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**COURT OF APPEALS DIVISION II  
OF THE STATE OF WASHINGTON**

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**LARRY D. RILEY,**

**Appellant,**

**Vs.**

**IRON GATE SELF STORAGE; ESMS PARTNERS LP; GLEN L.  
ARONSON EVE ARONSON TRUST; PRIME COMMERCIAL  
PROPERTY, INC.; all dba IRON GATE SELF STORAGE; dba  
IRON GATE STORAGE – CASCADE PARK,**

**Respondents.**

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**REPLY BRIEF OF APPELLANT**

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**A. Plaintiff's objections to the trial court's action in rendering judgment limiting damages have been preserved in the record.**

Iron Gate argues that any challenge by Mr. Riley to enter the Final Judgment of Dismissal with Prejudice<sup>1</sup> should not be considered because Mr. Riley did not object to the form or entry of the Final Judgment, based on RAP 2.5(a). However, RAP 2.5(a) provides, in part, as follows:

(a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court.

The purpose of the rule is to insure that a claim of error has been preserved for review. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). "The reason for this rule is to afford the trial court an opportunity to correct any error, thereby avoiding unnecessary appeals and retrials." *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983).

In the instance of the *Riley v. Iron Gate*, there was a motion by the defense for summary judgment<sup>2</sup> requesting essentially the same relief - imposition of a limitation on liability - as was afforded by the Final Judgment that was entered. Larry Riley submitted a lengthy, detailed and briefed legal argument in Plaintiff's Response to Defendants' Motion for Summary Judgment, with attachments<sup>3</sup>, and a Motion for

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<sup>1</sup> Hereinafter "Final Judgment", CP 95, 0307-0308

<sup>2</sup> CP 000000049-000000070.

<sup>3</sup> CP 75, 000000071-000000249

Reconsideration<sup>4</sup>, with attachments, in which Mr. Riley strenuously argued on many grounds why the Trial Court should not impose a limitation on the defendants' liability, or enforce any of the exculpatory language contained in the rental agreement.<sup>5</sup> Further, there were two sessions of the trial court in which Mr. Riley's counsel confirmed that the Court had had opportunity to review Mr. Riley's submissions<sup>6</sup>, at which time Mr. Riley's counsel orally summarized aspects of Mr. Riley's opposition to the enforcement of the exculpatory language, including the ostensible limitation on liability contained in paragraph 7 of the rental agreement. This is well demonstrated in the Transcripts of the oral presentation.<sup>7</sup>

Apparently, it is Iron Gate's position that notwithstanding the detailed analysis submitted by Mr. Riley in opposition to the imposition of a limitation on liability, the failure of Mr. Riley to thereafter say "I object" at the very moment of the Court's signing of the Final Judgment waived Mr. Riley's right to challenge on appeal the Trial Court's judgment taking the very action that Mr. Riley had gone to a great deal of effort to oppose on detailed grounds prior thereto, that action being the imposition of a limitation on liability by operation of the Final Judgment.

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<sup>4</sup> CP 82A, 000000278-000000298

<sup>5</sup> Ex. 1, Brief of Appellant (49)

<sup>6</sup> RP 7-8-15, 10/ 8-17; RP 7-17-15, 83/ 16-13.

<sup>7</sup> RP 7-8-15, 1-75; 76-94

However, bills of exception long ago passed from the scene. Mr. Riley's failure to say "I object" did not deprive the trial court of an opportunity to correct the grounds for an appeal and remand. It constituted no unfairness to Iron Gate, which had ample opportunity to consider and rebut Mr. Riley's opposition to the exculpatory language in the rental agreement, and in particular the limitation on liability, which such opposition Iron Gate expressed in its submissions to the trial court before the entry of the Final Judgment.<sup>8</sup>

RAP 1.2(a) provides:

These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands, subject to the restrictions in rule 18.8(b).

To the extent to which Mr. Riley's failure to say "I object" when the Final Judgment was signed, Iron Gate's argument he cannot argue error in the Final Judgment would make a mockery of that rule.

In fairness, however, Mr. Riley did state that he had no objection to the form of the order – or judgment. Supp. Clerk's Papers 37 (page 92, lines 12-14). Why would he object to the form of judgment? The judgment reflected a ruling consistent with the court's announced oral

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<sup>8</sup> CP 78, 2/11-21; 10/ 8-18/6.

ruling<sup>9</sup>, and its order of summary judgment<sup>10</sup>, and facilitated the disposition of the case in an agreeable manner consistent with the court's ruling on summary judgment. What was Mr. Riley to do, argue for the entry of a Final Judgment that repudiated the very action the court had announced that it would take, and the court's summary judgment order, and the purpose for which the court was signing the Final Judgment? Was he to waste the court's time verbally objecting and then rehash on the spot all of the grounds that Mr. Riley had to the imposition on a limitation on liability that he had already presented to the court and that the court had already announced that it was rejecting? The truth is that if the exculpatory language of the trial court's Final Judgment is ultimately upheld, Mr. Riley would want it to read as it is currently written. His objections are to the court's rulings against his arguments and its entry of any judgment that enforces the exculpatory language, which in this instance centers on the imposition of a limitation on liability.

**B. Mr. Riley did not expressly agree to an actual Value Limitation, and the damage limitation is unenforceable by the terms of the rental agreement and the decisional law**

**1. There is no value limitation in the Rental Agreement that Mr. Riley signed.**

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<sup>9</sup> RP 65/7-68/1.

<sup>10</sup> CP 000000305 & 000000306(2).

Iron Gate misinterprets the following portion of paragraph 5 of the rental agreement<sup>11</sup>:

5. . . . It is understood and agreed that Occupant may store personal property with substantially less [sic] or no aggregate value [sic] and nothing herein contained shall constitute or evidence, any agreement or administration [sic] by Operator that the aggregate value of all such personal [sic] property is, will be, or is expected to be, at or near \$5,000. It Is [sic] specifically understood and agreed that Operator need not be concerned with the kind, quality, or value of personal property or other goods stored by Occupant in or about the Premises pursuant to this Rental Agreement.

There is no value limitation. The language first states that the Occupant may store property with substantially less or no aggregate value, whatever that means. It provides that the Occupant agrees to store “substantially less”, but substantially less than what we don’t know. Does the reference to “or no aggregate value” actually mean that the stored property can have no value at all, which is how it is written? Then the language goes on to recite that the value of the property was not anticipated to be at or near \$5,000.

This does not constitute an agreement to a value limitation. At best, it would be an agreement that nothing in the rental agreement constitutes evidence of an agreement by Iron Gate that the value of the

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<sup>11</sup> CP 000000142-000000147

property will be “at or near \$5,000”. At or near could be less than or more than; the language is worse than ambiguous on this point.

What Iron Gate is asking the Court to do is interpret this confusing, exceedingly poorly worded, ambiguous agreement to create a value limitation in a consumer contract that would not be obvious to anyone reading it. In support of Iron Gate’s interpretation Iron Gate relies on the fact that Mr. Riley said that he read and understood the rental agreement. What he understood is not synonymous with Iron Gate’s interpretation of the rental agreement. For instance, CP 75, pages CP 000000125-000000133 in Mr. Riley’s declaration submitted in opposition to Iron Gate’s motion for summary judgment, Mr. Riley explains his interpretation of the agreement and the circumstances of its execution, which doesn’t support Iron Gate’s interpretation. It should be noted that Iron Gate fails to call to our attention what evidence in the Record supports its interpretation other than the written rental agreement; Iron Gate’s interpretation, based on the ambiguous language of the rental agreement, reflects the arguments of its attorneys, which is not evidence.

Further, Iron Gate asks the Court to resolve these ambiguities contrary to the Part C, pages 17-32 analysis of the Brief of Appellant, which amongst other things points out that exculpatory clauses are strictly enforced and narrowly applied (beginning at 18); points out that Mr.

Riley did not unambiguously agree not to store more than \$5,000 worth of property in the storage unit (beginning at 24); and points out that the exculpatory language is only upheld in Washington as a defense to ordinary negligence as opposed to an intentional tort or conduct (beginning at 27). Having covered this analysis and pertinent authorities in Part C, Appellant will not repeat them and instead directs the Court to Part C.

The fact that paragraph 5 of the Rental Agreement states that Iron Gate need not concern itself with the value of the property in the unit hardly justifies Iron Gate's willful, tortuous and intentional taking of the property itself and disposing of it for its own purposes, contrary to the procedures set for the in the Self-Storage Act, Ch. 19.150 RCW (040 & 060).

Assuming for purposes of argument that Mr. Riley breached his contract with Iron Gates by storing property valued at greater than \$5,000, what is Iron Gate's breach of contract remedy? It would certainly not be seizing Mr. Riley's property and selling it. It is submitted that the fact that if it could be argued that Mr. Riley violated his contract in this regard, the breach would not be a defense to the causes of action that Mr. Riley has brought against Iron Gate for conversion and violations of the Consumer Protection Act.

Finally on this point, paragraph 5 is to be contrasted to value limitation language quoted from cases from other jurisdictions that are cited and relied upon by Iron Gate, which is to be contrasted to the convoluted wording of paragraph 5 by virtue of the clarity of the language quoted from the other cases. “Occupant agrees that under no circumstances will the aggregate value of all personal property stored in the Premises exceed, or be deemed to exceed, \$5,000.” *Taylor v. Pub. Storage*, 2012 U.S. Dist. LEXIS 126967 (W.D. Wash. Sep. 2012). “Occupant agrees that under no circumstances will the aggregate value of all personal property stored in the Premises exceed, or be deemed to exceed \$5000 and may be worth substantially less than \$5,000.” *Mukwange b. Pub. Storage, Inc.*, 2015 Tex.App. LEXIS8373 (Aug. 11 2015). This same language is quoted in *Kocinee v. Pub. Storage, Inc.*, 489 F. Supp. 2d 555, 560 (E.D. Va 2007).

Further these cases all use words like “loss” and property instead of the words used by Iron Gate, “lose” and “properly”, which are obvious errors in the Riley rental contract.

**2. There is no damages limitation that should be enforced in this case.**

The Respondent relies on *Eifler v. Shurgard Capital Management Corp.*, 71 Wn.App. 684, 861 P.2d 1071 (1993) as a case in which a

liability disclaimer was upheld. This issue is discussed at length on pages 26-28 of the Brief of Appellant. Exculpatory language of this type is upheld in cases of simply negligence only; it is not upheld for cases of gross negligence or intentional acts. *Eifler* was a simple negligence case.

Respondent cites *Taylor v. Public Storage*, No. C10-2103RSM, 2012 U.S. Dist. LEXIS 126967 (W.D. Wash. 2012), as another example of a case upholding a damage limitation. But *Taylor* is clearly distinguishable on a couple of different grounds. It is clear from the decision in *Taylor* that the court determined that there was no violation of the notice procedures or any other provision of the Self-Service Storage Act as there was in Larry Riley's case. The *Taylor* court cites to *Eifler* to show "a party to a contract can generally limit liability for damages resulting from **negligence.**" (Bolding for emphasis). The express language of the rental agreement in *Taylor* also expressly applied the limitation on liability to conversion, which Iron Gate's rental agreement does not expressly do. Although plaintiff argues that such a limitation would not be enforceable, it is not an issue in *Taylor* because there was no failure to follow the notice requirements for the auction in *Taylor*. The court dismisses the conversion claim, which is no surprise because the auction was conducted only after 14 days notice as required by the statute. Since the lien in that case did appear to be valid, there was no need for the Court to specifically

address the claim for conversion. In any event, if the owner complied with the statute, there would be no valid claim for conversion; a conversion claim would only have been valid if the storage operator had not followed the notice requirements from the statute. As to any other claim than simple negligence, the court does not engage in any discussion of the merits of the other causes of action the principles invalidating or refusing to enforce exculpatory language in the instance of gross negligence or an intentional tort. Clearly the case did not address those issues in those contexts.

The *Taylor* court relies on *Wagenblast v. Odessa School District*, 110 Wash. 2d 845, 851-51 (1988) to decide that the appellant had not demonstrated that the liability limitation clause violated public policy, referencing a test adopted by Washington court in *Wagenblast*. The Respondents' Brief relies heavily on the *Wagenblast* test to negate appellant's attack on the enforceability of the exculpatory language for an intentional tort. However, the *Wagenblast* test is limited to analyzing the public policy factors for negligence claims, not gross negligence or intentional tort claims.

