

FILED
COURT OF APPEALS
DIVISION II
2015 APR -5 AM 9:59
STATE OF WASHINGTON
BY 
DEPUTY

NO. 47905-2-II

DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

LARRY D. RILEY,
Appellant,

v.

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.

IRON GATE RESPONDENTS' BRIEF

Paul R. Xóchihua, WSBA #18729
Christopher M. Parker, WSBA #48561
DAVIS ROTHWELL EARLE &
XÓCHIHUA, P.C.
Attorneys for Respondents
111 SW Fifth Avenue, Suite 2700
Portland, Oregon 97204
(503) 222-4422

 ORIGINAL

TABLE OF CONTENTS

	<i>Pg.</i>
A. Introduction.....	1
B. Response to Assignments of Error.....	1
1. The trial court did not err in granting defendants’ Motion for Partial Summary Judgment enforcing the \$5,000 value and damage limitation provisions	1
2. The trial court did not err in entering Final Judgment of Dismissal with Prejudice. Any challenge to the form or entry of the Final Judgment should not be considered because it was not raised in the trial court. RAP 2.5(a).....	1
3. The trial court did not err in denying plaintiff’s Motion for Reconsideration.....	1
C. Counterstatement of the Case	2
1. Identity of Parties Involved.....	2
2. Decisions Below and Issues on Appeal	2
3. Rental Agreement Background.....	3
4. Value and Damage Limitation Provisions	4
5. The Auction	6
D. Argument	7
1. Contractual Value and Damage Limitation Provisions are Enforceable	7
2. Evidence of Intentional or Willful Misconduct is Irrelevant, but even if Relevant, it has not been Proven.....	11

TABLE OF CONTENTS (CONT.)

	<i>Pg.</i>
3. Self-Storage and Consumer Protection Acts do not Preclude Contractual Limitations on Value and Damages	15
4. The Value and Damage Limitation Provisions are not Unconscionable.....	18
a. Procedural Unconscionability.....	19
b. Substantive Unconscionability.....	22
5. The Value and Damage Limitation Provisions are not Contrary to Public Policy.....	24
a. Public Policy	24
b. No Evidence of Gross Negligence.....	28
c. The Provisions are Conspicuous.....	28
6. No Objection Below to the Form or Entry of the Final Judgment.....	29
7. No Abuse of Discretion in Denying Plaintiff's Motion for Reconsideration.....	30
E. Conclusion	31

TABLE OF AUTHORITIES

	<i>Pg.</i>
CASES	
<i>Adkisson v. Seattle</i> , 42 Wn.2d 676, 682, 258 P.2d 461, 465 (1953).....	12, 13, 15
<i>Adler v. Fred Lind Manor</i> , 153 Wn.2d 331, 344, 103 P.3d 773, 781 (2004).....	22
<i>Boyce v. West</i> , 71 Wash. App. 657, 665-66, 862 P.2d 592, 597 (1993)	25, 28
<i>Cano-Garcia v. King City</i> , 168 Wn. App. 223, 249, 277 P.3d 34, 49 (2012).....	1
<i>Chauvlier v. Booth Creek Ski Holdings</i> , 109 Wn. App. 334, 35 P.3d 383 (2001).....	12
<i>Clements v. Olsen</i> , 46 Wn.2d 445, 448, 282 P.2d 266, 268 (1955).....	7
<i>Clover Park Sch. Dist. v. Consol. Dairy Prods. Co.</i> , 15 Wash. App. 429, 434, 550 P.2d 47, 50 (1976), <i>rev den</i> , 87 Wn.2d 1010 (1976).....	22
<i>Conradt v. Four Star Promotions</i> , 45 Wash. App. 847, 852, 728 P.2d 617, 621 (1986).....	28
<i>Dix v. ICT Grp., Inc.</i> , 160 Wn.2d 826, 161 P.3d 1016 (2007).....	16-17
<i>Eifler v. Shurgard Capital Mgmt. Corp.</i> , 71 Wn. App. 684, 689-96, 861 P.2d 1071 (1993).....	8, 17, 18, 27
<i>Fishburn v. Pierce Cty Planning & Land Servs.Dep't</i> , 161 Wash. App. 452, 472, 250 P.3d 146, 157 (2011).....	31

TABLE OF AUTHORITIES (CONT.)

	<i>Pg.</i>
CASES	
<i>In re Vanderveen</i> , 166 Wn.2d 594, 607 n.19, 211 P.3d 1008, ,1014 (2009).....	12
<i>Johnson v. Spokane to Sandpoint, LLC</i> , 176 Wash. App. 453, 460, 309 P.3d 528, 533 (2013).....	28
<i>Keystone Land & Dev. v. Xerox Corp.</i> , 171, 176, 94 P.3d 945, 948 (2004).....	7
<i>Kocinec v. Pub. Storage, Inc.</i> , 489 F. Supp. 2d 555 (E.D. Va. 2007)	9
<i>Maziar v. Dep't of Corr.</i> , 183 Wn.2d 84, 88, 349 P.3d 826, 828 (2015).....	11
<i>McKee v. AT&T Corp.</i> , 164 Wn.2d 372, 396, 191 P.3d 845, 857 (2008).....	18
<i>Minnick v. Clearwire</i> , 174 Wn.2d 443, 449 (2012).....	15
<i>Mon Wai v. Parks</i> , 43 Wash. 2d 562, 567, 262 P.2d 196, 199 (1953).....	15
<i>Mukwange v. Pub. Storage, Inc.</i> , 2015 Tex. App. LEXIS 8373 (Aug. 11 2015).....	9, 10
<i>Saleemi v. Doctor's Assocs.</i> , 176 Wn.2d 368, 292 P.3d 108 (2013).....	17
<i>Scott v. Cingular Wireless</i> , 160 Wn.2d 843, 161 P.3d 1000 (2007).....	16
<i>Scott v. Pac. W. Mt. Resort</i> , 119 Wn.2d 484, 834 P.2d 6 (1992).....	12, 24, 28

TABLE OF AUTHORITIES (CONT.)

Pg.

