my question.

A. It was not an immediate concern at that time, no.

Q. Well, did it become a concern at a later point?

A. Not until further, further down the road when I found out that the information I was given was wrong. CP 196 L 13-24.

E. ARGUMENT IN REPLY TO RESPONDENTS' ARGUMENTS

1. Bryson confirmed the statutory interpretation

Bryson's argument that there was no evidence to support the allegations against him ignores that he confirmed to Maddy, who in turn told David that the interpretation of the Federal Fair Housing Act regarding 20% of the units allowing children was correct, when in fact it was in error. David did not allege any action based on RCW 18.86, but instead alleged a violation of RCW 19.86, unauthorized practice of law, and negligent misrepresentation. The argument that a person is not liable when providing erroneous information because it is being relayed by another to a third party is simply an incorrect statement of the law. In *Haberman v. WPPSS*, 109 Wn 2d 107, 161-164 (1987), our Supreme Court adopted the Restatement of Torts II, section 552(1) regarding providing false information to another in a business transaction. In *Haberman*, the court held the attorneys who drafted the prospectus without disclosing the potential negatives of investing in nuclear power plants liable to those who purchased the bonds from Chemical Bank. There was no contact between the attorneys and the bond holders as the prospectus was provided by the bond seller (Chemical Bank) to the

consumer. It is not necessary that the person communicating the false statement have contractual privity if that person knew or reasonably should have known that a third party was going to rely on that false statement. *Haberman, supra, at p. 163.*

Bryson's communication with Maddy, knowing that she would communicate it to others, is the issue; not RCW 18.86.

2.a. The issue isn't what the document said but Bryson interpretation of a statute and its application to the intended use

Bryson argues that Davids had constructive knowledge of the Public Offering Statement and other documents such that no negligence could have occurred. However, this ignores the fact that the issue isn't what the documents say, but the legal interpretation of the effect of what those documents say. This is a far cry from making an erroneous statement about square footage of the property where the buyer knew the actual square footage prior to purchase (*Denaxas v. Sandstone Court of Bellevue, 148 Wn 2d 654 – 2004*) because in the present case the Davids relied on the statutory interpretation communicated by Bryson to Maddy that 20% of the units could be rented to families with children which was erroneous. In *Denaxas* the buyer actually knew the truth so same did not rely on the misrepresentation.

Bryson asserts that the disclaimer in the POS that the buyer should consider seeking legal advice to be sufficient. However, this “disclaimer” does not meet the test enunciated by the court in *Mattingly v. Palmer Ridge Homes*, 157 Wn App 376, 395-396 (2010) in that it must be specifically bargained for which includes at a minimum a discussion of the waiver and its effect. If Bryson’s argument was to be accepted by this court, then real estate agents would be unfettered in providing false information on specific legal issues by having a statement “should consider consulting an attorney” within pages and pages of documents. Such would be inconsistent with our Supreme Court’s holding in the landmark case of *Berg v. Stromme*, 70 Wn 2d 184, 193-194 (1971) where the Court rejected boilerplate disclaimers in automobile sales transactions “... which elevates these bland and substantially meaningless terms and conditions, and gives them controlling effect over specifically agreed upon items and conditions ...” (at p. 193). In the present case, there is nothing in the disclaimer quoted by Bryson that would alert the Davids that Bryson had communicated (through Maddy) an erroneous interpretation of a federal statute and how it would apply to the Davids’ intended use of the property.

2.b. Clear, cogent and convincing evidence is found in Bryson's admission

Bryson argues that the Davids did not show by clear, cogent and convincing evidence that Maddy was negligent in communicating false information. However, Mr. Bryson's admission in his deposition that after selling the condo to the Davids he obtained a legal opinion from an attorney which contradicted the legal interpretation that he had provided to the Davids through Maddy, and that had he timely obtained such opinion from an attorney he would have communicated it to the Davids. CP 283-284. This clearly demonstrates Bryson and Maddy's negligence in failing to obtain a legal opinion from an attorney which caused them to provide false information to the Davids upon which they knew the Davids were relying in making a purchasing decision. CP 285

Furthermore, the duty to *persuade* a purchaser to seek independent legal advice on a complex real estate issue is *required* of a real estate agent. *Graham v. Findall*, 122 Wn App 461, 468-469 (2004). The admitted failure to comply with that requirement and instead provide erroneous legal advice establishes clear, cogent and convincing evidence of negligence.