*Boyce v. West*, 71 Wn.App. 657, 862 P.2d 592 (1993): "In Washington, contracts of release of liability for **negligence** are valid unless a public interest is involved."

“We hold that the exculpatory release from any future school district **negligence** are invalid because they violate public policy.” *Wagenblast v. Odessa School Dist. No. 105*, 110 Wn.2d 845 848, 758 P.2d 968 (1988). “The general rule in Washington is that exculpatory clauses are enforceable unless (1) they violate public policy [*Wagenblast* factors], or (2) the **negligent** act falls greatly below the standard established by law for protection of others, or (3) they are inconspicuous.” *Scott v. Pacific West Mountain Resort*, 119 Wn.2d 484, 834 P.2d 6 (1992). [Bolding added.]

The *Wagenblast* test clearly does not establish a test for judging the enforceability of exculpatory language advanced in defense of a grossly negligent or intentional act.

The discussion of this issue is expanded on pages 28-31 of the Brief of Appellant.

Respondents also relies on *Kocinec v Pub. Storage, Inc.*, 489 F. Supp. 2d 555 (E.D. Va. 2007), a federal case that relies on the law of the State of Virginia. It is interesting to note that this case recites that provisions limiting liability are general disfavored; that such provisions are only enforceable in a contract that shows no ambiguity on its face (unlike the Riley rental agreement), in which event “a party . . . may exempt itself from liability for negligence in a contract with a party on

equal footing”, citing *Gill v Rollins Protective Servs. Co.*, 722 F.2d 55, 58 (4<sup>th</sup> cir. 1983). The court states that “(t)o limit liability for one’s own negligence, the exculpatory clause must be ‘clear and definite’”, citing *Krazek v Mountain River Tours, Inc.*, 884 F.2d 165 (4<sup>th</sup> Cir. 1989). However, the court found “that the exculpatory clause in the Rental Agreement clearly releases Defendant from liability for losses from any cause, unless such loss was caused by Defendant’s ‘fraud, willful injury or willful violation of law.’” The *Kocinec* court rules against the plaintiff on the basis that she did not “allege fraud, willful injury, or willful violation of law in her Complaint”, and made no allegations to support any such claim. However, Larry Riley made these allegations in his complaint.<sup>12</sup>

Respondent also relies on *Mukwange v. Public Storage, Inc.*, 2015 Tex. App. LEXIS 8373 (Aug. 11 2015). However, that case applied a damage limitation in a trial court decision that the storage unit owner had breached the contract between the parties. Although both conversion and fraud had been pled, the decision for recovery was limited to breach of contract as the only cause of action available under the facts, and the contract had a clear damage limitation.

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<sup>12</sup> CP 000000007 (19)/5-6.

It should be noted that none of these case cited by respondents recite the absence of a valid lien, which was a defect for the foreclosure of Mr. Riley's storage unit contents.<sup>13</sup>

**C. Evidence of intentional or willful misconduct is relevant and it has been proven.**

Respondent begins its argument on page 11 of Respondent's brief by stating that pre-injury liability waivers do not preclude enforcement of the provisions at issue here, which respondent characterizes as "mere" limitations on value and damages. Respondent states that intentional misconduct in this case is irrelevant because the provisions at issue are not liability waivers. However, in note 2 of the Virginia federal case (*Kocinec*) brought to the discussion of this appeal by Respondent states as follows:

Defendant asserts that the legal criteria a court must look to in evaluating exculpatory agreements is inapposite in this case because the contract term here at issue "does *not* seek a ruling exculpating it of all liability," but only "limits damages, if any to \$5,000." . . . Such a distinction, between terms that limit recovery and terms that wholly preclude recovery, lacks justification. Courts within this jurisdiction have consistently referred to both provision those that limit liability and those that foreclose liability as 'exculpatory. (Citations omitted) . . . In this case, Defendant seeks to reduce Plaintiff's asserted damages by 93%, from \$70,000 to, at most, \$5,000. The Court is loath to conclude that the contractual term purporting to impose such a limitation of liability

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<sup>13</sup> Brief of Appellant, page 12 discusses the Riley foreclosure in the absence of a valid lien to foreclose.

does not constitute an ‘exculpatory clause’. Accordingly, the Court will examine the contractual provision at issue in view of the law governing exculpatory agreement within this jurisdiction.”

Incredibly, Respondent then argues at page 12 that appellant’s challenge to the value and damage limitation provision fail because there is no evidence that Iron Gate intended to violate plaintiff’s rights, or otherwise intent to cause him harm. First, Iron Gate purposefully elected to commence a foreclosure of the contents of Mr. Riley’s storage unit by procedures that violated the express provisions of the statute, the facts of which were exhaustively reviewed in the Statement of the Case in the Brief of Appellant at pages,4-10 & Part B, pages11-17. It is worth noting that Iron Gate not only failed to follow the procedures imposed by Ch. 19.150 RCW, but it issued the notices and auctioned the property without even perfecting a lien, which is required in order to seize and sell the property.<sup>14</sup> Second, Iron Gate sold Mr. Riley’s storage unit contents. That shows an actual intent to harm. Once sold, those contents no longer belong to Mr. Riley. Iron Gate most certainly would have understood that, and that it would harm him.

Respondents go on to argue that “(a)s long as the element of inadvertence remains in conduct, it is not properly regarded as willful”, *citing Adkinson v. Seattle*, 42 Wn.2d 676, 682, 258 P.2d 461, 465 (1953),

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<sup>14</sup> *Id.*, at page 12.

which cites 38 Am. Jur. 692, Negligence, § 48. This is pure dicta and has nothing to do with the holding in that case. But it begs the question of what constitutes inadvertence. “Inadvertence” is defined at

<http://www.dictionary.com/browse/inadvertence> as:

1. the quality or condition of being inadvertent; heedlessness.
2. the act or effect of inattention; an oversight.

It is similarly defined in Webster’s New World Dictionary (1997; 3<sup>rd</sup> Ed)

It is submitted that Iron Gate’s conduct in sending out the lien and auction notices, and conducting the auction, were intentional acts. These acts constituted conversion as discussed in detail in Part B, pages 11-17 of Brief of the Appellant. As pointed out at page 15, conversion is defined as “an intentional exercise of dominion or control over a chattel that so seriously interferes with the right of another that the actor may be required to pay the other the full value of the chattel”, citing the Restatement of Torts. Wrongful intent is not required; good faith is not a defense.

In this instance, the resident manager of the facility that sold Mr. Riley’ storage unit contents, prepared notices of this type and sent them out for Mr. Riley’s unit, which is what she intended to do, which is what Iron Gate trained her to do.<sup>15</sup> She filled out the variable information on the notice forms when they came up on her computer and then she or her

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<sup>15</sup> CP 000000160, 17/10-11; 18/25-19/2; CP 000000161, 23/1-25, 24/7-22; CP 000000162, 25/1-24.

co-manager sent them out.<sup>16</sup> Neither had read the Washington Self-Service Storage Act.<sup>17</sup> The date for the auction was furnished to her by the corporate office. She merely sent the notice out with reference to a date supplied by corporate and not by reference to the 14 days required for the auction notice by RCW 19.150.060.<sup>18</sup> Her activities are described on CP 000000160, pages 17/1-20/25; CP 000000161, pages 22/1-pages 24/22. Iron Gate's activities in this regard were not inadvertent, not that it would have mattered if they were so long as Iron Gate intended to send out the notices and thereafter sold the property at auction, which was intentional.

It is worth remembering that Iron Gate had a Buyers Agreement with the buyer of Mr. Riley's storage unit contents whereby Iron Gate had the right to buy back the storage unit contents for 60 days after the auction.<sup>19</sup> This Buyers Agreement was effectively a part of the sale. Nevertheless, Iron Gate never elected to pursue the purchase of the storage unit contents although having received a letter from Mr. Riley's counsel two days after the auction in which Iron Gate was advised that the auction was invalid and did not comply with the requirements of the Self-Storage.

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<sup>16</sup> *Ibid*

<sup>17</sup> CP 000000161, 22/18-20; 24/7-11; CP 000000164, 11/2-5; 11/13-19; 11/20-23.

<sup>18</sup> CP 000000161, 22/3-23/1-25.

<sup>19</sup> CP 000000156

Act<sup>20</sup>; Iron Gate never even responded to that letter until Dec. 2010, more than five months after the auction.<sup>21</sup> In light of that, it is kind of hard for Iron Gate to contend that its actions were not intended.<sup>22</sup> This is at least gross negligence as discussed on page 8, Brief of Appellant, but it is really evidence of an intentional act.

Contrary to what the Respondents Brief contents, Iron Gate returned a very small portion of Mr. Riley's property after suit was filed, but what was returned was for the most part damaged and in a state of disarray.<sup>23</sup> Some of that which was not returned were "personal papers and person photographs"<sup>24</sup> that were exempt from the auction sale by statute<sup>25</sup> required to be made available to Mr. Riley, except that it was sold. The notice of lien and notice of auction (CP 00000049 & 0151) excluded personal effects and household goods from the auction, but these were also not returned to him.<sup>26</sup>

**1. Mr. Riley self-insured as permitted  
by the storage lease agreement.**

Iron Gate complains that Mr. Riley represented that he would insure the property for 100 percent of its actual cash value, quoting from

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<sup>20</sup> See the attached Exhibit A that outlines the violations calendare.

<sup>21</sup> CP 00000037 (3)/7..

<sup>22</sup> Letter dated 7/17/2010, 000000153; page 8, Brief of Appellant.

<sup>23</sup> CP 000000124(28)/23-26 & CP 000000125/1-4.

<sup>24</sup> *Id.*

<sup>25</sup> RCW 19.150.060(3),(5) & 070; &19.150.080(1) & (3)

<sup>26</sup> *Id.*

the lease agreement at page 6 of the Respondent Brief. Whether Iron Gate contends that Mr. Riley's conduct in this regard was a breach of contract or a misrepresentation is unclear, but it was neither. Without stating so Iron Gate apparently believes that Mr. Riley's failure to insure relieves Iron Gate of its liability for having intentionally seized his property and auctioned it contrary to RCW 19.150.040 and 060. There are several problems with respondents' line of argument.

First, Iron Gate fails to cite to any authority that would establish that the existence of insurance coverage, or the absence thereof, would relieve Iron Gate of any liability for conversion and Consumer Protection Act violations. Under the Collateral Source Doctrine, the presence or absence of insurance would be irrelevant to Mr. Riley's realization of his remedy in any event. *Heath v. Seattle Taxicab Co.*, 73 Wash. 177, 186, 131 P. 843 (1913); *Ciminski v. SCI Corp.*, 90 Wash.2d 802, 804-05, 585 P.2d 1182 (1978).

Second, the losses for which the lease agreement purports to require insurance are fire, extended coverage perils, vandalism and burglary.<sup>27</sup> There are two ways of looking at this. Was Iron Gate's conduct in seizing Mr. Riley's property vandalism or burglary? Assuming that it was not (and Iron Gate is unlikely to concede that it was),

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<sup>27</sup> CP 000000143, sec. 6.

conversion by Iron Gate is not one of the losses for which insurance is ostensible required, at least under Iron Gate's argument.

Fourth, the rental agreement in paragraph 6<sup>28</sup> only requires the Occupant to obtain the referenced coverage "or to be 'self-insured'". Commensurate with that language, Mr. Riley initialed the space provided in paragraph 6 that indicates that he elected to self-insure.

Paragraph 6 has some other language that is worthy of comment. It is written that "(t)o the extent that Occupant has 'self-insured', Occupant shall beat all risk of loss damage." (underlining added for emphasis). Iron Gate may argue that under this language Mr. Riley agreed to *bear* the risk of loss, but that is clearly not what it reads. Assuming arguendo that the language can be interpreted that way, Mr. Riley did not bear the risk of loss for Iron Gate's conversions and Consumer Protection violations because neither were one of the losses for which insurance was referenced in paragraph 6. It is doubtful that insurance could even be obtained for such losses.