CASES

Shields v. Sta-Fit, Inc.,
79 Wn. App. 584, 589, 903 P.2d 525, 528 (1995).....25

State v. Melton,
63 Wash. App. 63, 68, 817 P.2d 413, 414 (1991).....1

Torgerson v. One Lincoln Tower, LLC,
166 Wn.2d 510, 517, 210 P.3d 318, 322 (2009).....7, 8, 19, 23

Taylor v. Pub. Storage,
2012 U.S. Dist. LEXIS 126967 (W.D. Wash. Sep. 2012).....8, 9

Wagenblast v. Odessa Sch. Dist.,
110 Wn.2d 845, 758 P.2d 968 (1988).....12, 25, 27

Wallace Real Estate Law Inv., Inc. v. Groves,
124 Wn.2d 881, 897 (1994).....15

Wynn v. Earin,
163 Wn.2d 361, 371, 181 P.3d 806, 811 (2008).....11

Zellmer v. Zellmer,
164 Wn.2d 147, 155 n.2, 188 P.3d 497, 500 (2008).....12, 13

COURT RULES

CR 56(e).....1

FRAP 31.1.....8

GR 14.1(b)10

RAP 2.5(a)1, 30

RCW 19.150 *et seq.*10, 11, 16, 25

TABLE OF AUTHORITIES

Pg.

COURT RULES

RCW 19.150.14010, 16, 25

RCW 19.150.17011, 16, 23

OTHER AUTHORITY

2 Bouvier’s Law Dictionary, 2023 [3rd Rev.]15

3 A Corbin, Corbin on Contracts § 609, AT 680.....22

A. INTRODUCTION

This appeal involves the enforceability of contractual value and damage limitation provisions in a self-storage unit lease agreement. The contract provisions at issue limit the value of the property to be stored within the unit to \$5,000, and similarly limit the plaintiff's recoverable damages to \$5,000. The trial Court correctly enforced these provisions.

B. RESPONSE TO ASSIGNMENTS OF ERROR

1. The trial Court did not err in granting defendants' Motion for Partial Summary Judgment enforcing the \$5,000 value and damage limitation provisions.

2. The trial Court did not err in entering Final Judgment of Dismissal with Prejudice. Any challenge to the form or entry of the Final Judgment should not be considered because it was not raised in the trial Court. RAP 2.5(a).

3. The trial Court did not err in denying plaintiff's Motion for Reconsideration.¹

¹ Much of the evidence submitted by plaintiff in the proceedings below is inadmissible. This inadmissible evidence should not be considered. CR 56(e); *Cano-Garcia v. King Cty.*, 168 Wn. App. 223, 249, 277 P.3d 34, 49 (2012) ("A trial court may not consider inadmissible evidence when ruling on a motion for summary judgment."). While the trial Court did not rule on Iron Gate's Motions to Strike/Objections to Admissibility, "[w]e presume the trial court disregarded any inadmissible evidence." *Id.*; *State v. Melton*, 63 Wash. App. 63, 68, 817 P.2d 413, 414 (1991) ("A trial judge is presumed to be able to disregard inadmissible evidence. . . ."). This Court should also disregard the above evidence. The specific objections to this evidence are set forth in Iron Gate's Motion to Strike/Objections to Admissibility, filed in the trial Court. CP 313-347.

C. COUNTERSTATEMENT OF THE CASE

1. Identity of Parties Involved

This case arises out of the sale of items stored by plaintiff Larry Riley in a storage unit leased from defendant ESMS Partners, L.P., dba Iron Gate Storage – Cascade Park. CP 1-8.²

2. Decisions Below and Issues on Appeal

Iron Gate filed a Motion for Summary Judgment based on a liability waiver/disclaimer in the Rental Agreement. CP 49-70. It also filed an alternative Motion for Partial Summary Judgment based on the \$5,000 value and damage limitation provisions. *Id.*

Plaintiff submitted a response, declarations and exhibits in opposition to Iron Gate’s motions. CP 71-249. Iron Gate submitted a Reply and Motions to Strike/Objections to Admissibility. CP 259-277, 313-347.

The trial Court did not rule on Iron Gate’s Motion for Summary Judgment, but the Court granted the alternative Motion for Partial Summary Judgment. CP 305-306. The trial Court’s ruling limited plaintiff’s recoverable damages to a maximum of \$5,000. CP 306.

The trial Court denied plaintiff’s Motion for Reconsideration. CP 278-296, 303-304. Iron Gate thereafter tendered to plaintiff a check in the

² ESMS Partners, L.P. owned and operated the storage facility at issue during the relevant timeframe. CP 45 (paragraph 2, lines 21-23). Defendants are hereafter collectively referred to in this Brief as “Iron Gate.”

amount of \$23,000, representing three times the \$5,000 value/damage limit set forth in the contract, plus interest. RP 91-92 (July 7, 2015 hearing). The \$23,000 tender represented the maximum amount of damages that plaintiff could potentially recover, even if the \$5,000 limit was trebled under the Consumer Protection Act, and interest was awarded. *Id.*

Based on this tender, the trial Court entered a Final Judgment. CP 307-308. Plaintiff did not object to the form or entry of the Final Judgment. RP 92 (lines 12-14).

3. Rental Agreement Background

Plaintiff began renting the storage unit at issue in 2003 pursuant to the Rental Agreement. CP 18 (pages 49-50). Plaintiff signed and initialed the agreement many times, including eight times on the first two pages. CP 21-26.

This is a fully integrated contract. Section 11 states:

11. ENTIRE AGREEMENT

There are no representations, warranties, or agreements by or between the parties which are not fully set forth herein and no representative of [Iron Gate] or [Iron Gate's] agent's are authorized to make any representations, warranties or agreements other than as expressly set forth herein.

CP 23. The Rental Agreement contains a savings provision, at section 23, stating:

23. CONSTRUCTION:

Whenever possible each provision of this Rental Agreement shall be interpreted in such a manner as to be

effective and valid under applicable law, but if any provision of this Rental Agreement shall be invalid or prohibited under such applicable law, such provision shall be ineffective only In the extent of such prohibition or invalidity without invalidating the remainder of such provision or the remaining provisions of this Rental Agreement.

CP 24 (bold in original).

Plaintiff agrees that he read and understood the agreement before entering into the lease:

Q: Well, I mean, you've signed this piece of paper it looks like on December 1 of 2003. Did you read it? Did you understand what it was saying?

A: Yes, I read it and I understand what it said. And I also have read the law regarding collection of fees and regarding what storages can do and can't do. And so I also understand those.

CP 19 (page 56:7-13 of plaintiff's deposition).

4. Value and Damage Limitation Provisions

Plaintiff expressly agreed in the Rental Agreement that Iron Gate's liability would in no event exceed \$5,000:

Notwithstanding anything contained in this Rental Agreement, In no event shall Operator or Operator's Agents be liable to Occupant In an amount In excess of \$5,000 for any damage or lose [sic] to any person, Occupant or any property stored in, on or about the Premises or the Project arising from any cause whatsoever, Including, but not limited to, Operators Agents' active of [sic] passive acts, omissions or negligence.