2.c. Maddy was negligent in communicating false information

Maddy argues that she was not negligent in communicating false information because the Davids do not cite the court to any record that Maddy violated the standard of care of a reasonably prudent real estate professional, and that Davids did not provide any expert testimony. However, such ignores the decision in *Hecomovich v. Nielsen*, 10 Wn App 563, 572 (1974 - the court can take judicial notice of the standard of care of an attorney) and the admission by Bryson regarding his and Maddy's obtaining of a real legal opinion (one given by an attorney) which contradicted what they had communicated to the Davids.

2.d Davids relied on the false communication by Maddy

Bryson and Maddy argue that the Davids did not rely on the legal interpretation of the Federal Fair Housing Act because Mr. David signed the contract and made his own interpretation of that statute. Such is blatantly incorrect. Such an argument is based on the incorrect argument that Mr. David had already made his own interpretation and decision based on that interpretation without regard to erroneous legal advice communicated by Maddy and confirmed by Bryson. These factual assertions by Bryson and Maddy are inconsistent with the evidence. In fact, the evidence is exactly the opposite: the Davids relied on Bryson and

Maddy's legal interpretation of the statute and its application to the Davids' intended use, and that the Davids would not have purchased the unit but for Bryson and Maddy's legal interpretation communicated to the Davids. See Section D. FACTUAL CORRECTIONS hereinabove.

2.e David's reliance was reasonable, and they had a right to such reliance

Bryson and Maddy's brief essentially argues that there can be no justifiable reliance where there exists an "explicit disclaimer." David does not dispute this legal concept, but disputes whether a boilerplate disclaimer amidst pages and pages of documents that merely suggests that a person consider seeking independent legal advice relating to the contract, but without any specific reference to the interpretation of that contract by a third party is not an "explicit disclaimer". As argued hereinabove, "explicit disclaimers" are those that are specifically negotiated such that the person knowingly waives a legal right. *See Mattingly v. Palmer Ridge, supra, at pp. 395-396; Berg v. Stromme, supra, 193-194.*

Furthermore, whether reliance is "reasonable" is the province of the trier of fact, not summary judgment. In a more recent decision that

references the caselaw cited by Bryson and Maddy in their brief, the court stated whether a party justifiably relied upon a misrepresentation is an issue of fact (citing *Barnes v. Cornerstone Investment*).

In determining whether the Alejandres' reliance on Ms. Bull's representations was reasonable under the circumstances, we must grant them the truth of their evidence and all reasonable inferences from their evidence. If we do so, we cannot hold as a matter of law that no trier of fact would find the Alejandres' reliance was not justified. The trial court erred by holding otherwise. *Allejandre v. Bull*, 123 Wn App 611, 625-626 (2004).

It should be noted that the *Allejandre* case is a real estate sales case and, therefore, is more applicable to the facts of the present case.

3. Bryson, Maddy and Nord's acts fall within the CPA

Bryson and Maddy's argument that "claims directed at the competence of and strategies employed by a professional" to be exempt from the Consumer Protection Act is misdirected. The conduct of real estate agents has long been subject to the provision of the CPA. *See Edmunds v. Scott Real Estate* 87 Wn App 834, 840, 845-846 (1997 – *real estate transaction clearly falls within trade or commerce of CPA, drafting of earnest money was unfair and subject to CPA*).

Furthermore, Bryson and Maddy's argument fails because they had a pecuniary interest in the transaction (commission) and that transaction would not have occurred but for the erroneous legal advice they

communicated to the Davids. *Ramos v. Arnold*, 141 Wn App 11, 20 (2007 – recognized that the entrepreneurial aspect of an appraiser/professional would be subject to the CPA).

4.a. Unauthorized Practice of Law involves legal advice

Bryson and Maddy cite RCW 2.48.180 as the sole definition of the unauthorized practice of law. By doing so, they utterly ignore a century of caselaw as enunciated in *Estate of Marks*, 91 Wn App 325, 335 (1998 – *unauthorized practice of law is not only the performances of services in a court of law but includes giving legal advice, counsel, and preparation of legal documents*), and as clearly applied to real estate agents as enunciated in *Cultum v. Heritage House*, 103 Wn 2d 623, 647 (1985 – *exempts agents from the unauthorized practice of law solely when filling out a form prepared by an attorney and does not extend to giving legal advice or drafting legal documents*).

5 Giving legal advice is unauthorized practice of law

Bryson and Maddy rely on RCW 18.86.030 to excuse their conduct in giving the Davids legal advice on the application of a statute to the Davids' intended use. Their argument is that they merely conveyed what they were told.