**2. Respondent's reliance on the Amendment to the Self Storage Act Statute is Misplaced.**

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<sup>28</sup> *Id.*

The Respondent's Brief cites to an amendment to RCW19.150 regarding limitation of value in rental agreement for a self storage unit.<sup>29</sup> Nothing in this amendment changes the public policy analysis as to intentional torts. Nothing in this amendment indicates an intention to allow an exculpation for liability for the storage owner's failure to follow proper lien procedures. The legislation merely says that if there is a limit on the value specified in the rental agreement for the contents, that limit is for the purposes of the owner's liability only. It says nothing about the enforceability of any limit on the owner's liability in defense of an action by a storage unit lessee. It would probably be enforceable against many actions for ordinary negligence, but not against action based on gross negligence or an intentional tort. The statute changes reflected in this House Bill have no effect on the issues raised by this case, the events of which took place in July of 2010; the effective date of the legislation is in July 2015. The Senate Bill Report attached to the report states that it was prepared by "legislative staff for the use of legislative members in their deliberations."<sup>30</sup> This analysis is not part of the legislation nor does it constitute a statement of legislative intent." This amendment does not address situations in which such a limitation may or may not apply and

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<sup>29</sup> SHB 1043, CP 00000034-00000040.

<sup>30</sup> CP 000000041-000000043.

should not be seen to displace the well-established principle that a party may not exculpate, partially or totally, liability for intentional torts.

**D. Respondents Fail to Negate Appellant's CPA Claims**

Appellant's CPA argument is addressed in detailed in the Brief of Appellant, Part D, pages 35-44. Appellant will only comment at this time that appellant's CPA claims would not be limited to express statutory reference to value and damage limitations, as respondent suggests. CPA violations can be based on unfair or deceptive acts or practice in the conduct of any trade or commerce. No. 2, page 38, Brief of Appellant. Finally a violation can occur if it is either unfair or deceptive. *Klem v Wash. Mut. Bank*, 176 Wn.2d 771, 787-788, 295 P.3d 1179, 1187 (2013). For instance, Iron Gate advertizes to the public through phone book ads, signage and its webpage, [www.irongatestorage.com](http://www.irongatestorage.com).<sup>31</sup> The CPA violations are not rendered moot by the tender of amounts based on an unenforceable damage limitation.

**E. Mr. Riley said he read the rental agreement and understood what it said, which is not the same as understanding how Respondent interprets it.**

Iron Gate makes the point that Mr. Riley read and understood the rental agreement, Ex. 1 to Appellant's Brief, page 49-54. Actually he said "Yes, I read it and understand what it said." CP000000019, p. 56/10.

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<sup>31</sup> CP 000000018(16)/1925; 000000019(17)/1-4; 000000243-243.

However, what he understood is not synonymous with Iron Gate's interpretation of the rental agreement. For instance, CP 75, pages 0125-0133 from Mr. Riley's declaration submitted in opposition to Iron Gate's motion for summary judgment in which he explains his interpretation of the agreement and the circumstances of its execution. Iron Gate didn't ask him if he understood what it meant. Iron Gate proceeds on the theory that Mr. Riley's stating that he read and understood what the agreement said does not mean that he acknowledged that he accepted Iron Gate's interpretation of the agreement, which he clearly never did; he understood it differently.

**F. Respondent's Evidentiary Objection Should not be Considered Unless Obviously and Clearly Stated.**

Respondents have submitted a Defendants' Motion to Strike/Objection to Admissibility, 06/03/2015, submitted herein as Supplemental Clerk's Papers. 000000313-000000385, which had been submitted to the trial court in connection with Respondents' Motion for Summary Judgment. This constitutes objections to evidence in the Declaration of Larry Riley, beginning at 000000324. The trial court deferred ruling on these objections. CP 000000306.

Appellant objects to these Clerk's Papers as objections on this appeal on a couple of different grounds. First, the trial court didn't rule on these objections. More importantly, the objections are at times not specific to particular evidentiary matters in Mr. Riley's Declaration. As stated in part in the Washington Appellate Practice Deskbook, 4<sup>th</sup> Ed.

2016 §11.7(1)(a)(ii):

The specific evidence objected to, as well as the grounds, must be described in the objection or motion to strike. For example, if only part of a witness's testimony is objectionable, the objection should be expressly limited to that part. See, e.g., *Pac. Nw. Pipeline Corp. v. Myers*, 50 Wn.2d 288, 291, 311 P.2d 655 (1957); *Davidson v. Municipality of Metro. Seattle*, 43 Wn.App. 569, 572-73, 719 P.2d 569, review denied, 106 Wn.2d 1009 (1986).

Respondent's carved out large sections of Mr. Riley's Declaration in which there are at least some admissible evidence, failed to adequately specify the basis for the objections, and failed to isolate each basis for objection. With respect to the specific basis for objection that are indicated, the portions carved out include portions that are far more extensive than the more limited basis for objection. For instance, Mr. Riley relates what personal property was in the unit at CP 000000332 (25(a))/20-25, which he could clearly testify to with no explanation as to why this testimony had evidentiary problems. This continues into the next page in CP 000000332 (25(b))/1-2.

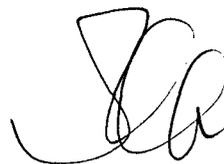
Further, it is hardly fair to the Appellant to address the objections, which are not specified in the Respondents' Brief or discussed in detail therein. If the event of the Court's consideration of the declaration of Mr. Riley under these circumstances, some leniency is appropriate. *Meadows v. Grant's Auto Brokers, Inc.*, 71 Wn.2d 874, 879, 431 P.2d 216 (1967)), review denied, 112 Wn.2d 1001 (1989).

### CONCLUSION

The respondents' approach in its brief has been to create a \$5,000 value limitation/damage limitation combined from out of the confusing, tortured, poorly written and ambiguous language of the rental agreement to protect Iron Gate against a loss by Mr. Riley that Iron Gate itself created. The exculpatory language should not be enforced at all, but certainly not enforced in defense of the operator's own intentional acts. If storage unit operators are going to have a right of nonjudicial foreclosure of storage unit contents, they shouldn't be able to limit their liability when they choose not to follow the law.

Dated May 9, 2016

Respectfully submitted,



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James L. Sellers  
Attorney for Appellant  
WSBA No. 4770

STATE OF WASHINGTON )  
 ) ss.  
County of Clark )

COMES NOW, Christine Tracy, and does hereby certify and declare the following to be true under penalty of perjury and under the laws of the State of Washington:

(1) That I am over the age of 21 and I am competent to be a witness herein, and make this Declaration to the best of my own personal knowledge and belief.

(2) On date of this letter, I did those of the following that are checked:

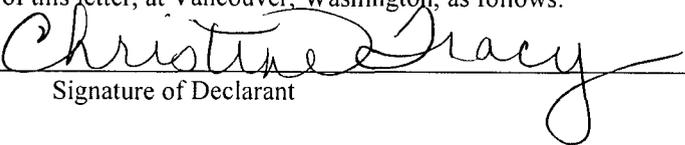
I deposited in the mails of the United States, a properly stamped and addressed envelope,

I transmitted by fax,

I transmitted by email,

which was addressed and directed to the recipient of this letter, and which contained a true and correct copy of the document accompanying in this letter.

I certify and declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct; which I subscribe on the date of this letter, at Vancouver, Washington, as follows:

  
\_\_\_\_\_  
Signature of Declarant

**Sent to:**

Court of Appeals – Division II  
950 Broadway Ste. 300  
Tacoma, WA 98402-4454

Paul Xochihua  
Davis, Rothwell, Earle, & Xochihua  
111 SW 5<sup>th</sup> Ave., Ste. 2700  
Portland, OR 97204-3650

FILED  
COURT OF APPEALS  
DIVISION II  
2016 MAY 11 AM 11:32  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

July

2010

WEEK VIEW

# MONTH VIEW

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
				NOTICE OF LIEN (Dated this date) *Notice of Lien does not Conform to Statute therefore has no legal affect.	NOTICE OF LIEN DAY 1	NOTICE OF LIEN DAY 2
NOTICE OF LIEN DAY 3	NOTICE OF LIEN DAY 4	NOTICE OF LIEN DAY 5	NOTICE OF LIEN DAY 6	NOTICE OF LIEN DAY 7	NOTICE OF LIEN DAY 8	NOTICE OF LIEN DAY 9
				NOTICE OF AUCTION (Dated this date)	NOTICE OF AUCTION DAY 1	NOTICE OF AUCTION DAY 2
NOTICE OF LIEN DAY 10	NOTICE OF LIEN DAY 11	NOTICE OF LIEN DAY 12	NOTICE OF LIEN DAY 13	NOTICE OF LIEN DAY 14	NOTICE OF AUCTION DAY 8	NOTICE OF AUCTION DAY 9
NOTICE OF AUCTION DAY 3	NOTICE OF AUCTION DAY 4	NOTICE OF AUCTION DAY 5	NOTICE OF AUCTION DAY 6	NOTICE OF AUCTION DAY 7	*First Day Legal Notice of Auction could have been sent. *Plaintiff attempted to tender payment in full - payment refused. *Plaintiff requested the return of "Personal Effects" & "Non-Household Goods" in person & by phone.	NOTICE OF LEGAL AUCTION DAY 1
				<b>ILLEGAL AUCTION DATE (Buyers Agreement in effect)</b>		*Plaintiff's Lawyer's Letter Delivered.
NOTICE OF AUCTION DAY 10	NOTICE OF AUCTION DAY 11	NOTICE OF AUCTION DAY 12	NOTICE OF AUCTION DAY 13	NOTICE OF AUCTION DAY 14	NOTICE OF AUCTION DAY 15	NOTICE OF AUCTION DAY 16
NOTICE OF LEGAL AUCTION DAY 2	NOTICE OF LEGAL AUCTION DAY 3	NOTICE OF LEGAL AUCTION DAY 4	NOTICE OF LEGAL AUCTION DAY 5	NOTICE OF LEGAL AUCTION DAY 6	NOTICE OF LEGAL AUCTION DAY 7	NOTICE OF LEGAL AUCTION DAY 8
Buyers Agreement Day 3	Buyers Agreement Day 4	Buyers Agreement Day 5	Buyers Agreement Day 6	Buyers Agreement Day 7	Buyers Agreement Day 8	Buyers Agreement Day 9
NOTICE OF LEGAL AUCTION DAY 9	NOTICE OF LEGAL AUCTION DAY 10	NOTICE OF LEGAL AUCTION DAY 11	NOTICE OF LEGAL AUCTION DAY 12	NOTICE OF LEGAL AUCTION DAY 13	NOTICE OF LEGAL AUCTION DAY 14	NOTICE OF LEGAL AUCTION DAY 15
Buyers Agreement Day 10	Buyers Agreement Day 11	Buyers Agreement Day 12	Buyers Agreement Day 13	Buyers Agreement Day 14	Buyers Agreement Day 15	Buyers Agreement Day 16
						*First Day a Legal Auction could have occurred.
NOTICE OF AUCTION DAY 18	NOTICE OF AUCTION DAY 19	NOTICE OF AUCTION DAY 20	NOTICE OF AUCTION DAY 21	NOTICE OF AUCTION DAY 22	NOTICE OF AUCTION DAY 23	NOTICE OF AUCTION DAY 24
NOTICE OF AUCTION DAY 10	NOTICE OF AUCTION DAY 11	NOTICE OF AUCTION DAY 12	NOTICE OF AUCTION DAY 13	NOTICE OF AUCTION DAY 14	NOTICE OF AUCTION DAY 15	NOTICE OF AUCTION DAY 16
NOTICE OF LEGAL AUCTION DAY 2	NOTICE OF LEGAL AUCTION DAY 3	NOTICE OF LEGAL AUCTION DAY 4	NOTICE OF LEGAL AUCTION DAY 5	NOTICE OF LEGAL AUCTION DAY 6	NOTICE OF LEGAL AUCTION DAY 7	NOTICE OF LEGAL AUCTION DAY 8
Buyers Agreement Day 3	Buyers Agreement Day 4	Buyers Agreement Day 5	Buyers Agreement Day 6	Buyers Agreement Day 7	Buyers Agreement Day 8	Buyers Agreement Day 9
NOTICE OF LEGAL AUCTION DAY 9	NOTICE OF LEGAL AUCTION DAY 10	NOTICE OF LEGAL AUCTION DAY 11	NOTICE OF LEGAL AUCTION DAY 12	NOTICE OF LEGAL AUCTION DAY 13	NOTICE OF LEGAL AUCTION DAY 14	NOTICE OF LEGAL AUCTION DAY 15
Buyers Agreement Day 10	Buyers Agreement Day 11	Buyers Agreement Day 12	Buyers Agreement Day 13	Buyers Agreement Day 14	Buyers Agreement Day 15	Buyers Agreement Day 16
						*First Day a Legal Auction could have occurred.