CP 22. Plaintiff initialed right below these provisions, indicating that he "read, understands and agrees to the provisions of this paragraph 7." *Id.*

The \$5,000 limitation on damages was not arbitrary, but rather was based on the acknowledgement, set forth in paragraph 5 of the Rental Agreement, that the kind, quality or value of the property would not be a concern and that the value of the property in the unit was not anticipated to be at or near \$5,000:

* * * It is understood and agreed that Occupant [plaintiff] may store personal property with substantially less or no aggregate value and nothing herein contained shall constitute or evidence, any agreement or administration by Operator [Iron Gate] that the aggregate value of all such personal property is, will be, or is expected to be, at or near \$5,000. It Is 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.

CP 21.

Plaintiff also represented that he would insure the property for 100 percent of its actual cash value:

INSURANCE. OCCUPANT, AT OCCUPANT'S SOLE EXPENSE, SHALL MAINTAIN ON ALL PERSONAL PROPERTY, IN, ON OR ABOUT THE PREMISES, TO THE EXTENT OF AT LEAST 100% OF THE ACTUAL CASH VALUE OF SUCH PERSONAL PROPERTY, A POLICY OR POLICIES OF INSURANCE COVERING DAMAGE BY FIRE, EXTENDED COVERAGE PERILS, VANDALISM AND BURGLARY. Occupant may satisfy the Insurance requirement for personal property stored in the enclosed Space by electing coverage under the Insurance plan. . . .

CP 22 (capitalization and bold in original). Directly below this provision, plaintiff initialed the box titled “self-insure,” thereby agreeing to “personally assume all risk of loss or damage[.]” *Id.*

The representations in the Rental Agreement regarding the kind, quality and value of the personal property stored in the unit were essential terms of this contract. CP 46 (paragraph 4 of Glen Aronson’s Declaration). Iron Gate relies upon these representations in entering into Rental Agreements with renters. *Id.* At the time plaintiff entered into the Rental Agreement, Iron Gate used a third-party broker/insurer that offered various levels of coverage to renters. *Id.* Iron Gate’s practice was to provide brochures for such insurance to renters if requested. *Id.*

By initialing the “self-insure” box, plaintiff confirmed his decision to self-insure the property, without providing any indication to Iron Gate that he intended to store items with an anticipated value in excess of \$5,000. CP 22.

5. The Auction

It was not an unusual circumstance for plaintiff to fall behind in his rent payments to Iron Gate. CP 46 (paragraph 5 of Aronson Declaration). Iron Gate sent plaintiff a number of past due notices, Notices of Lien, a Notice of Cutting Lock, and a Notice of Auction in May, June and July of 2010. *Id.*

At the time these notices related to the auction were sent, Iron Gate believed they complied with Washington law. *Id.* However, it appears a mistake was inadvertently made in that the July 8, 2010 Notice of Auction

contained an auction date less than 14 days from the date of the notice. CP 10 (paragraph 7) and 151.

Iron Gate auctioned the contents of plaintiff's unit, excluding personal papers and personal photographs, on July 15, 2010. CP 46 (paragraph 6 of Aronson Declaration). Iron Gate successfully recovered many or most of the auctioned items by repurchasing them from the winning bidder. *Id.* Iron Gate stored the substantial volume of items excluded from the sale, and also the successfully recovered auctioned items, at no cost to plaintiff until plaintiff was able to retrieve them several months later. *Id.*

D. ARGUMENT

1. Contractual Value and Damage Limitation Provisions are Enforceable

“It is black letter law of contracts that the parties to a contract shall be bound by its terms.” *Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d 510, 517, 210 P.3d 318, 322 (2009) (citation omitted). “Courts do not have the power, under the guise of interpretation, to rewrite contracts which the parties have deliberately made for themselves.” *Clements v. Olsen*, 46 Wn.2d 445, 448, 282 P.2d 266, 268 (1955). “Under the principle of freedom to contract, parties are free to enter into, and courts are generally willing to enforce, contracts that do not contravene public policy.” *Keystone Land & Dev. v. Xerox Corp.*, 152 Wn.2d 171, 176, 94 P.3d 945, 948 (2004).

The freedom of contract rule applies to contractual value/damage limitation provisions. They are enforceable. *Torgerson, supra* at 522-23 (enforcing damage limitation provision in connection with real estate agreement). In *Eifler v. Shurgard Capital Mgmt. Corp.*, 71 Wn. App. 684, 689-96, 861 P.2d 1071 (1993), this Court enforced a liability disclaimer in a self-storage lease agreement that barred several of the plaintiff's claims. If claims can be barred by a disclaimer, they can certainly be limited by a value limitation set forth in the agreement. The trial Court correctly enforced the value and damage limitation provisions.³

The Western District of Washington enforced similar value and damage limitation provisions in a self-storage unit lease agreement in *Taylor v. Pub. Storage*, 2012 U.S. Dist. LEXIS 126967 (W.D. Wash. Sep. 2012).⁴ *Taylor* involved nearly identical facts as the case at bar. Plaintiff Taylor rented a self-storage unit pursuant to a written lease agreement containing the following limitation on damages: "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." *Id.* at *4-5.

The *Taylor* Court granted the defendant's motion for summary judgment based on a liability waiver in the agreement (something not at

³ ESMS Partners is the only proper defendant in this action. However, that issue is irrelevant to this appeal, since plaintiff agrees the contractual value and damage limitation provisions apply equally to all defendants.

⁴ A copy of the *Taylor* decision is included in the appellate record at CP 27-33; GR 14.1(b) (permitting citation to unpublished from other jurisdictions if permitted by that jurisdiction's rules); FRAP 32.1 (permitting citation to unpublished opinions issued on or after January 1, 2007).

issue in this appeal), and additionally granted partial summary judgment against any recovery in excess of \$5,000:

Summary judgment shall be granted to defendant on this issue and plaintiff's claims of negligence and conversion shall be dismissed. *Her damages on remaining claims shall be limited to \$5,000 where appropriate.*

Id. at *14-15 (emphasis added). The *Taylor* Court correctly applied Washington law. The same result should follow here.

Courts in other jurisdictions have reached similar results. For example, in *Kocinec v. Pub. Storage, Inc.*, 489 F. Supp. 2d 555 (E.D. Va. 2007), the plaintiff sued the defendant storage facility, alleging it violated statutory law in selling the contents of her storage unit. The defendant moved for partial summary judgment based on a \$5,000 contractual limitation on value and damages. *Id.* at 557. As in the present case, the value and damage limitation provisions worked together, with the first limiting the value of property to be stored within the unit to \$5,000, and the second limiting the recoverable damages to \$5,000.