The legislature explicitly included within RCW 18.86 an exclusion

of the application of any provisions within that title that constituted the unauthorized practice of law. RCW 18.86.110. Caselaw clearly demonstrates that where a non-lawyer undertakes to communicate legal advice, they are engaged in the practice of law. *See Cultum v. Heritage House, supra, p. 647; Graham v. Findall, 122 Wn app 461, 468-469 (2004)*

5.a RCW 64.34.405 is inapplicable

Bryson and Maddy cite the court to RCW 64.34.405 by analogy that the legislature intended that brokers were not to be held liable for “mere communication of information” from a seller. However, such is not analogous because RCW 18.86 contains an explicit expression by the legislature that prohibits the unauthorized practice of law by realtors notwithstanding any other statutory provision. RCW 18.86.110. Should the court adopt their position it would insulate real estate agents from their affirmative duty to “persuade” clients to seek independent legal advice on complex real estate issues contrary to *Cultum, ibid, and Graham, ibid.*

6. Caselaw, both pre and post 1996 legislative enactment, enunciates what is the unauthorized practice of law

Both *Estate of Marks, 91 Wn App 325 (1998)* and *Burien Motors v. Balch, 9 Wn App 573 (1973)* enunciate the basic principles of what

constitutes the unauthorized practice of law and are consistent with the other cases cited by the Davids such as *Graham, supra*, and *Cultum, supra*. However, the Davids cited *Marks* and *Burien Motors* for a very specific purpose.

In *Estate of Marks*, the court analyzed a situation where friends were trying to be helpful and where there existed no pecuniary interest or ulterior motive. Yet the court still found that the legal advice, as well as the documents prepared, by the friends to have been the “inadvertent” yet still unauthorized practice of law. *Estate of Marks, supra, at p. 335*.

In *Burien Motors v. Balch, 9 Wn App 573 (1973)*, the court analyzed a situation where the realtor knew the intended use of the property by the buyer but failed to either communicate accurate zoning information or encourage the buyer to seek independent legal advice. The court held that even an “honest mistake” where it involved the practice of law not to be an excuse. *Burien Motors, supra, at p. 577*.

This is significant because RCW 18.86.110 explicitly states “This chapter *does not affect* the duties of a licensee while engaging in the authorized or unauthorized practice of law *as determined by the courts of this state*. (emphasis added). As such, where the conduct constitutes the authorized or unauthorized practice of law, RCW 18.86 does not apply

and, therefore, does not supersede prior caselaw.

6.a. Jones establishes the test for courts to use in determining the Unauthorized Practice of Law by third parties who are in an adversarial position

The factual circumstances in *Jones v. Allstate*, 146 Wn 2d 291 (2002) may be different from this case, but the legal theories are directly applicable. The construct of “adversarial” can be an artificial one when parties act in a manner where they appear to be “helpful” and provide erroneous legal advice even though the recipient knows that the provider is not an attorney, not representing him or her, and understands that the provider is in fact adversarial to his or her interests. This was the case in *Jones*. See *Jones*, *supra* at p. 324. As such, public policy demands that the courts protect the public from future potential harm in like circumstances. *Jones*, at p. 307.

A realtor should not be allowed to give legal advice and then avoid the consequences because of being “adversarial”. The *Jones* decision sets boundaries on such an abuse of the unauthorized practice of law.

6.b. The Jones Test relates to the application of the practice of law to adversarial situations.

Bryson and Maddy argue that this court should not utilize the Bohn

test in determining the unauthorized practice of law because of legal and factual differences. However, the Davids argued the test as modified by the *Jones* decision which is clearly determinative on the issue of the unauthorized practice of law in an adversarial setting. The Davids rely on their analysis set forth in their opening brief.

7. Bryson and Maddy owed a duty to the Davids to persuade them to seek independent legal advice rather than giving them erroneous legal advice.

Bryson and Maddy's argument that RCW 18.86, and the duties enunciated in there, relieve them of any duty to persuade the Davids to seek independent legal advice and instead allows them to give erroneous legal advice makes no sense given the legislative pronouncement in RCW 18.86.110 and caselaw subsequent to the adoption of said statute in 1996 which specifically denotes such a duty. *See Graham v. Findall*, 122 Wn App 461, 468-469 (2004).

8.a. Rules of Professional Conduct do not give rise to independent action, but do establish the duty owed and deceptive act under CPA

Bryson and Maddy's citation of *Hizey v. Carpenter*, 119 Wn 2d 251 (1992) for the proposition that the Rules of Professional Conduct have

no application in the present case is misplaced. While *Hizey* at pages 258-259 does state that the RPCs do not create an independent action in themselves, at page 264 the court recognizes that the RPCs can be used to establish a deceptive act under the CPA, and at page 265 recognizes that the RPCs can be used for the basis of an opinion that an attorney violated a duty that could constitute legal malpractice. This is consistent with the court's prior ruling in *Epiks v. Denver*, 118 Wn 2d 451, 464 (1992) where the court allowed evidence of the violation of the RPC to establish a deceptive act and further analyzed the circumstances of the failure to disclose potential conflicts of interest in writing as an entrepreneurial fact to be determined by a trier of fact and not on summary judgment.