EXHIBIT

1

August 2010

WEEKVIEW

# MONTH VIEW



SUNDAY	1	MONDAY	2	TUESDAY	3	WEDNESDAY	4	THURSDAY	5	FRIDAY	6	SATURDAY	7
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Buyers Agreement Day 17	Buyers Agreement Day 18	Buyers Agreement Day 19	Buyers Agreement Day 20	Buyers Agreement Day 21	Buyers Agreement Day 22								
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8	9	10	11	12	13	14
Buyers Agreement Day 23	Buyers Agreement Day 24	Buyers Agreement Day 25	Buyers Agreement Day 26	Buyers Agreement Day 27	Buyers Agreement Day 28	Buyers Agreement Day 29

15	16	17	18	19	20	21
Buyers Agreement Day 30	Buyers Agreement Day 31	Buyers Agreement Day 32	Buyers Agreement Day 33	Buyers Agreement Day 34	Buyers Agreement Day 35	Buyers Agreement Day 36

22	23	24	25	26	27	28
Buyers Agreement Day 37	Buyers Agreement Day 38	Buyers Agreement Day 39	Buyers Agreement Day 40	Buyers Agreement Day 41	Buyers Agreement Day 42	Buyers Agreement Day 43

29	30	31
Buyers Agreement Day 44	Buyers Agreement Day 45	Buyers Agreement Day 46

# MONTH VIEW



SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY	SUNDAY
5 Buyers Agreement Day 51	6 Buyers Agreement Day 52	7 Buyers Agreement Day 53	8 Buyers Agreement Day 54	9 Buyers Agreement Day 55	10 Buyers Agreement Day 56	11 Buyers Agreement Day 57	12 Buyers Agreement Day 58
13 Buyers Agreement Day 59	14 Buyers Agreement Day 60	15 Buyers Agreement Day 61	16 Buyers Agreement Day 62	17 Buyers Agreement Day 63	18 Buyers Agreement Day 64	19 Buyers Agreement Day 65	20 Buyers Agreement Day 66
21 Buyers Agreement Day 67	22 Buyers Agreement Day 68	23 Buyers Agreement Day 69	24 Buyers Agreement Day 70	25 Buyers Agreement Day 71	26 Buyers Agreement Day 72	27 Buyers Agreement Day 73	28 Buyers Agreement Day 74
29 Buyers Agreement Day 75	30 Buyers Agreement Day 76	31 Buyers Agreement Day 77	32 Buyers Agreement Day 78	33 Buyers Agreement Day 79	34 Buyers Agreement Day 80	35 Buyers Agreement Day 81	36 Buyers Agreement Day 82

\*Final Day per Buyers Agreement to buy back Auctioned Property



STEPHANIE CROSSLEY TAYLOR, Plaintiff, v. PUBLIC STORAGE, Defendant.

CASE NO. C10-2103RSM

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF  
WASHINGTON

2012 U.S. Dist. LEXIS 126967

September 6, 2012, Decided

September 6, 2012, Filed

**COUNSEL:** [\*1] For Stephanie Crossley Taylor, Plaintiff: Lane HW Fitzgerald, LEAD ATTORNEY, PRO HAC VICE, THE FITZGERALD LAW FIRM, BELOIT, WI; Todd M Nelson, LEAD ATTORNEY, NELSON LAW GROUP, SEATTLE, WA.

For Public Storage, Defendant: James B Tobin, Timothy J Young, Lewis Brisbois Bisgaard & Smith LLP, PRO HAC VICE PENDING, Chicago, IL; Jean E Huffington, William T McKay, MCKAY HUFFINGTON & TYLER, BELLEVUE, WA.

**JUDGES:** RICARDO S. MARTINEZ, UNITED STATES DISTRICT JUDGE.

**OPINION BY:** RICARDO S. MARTINEZ

**OPINION**

**ORDER ON DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

This matter is before the Court for consideration of defendant's motion for partial summary judgment. Dkt. # 56. Plaintiff's opposition to this motion (Dkt. # 65) was filed late, but it shall nevertheless be considered by the Court. The Court deems oral argument on this motion unnecessary and shall, for the reasons set forth below, grant the motion.

**FACTUAL BACKGROUND**

This case arises from the July, 2007 auction of personal property stored in defendant's self-service storage facility in Seattle by plaintiff. Stephanie Taylor filed this action asserting causes of action for breach of contract, conversion, fraud, intentional infliction of emotional distress (outrage), negligence, [\*2] negligent infliction of emotional distress, violation of various state and federal criminal statutes, violation of the Washington Consumer Protection Act, *RCW 19.86*, and violation of the Washington State Self-Service Storage Facilities Act, *RCW 19.150 et seq.* Dkt. # 1. The case was originally filed in United States District Court for the Eastern District of Wisconsin, and transferred to this court upon motion by defendant. Dkt. # 31.

Defendant has now moved for partial summary judgment, asserting that plaintiff's claims of negligence, conversion, fraud, and outrage should be dismissed, and that liability on plaintiff's remaining claims be limited to \$5,000 pursuant to the contract in force between the parties. The following factual recitation summarizes relevant facts presented by the parties in support of, and in opposition to, this motion.

Plaintiff signed a rental agreement with defendant for a self-storage unit on January 25, 2007, initialing each page of the 2 1/2-page agreement. Declaration of Alison Herber, Dkt. # 57, Exhibit A. Plaintiff listed a Seattle

address on Roy Street and a phone number for contact, and also provided an alternate name, address, and phone number for Sandra [\*3] Taylor, her mother. *Id.* A "change of address" provision in the agreement required that plaintiff notify defendant in writing of any change in her place of residence, or a change in the alternate's name or address, within ten days of the change. *Id.*, ¶ 9.

The agreement provided for a rental fee of \$137 per month for the unit, paid in advance on the first of each month, plus additional late fees for late payment. *Id.* In the event of non-payment, the agreement provided that property stored in the unit would be subject to a lien in favor of defendant.

If any part of the rent or other charges due hereunder remain unpaid for six consecutive days, Owner may place its lock on the Premises and deny occupant access. The property, except boxes clearly labeled "personal property" and/or "personal effects" may be sold by Owner to satisfy the lien if the rent or other charges due . . . remain unpaid for fourteen (14) consecutive days, . . . and Occupant agrees to label any boxes containing personal papers or personal effects as such.

*Id.*, ¶ 6. Plaintiff initialed this paragraph, acknowledging that she read, understood, and agreed to it. *Id.*

The agreement stated that "Occupant agrees that under no circumstances [\*4] will the aggregate value of all personal property stored in the Premises exceed, or be deemed to exceed, \$5,000." *Id.*, ¶ 3. The paragraph specifically advised that the storage unit was

not suitable for the storage of heirlooms or precious, invaluable or irreplaceable property such as books, records, writings, works of art, objects for which no immediate resale market exists, objects which are claimed to have special meaning or emotional value to Occupant and records or receipts relating to the stored goods.

*Id.* Plaintiff acknowledged this limitation by initialing the paragraph.

The agreement further limited defendant's liability in the event of loss as follows:

Owner and Owner's Agents will have no responsibility to Occupant or any other persons for any loss, liability, claim, expense, damage to property or injury to persons ("Loss") from any cause, including without limitation, Owner's and Owner's active or passive acts, omissions, negligence or conversion, unless the Loss is directly caused by Owner's fraud, willful injury or willful violation of law. . . . Occupant agrees that Owner's and Owner's Agents' total responsibility for any Loss from any cause whatsoever will not exceed a total [\*5] of \$5,000.

*Id.*, ¶ 5. Plaintiff also initialed this section, thereby acknowledging that she understood. *Id.*

On an addendum to the rental agreement, plaintiff acknowledged her understanding that the company was not responsible for any loss to her property stored on the premises, and agreed to insure her property for its full value against all risks. Declaration of Alison Herber, Dkt. # 57, Exhibit B. She elected to purchase the lowest level of coverage offered, \$2,000, for an additional \$8.00 per month. *Id.*

According to the payment ledger kept by defendant, plaintiff paid the balance of January and the February rent on January 25, 2007. Declaration of Alison Herber, Dkt. # 57, Exhibit C. <sup>1</sup> She was late with her rental payments for March and April, 2007, and late fees were applied. *Id.* Plaintiff presented payments on April 21 and April 30 to cover these amounts and make her account current. *Id.* Her payment on May 4, 2007, for the month of May was the last payment she made. *Id.* The property was sold at auction on July 19, 2007, resulting in a credit of \$5.45 to plaintiff's account, leaving a balance due of \$310.97. *Id.*

<sup>1</sup> Plaintiff objected to the admissibility of Ms. Herber's declaration and [\*6] the attached exhibits in an improperly-filed motion to strike, which the Court denied. Dkt. ## 72, 90. The Court notes that this and other exhibits attached to the declaration are admissible under *Federal Rules of Evidence 803(6)* as business records.

Plaintiff cannot and does not dispute that she fell into default on her payments. Her claims arise from the timing and contents of the notice of default and auction. The evidence of record appears in the ledger notes maintained by defendant, together with copies of the notices. Declaration of Alison Herber, Dkt. # 57, Exhibits D, E, F. The ledger notes indicate that delinquency notices sent to plaintiff and to her alternate (Sandra Taylor) in March at their addresses of record were returned as undeliverable. *Id.*, Exhibit D. A subsequent pre-lien letter sent to the alternate was returned on April 19. Pre-lien letters sent to both plaintiff and her alternate, again at their address of record, were returned as undeliverable on June 21 and 22, 2007, and notices of the impending sale sent to both Stephanie and Sandra Taylor were returned on July 5, 2007. *Id.* Plaintiff had thus failed to keep defendant apprised of her change in her and her alternate's [\*7] residence address, as required in the rental agreement. Nevertheless, the ledger reflects that defendant's employees were in contact with plaintiff, her mother, and friends during this period regarding the impending auction for non-payment. *Id.* An employee, C. Thompson, spoke with plaintiff on June 15 to advise her she needed to pay \$160 before the company's lock would be removed from the unit. Friends called on June 27 and June 29 and offered to make up the delinquent payment on behalf of plaintiff. *Id.* A friend called on July 12 to say that either she or plaintiff's father would pay the balance owed on July 17 or 18. Plaintiff's mother called on July 16 to say that she would pay the rent for the unit on July 18. *Id.*

Copies of the "Notice of Lien Sale or Notice of Disposal" were mailed to plaintiff and to Sandra Taylor at their addresses of record on July 2, 2007. This letter stated that plaintiff's property, other than personal papers and personal effect "so labeled," would be sold after July 16, 2007 to satisfy the lien. Declaration of Jessie Riebe, Dkt. # 58, Exhibit B. Like previous notices, these were returned as undeliverable. *Id.*, Exhibit C. The envelope which was mailed to [\*8] plaintiff was returned with a sticker indicating a new address for plaintiff, on Third Avenue in Seattle. *Id.*, Exhibit C. On July 7, 2007, Ms. Riebe re-mailed the Notice to plaintiff at this new address. Declaration of Jessie Riebe, Dkt. # 58, ¶¶ 11-12. She counted two weeks from that date and wrote "July 20" as the date after which the auction would occur, then changed it to July 19 when she realized that the auction was already scheduled for that date based on the earlier (returned) notice. *Id.* A copy of this notice was retained in

the file and appears in the record. *Id.*, Exhibit D.