The *Kocinec* Court granted the defendant's motion for partial summary judgment. The Court found the "relevant provisions of the Rental Agreement are simple, direct, and concise. They contain no complex, legal, or confusing terms that require special expertise." *Id.* at 561.

A Texas appellate court recently enforced a \$5,000 limitation on value and damages in a self-storage lease agreement in *Mukwange v. Pub.*

Storage, Inc., 2015 Tex. App. LEXIS 8373 (Aug. 11 2015).⁵ The plaintiff alleged the storage facility committed fraud and breached the lease agreement in auctioning the contents of her unit. The lease contained value and damage limitation provisions similar to the ones at issue in the case at bar. *Id.* at 13. The appellate court affirmed the trial court’s decision enforcing these provisions, noting that the plaintiff initialed the specific paragraph where the provisions were found (as did Mr. Riley in the present case). *Id.* at 14.

Plaintiff’s contention that contractual value and damage limitation provisions violate public policy is also contrary to Washington statutory law. The Self-Service Storage Facility Act, RCW 19.150 *et seq* (“Self-Storage Act”), has never precluded or prohibited contractual limitations on value and damages.⁶ And importantly, the statute was recently amended so as to expressly recognize the viability of such provisions. The new amendment provides:

If a rental agreement contains a condition on [the] occupant’s use of the space that specifies a limit on the value of personal property that may be stored, that limit is the maximum value of the stored personal property in the occupant’s space for the purposes of the [self-service] storage facility owner’s liability only.

⁵ A copy of the *Mukwange* decision is included with this brief per GR 14.1.

⁶ As explained in greater detail below, the Self-Storage Act expressly provides (and so provided at the time plaintiff entered into this lease in 2003) that the Act does *not* impair or affect any rights existing outside the statute. RCW 19.150.140.

RCW 19.150.170. The Senate Bill Report for the companion bill explains how this amendment “makes it clear that the limit in a contract on the value is only for purposes of owner’s liability, which helps protects [sic] tenants from their insurance companies limiting the value for other purposes.” CP 42-43.

“The legislature is presumed to know the law in the area in which it is legislating. . . .” *Wynn v. Earin*, 163 Wn.2d 361, 371, 181 P.3d 806, 811 (2008); *Maziar v. Dep’t of Corr.*, 183 Wn.2d 84, 88, 349 P.3d 826, 828 (2015) (“We presume that the legislature enacts laws with full knowledge of existing laws.”) (citation omitted). Plaintiff Riley’s contention that value and damage limitation provisions violate public policy makes no sense, given the legislature recent acknowledgement that such provisions are enforceable, and given the fact the Self-Storage Act has never prohibited or precluded such provisions. The trial Court correctly enforced the provisions at issue.

2. Evidence of Intentional or Willful Misconduct is Irrelevant, but even if Relevant, it has not been Proven

Plaintiff argues at length that liability waivers do not apply to intentional misconduct. Opening Brief at 11-24. This is irrelevant because the provisions at issue are not liability waivers. They are mere limitations on value and damages. Case law invalidating pre-injury

liability waivers⁷ does not preclude enforcement of the provisions at issue here.

Plaintiff's challenge to the value and damage limitation provisions additionally fails because there is no evidence that Iron Gate intended to violate plaintiff's rights, or otherwise intended to cause him harm. Mere "volition" alone is not sufficient to support a finding that Iron Gate acted with intent or willfulness.⁸ Such a finding "requires a showing of actual intent to harm. . . ." *Zellmer v. Zellmer*, 164 Wn.2d 147, 155 n.2, 188 P.3d 497, 500 (2008). "As long as the element of inadvertence remains in conduct, it is not properly regarded as wilful." *Adkisson v. Seattle*, 42 Wn.2d 676, 682, 258 P.2d 461, 465 (1953).

Iron Gate intended to foreclose on the storage unit and satisfy its lien pursuant to the terms of the contract. Iron Gate's miscalculation of a statutory deadline was at most an inadvertent mistake, not any intentional or willful misconduct. As a matter of law, this type of inadvertent conduct could never support a finding of willfulness or intent. Nor do the volitional acts performed by Iron Gate's employees – such as intentionally putting a letter inside an envelope and intentionally depositing the

⁷ See e.g., Plaintiff's Opening Brief at 18-22, 27-32, discussing *Wagenblast v. Odessa Sch. Dist.*, 110 Wn.2d 845, 758 P.2d 968 (1988) (adopting public policy factors for enforcing pre-injury releases/liability waivers); *Scott v. Pac. W. Mt. Resort*, 119 Wn.2d 484, 834 P.2d 6 (1992) (pre-injury release regarding ski school); *Chauvlier v. Booth Creek Ski Holdings*, 109 Wn. App. 334, 35 P.3d 383 (2001) (same).

⁸ *In re Vanderveen*, 166 Wn.2d 594, 607 n.19, 211 P.3d 1008, 1014 (2009) ("'[W]illful' is synonymous with 'intentional.'").

envelope into a mailbox – support a finding that Iron Gate intended to cause harm. *Zellmer/Adkisson, supra*.

Plaintiff’s conflation of “volitional acts” with “intentional misconduct” is not only contrary to Washington case law, it also defies common sense. Nearly every accidental or negligently caused damage involves some volitional act or series of volitional acts. For example, a driver who negligently runs down a pedestrian can be said to have “intended” to turn the ignition key to start the engine, and “intended” to drive the car down the road toward the accident scene. So too does a homeowner who negligently causes a house fire with his barbecue “intend” to turn the knob on the propane tank, and “intend” to light the flame. But this does not support a finding that the driver intended to injure the pedestrian, or that the homeowner intended to cause the property damage to the home. Again, “[a]s long as the element of inadvertence remains in conduct, it is not properly regarded as wilful.” *Adkisson v. Seattle, supra*.⁹

Plaintiff references an agreement Iron Gate had with the purchaser of the subject storage unit. Opening Brief at 13. This agreement provides that Iron Gate “may contact the buyer [Ernest Dolan], and request that the

⁹ Plaintiff discusses the rule from the Restatement (Second) of Torts that “intent” can be found if the actor is “substantially certain” the consequences of an act will occur. Opening Brief at 15. This is a red herring. The “act” is the violation of the statute. There is no evidence that Iron Gate was on notice (much less substantially certain) that its actions in connection with the auction were potentially wrongful until after the auction already occurred.

items be purchased back by Iron Gate Storage and/or the auctioneer in order to prevent any court action.” CP 156.

