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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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NO. 37556-7-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

KENNETH BRACKETT and DAYNA
BRACKETT,
Husband and Wife,
Appellant ,

v.

RICHARD E. WALSH and LINDA M. WALSH,
Husband and Wife,
Respondent.

BRIEF OF RESPONDENT

ALAN RASMUSSEN WSB 2545
ATTORNEY FOR RESPONDENT
P.O. BOX 118 – 144 SO. 161ST STREET
SPANAWAY, WA., 98387 – 0118
(253) 537-0504

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RESPONDENT'S COUNTER-STATEMENT OF THE CASE

This appeal by KENNETH and DAYNA BRACKETT (Brackett) brings up for review the trial court's order entered March 10, 2008, [At CP 119-121], granting motion of RICHARD E. WALSH and LINDA M. WALSH, (Walsh) for summary judgment and order dismissing the complaint filed by Brackett. The appendix attached to the order granting summary judgment contains a listing of all the pleadings and date of submission, including affidavits and exhibits.[CP 121]. The appendix to the summary judgment order was submitted to comply with RAP 9.12 and to provide an immediate reference to the documents that are appended to declarations of both parties and their witnesses. All of the same pleadings and numerous documents introduced by declarations of the parties or their counsel or their witnesses are found in the clerk's papers referred to in the discussion which follows.

Although the appellant has not furnished a transcript of the court's oral decision from the hearing on the Walsh motion for summary judgment held 02-15-2008, a portion of the verbatim report from the previous hearing on the Brackett motion for summary judgment on 12-21-2007, focuses the central issue:

[At RP 10, oral argument by respondent's attorney]

The plaintiffs argue and the premise to his lawsuit is that the contract requires the defendants not only to list, not only to vacate, but to remain forever away and not reside in their home. And that isn't what the contract said.

[At RP, 17, oral decision by trial court denying the Brackett motion for summary judgment], the trial court judge said:

"The only thing before me today is a request for summary judgment on behalf of the plaintiffs. The phrase that I'm asked to interpret in this contract is at paragraph 3 of the agreement, it's entitled "Vacating and Selling." And I'm going to read it.

"The Walshes shall immediately list their property for sale. The Walshes agree to vacate their residence next door to the Bracketts not later than May 31st, 2007."

"The property was listed for sale. The property was vacated by the Walshes. They went to – they moved to Arizona. I have examples of the $6,000 in bills to move, the fact that they did rent property there. . . .

"I'm going to deny summary judgment on behalf of the plaintiff.

"I'm interpreting the contract, and while one might say, well, we intended something that's not said here, the language is plain. List the property; that was done. It doesn't say sell the property. And secondly, vacate the residence; that was done."

Subsequent to hearing the Brackett motion for summary judgment, (Refer to CP at 82-83), the Walsh cross motion for summary judgment was heard on February 15, 2008, [CP at 121, oral argument of counsel is referenced in subparagraph #13 in the appendix to the court's order], and the order granting summary judgment to Walsh was entered March 10, 2008, (CP at 119-121).

In the Brackett brief on appeal, (at page -1-, A., "Assignments of Error," in subparagraph -3-) error is assigned as follows:

The trial court erred in refusing to consider extrinsic evidence as to the intent and understanding of the parties in the execution of the Settlement Agreement. (Emphasis by underlying is here supplied)

Brackett does not cite to or discuss what specifically is the "extrinsic evidence" that the trial court refused to consider. The appendix to the order granting summary judgment (CP at page 121) lists all the pleadings, including declarations of the parties and other witnesses. Included in the appendix is a list of declarations considered by the trial court:

Declaration by Walsh, CP 45-66;

Declaration by Margo Street, realtor, CP 37-44;

Declaration by Dayna Brackett, CP 107-108.

Declaration of Brackett's attorney, John Turner, in which he introduced letters sent between legal counsel to the parties before the contract settlement was signed. CP 109-118

Brackett has not assigned error to the admission of any of the extrinsic evidence offered by both parties concerning circumstances surrounding the negotiations leading to signing of the settlement agreement which is appended to the complaint. CP 4-24.

The record of the case in the clerk's papers for review shows the following material facts are not in dispute.

1. The settlement agreement between the parties required that Walsh list their residence for sale and that they vacate their residence not later than May 31, 2007. (Settlement Agreement at ¶3, CP 5). The Walsh listing of their home for sale on April 29, 2007 is verified by Margo Street, broker at Real Estate Executives, a licensed real estate brokerage and member of the Northwest Multiple Listing Service. CP 37-44

2. Walsh testified by affidavit that their residence was listed for sale April 29, 2007, (Declaration of Richard and Linda Walsh, CP 45-50), and that they vacated their home and signed a rent contract for residential lease in Arizona in April, 2007. The signed rent contract is shown in Exhibit 2-A appended to declaration of Walsh, CP 63. Walsh

paid $6,192 to have all their household furniture transported to their new location. (Exhibit 2-B to declaration of Walsh, CP 64)

3. The Walsh residence was advertised in Northwest Multiple Listing Service by Margo Street beginning May 03, 2007, (Declaration of Margo Street at page -2-, CP 38). The house was sold almost immediately, May 04, 2007, but the purchasers withdrew from the transaction in June, 2007, because they could not qualify for the loan they required. CP 43-44

4. Walsh testified that the failure of the purchaser to qualify for purchase of their home placed them in a real dilemma – their home mortgage loan required payment of $1,928 monthly whereas their monthly rent in Arizona was $1,207. Walsh testified they recognized they could not afford both the mortgage installment and the rent. Walsh believed they had no other choice but to move back to their residence which they did on June 11, 2007. CP 48 Brackett states Walsh returned to their home June 19, 2007, (CP 107), but the relocation date is largely immaterial. The lawsuit was filed immediately thereafter (07-13-2007) by Brackett complaining Walsh breached the covenant to vacate their house.

THE STANDARD OF APPELLATE REVIEW

The order and summary judgment from which Brackett now appeals brings up for review all of the pleadings and records before the trial court judge who granted summary judgment. The scope of review by

the appellate court is subsumed in the rule referred to as the standard of review for summary judgment:

> When reviewing an order on summary judgment the appellate court engages in the same inquiry as the trial court. The appellate court will affirm summary judgment if no genuine issue of material fact exists and the moving party is then entitled to judgment as a matter of law.
> (Quoting from Greater Harbor 2000 v. Seattle, 132 Wn.2d 267, at 279, 937 P.2d 1082 (1997)

The difficulty in applying the rule governing the standard of review from summary judgment is deceptively complex when the analytical framework is understood in the context of contract interpretation. The Supreme Court explained *Greater Harbor 2000, supra,* that a *material fact* is one of such nature that it affects the outcome of the litigation. The burden falls on the moving party, here Walsh, to show that there is no issue of material fact. Only after the moving party has met its

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CERTIFICATE OF SERVICE

To certify that on the date below stated the undersigned attorney has served a copy of this pleading to the opposing legal counsel via ABC Legal Services, Inc., state-licensed courier by requesting delivery to the law office of Attorney Robert M. Quillan at 2633 – A, Parkmont Lane SW, Olympia, Wa. 98502.

Date: November 18, 2008

ALAN RASMUSSEN WSB 2545
ATTORNEY AT LAW