Plaintiff does not present any evidence which would create a factual dispute as to these events. Her declaration filed in opposition to partial summary judgment consists mainly of conclusory allegations such as the assertion that "Defendant unlawfully sold/stole my items at an illegitimate auction." Declaration of Stephanie Taylor, Dkt. # 66, ¶ 5. She also states that "Defendant never went through the terms and conditions of the contract with me but rather only explained a minuscule amount about the contract." *Id.*, ¶ 7. With respect to the Notice of Sale, she states,

[r]egardless of which date the Defendant [\*9] fraudulently asserts was noted on the Notice of Sale (they have asserted about half a dozen different dates as of their latest filing), the Notice clearly states that the unit will be auctioned after the date listed on the Notice. Accordingly, even if the Notice shows July 19, 2007, the Defendant openly admits they auctioned the unit on that date, not after that date.

*Id.*, ¶ 8 (emphasis in original). Nowhere in the declaration does she state whether she did, or did not, receive any of the written notices or telephone calls, or provide an explanation for her failure to update her address and telephone number as required.

On these facts, defendant has moved for dismissal of plaintiff's claims of negligence, conversion, fraud, and outrage, as well as for enforcement of the limitation on liability. The claims shall be addressed separately.

## DISCUSSION

### I. Summary Judgment Standard

Summary judgment should be rendered "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed.R.Civ.P. 56(a)*. An issue is "genuine" if "a reasonable jury could return a verdict for the nonmoving party" and a fact is material if it "might [\*10] affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The evidence is viewed in the light most favorable to the non-moving party. *Id.* However, "summary judgment should be

granted where the nonmoving party fails to offer evidence from which a reasonable jury could return a verdict in its favor." *Triton Energy Corp. v. Square D Co.*, 68 F. 3d 1216, 1221 (9th Cir. 1995). It should also be granted where there is a "complete failure of proof concerning an essential element of the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). "The mere existence of a scintilla of evidence in support of the non-moving party's position is not sufficient" to prevent summary judgment. *Triton Energy Corp.*, 68 F. 3d at 1221.

## II. Analysis

### A. Limitation of Liability

Defendant asks that the Court enforce the limitation of liability in the rental contract, as agreed to by plaintiff when she initialed the section. Enforcement of the limitation would bar plaintiff's claims for negligence and conversion, and would limit her damages on other claims to \$5,000.

Plaintiff in her declaration states that "Defendant never went through the [\*11] terms and conditions of the contract with me but rather only explained a minuscule amount about the contract." Declaration of Stephanie Taylor, Dkt. # 66, ¶ 7. Even viewing this bare assertion in the light most favorable to plaintiff, it fails to release her from the contract which she signed and initialed, paragraph by paragraph. Plaintiff also argues that "[c]ase law indicates that limitation clauses contained in rental agreements are inapplicable." Plaintiff's Response, Dkt. # 65, p. 5. Yet she has not cited a single Washington case in support of her argument; instead she cites cases from Wisconsin and Illinois.

Washington law applies to plaintiff's claims. In Washington, a party to a contract can generally limit liability for damages resulting from negligence. *Eifler v. Shurgard Capital Management Corporation*, 71 Wash. App. 684, 690, 861 P.2d 1071 (1993); citing *American Nursery Products v. Indian Wells*, 115 Wash2d 217, 230, 797 P.2d 477 (1990). There are exceptions, where exculpatory agreements have been found to violate public policy. The factors to be considered in this determination were set forth by a California court and adopted in Washington:

Thus, the attempted but invalid

exemption involves a transaction [\*12] which exhibits some or all of the following characteristics. It concerns a business of a type generally thought suitable for public regulation. The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents.

*Eifler*, 71 Wash. App. at 691, [\*13] quoting *Tunkl v. Regents of the University of California*, 60 Cal. 2d 92, 32 Cal. Rptr. 33, 383 P.2d 441 (1963). This test was adopted by the Washington courts in *Wagenblast v. Odessa School District*, 110 Wash. 2d 845, 851-51, 758 P.2d 968 (1988).

The burden is on plaintiff to demonstrate that these factors dictate that the limitation clause in the rental agreement violates public policy of Washington, but she has not done so. The Court finds in particular that the second factor, that "the party seeking exculpation is engaged in performing a service of great importance to the public" is not present here. As defendant contends, the self-storage industry is not a service of great importance to the public, or a matter of practical necessity. "A common thread runs through those cases in which exculpatory agreements have been found to be void as against public policy. That common thread is they

are all essential public services--hospitals, housing, public utilities, and public education." *Shields v. Sta-Fit*, 79 Wash. App. 584, 589, 903 P.2d 525 (1995). A self-storage facility does not fit within the category of "essential public services;" it is merely a convenience for a portion of the public, mainly those in transit between housing situations who [\*14] need to temporarily store some of their personal possessions.

Nor was there inequality of bargaining strength. Plaintiff had other options for storing her possessions if she needed to do so; she could go to a different self-storage company, or store them with her family or friends. Further, the standardized contract was not a contract of adhesion, as plaintiff was advised of the need to insure her property and was offered insurance. Under similar facts, Washington appellate court held

Under these circumstances, we do not perceive a contract of adhesion whereby Eifler was deprived of a fair opportunity to protect the value of his property, and we hold that Shurgard was not precluded from limiting its liability for negligence in the way that it did.

*Eifler*, 71 Wash. App. at 694.

The same analysis applies here. The Court finds, after considering the appropriate factors under Washington law, that the rental agreement signed by plaintiff is not a contract of adhesion and does not violate public policy in this state. The limitation of liability shall accordingly be enforced. Summary judgment shall be granted to defendant on this issue and plaintiff's claims of negligence and conversion shall [\*15] be dismissed. Her damages on remaining claims shall be limited to \$5,000 where appropriate.

#### B. Fraud

Defendant has moved for summary judgment on plaintiff's claim of fraud, asserting that plaintiff has not established the requisite elements. The complaint alleges that the fraud occurred in the last Notice of Sale that was sent to plaintiff, advising that the auction of her possessions would take place "sometime after July 20, 2007." Complaint, Dkt. # 1, ¶ 39-40. Actually, as set forth above, the Notice of Sale sent by Ms. Riebe on July 7 had the date of July 19 written over the July 20 date, so this will be deemed the allegation. Plaintiff contends that

she was induced to rely on the representation that the auction would not occur until after that date, but instead it occurred on that date, July 19. *Id.*, ¶ 43.

Under Washington law, "[t]he nine elements of fraud are: (1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance on the truth of the representation; (8) plaintiff's right to rely upon [\*16] it; and (9) damages suffered by the plaintiff." *Vernon v. Qwest Communications Intern., Inc.*, 643 F.Supp.2d 1256, 1265 (W.D.Wash.2009), quoting *Stiley v. Block*, 130 Wash. 2d 486, 505, 925 P.2d 194 (Wash. 1996). Defendant advances two arguments in support of summary judgment on this claim: first, that the original Notice of Sale sent on July 2, 2007, giving the date of sale as occurring after July 16, was the effective and legally required notice, and was not false; and second, that if that is not the case, the Notice gratuitously sent by Ms. Riebe with the July 19 date was an innocent mistake made with no intent to deceive plaintiff. Defendant thus argues in this second assertion that plaintiff cannot meet the fourth and fifth elements of a claim of fraud.

Plaintiff, in opposition, has asked for an opportunity to conduct discovery on this issue, particularly to depose Ms. Riebe. Pursuant to *Fed.R.Civ.Proc. 56(d)*, where a non-movant shows by affidavit or declaration that it cannot present facts in opposition to a summary judgment motion, the Court may defer a ruling until an appropriate time. Plaintiff has not met the requirement of showing by affidavit or declaration that she has been unable to discover [\*17] facts on this issue.<sup>2</sup> While the Court has been lenient with plaintiff in other ways, such as considering her untimely-filed opposition to this summary judgment motion, it will not excuse this requirement set forth in *Rule 56(d)*. Accordingly, the Court declines to defer consideration of the motion with respect to the fraud claim. As plaintiff has failed to show that there is a genuine factual dispute on the fraud claim, defendant's motion for summary judgment shall be granted and the fraud claim shall be dismissed.

<sup>2</sup> The declaration of counsel, filed at Dkt. # 66, addresses three different witnesses who would present evidence on issues unrelated to this fraud claim and Ms. Riebe's intent.

#### C. Outrage/Intentional Infliction of Emotional Distress

Plaintiff alleges in her complaint that defendant, "by its unreasonable and premature sale of [her] personal property, engaged in extreme and outrageous conduct," causing her to suffer from post-traumatic stress syndrome. Complaint, Dkt. # 1, ¶¶ 46, 48. She further alleges that

[t]his claim is bolstered by the repeated phone calls made by and on the behalf of Taylor to PSA in order to secure her property and pay all arrearages. A person of ordinary [\*18] sensibilities would find it extreme and outrageous to sell personal property of another without providing proper notice and time to pay arrearages. PSA not only prematurely sold Taylor's personal property, but PSA simply refused Taylor's timely arrearage payment. Furthermore, PSA stated to Taylor that the sale of all her most treasured items was for a mere \$5.00. The entirety of PSA's actions is extreme and outrageous.

*Id.*, ¶ 46. Defendant has moved for summary judgment on this claim.

In Washington, the tort of intentional infliction of emotional distress is treated the same as the tort of outrage. The elements of the tort of outrage are (1) extreme or outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) actual result to the plaintiff of severe emotional distress. *Robel v. Roundup Corp.*, 148 Wash. 2d 35, 41, 59 P.3d 611 (2002). The conduct must be "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." *Kirby v. City of Tacoma*, 124 Wash. App. 454, 473, 98 P.3d 827 (2004), quoting *Grimsby v. Samson*, 85 Wash. 2d 52, 59, 530 P.2d 291 (1975). Liability for outrage [\*19] does not arise from "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Id.* The question of whether certain conduct is sufficiently outrageous to give rise to a cause of action is ordinarily one for the jury, but "it is initially for the court to determine whether reasonable minds could differ on whether the conduct was sufficiently extreme to result in liability." *Dicomes v. Stote*, 113 Wash. 2d 612, 630, 782 P.2d 1002 (1989).

Plaintiff has the burden of proof on her claim of

outrageous conduct. As the non-moving party, she may not simply rest on the allegations of her pleadings, but must set forth specific facts to show that there is a genuine dispute of material fact. *Fed.R.Civ.P.* 56(c); *Dicomes v. Stote*, 113 Wash. 2d at 631. She has failed to do so. Plaintiff's own declaration sets forth only conclusory allegations such as, "Defendant unlawfully sold/stole my items at an illegitimate auction" and "Defendant openly admits they auctioned the unit on [July 19], not after that date." Declaration of Stephanie Taylor, Dkt. # 66, ¶¶ 5, 8. She states no facts regarding what notice she did receive or when she received it, or explain why she failed to provide a correct [\*20] address for contact as required by her rental contract. *Id.* Plaintiff's mother filed a declaration stating "I never received any correspondence from the Defendant on any occasion whatsoever" and "I never called the Defendant to state that I was fearful that Ms. Taylor was using drugs or would sell items in her unit to buy drugs," but does not provide any facts regarding her actual knowledge of the Notice of Sale, or mention her documented telephone contacts with defendant. Declaration of Sandra Taylor, Dkt. # 67, ¶¶ 6, 7. A friend provided a declaration stating that "I saw a Notice from the Defendant that stated Ms. Taylor must pay the arrears on her unit" but he does not say when he saw the notice or what auction date was stated on the notice. Declaration of Ion de Leeuw, Dkt. # 68, ¶ 3.

Nowhere has plaintiff produced any evidence that disputes the facts demonstrated by defendant that (1) a Notice of Sale with the date of July 16, 2007, as the date after which the unit would be auctioned, was mailed to both plaintiff and to her alternate at their addresses of record; (2) both Notices were returned as undeliverable as neither plaintiff nor her alternate had provided an updated or correct [\*21] address for contact; (3) defendant's employees made numerous attempts to reach plaintiff by telephone in late June and early July and left messages where possible; (4) messages regarding the sale were left on plaintiff's mother's answering machine on July 9 and July 11; (5) friends and relatives of plaintiff, including her mother, called and offered on several occasions (June 27, June 29, July 12, July 13, July 16) to pay the amount due on plaintiff's behalf, on or before July 18, but no such payment was ever tendered; and (6) nowhere in the ledger notes from late June through July 18, 2007 is there any record of a phone call or other contact from plaintiff; she first called on July 20, 2007. Dkt. # 57, Exhibit D.