Iron Gate’s agreement with Mr. Dolan does not support a finding of intent or willfulness for at least two reasons. First, the “harm” at issue was the allegedly improper auction of plaintiff’s property, based on a miscalculation of a statutory deadline. This alleged harm already occurred before the events related to the attempted recovery of plaintiff’s property after the auction. The alleged post-auction events may be relevant to whether plaintiff properly mitigated his damages (something not at issue in this appeal), but they have no bearing on whether the harm itself (mistakenly auctioning plaintiff’s property without the requisite 14 days of notice) was intentionally caused by Iron Gate.

Second, no evidence in the record supports plaintiff’s contention that Iron Gate intentionally prevented him from recovering his property after the auction. It is undisputed Iron Gate provided the winning bidder, Mr. Dolan, with plaintiff’s telephone number, and Dolan called plaintiff to discuss the repurchase of the subject property. CP 253-254 (pages 23-25 of Dolan deposition). The only inference that can be reasonably drawn from this is that Iron Gate intended to help plaintiff recover his property. This certainly does not support the opposite inference – that Iron Gate intended to prevent plaintiff from recovering his property.

In short, this case involves the inadvertent miscalculation of a statutory deadline, not any intent to cause harm to plaintiff or his property.

This type of “inadvertence” does not support a finding of willfulness. *Adkisson*, 42 Wn.2d at 682.

Plaintiff also references liquidated damages cases.¹⁰ These cases are inapplicable because the contract provisions at issue here are not liquidated damages provisions. Liquidated damages are defined as “[d]amages for a specific sum stipulated or agreed upon as part of a contract, as the amount to be paid to a party who alleges and proves a breach of it.” *Mon Wai v. Parks*, 43 Wash. 2d 562, 567, 262 P.2d 196, 199 (1953) (citing 2 Bouvier's Law Dictionary, 2023 [3rd Rev.]). The provisions at issue here are fundamentally different because they do not set or pre-determine any particular amount of damages. Instead, they limit damages to the value limit set forth in the agreement. Plaintiff’s reliance on liquidated damages cases is misplaced.

3. Self-Storage and Consumer Protection Acts do not Preclude Contractual Limitations on Value and Damages

Plaintiff contends it would be against public policy for the value and damage limitation provisions to apply to a claim based on alleged violations of the Self-Storage and Consumer Protection Acts. Opening Brief at 32-38. He is wrong.

The Self-Storage Act has never precluded value or damage limitation provisions. The Act expressly provides (and it so provided

¹⁰ Opening Brief at 26 (citing *Wallace Real Estate Inv., Inc. v. Groves*, 124 Wn.2d 881, 897 (1994) and *Minnick v. Clearwire US LLC*, 174 Wn.2d 443, 449 [2012]).

when the Rental Agreement was initially signed in 2003) that it does not impair or affect the rights of the parties existing outside the statute:

Nothing in this chapter may be construed to impair or affect the right of the parties to create additional rights, duties, and obligations which do not conflict with the provisions of this chapter. The rights provided by this chapter shall be in addition to all other rights provided by law to a creditor against his or her debtor.

RCW 19.150.140. Plaintiff's contention the statute precludes enforcement of value and damage limitation provisions fails.

As noted, not only does the Self-Storage Act not preclude value or damage limitation provision, the Act has since been amended to expressly recognize the viability of such provisions. RCW 19.150.170. This *supports* enforcement of the provisions at issue here. It certainly does not preclude them.

Plaintiff also contends Iron Gate cannot disclaim¹¹ liability under the Consumer Protection Act ("CPA"). Opening Brief at 35-38. This contention fails. Plaintiff cites no provision in the CPA precluding contractual limitations on value or damages. Nor does plaintiff cite any case that has ever held a mere limitation on value or damages is somehow unenforceable when applied to a CPA claim.

The cases plaintiff relies upon, *Scott v. Cingular Wireless*, 160 Wn.2d 843, 161 P.3d 1000 (2007) and *Dix v. ICT Grp., Inc.*, 160 Wn.2d

¹¹ Again, the liability disclaimer/waiver provision in the Rental Agreement is not at issue in this appeal. The sole issue is the enforceability of provisions limiting value and damages, not any liability waiver or release.

826, 161 P.3d 1016 (2007), involved class actions that would be completely destroyed by a class action waiver/forum selection clause (thus leaving a multitude of named plaintiffs without a remedy). As explained by the Supreme Court in the *Scott* decision (quoting Posner), “[t]he realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.” 160 Wash. 2d at 855.

Such is not the case here. The \$5,000 value and damage limitation provisions do not deprive plaintiff of an adequate forum, nor do they limit his damages to some inconsequential amount not worth pursuing. The only limitation is that he is not entitled to pursue damages above the value limit. This is fundamentally different from the waiver and forum selection provisions at issue in *Scott* and *Dix*.¹²

Plaintiff also discusses the *Eifler* decision, suggesting it somehow supports invalidating the value and damage limitation provisions. Opening Brief at 37. It does not. In *Eifler*, the trial court directed a verdict against the plaintiff’s CPA claim. 71 Wn. App. at 688. As it relates to the CPA claim, the only issue on appeal was whether there was evidence sufficient to withstand a motion for directed verdict on the

¹² Plaintiff’s reliance on *Saleemi v. Doctor’s Assocs.*, 176 Wn.2d 368, 292 P.3d 108 (2013) is equally misplaced. *Saleemi* merely commented in dicta that the disputed remedy waiver provision “may well be unenforceable under Washington law[.]” *Id.* at 383. This dicta is not controlling. And if it was, the *Saleemi* case supports enforcement of the damage limitation provision because the court then “[a]ssum[ed] for the sake of argument that the trial judge should *not* have struck the damages limit in the arbitration agreement as unenforceable under Washington law. . . .” *Id.* (emphasis added).

elements of a claim under the CPA. The Court did not address the applicability of the liability waiver to the plaintiff's CPA claim, much less the applicability of a mere limitation on value and damages.

In addition, *Eifler* supports the trial Court's decision in the present case because *Eifler* held the plaintiff's remaining claims were barred by the liability waiver. If claims can be barred by a waiver, they can certainly be limited to the value limit set forth in the agreement.

Plaintiff discusses at length the elements necessary to prove a claim under the CPA. Opening Brief at 38-44. Again, this is irrelevant because no provision in the CPA (nor any case interpreting the CPA) precludes contractual limitations on value or damages. While Iron Gate denies that it violated the CPA, the issue is moot because Iron Gate has already tendered to plaintiff an amount equal to three times the \$5,000 value limitation, plus interest. CP 307-308; RP 91-92. This represents plaintiff's maximum recovery under the CPA, so the issue of whether Iron Gate's conduct violated the CPA (it did not) is moot.