8.b. David did not consent to any potential conflict

RPC 1.8(a)(1) provides that any conflict of interest be "... fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client." In the present case, no such specific writing was ever provided to the Davids. Instead, the Purchase and Sale Agreement, which was executed *after* Maddy provided the erroneous legal advice, merely has a box checked that indicates that the "Selling Licensee represents the Buyer" and the "Listing Agent represents

the Seller.” No mention of any potential conflict or attempt to persuade to seek independent legal advice was included in that document. As such, Bryson and Maddy violated RPC 1.8.

9. The unlawful practice of law violates the CPA

The unauthorized practice of a profession (medical or legal) is inherently a deceptive act under the CPA. *State v. Pacific Health Center, 135 Wn App 149, 171-172 (2006)*. This ruling clearly enunciates that an unauthorized practice comes under the purview of the CPA. Furthermore, both *Hizey, ibid*, and *Epiks, ibid*, provide that violations of the RPC can be a basis for a CPA action.

9.a. Unauthorized Practice, violation of RPCs or any act that has the capacity to deceive the general public is a deceptive act

Bryson and Maddy cite the court to *Robinson v. Avis Rent a Car, 106 Wn App 104, 116 (2001)* for the proposition that because Maddy didn't know the legal advice she conveyed to the Davids was false, she could not have committed a deceptive act. However, such is not the holding of *Robinson*. The holding of *Robinson* was that a knowing failure to reveal is a deceptive act in that case, but did not state or overrule thirty years of Consumer Protection law that “intent” to deceive was not the rule, but whether the act had the “capacity to deceive”. *See NW Infrastructure*

v. PCL Construction, 172 Wn App 1019, fn 36 (2012). As such, both a knowing or unknowing statement where it has the capacity to deceive is a deceptive act under the CPA.

9.b Public Interest under the CPA is established by a repetitive act

Bryson and Maddy argue that the Davids cannot prove additional people have been or will be affected in exactly the same fashion. Such ignores the evidence in this case; specifically, that Maddy gave exactly the same legal advice to the Luthers who also purchased a unit based on her legal advice. CP 379-380. Furthermore, both Bryson and Maddy testified that the erroneous interpretation of the federal statute was their understanding as to the law (CP 266-286) and Maddy was involved in the sale of 23 of the 40 units in that project (CP 280).

9.c Davids would not have purchased the unit but for the erroneous legal advice communicated to them

Bryson and Maddy argue that Davids' lack of due diligence and the disclaimers negate any proximate cause. These arguments are addressed earlier in this brief and will not be recited again here. However, the bottom line is that the Davids would not have purchased the unit but for the communication by Maddy, after checking with Bryson to insure its

accuracy, that the Federal Fair Housing Act would allow the Davids to rent the unit to families with children. Mr. David repeatedly testified that but for that advice, they would not have purchased the unit. CP 365-367.

10. Nord does not provide any caselaw in support of his contentions

Mr. Nord filed a responding brief pro se in which he only gives his opinion without any citation to caselaw. RAP 10.3(a)(6) requires that a party provide citation to the record and legal authority. Failure to do so allows the court to rule favorably for the opposing party. *State v. Reitner*, 175 Wn App 1070 (2013); *See also, In Re Wickersham*, 178 Wn 2d 653, 665 (2013).

F. CONCLUSION

This court should not allow real estate agents and developers to give erroneous legal advice on the application of a statute to a buyer's intended use because to do so would allow for significant consumer harm in the future where such agents and developers would have unfettered ability to say whatever would make the deal go together regardless of the truth. Accordingly, this Court should reverse the trial court's decisions and grant the Davids' summary judgment on the issue of liability under the theories of negligence and violation of the CPA.

Respectfully submitted this 14 day of February, 2014

A handwritten signature in black ink, appearing to be 'F. Ockerman', written over a horizontal line.

Frederick H. Ockerman #12248
Attorney for Appellant Davids

CERTIFICATE OF SERVICE

Frederick H. Ockerman certifies that on February 14, 2014 he caused the foregoing amended Appellant's Brief to be filed with the Court of Appeals, Division I, by delivery via legal messenger, and served Respondent Richard G. Nord, Pro Se, and Respondents' Georgan Maddy and Gene Bryson attorneys Lars Neste and Bryan Cossette via email per parties' agreement

A handwritten signature in black ink, appearing to be 'F. Ockerman', written above a horizontal line.

Frederick H. Ockerman