Given the extensive record of continued efforts made to reach plaintiff, and the successful telephone contacts with her friends and her mother, together with the fact that plaintiff herself failed to provide a current address and failed to contact defendant herself until July 20, 2007, no reasonable juror could find conduct sufficiently extreme as to amount to the tort of outrage on the part of defendant. The conclusion is inescapable that plaintiff herself is responsible [\*22] for the fact that she did not receive the original Notice of Sale that was mailed on July 2, 2007. This is not a question on which reasonable minds could disagree. Further, the calls from her friends and her mother demonstrate that plaintiff knew of the impending auction, and she could easily have called to confirm the date, but did not.

Nowhere in the record is the requisite atrocious, utterly intolerable conduct that would give rise to a claim of outrage. *Kirby v. City of Tacoma*, 124 Wash. at 473. Defendant's motion for summary judgment on this claim

shall be granted.

#### CONCLUSION

Defendant's motion for partial summary judgment (Dkt. # 56) is GRANTED in its entirety. Plaintiff is bound by the limitations on liability set forth in her contract, such that her claims of negligence and conversion are barred, and her damages on other claims are limited to \$5,000 where appropriate. Plaintiff's claims of negligence, conversion, fraud, and intentional infliction of emotional distress are DISMISSED.

Dated this 6th day of September 2012.

/s/ Ricardo S. Martinez

RICARDO S. MARTINEZ

UNITED STATES DISTRICT JUDGE

Affirmed and Memorandum Opinion filed August 11, 2015.



In The  
**Fourteenth Court of Appeals**

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NO. 14-14-00212-CV

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**TCHEWAM LILY MUKWANGE, Appellant/Cross-Appellee**

**V.**

**PUBLIC STORAGE, INC., Appellee/Cross-Appellant**

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**On Appeal from the 234th District Court  
Harris County, Texas  
Trial Court Cause No. 2012-45830**

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**MEMORANDUM OPINION**

Appellant/cross-appellee Tchewam Lily Mukwange sued appellee/cross-appellant Public Storage, Inc. for the unlawful conversion of the contents contained in her storage unit. The trial court signed a judgment in Mukwange's favor and awarded her \$5,000 in damages. In several issues, Mukwange contends that the trial court erred by concluding that there was insufficient evidence to support her claim for fraud and that she was only entitled to recover \$5,000 in damages. In a

cross-appeal, Public Storage asserts that the evidence is legally insufficient to support Mukwange's damages, and in the alternative, the trial court properly limited Mukwange's damages to \$5,000. We affirm.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

On February 17, 2011, Mukwange began renting a self-storage unit at a Public Storage facility, located at 9811 North Freeway, Houston, Harris County, Texas. Mukwange agreed to pay \$30.00 per month rent, due on the first day of each month. Late charges of \$20.00 per month became due if rent was not paid by the sixth day of the month. As of April 30, 2011, Mukwange's balance due to Public Storage was \$0.

Mukwange testified that on April 30, 2011, she dropped a money order in the mail slot of a different Public Storage facility, located at 6336 Fairdale Lane, Houston, Texas. Mukwange stated that the money order was in the amount of \$60.00 and was intended to cover rent for May and June. Mukwange testified that she had paid Public Storage in this manner on previous occasions. On that same day, Mukwange placed the money order receipt in her storage unit.

Public Storage claimed that it had no record of ever receiving Mukwange's money order and on May 8, it began calling Mukwange to inform her that her rent was past due. On June 1, Public Storage sent Mukwange the statutorily required notice of claim. The notice of claim was sent to the address that Mukwange provided in her lease agreement. On July 27, Public Storage auctioned the contents of Mukwange's storage unit.

On several occasions, Mukwange attempted to notify Public Storage that she had paid rent for May and June. Mukwange wrote Public Storage a letter, explaining the situation and also met with several employees in-person. On July

12, Mukwange received an invoice from Public Storage indicating that her balance was \$205.00. The following day, Mukwange went to the Public Storage facility and paid \$30.00 in cash for July rent. Mukwange did not pay the associated late fee. An employee explained that this payment would not stop the auction from proceeding. On July 27, Public Storage auctioned the contents of Mukwange's storage unit to the highest bidder at a public sale. The unit sold for a total of \$105.19.

Appearing pro se, Mukwange filed suit against Public Storage, claiming that it breached the lease agreement and wrongfully sold her property. Public Storage filed a motion for partial summary judgment, seeking for the enforcement of a limitation of liability clause in the lease agreement. On September 3, 2013, the trial court granted Public Storage's motion for partial summary judgment and ruled that Mukwange's recovery of actual damages, if any, would be limited to \$5,000.00. The parties proceeded to a bench trial, in which the trial court ruled in Mukwange's favor. On March 7, 2014, the trial court issued a final judgment and findings of fact and conclusions of law. The trial court found that Public Storage breached the lease agreement and caused Mukwange to suffer damages in the amount of \$5,000.00.

#### ISSUES AND ANALYSIS

Because Mukwange is proceeding as pro se, we will liberally interpret the issues raised in her brief. However, we recognize that in Texas, pro se plaintiffs are held to the same standards as those applied to attorneys. *See Mansfield State Bank v. Cohn*, 573 S.W.2d 181, 184–85 (Tex. 1978). To do so otherwise could give a pro se litigant an unfair advantage over litigants represented by counsel. *Id.* at 185. Here, our liberal interpretation of the issues raised by Mukwange results in two basic complaints—specifically, that the trial court erred by finding that she failed

to prove fraud and erred by limiting her damages to \$5,000.

In a cross-appeal, Public Storage asserts that the evidence is legally insufficient to support the trial court's award of damages.

### **I. Fraud**

In several issues, Mukwange contends that (1) she properly pleaded a fraud claim, not a breach of contract claim; (2) the trial court erred by only ruling on her breach of contract claim, instead of her fraud claim; and (3) the trial court erred by finding that she presented insufficient evidence of fraud. Mukwange asserts that because she sufficiently pleaded and proved fraud by a preponderance of the evidence, she was entitled to exemplary damages and damages for mental anguish.

Mukwange asserts that the trial court erred by ruling on a breach of contract claim because she did not bring suit under a theory of breach of contract. Mukwange's original petition states that "Public Storage acted in violation of Texas Property Code sections 59.042, 59.043, 59.044, and 54.042, and thus breached its rental agreement with plaintiff." In its findings of fact, the trial court stated that "[t]he petition does not clearly define the causes of action under which relief is sought but Ms. Mukwange testified that she was suing for breach of contract and conversion." The trial court concluded that Mukwange brought suit under theories of conversion and breach of contract only. The lease agreement was admitted without objection at trial and discussed in detail. When viewing Mukwange's original petition and the testimony at trial, the trial court properly concluded that Mukwange brought a breach of contract claim. *See Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 617–18 (Tex. 1986); *see also Kline v. O'Quinn*, 874 S.W.2d 776, 788 (Tex. App.—Houston [14th Dist.] 1994, writ denied) ("In determining whether an action is in tort or in contract, we must look to the substance of the cause of action, not the manner in which it was pleaded.").

Mukwange also complains that the trial court erred by finding that she did not plead a claim for fraud. The trial court's conclusions of law stated the following:

Although the Court does not find that Ms. Mukwange pled a claim for fraud, if her petition is construed to include such a claim, Ms. Mukwange did not present sufficient evidence to justify a finding of fraud by a preponderance of the evidence. Specifically, Ms. Mukwange did not present evidence of a material, false representation made by Public Storage that Public Storage knew to be false or that Public Storage made recklessly without knowledge of the truth.

We review the trial court's conclusions of law de novo. *Smith v. Smith*, 22 S.W.3d 140, 143–44 (Tex. App.—Houston [14th Dist.] 2000, no pet.). We will uphold conclusions of law on appeal if the judgment can be sustained on any legal theory the evidence supports. *Waggoner v. Morrow*, 932 S.W.2d 627, 631 (Tex. App.—Houston [14th Dist.] 1996, no writ).

Assuming without deciding that Mukwange pleaded a claim for fraud, the record reflects that Mukwange did not present sufficient evidence to justify a finding of fraud. Mukwange claims that Public Storage committed fraud by sending her an invoice on July 12, 2011, in which Public Storage informed her that her balance due was \$205.00. Mukwange argues that the invoice is a material representation because it “makes no mention of a possible auction or ongoing auction process.” Mukwange asserts that she relied on the invoice and believed that it was an extension of grace provided in response to the letter she sent Public Storage in June.

A cause of action for fraud requires (1) a material misrepresentation; (2) which was either known to be false when made or was asserted without knowledge of its truth; (3) was made with the intention that it be acted upon by the other party; (4) the other party acts in reliance upon it; and (5) the other party suffers harm as a

result of that reliance. *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 47 (Tex. 1998). Fraud requires a showing of actual and justifiable reliance. *Grant Thornton LLP v. Prospect High Income Fund*, 314 S.W.3d 913, 923 (Tex. 2010). In evaluating justification, the court considers whether, given a fraud plaintiff's individual characteristics, abilities, and appreciation of facts and circumstances at or before the time of the alleged fraud, it is extremely unlikely that there is actual reliance on the plaintiff's part. *Id.* One may not justifiably rely on a representation when there are "red flags" indicating that such reliance is unwarranted. *See id.*

Michelle England, a district manager for Public Storage, testified about Public Storage's policies for handling accounts with delinquent rent. England stated that after sending the July 12 invoice, Public Storage informed Mukwange several times that her partial payment of rent would not prevent the auction from proceeding. England testified that on July 15 and July 19, Public Storage explained to Mukwange that she still had a balance due on her account and that they were going to auction the contents of her storage unit. Mukwange admitted that when she went to Public Storage on July 15, an employee told her that her property may still be auctioned. Thus, Mukwange cannot show that she relied on the invoice as a representation that the auction had been cancelled because Public Storage notified her that the auction would continue to proceed. Because Mukwange cannot show that she relied on any alleged material misrepresentation in the invoice, Mukwange cannot prove that the evidence was sufficient to support her fraud claim. The trial court properly concluded that Mukwange did not present sufficient evidence to justify a finding of fraud by a preponderance of the evidence. *See Waggoner*, 932 S.W.2d at 631 ("We will uphold conclusions of law on appeal if the judgment can be sustained on any legal theory the evidence supports.").

We overrule Mukwange's issue.

## **II. Damages**

In a cross-appeal, Public Storage contends that Mukwange failed to present any evidence of damages, or in the alternative, that the evidence is legally insufficient to support the trial court's award of damages. Mukwange asserts that the trial court erred by ruling that her damages were limited to \$5,000.

### **A. The Evidence is Legally Sufficient to Support the Trial Court's Award of Damages**

Public Storage asserts that Mukwange failed to present any evidence of damages at trial, or alternatively, that Mukwange presented insufficient evidence at trial to support the trial court's award of damages.

In determining whether there is legally sufficient evidence to support the finding under review, we must consider evidence favorable to the finding if a reasonable factfinder could and disregard evidence contrary to the finding unless a reasonable factfinder could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). Anything more than a scintilla of evidence is legally sufficient to support the finding. *Cont'l Coffee Prods. Co. v. Cazarez*, 937 S.W.2d 444, 450 (Tex. 1996). More than a scintilla of evidence exists if the evidence furnishes some reasonable basis for differing conclusions by reasonable minds about the existence of a vital fact. *Rocor Int'l, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 77 S.W.3d 253, 262 (Tex. 2002).

The trial court has discretion to award damages within the range of evidence presented at trial. *Gulf States Utils. Co. v. Low*, 79 S.W.3d 561, 566 (Tex. 2002). Generally, the measure of damages to personal property is "the difference in its market value immediately before and immediately after the injury, at the place where the damage occurred." *Thomas v. Oldham*, 895 S.W.2d 352, 359 (Tex.