4. The Value and Damage Limitation Provisions are not Unconscionable

Plaintiff contends the contract provisions at issue are unconscionable. Opening Brief at 44-46. They are not.¹³

¹³ "Whether an agreement is unconscionable is a question of law for the courts." *McKee v. AT&T Corp.*, 164 Wn.2d 372, 396, 191 P.3d 845, 857 (2008).

a. Procedural Unconscionability

Procedural unconscionability requires evidence of “blatant unfairness in the bargaining process and a lack of meaningful choice. . . .” *Torgerson, supra* at 518. This is determined “in light of the totality of the circumstances, including (1) the manner in which the parties entered into the contract, (2) whether the parties had a reasonable opportunity to understand the terms, and (3) whether the terms were ‘hidden in a maze of fine print.’” *Id.* at 518-19.

The value limitation provision unambiguously states that it was understood and agreed that “nothing herein shall constitute or evidence any agreement or administration by [Iron Gate] that the aggregate value of all such property is, will be, or is expected to be, at or near \$5,000.” CP 21. This is a clear limitation (initialed by plaintiff Riley) regarding the value of the property to be stored within the storage unit.

The agreement then goes on to state, on the next page, that in no event shall Iron Gate be liable for any amount in excess of \$5,000. CP 22. This provision is equally clear and unambiguous, particularly when read in conjunction with the limitation on value. Plaintiff agrees that he read and understood these provisions.¹⁴ They are not confusing, ambiguous or otherwise procedurally unconscionable. They should be enforced.

Plaintiff quibbles with various spelling, formatting, and punctuation errors, including:

¹⁴ CP 19 (page 56, lines 7-13 of plaintiff’s deposition); CP 125 (page 14 of plaintiff’s declaration).

- Lack of indentation before section numbers/headings.
- Minor spelling errors, such as the use of an “o” instead of an “e” in “premises”; the lack of an “s” after “lien” and “agent”; the use of an “e” instead of an “s” in “loss.”
- Improper capitalization of “Is” and “In” and the lack of a capital “a” in “address.”
- Lack of an apostrophe after “operators.”
- Lack of a space between “suchpersonal.”
- Lack of explanation as to what “substantially less” refers to.

Opening Brief at 46; Exhibit 2.

This after-the-fact effort by plaintiff’s attorney to create ambiguity in the contract fails. Mr. Riley expressly confirmed in his deposition that he understood the agreement. CP 19 (page 56 of plaintiff’s deposition). That his attorney was able to identify a list of purported typographical errors has no bearing on whether plaintiff was confused at the time he entered into the agreement. A lawyer can find typographical errors in just about any document. The contracting party, Mr. Riley, agrees he understood the agreement. The provisions at issue are not procedurally unconscionable.

Plaintiff's procedural unconscionability challenge additionally fails because the record contains no evidence explaining how the purported typographical errors allegedly changed the meaning of the two contract provisions at issue. If Mr. Riley is claiming he was confused by these provisions (notwithstanding his express agreement in his deposition that he was not), in what way was he confused? Plaintiff presents no evidence on this issue. He does not, for example, claim that he somehow interpreted the value/damage limit to be some amount greater than the \$5,000 limit set forth in the agreement. Nor does he contend that he somehow interpreted the value/damage limit to be inapplicable to his particular storage unit. He offers no alternative interpretation whatsoever. There is no evidence any alternative interpretation existed in his mind then, and none exists now. The provisions at issue are clear and unambiguous.¹⁵

Plaintiff's own declaration submitted in the trial Court further undercuts his procedural unconscionability argument. In the declaration,

¹⁵ Plaintiff's contention that the "substantially less" language is ambiguous fails. This language clearly refers to the \$5,000 limitation. Plaintiff also contends the phrase "or no aggregate value" is somehow contradictory because "[o]ne cannot insure contents that have no value." Exhibit 2. It is not hard to imagine a scenario where a person may rent a storage unit to store items that have personal or sentimental value, but no

plaintiff concedes the errors in the agreement were not a surprise to him. He expressly admits that when he first read the agreement back in 2003, he “immediately noticed numerous obvious defects in the document.” CP 125 (page 14, lines 7-9).

A contracting party “who has reason to know of a unilateral mistake will not be permitted to ‘snap up’ such an offer and profit thereby.” *Clover Park Sch. Dist. v. Consol. Dairy Prods. Co.*, 15 Wash. App. 429, 434, 550 P.2d 47, 50 (1976) (citing 3 A Corbin, Corbin on Contracts § 609, at 680), *rev den*, 87 Wn.2d 1010 (1976). Plaintiff should not be permitted to “snap up” these typographical errors several years after first discovering them in order to pursue a claim substantially greater than the value limit set forth in the agreement. The subject provisions are not procedurally unconscionable as a matter of law.

b. Substantive Unconscionability

Substantive unconscionability “involves those cases where a clause or term in the contract is alleged to be one-sided or overly harsh. . . .” *v. Fred Lind Manor*, 153 Wn.2d 331, 344, 103 P.3d 773, 781 (2004) (citation omitted). Such unfairness must truly stand out. “‘Shocking to the conscience’, ‘monstrously harsh’, and ‘exceedingly calloused’ are terms

economic value. In that situation, the tenant would presumably opt out of purchasing insurance for economic loss (as Mr. Riley did here).

sometimes used to define substantive unconscionability.” *Torgerson, supra* at 519 (citations omitted).

There is nothing harsh or unfair about setting a value limit on property to be stored within a self-storage unit. Plaintiff offers no evidence to the contrary. He does not, for example, contend that value or damage limitations are inherently unfair or harsh. It appears his sole objection is to the number itself (\$5,000), not to the nature or effect of the provisions at issue. If the limit were set at some value equal to or greater than the purported value of the property that plaintiff says he stored within the unit, he would presumably have no objection to it. Based on this logic, a tenant could avoid any contractual limitation on value or damages simply by failing to follow the limit. Such a wide-reaching holding would be inappropriate, particularly in light of the legislature’s express recognition of contractual value/damage limitations in the Self-Storage Act. RCW 19.150.170, *supra*.

Iron Gate is not required to accept property stored at its facility allegedly worth in excess of a million dollars. Iron Gate relied on plaintiff’s representation, as contractually, if its renter is not in default on the obligation to pay rent, it has no access to units and no specific knowledge about the value of the property being stored within them. There is nothing unjust about holding plaintiff to this contractual limitation on value. The real injustice would be permitting plaintiff to pursue a claim several hundred times greater than the \$5,000 value limit

acknowledged in the Rental Agreement. These provisions are not substantively unconscionable.

5. The Value and Damage Limitation Provisions are not Contrary to Public Policy

The contract provisions at issue in this appeal are mere limitations on value and damages; not pre-incident liability waivers or releases. Plaintiff attempts to distract the Court with a discussion about public policy as it relates to complete waivers or releases of liability. Opening Brief at 18-22. His discussion in this regard is not helpful to the issue of enforcement of value and damage limitation provisions. But, even if the subject provisions are analyzed as releases or liability waivers, they are enforceable.

Pre-injury liability waivers are enforceable unless: “(1) they violate public policy, or (2) the negligent act falls greatly below the standard established by law for protection of others or (3) they are inconspicuous.” *Scott*, 119 Wn.2d at 492. None of the three exceptions are applicable here.

a. Public Policy

Washington courts apply six factors in determining whether a pre-injury liability waiver or release violates public policy:

[W]hether (1) the agreement concerns an endeavor of a type generally thought suitable for public regulation; (2) 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; (3) such party holds itself 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; (4) because 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 the services; (5) 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; and (6) the person or property of members of the public seeking such services must be placed under the control of the furnisher of the services, subject to the risk of carelessness on the part of the furnisher, its employees or agents.

Boyce v. W., 71 Wn. App. 657, 663-64, 862 P.2d 592, 596 (1993) (citing *Wagenblast*, 110 Wn.2d at 851-55). None of these factors militate against enforcement of provisions at issue here.

Public regulation: The self-storage facility industry is not highly regulated. The lien and foreclosure requirements have been codified in the Self-Storage Act, but the codification of a small, limited aspect of the business does not amount to public regulation of the industry. As noted, the Self-Storage Act expressly reserves the parties' rights existing outside the Act. RCW 19.150.140.

Public 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, Inc.*, 79 Wn. App. 584, 589, 903 P.2d 525, 528 (1995); *Wagenblast*, 110 Wn.2d at 854 (public schools are a matter of public importance).

Self-storage facilities are certainly beneficial to some members of society, but they are not an essential public service. Plaintiff could have stored his property in his house or apartment. He could have stored it in a friend's house or apartment. If he had nowhere to store his property, he could have sold the property or given it away. There is no reasonable, objective basis to conclude that a self-storage unit is an essential public necessity, as is a hospital or school.

Plaintiff references how he first rented a storage unit from Iron Gate late at night after traveling to Washington from California. Opening Brief at 4. This is irrelevant because even if the Iron Gate facility was somehow an essential public service for plaintiff when he moved to Washington in 2003 (it was not), he moved here approximately seven years before the disputed auction. CP 112. He certainly had the opportunity to move his property to some other location in the seven years preceding the disputed auction.¹⁶ This factor militates in favor of enforcing the value and damage limitation provisions.

Offered to the Public: Iron Gate's rental units are not open to the general public. This is not a parking lot or parcel check service where any member of the public can grab a ticket to park or deposit an item. Each unit is rented pursuant to an individual rental agreement signed and

¹⁶ Plaintiff's declaration submitted in the trial Court concedes he could have "simply moved out of Iron Gate Self Storage and found a cheaper facility[.]" CP 118 (lines 2-5).

initialed by the renter. Iron Gate is a commercial business renting space to individual renters, not a public bailee.

Bargaining Strength: With this factor, the focus is on the “essential nature of the service, in the economic setting of the transaction. . . .” *Wagenblast*, 110 Wn.2d at 854. Again, self-storage facilities are not an essential public service. If a particular person does not want to agree to the terms offered by such facilities, he or she has the option of making other arrangements for the storage of the subject property. The bargaining power is the ability to walk away and not rent a unit. This factor is at most neutral.

Contract of adhesion: A self-storage lease agreement giving the plaintiff the option of protecting himself by purchasing insurance is not a contract of adhesion as a matter of law. *Eifler*, 71 Wn. App. at 694. Plaintiff had this option, which he expressly declined by checking the appropriate box in the agreement. CP 22. This factor militates in Iron Gate’s favor.

Control of the furnisher of services: The last factor is whether the plaintiff was placed under the control of defendant. Here, this factor militates in Iron Gate’s favor because the Rental Agreement gave plaintiff exclusive control over the storage unit, including putting his own lock on the unit. CP 23 (section 14). Iron Gate was only permitted to enter the unit upon a default by plaintiff.

b. No Evidence of Gross Negligence

As indicated above, the second exception to enforcement of pre-injury releases or waivers applies when the plaintiff proves the defendant's conduct fell greatly below the applicable standard of care. *Scott*, 119 Wn.2d at 492. This exception is generally referred to as the "gross negligence" exception. *Conradt v. Four Star Promotions*, 45 Wash. App. 847, 852, 728 P.2d 617, 621 (1986).

A volitional act inadvertently resulting in harm does not equate to intentional or grossly negligent misconduct. The record proffered by plaintiff, at best, supports only an inadvertent mistake. The miscalculation of a statutory deadline is not a grossly negligent act. In addition, no evidence in the record establishes the applicable standard of care for auctions conducted by private storage facilities, much less that Iron Gate's conduct fell considerably below that standard of care. Without such evidence, the gross negligence exception does not apply. *See e.g., Johnson v. Spokane to Sandpoint, LLC*, 176 Wash. App. 453, 460, 309 P.3d 528, 533 (2013); *Boyce v. West*, 71 Wash. App. 657, 665-66, 862 P.2d 592, 597 (1993); *Conradt, supra* at 852.

c. The Provisions are Conspicuous

The third exception to enforcement of pre-injury releases or waivers applies when the release or waiver is inconspicuous. *Scott*, 119 Wn.2d at 492. This exception does not apply in the present case. The damage limitation provision at issue is not buried in fine print. It appears on page two of the contract and is conspicuously titled: "**LIMITATION**

OF OPERATOR'S LIABILITY; INDEMNITY." CP 22 (capitalization and bold in original). It cannot be reasonably disputed that plaintiff was aware of these provisions, as he initialed (twice) directly below them on a line acknowledging that he "has read, understands and agrees to the provisions of" the damage limitation paragraph. *Id.*

6. No Objection Below to the Form or Entry of the Final Judgment

Plaintiff's second assignment of error contends the trial Court erred in entering the Final Judgment, which dismissed all claims based on Iron Gate's \$23,000 tender. Opening Brief at 2. It is not clear whether this assignment of error is based on plaintiff's contention that the value and damage limitation provisions are unenforceable, or whether plaintiff now contends the case should have gone forward, and final judgment should not have been entered, despite the Court's ruling on the Motion for Partial Summary Judgment.