1995). Market value is defined as the amount that a buyer who desires to buy but is under no obligation to buy, would pay to a willing seller who desires to sell but is under no obligation to sell. *City of Pearland v. Alexander*, 483 S.W.2d 244, 247 (Tex. 1972). However, not all property has a “market value.” *Gulf States Utils. Co.*, 79 S.W.3d at 566. The Texas Supreme Court has recognized “that used household goods, clothing and personal effects have no market value in the ordinary meaning of that term.” *Crisp v. Sec. Nat’l Ins. Co.*, 369 S.W.2d 326, 328 (Tex. 1963). Therefore, the measure of damages that should be applied to household property is the actual value of the property to its owner for use in the condition in which it was at the time of the injury. *Id.* at 329 (“Where property, such as household goods and wearing apparel, has no recognized market value, the actual value to the owner must be determined without resort to market value.”).

In determining actual value to the owner, the trial court may consider the original cost, replacement cost, opinions of qualified witnesses, the property’s use, and any other reasonably relevant facts. *Gulf States Utils. Co.*, 79 S.W.3d at 566. A property owner may testify about the value of her personal property. *Id.*

Mukwange testified at trial that the contents in her storage unit contained her “life-long properties” and that she “stored everything [she] owned” in the unit. Mukwange stated that she valued her coin collections and stamp collections and that the unit contained literary work she had written and a family photo album. Further, an exhibit was admitted into evidence at trial which consisted of a series of communications between Mukwange and Public Storage. Mukwange’s email to Public Storage explained that the storage unit contained her literary works, legal documents, certificates, books, work tools, children’s clothing and toys, and her clothing. The record reflects that Mukwange presented evidence showing that the storage unit contained household items and personal effects. *See Crisp*, 369

S.W.2d at 329 (noting that “household furniture, family records, wearing apparel, personal effects, and family portraits” are examples of property held for the comfort and well-being of the owner); *Dearman v. Dutschmann*, 739 S.W.2d 454, 455 (Tex. App.—Corpus Christi 1987, writ denied) (“Personal effects are defined to mean articles of personal property bearing intimate relation or association to [the] person. Generally considered as personal effects are clothing, jewelry, and similar chattels.”) (Internal quotations and citations omitted). As owner of the property, Mukwange was allowed to testify as to the value of her personal property. *See Gulf States Utils. Co.*, 79 S.W.3d at 566 (stating that when measuring damages for household goods, “[i]t is well settled that a property owner may opine about the property’s value”).

Mukwange testified that she believed her property was worth \$100,000.00 and that her literary work was worth \$75,000.00. In reaching these values, Mukwange stated that she browsed stores online to determine what the replacement costs for the goods would be. *See Allstate Ins. Co. v. Chance*, 590 S.W.2d 703, 704 (Tex. 1979) (holding that the factfinder may consider replacement costs to determine the actual value to the owner). She explained that the values were very conservative and low-end estimates for her property.

The trial court awarded Mukwange \$5,000.00 in damages but stated that he believed her items were worth more than that amount. Because Mukwange testified on the value of her property and the trial court awarded an amount within that range of evidence presented at trial, the evidence is legally sufficient to support the trial court’s value determination.

We overrule Public Storage’s cross-point.

## **B. The Trial Court Properly Limited Mukwange's Damages**

Mukwange contends that the trial court erred by limiting her actual damages to \$5,000.00.

A general measure of damages is subject to any agreement that the parties might have made with respect to damages because parties to a contract are free to limit or modify the remedies available in the event of a breach of the contract. *GT & MC, Inc. v. Tex. City Refining, Inc.*, 822 S.W.2d 252, 256 (Tex. App.—Houston [1st Dist.] 1991, writ denied); *see also Head v. U.S. Inspect DFW, Inc.*, 159 S.W.3d 731, 748 (Tex. App.—Fort Worth 2005, no pet.) (“In the absence of a controlling public policy to the contrary, contracting parties can limit their liability in damages to a specified amount.”). Here, the lease agreement reflects that the parties agreed to limit their liability in damages to a specified amount.

The lease agreement provides that “Occupant agrees that under no circumstances will the aggregate value of all personal property stored in the Premises exceed, or be deemed to exceed \$5,000 and may be worth substantially less than \$5,000.” The lease agreement also contains a limitation of liability clause, stating:

Owner and Owner's Agents will have no responsibility to Occupant or to any other person for any loss, liability, claim, expense, damage to property or injury to persons (“Loss”) from any cause, including without limitation, Owner's and Owner's Agents active or passive acts, omissions, negligence or conversion, unless the Loss is caused by owner's fraud, willful injury or willful violation of the law . . . Occupant agrees that Owner's and Owner's Agent's total responsibility for any Loss from any cause whatsoever will not exceed a total of \$5,000.

Mukwange initialed this paragraph and testified at trial that they looked like her initials.

Mukwange argues that the trial court erred by limiting her damages because she proved fraud. However, as we have discussed above, Mukwange did not present sufficient evidence for a fraud claim. Thus, the trial court properly limited her damages to \$5,000.00, the amount provided in the lease agreement.

#### CONCLUSION

We overrule Mukwange's issues and Public Storage's cross-point and affirm the judgment of the trial court.

/s/ Ken Wise  
Justice

Panel consists of Justices Christopher, Donovan, and Wise.

**489 F. Supp. 2d 555 (2007)**

**Deborah KOCINEC, Plaintiff,**

v.

**PUBLIC STORAGE, INC. Defendant.**

No. 2:06 CV 649.

**United States District Court, E.D. Virginia. Norfolk Division.**

June 6, 2007.

\*556 Francis John Driscoll, Jr., Law Office of Frank J. Driscoll Jr. PLLC, Barry Ray Taylor, Scialdone & Taylor, Inc., Claude Michael Scialdone, Scialdone & Taylor Inc., Virginia Beach, VA, for Deborah Kocinec, Plaintiff.

Keith Patrick Zanni, McGuireWoods LLP, Norfolk, VA, for Public Storage, Inc., Defendant.

***MEMORANDUM OPINION AND ORDER***

DOUMAR, District Judge.

Presently before the Court is a Motion for Partial Summary Judgment filed by Defendant Public Storage Inc. ("Defendant") against Plaintiff Deborah Kocinec ("Plaintiff") under Rule 56 of the Federal Rules of Civil Procedure. Defendant seeks to limit Plaintiffs potential recovery at trial to \$5,000, pursuant to the terms of a written rental agreement executed by the parties on March 22, 2004 ("Rental Agreement"). For the reasons that follow, the Court GRANTS Defendant's Motion for Partial Summary Judgment and ORDERS judgment in favor of Defendant's First Affirmative Defense asserting that Plaintiffs damages are contractually limited to \$5,000. As Plaintiff has not alleged fraud, willful injury, or willful violation of law, she may hereinafter recover damages, if any, of no more than \$5,000, in accordance with the lawful exculpatory clause contained in the Rental Agreement.

**I. FACTUAL BACKGROUND AND PROCEDURAL POSTURE**

**A. Facts**

On March 22, 2004, Plaintiff entered into a written contract with Defendant to rent storage unit A04 at a Defendant's privately-owned \*557 self-storage facility located at 880 Widgeon Road in Norfolk, Virginia. Plaintiff alleges, and Defendant admits, that on August 28, 2006, Plaintiff received a rental payment receipt from Defendant reflecting a credit of \$6.00 and indicating that the next payment under the Rental Agreement was due and payable on September 1, 2006.

Plaintiff further alleges that she sent payment to Defendant after the due date, on September 30,

2006. Apparently, the parties made no other communications until October 21, 2006, on which date Plaintiff allegedly called Defendant to provide thirty days advance notice that she would be removing her property and vacating the unit. At that time, Defendant informed Plaintiff that the property contained in her storage unit had been sold at public auction on September 25, 2006. Plaintiff contends that Defendant failed to provide her with notice of the unpaid balance and intended auction, and that such failure constitutes a breach of Defendant's statutorily imposed duties. Plaintiff initially sought money damages of \$82,225.00, but now seeks \$70,000.00.<sup>[1]</sup>

#### B. Procedural Posture

Plaintiff filed this private cause of action against Defendant in the Circuit Court for the City of Norfolk on October 30, 2006, alleging Defendant breached its "statutorily imposed duty to notify the Plaintiff . . . of her alleged unpaid rental balance" and "its intention to auction her Unit and sell her property before executing such auction and sale." Compl. ¶ 7. Defendant properly removed Plaintiff's action on November 22, 2006, pursuant to this Court's diversity jurisdiction under 28 U.S.C. § 1332. Defendant subsequently filed an Answer to Plaintiff's Complaint and Affirmative Defenses on November 22, 2006, asserting, among other defenses, that "Plaintiff's damages are contractually limited to \$5,000." Pl.'s Aff. Def. ¶ 1. Defendant filed the instant motion on May 11, 2007, and Plaintiff responded in opposition on May 25, 2007. As Defendant replied thereto on May 31, 2007, this motion is ripe for disposition.

### II. ANALYSIS

#### A. Motion for Summary Judgment (Rule 56)

Federal Rule of Civil Procedure 56(c) provides that summary judgment should be granted where "the pleadings, depositions [and] answers to interrogatories . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." "The purpose of summary process is to avoid a clearly unnecessary trial," *Continental Can Co. v. Monsanto Co.*, 948 F.2d 1264, 1265 (Fed.Cir.1991) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)), and "it is not designed to substitute lawyers' advocacy for evidence, or affidavits for examination before the fact-finder, when there is a genuine issue for trial." *Continental Can Co.*, 948 F.2d at 1265. In ruling on a motion for summary judgment, a court views the facts in the light most favorable to the non-moving party. *United States v. Lee*, 943 F.2d 366, 368 (4th Cir.1991). The moving party has the threshold burden of informing the court of the basis of the motion, of establishing

that there is no genuine issue of material fact, and of showing that it is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); see also *Castillo v. Emergency Med. Assoc.*, 372 F.2d 348, 346 (4th Cir.2004). Once the moving party satisfies this threshold showing under Rule 53(c), the burden of production shifts to the nonmoving party. *Celotex Corp.*, 477 U.S. at 322-23, 106 S.Ct. at 2552. The non-movant must "go beyond the pleadings and by [his] own affidavits, or by `depositions, answers to interrogatories, and admissions on file,' designate `specific facts showing that there is a genuine issue for trial.'" *Id.* at 324, 106 S.Ct. at 2553. "The plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322, 106 S.Ct. at 2552. Thus, to defeat summary judgments the nonmovant must go beyond the pleadings with affidavits, depositions, interrogatories, or other evidence to show that a genuine issue of material fact exists. See *id.* at 324, 106 S.Ct. at 2553.

#### B. Exculpatory Agreements

The issue before the Court is whether a private party may contractually limit its potential liability to a counterparty in Virginia, and, if so, whether an exception to this right applies to private owners of self-storage facilities. The Court finds that parties may enter into such exculpatory agreements, and that no exception at law precludes a private self-storage facility, such as Defendant; from limiting its risk as to its customers. Moreover, the Court is unwilling to create such an exception under the circumstances of this case. Accordingly, Defendant's liability is to be limited pursuant to the exculpatory provisions contained in the Rental Agreement.