If plaintiff is now challenging the trial Court's decision to enter the Final Judgment based on Iron Gate's \$23,000 tender, that challenge should not be considered because it was not raised below. Iron Gate explained in the trial Court the premise of its \$23,000 tender as follows:

As counsel will agree, I'm sure, last year about this time an offer of compromise of judgment was made in the maximum amount of \$5,000, trebled, with interest on that trebling, because there is a Consumer Protection Act claim, from the date of the auction through the expiration of the offer. That was not accepted.

And we are here today with \$23,000, which slightly exceeds that same number, if you did the math. And it's payable to the Court, the Clark County Superior Court. . . .

So what we want to do, Judge, because there is no matter left for trial, based on the Court's rulings, is to have the Court agree there's no just reason for delay, and to enter final judgment, strike the trial date from the calendar, and allow plaintiff to proceed, if they wish to, for an appeal.

RP 91:18 to 92:11. Plaintiff did not object to this procedure, nor to the Final Judgment being entered at that time:

Trial Court: Any objection to that?

Plaintiff's counsel: I have no objection to the form of the order -- or judgment, I guess it is.

RP 92:12-14.

Because plaintiff did not object to the form or entry of the Final Judgment, any challenge to the trial Court's decision to enter the judgment should not be considered. RAP 2.5(a).¹⁷

7. No Abuse of Discretion in Denying Plaintiff's Motion for Reconsideration

Plaintiff's third assignment of error contends the trial Court erred in denying his motion for reconsideration. Opening Brief at 2. It did not.

¹⁷ Even if plaintiff preserved a potential challenge to the trial Court's entry of the Final Judgment, such a challenge would be without merit. The \$23,000 tender represented an amount greater than three times the \$5,000 value/damage limitation, plus interest. This exceeds plaintiff's recoverable damages, even if they were trebled under the CPA. The Final Judgment also permitted plaintiff the right to move for his reasonable attorney fees, the entitlement and right to which were to be determined by the trial Court. CP 307-308. There were no remaining issues in the case, so dismissal was proper.

“Motions for reconsideration are addressed to the sound discretion of the trial court and a reviewing court will not reverse a trial court's ruling absent a showing of manifest abuse of discretion.” *Fishburn v. Pierce Cty. Planning & Land Servs. Dep't*, 161 Wash. App. 452, 472, 250 P.3d 146, 157 (2011) (citation omitted).

Plaintiff's motion for reconsideration was based on the same incorrect contention that the value and damage limitation provisions in the agreement are unenforceable. CP 278-296. The trial Court did not abuse its discretion in refusing to reconsider its ruling.

E. CONCLUSION

The contract provisions at issue do not waive, disclaim or otherwise eliminate any claim. They are mere limitations on value and damages. Plaintiff was aware of these provisions before entering into the contract. He read the contract thoroughly, and signed and initialed the document a number of times. The relevant provisions are on the first two pages of the agreement. They are short, simple and concise. There is

///

///

///

///

///

///

nothing unfair or unconscionable about holding plaintiff to the terms of this agreement. The trial Court did not err in enforcing the value and damage limitation provisions.

RESPECTFULLY SUBMITTED this 4th day of April, 2016.

DAVIS ROTHWELL
EARLE & XÓCHIHUA, PC

A handwritten signature in black ink, appearing to read 'Paul R. Xóchihua', written over a horizontal line.

Paul R. Xóchihua, WSBA #18729
Christopher M. Parker, WSBA #48561
Attorneys for Respondents

Mukwange v. Public Storage, Inc.

Court of Appeals of Texas, Fourteenth District, Houston

August 11, 2015, Memorandum Opinion Filed

NO. 14-14-00212-CV

Reporter

2015 Tex. App. LEXIS 8373; 2015 WL 4748308

TCHEWAM LILY MUKWANGE. Appellant/Cross-Appellee
v. PUBLIC STORAGE. INC.. Appellee/Cross-Appellant

Subsequent History: Petition for review denied by *Mukwange v. Public Storage, 2015 Tex. LEXIS 1096 (Tex., Dec. 4, 2015)*

Prior History: [*1] On Appeal from the 234th District Court, Harris County, Texas. Trial Court Cause No. 2012-45830.

Case Summary

Overview

ISSUE: Whether the renter of a public storage unit was entitled to recover damages when the contents of her storage unit were auctioned off because she was delinquent in her rental payments. HOLDINGS: [1]-The trial court properly concluded that the renter brought a breach of contract claim; [2]-Assuming without deciding that the renter pleaded a claim for fraud, the renter did not present sufficient evidence to justify a finding of fraud because she could not show that she relied on any alleged material misrepresentation; [3]-Because the owner testified at trial on the value of her property and the trial court awarded an amount within that range of evidence, the evidence was legally sufficient to support the trial court's value determination; [4]-The trial court properly limited the renter's damages to the amount provided in the parties' lease agreement.

Outcome

Judgment affirmed.

Counsel: For Appellant: Tchewam Lily Mukwange, HOUSTON, TX.

For Appellee: Murphy S. Klasing, HOUSTON, TX.

Judges: Panel consists of Justices Christopher, Donovan, and Wise.

Opinion by: Ken Wise

Opinion

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 [*2] 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, [*3] 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 [*4] 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. Colm*, 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 [*5] 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 [*6] 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 pct.). 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 [*7] 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 [*8] 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 [*9] 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 [*10] 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 [*11] 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. [*12] 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 [*13] 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 [*14] 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

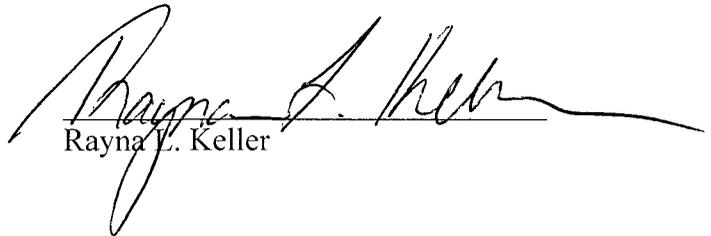
DECLARATION OF SERVICE

I, Rayna L. Keller, hereby declare under penalty of perjury under the laws of the State of Washington that on this date I sent a copy of DEFENDANTS' RESPONDENTS' BRIEF to all counsel of record as follows:

<i>Via</i>
Mr. James L. Sellers, WSBA #4779 Attorney at Law P.O. Box 61535 Vancouver, WA 98666 Telephone: 360-695-0464 Fax: 360-695-0466
Counsel for Larry D. Riley

FILED
COURT OF APPEALS
DIVISION II
2016 APR -5 AM 9:59
STATE OF WASHINGTON
BY _____
DEPUTY

DATED at Portland, Oregon, on this 4th day of April, 2016.


Rayna L. Keller