In Virginia, parties may limit their risk of loss through contract, as "it is apparently not against the public policy . . . for one to contract against his own negligence in some situations." *Nat'l Motels, Inc. v. Howard Johnson, Inc.*, 373 F.2d 375, 379 (4th Cir.1967). "Virginia courts regularly enforce exculpatory agreements." *Trumbull Invs., Ltd. v. Wachovia Bank, N.A.*, No. 1:05CV15 (GBL), 2005 U.S. Dist. LEXIS 7195, at \* 10 (E.D.Va. Apr. 15, 2005); see, e.g., *Chesapeake & Ohio R. Co. v. Clifton Forge-Waynesboro Tel. Co.*, 216 Va. 858, 224 S.E.2d 317, 321 (1976) ("[W]hen a railroad is called upon to perform a service which it is not compelled to perform by the very nature of its operation as a common carrier, it may, under proper conditions, contract against its liability for negligence for the reason that it is then acting in the

capacity of a private carrier."); *Peninsula Transit Corp. v. Jacoby*, 181 Va. 697, 26 S.E.2d 97, 100 ("The courts generally have recognized the right of the carrier to limit its liability for the loss of baggage by special contract. . . ."); *Ripley Heatwole Co. v. John E. Hall Elec. Contr., Inc.*, 69 Va. Cir. 69, 71, 2005 WL 4827398 (2005) (noting that a "contractual provision specifically limiting a party's liability" embodies "one of the essential purposes of contract law the freedom of parties to limit their risks in commercial transactions"); *Howie v. Atl. Home Inspection, Inc.*, 62 Va. Cir. 164, 167-70, 2003 WL 23162330 (2003) (upholding a contract provision limiting a termite inspector's liability to the cost of inspection); *Phoenix Med. Elecs. Servs. v. Klamm*, 18 Va. Cir. 128, 129, 1989 WL 646529 (1989) ("Since the contract specifically limits liability to the cost of repairing or correcting the defects, claims other than for such cost are demurrable."). However, such terms limiting liability are generally disfavored, and "should be read into a contract which shows no ambiguity \*559 on its face." *Nat'l Motels*, 373 F.2d at 379. Additionally, "a party . . . may exempt itself from liability for negligence in a contract with a party on equal footing." *Gill v. Rollins Protective Servs. Co.*, 722 F.2d 55, 58 (4th Cir.1983). Exculpatory clauses are typically evaluated through a three-part test.<sup>[2]</sup> "[A] defendant seeking to avoid liability under an exculpatory agreement must show (1) that the agreement does not contravene public policy, (2) that it could be readily understood by a reasonable person in the plaintiffs position, and (3) that it clearly and unequivocally releases the defendant from precisely the type of liability alleged by the plaintiff." *Hiatt v. Barcroft Beach, Inc.*, 18 Va. Cir. 315, 318, 1989 WL 646461 (1989). Because the exculpatory clause contained in the Rental Agreement meets these requirements, it is valid and enforceable.. Accordingly, Plaintiff may recover damages, if any, of no more than \$5,000, pursuant to the unambiguous terms of the Rental Agreement.

#### 1. Public Policy

While Plaintiff "concede[s] . . . that Virginia law has permitted . . . the right to limit risk of loss through contract," she broadly asserts that "there does not appear to be any precedent whether an owner of a Virginia self-storage facility may do so by contract to the extent that the Defendant attempts to limit its liability in the Rental Agreement." Pl.'s Opp. Mot. Summ. J. 5. Plaintiff simply concludes that, "[a]s in the case of a common carrier and a passenger, an occupant and an owner of a self-service storage facility are . . . not on equal footing." *Id.* at 6. Evidence of this alleged disequilibrium, according to Plaintiff, is found in the Virginia Self-Service Storage Act,

Va.Code § 55-416, *et seq.*, the statutory regime regulating self-service storage facilities in the state of Virginia, wherein the Virginia Legislature "set forth strict statutory requirements that an owner of a self-service storage facility must follow before they dispose of an occupant's personal property." Pl.'s Opp. Mot. Summ. J. 6.<sup>[3]</sup>

The Court finds no basis to conclude that Defendant possessed an unfair bargaining position over Plaintiff, nor that the exculpatory clause contained in the Rental Agreement violates public policy. \*560 "[C]ertain parties have been prohibited as a matter of public policy from contractually limiting their tort liability. Thus such a provision has been held void when contained in the contract of carriage of a common carrier, unless a reduced fare was charged; or in the contract of a public utility under a duty to furnish telephone service; or when imposed by an employer as a condition of employment." *Hiatt*, 18 Va. Cir. at 318, 1989 WL 646461.

Defendant is not among these designated entities principally quasi-public in nature for which the contractual right to limit liability is circumscribed. Moreover, there is no reason, academic or practical, to foreclose the right of a private owner of a self-storage facility to contractually limit its liability as an appropriate or necessary business practice. As Defendant asserts, "without the common sense provision limiting liability to the amount of goods one is allowed to store, companies like PSI could not afford to offer self-storage services to consumers." Def.'s Reply Mem. Supp. Summ. 8. Indeed, given the relatively thick market for self-storage facilities in southeastern Virginia, it is probable, if not certain, that Defendant's contractual limitation of liability yielded a lower rental cost to Plaintiff. To hold that such a transaction between two symmetrically informed parties violates public policy would be to unnecessarily frustrate the private marketplace. The Court serves no such function, absent some evidence of market failure. As Plaintiff has offered no such evidence in this case, the Court finds that the exculpatory clause contained in the Rental Agreement does not contravene public policy.

## 2. Readily Understood by a Reasonable Person

Although Plaintiff does not appear to dispute whether the exculpatory clause can be "readily understood by a reasonable person in the plaintiff's position," the Court finds that the language contained Rental Agreement can be readily understood by reasonable parties. "[A] release, like any other contractual provision, must be interpreted based on its plain and unambiguous language." *FS Photo, Inc. v. PictureVision Inc.*, 61 F. Supp. 2d 473, 482 (E.D.Va.1999). To limit

liability for one's own negligence, the exculpatory clause must be "clear and definite." See *Krazek v. Mountain River Tours, Inc.*, 884 F.2d 163, 165 (4th Cir. 1989).

In this case, the Rental Agreement contains two provisions that should have clearly informed a reasonable person in Plaintiffs position that Defendant's liability would be capped at \$5,000.

Paragraph 3 of the Rental Agreement, entitled "USE OF PREMISES AND PROPERTY AND COMPLIANCE WITH THE LAW," provides in relevant part as follows:

Because the value of personal property may be difficult or impossible to ascertain, Occupant agrees that under no circumstances will the aggregate value of all personal property stored in the Premises exceed or be deemed to exceed, \$5,000, and may be worth substantially less than \$5,000. . . . Occupant acknowledges and agrees that the Premises and the Property are not suitable for the storage of heirlooms or precious, invaluable or irreplaceable property such as (but not limited to) books, records, writings, works of art, objects for which no immediate resale market exists, objects which are claimed to have special or emotional value to Occupant and records or receipts relating to the stored goods.

Pl.'s Mot. Summ. J. Ex. ¶ 3. Plaintiff signed her initials below this paragraph to \*561 "acknowledge[] that [s]he has read and understands the provisions of this paragraph and agrees to comply with its requirements."<sup>[4]</sup>*Id.* Paragraph 5 of the Rental Agreement, plainly titled "LIMITATION OF OWNER'S LIABILITY; INDEMNITY," provides in relevant part as follows:

"Owner and Owner's Agents will have no responsibility to Occupant or any other persons for any loss, liability, claim, expense, damage to property or injury to persons ("Loss") from any cause, including without limitation, Owner's and Owner's Agents' active or passive acts, omissions, negligence or conversion, unless the Loss is directly caused by Owner's fraud, willful injury or willful violation of law. . . . Occupant agrees that Owner's and Owner's Agents' total responsibility for any Loss from any cause whatsoever will not exceed a total of \$5,000."

Pl.'s Mem. Summ. J. Ex. 1 ¶ 5. Again, Plaintiff signed her initials below this paragraph in apparent recognition and understanding thereof. *Id.*

These relevant provisions of the Rental Agreement are simple, direct, and concise. They contain no complex, legal, or confusing terms that require special expertise. Accordingly, the Court finds that a reasonable person in Plaintiffs position could have readily understood the import of such exculpatory language.

### 3. Claim Within the Contemplation of the Parties

Finally, the exculpatory clause must "clearly and unequivocally release[] the defendant from precisely the type of liability alleged by the plaintiff." *Hiatt*, 18 Va. Cir. at 318, 1989 WL 646461. On this point, Plaintiff contends that "[i]t is not clear whether Plaintiffs Breach of Contract/Virginia Self-Service Storage Act Action falls within Defendant's limitation of liability language in Paragraph 5 [of the Rental Agreement]." Pl.'s Mem. Opp. Summ. J. 4. The Court disagrees, and finds that the exculpatory clause in the Rental Agreement clearly releases Defendant from liability for losses from any cause, unless such loss was caused by Defendant's "fraud, willful injury or willful violation of law." Def.'s Mot. Summ. J. Ex. ¶ 5.

In this case, Plaintiff has made no allegations, and offers no facts to support a claim, of fraud, willful injury, or willful violation of law. Perhaps in recognition of this, Plaintiff seeks to avoid summary judgment by now claiming at this late day that "[t]his issue is . . . not ripe for consideration because there is still discovery that must be conducted to determine whether fraud occurred, willful injury or willful violation of law by [Defendant] in the disposition of the Plaintiffs personal property." Pl.'s Mem. Opp. Summ. J. 4. Such an assertion fails on two grounds. First, Plaintiff failed to allege fraud, willful injury, or willful violation of law in her Complaint. Second, discovery closed on April 26, 2007, pursuant to this Court's Order issued on April 19, 2007. Plaintiffs mere assertion that discovery remains does not make it so, and her unsubstantiated assertion that Defendant engaged in fraud, without evidence of any kind, lacks merit. "In order to successfully defeat a motion \*562 for summary judgment, a nonmoving party cannot rely on mere belief or conjecture, or the allegations and denials contained in his pleadings. Rather, the nonmoving party must set forth specific facts through affidavits, depositions, interrogatories; or other evidence to show genuine issues for trial." *Blaustein & Reich, Inc. v. Buckles*, 220 F. Supp. 2d 535, 541 (E.D.Va.2002) (citations omitted). Accordingly, the Court finds that the Rental Agreement clearly releases Defendant from precisely the type of liability alleged by Plaintiff.

### III. CONCLUSION

In view of the foregoing, Defendant's Motion for Partial Summary Judgment is hereby GRANTED. Exculpatory agreements are routinely enforceable in Virginia, and no basis exists in fact or law to curtail Defendant's *ex ante* right to contract for limited liability. Defendant held no unfair bargaining position over Plaintiff, and is not among the class of defendants for which

exculpatory agreements violate public policy. The release, interpreted based on its plain and unambiguous language, may be readily understood by a reasonable person in Plaintiffs position. Finally, Plaintiffs asserted claim was clearly within the contemplation of the parties at the time of contracting. As such, the exculpatory clause contained in the Rental Agreement prevails, and effectively limits Plaintiffs potential recovery in this action to \$5,000. The Court hereby ORDERS judgment in favor of Defendant's First Affirmative Defense.

The Clerk of the Court is DIRECTED to forward copies of this Memorandum Opinion and Order to counsel of record for all parties.

IT IS SO ORDERED.

#### NOTES

[1] On December 7, 2006, Plaintiff moved to amend her Complaint to reduce the *ad damnum* clause to \$70,000. The Court granted Plaintiff's motion, over Defendant's objections, on January 9, 2007.

[2] Defendant asserts that the legal criteria a court must look to in evaluating exculpatory agreements is inapposite in this case because the contract term here at issue "does *not* seek a ruling exculpating it of all liability," but only "limits damages, if any, to \$5,000." Def.'s Reply Mem. Supp. Mot. Summ. J. 4. Such a distinction, between terms that limit recovery and terms that wholly preclude recovery, lacks justification. Courts within this jurisdiction have consistently referred to both provisions those that limit liability and those that foreclose liability as "exculpatory." *See, e.g., Georgetown Steel Corp. v. Law Eng'g Testing Co.*, No. 92-2588, 1993 WL 358770, at \*2-3, 1993 U.S.App. LEXIS 23541, at \*7-9 (4th Cir. Sept. 14, 1993); *Trumbull Invs.*, 2005 U.S. Dist. LEXIS 7195 at \*10-13. In this case, Defendant seeks to reduce Plaintiff's asserted damages by 93%, from \$70,000 to, at most, \$5,000. The Court is loathe to conclude that the contractual term purporting to impose such a limitation of liability does not constitute an "exculpatory clause." Accordingly, the Court will examine the contractual provision at issue in view of the law governing exculpatory agreements within this jurisdiction.

[3] A "self-service storage facility" is defined as "any real property designed and used for renting or leasing individual storage spaces, other than storage spaces which are leased or rented as an incident to the lease or rental of residential property or dwelling units, to which the occupants thereof have access for storing or removing their personal property." Va.Code § 55-417(4). Neither party disputes the application of the Virginia Self-Service Storage Act.



[4] In view of Plaintiff's signature, it is of no matter whether she actually read the terms of the Rental Agreement: "In the absence of fraud, duress, or mutual mistake . . . an individual having the capacity to understand a written document who signs it after reading it, *or who signs it without reading it*, is bound by the signature." *First Nat'l Exchange Bank of Virginia v. Johnson*, 233 Va. 254, 355 S.E.2d 326, 329-330 (1987) (emphasis added).