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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

NO. 32006-5-III

ANNE M. LOPINTO

Appellant

v.

BOB SPAIN REAL ESTATE SERVICES, INC., a Washington Corporation, d/b/a LAKEMONT REAL ESTATE,

Respondent

REPLY BRIEF OF APPELLANT

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I. ARGUMENT

A. The issue of ambiguity is not new on appeal.

Anne Lopinto and Bob Spain Real Estate Service, Inc. d/b/a Lakemont Real Estate (Lakemont) argued the issue of ambiguity before the trial court. "In construing a written contract, the basic principles require that (1) the intent of the parties controls; (2) the court ascertains the intent from reading the contract as a whole; and (3) a court will not read an ambiguity into a contract that is otherwise clear and unambiguous." *Mayer v. Pierce Cnty. Med. Bureau, Inc.*, 80 Wash. App. 416, 420, 909 P.2d 1323, 1326 (1995). "Interpretation of an unambiguous contract is a question of law." *Id.* "If a contract is unambiguous, summary judgment is proper even if the parties dispute the legal effect of a certain provision." *Voorde Poorte v. Evans*, 66 Wn. App. 358, 362, 832 P.2d 105 (1992). "A contract provision is ambiguous when its terms are uncertain or when its terms are capable of being understood as having more than one meaning." *Mayer*, 80 Wn. App. at 421. "Contract terms are ambiguous if they are fairly susceptible to two different, reasonable interpretations." *Marshall v. Thurston Co.*, 165 Wn. App. 346, 351, 267 P.3d 491 (2011).

Lakemont argued before the trial court that Ms. Lopinto was deemed to "have 'an intention corresponding to the reasonable meaning of

the words used.'" (CP 167). It argued that a virgule has a "plain meaning." (CP 167). Ms. Lopinto disagreed that she was creating a joint obligation because "parties who are divorcing are not intending to be jointly liable in any situation, let alone the court-ordered sale of the marital residence[.]" (CP 288).

In its reply memorandum on summary judgment Lakemont argued from a section in *Turner v. Gunderson*, 60 Wn. App. 696, 704, 807 P.2d 370 (1991) regarding ambiguity. The section from *Turner* stated, "The March 13, 1986 contract is **ambiguous**. It does not expressly state whether the Gundersons agreed to look to Ingram for one-half of the down payment and to Turner for the other half . . . ." (CP 293) (quoting *Turner*, 60 Wn. App. at 704) (emphasis added).

The issue of ambiguity was part of the analysis in which the trial court engaged to determine the meaning of the Listing Agreement. Even if the parties did not use the term frequently, the issue was before the trial court.

B. The term "Seller" was ambiguous in the Listing Agreement because it could mean either Ms. Lopinto and Mr. Cox together or separately.

1. The term "Seller" was ambiguous in the Listing Agreement.

The term "Seller" was ambiguous as to whether one of the parties to the Listing Agreement was jointly liable for the other's breach. Contract interpretation and construction are separate endeavors. *International Marine Underwriters v. ABCD Marine, LLC*, 179 Wn. 2d 274, 281, 313 P. 3d 395 (2013). "When interpreting a contract a court is 'giv[ing] meaning to the symbols of expression used by another person.'" *Id.* at 281-282 (quoting *Berg v. Hudesman*, 115 Wash.2d 657, 663, 801 P.2d 222 (1990)). During interpretation, a court's primary goal "is to ascertain the parties' intent at the time they executed the contract. *International Marine Underwriters*, 179 Wn. 2d at 282. The court looks at the contact as a whole to determine the intent of the parties. *Id.* at 283.

If terms are undefined, they will be given the "plain, ordinary, and popular meaning . . . ." *Queen City Farms, Inc. v. Cent. Nat'l Inc. Co. of Omaha*, 126 Wn. 2d 50, 66, 882 P.2d 703, 891 P.2d 718 (1994). A term is not ambiguous because it is complicated, confusing or undefined. *International Marine Underwriters*, 179 Wn. 2d at 400-401. "Any determination of meaning or ambiguity should only be made in the light of

the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties." *Berg*, 115 Wash.2d at 667-68.

On April 1, 2005, that the superior court ordered Ms. Lopinto and Mr. Cox to sell their house in a divorce decree and divide the net proceeds. (CP 18, 25). According to the Listing Agreement, dated April 14, 2005, the "Seller" "employ[ed] and grant[ed] Lakemont Real Estate Service . . . the exclusive and irrevocable right to sell the real property . . . commonly known as 7001 Englewood . . . ." (CP 139). "Seller" is defined in the Listing Agreement, but only states that it includes a "Landlord and Tenant." (CP 139).

RCW 26.09.080 requires the superior court to divide the parties' property in a divorce. *See In re: Marriage of Kaseburg*, 126 Wn. 546, 556, 108 P. 3d 1278 (2005). Both parties signed the Listing Agreement because both had an interest in the property. (CP 25). No reasonable argument exists that Lakemont could sell the house without both Ms. Lopinto's and Mr. Cox's signatures and consent.

Lakemont's argument that the use of a virgule between the names Anne Bell and Wm. Cox imposes joint liability is contrary to the parties' intent, the circumstances under which they entered the Listing Agreement

and Washington law. No term in the Decree of Dissolution or in the Listing Agreement imposed joint liability on Ms. Lopinto or Mr. Cox for the real estate commission in the event that the other breached his or her obligation to sell the property. No part of the record offers any evidence that Lakemont asked for or that Ms. Lopinto and Mr. Cox promised joint liability for the other's breach of the Listing Agreement. The only reasonable interpretation of the Listing Agreement in these circumstances is that two separate people made separate promises to sell one piece of property in which each had an interest pursuant to a Decree of Dissolution.

Under the Listing Agreement, "Seller" meant both Ms. Lopinto and Mr. Cox. That does not mean, however, that each is responsible for the other's performance. Additionally, Lakemont was not entitled to a commission from Ms. Lopinto under the terms of the Listing Agreement. Under the "procures a buyer" portion of paragraph 8 of the Listing Agreement, liability only arises "at the time of the closing, or upon the occurrence of any action provided foer in sections 'a' or 'f' below." (CP 139). The sale did not close. Therefore, Ms. Lopinto was not liable under that clause. Additionally, Ms. Lopinto did not withdraw the property from sale under paragraph section "f" 8. (CP 140). Therefore, she was not liable for any commission under the terms of that section of the Listing Agreement.

When the court looks at the extrinsic evidence, the only reasonable interpretation of "Anne Bell/ Wm. Cox" is that the Listing Agreement required both signatures to perform and that each person was only required to perform only his or her part of the Listing Agreement. If Lakemont wanted it some other way, it should attempted to add a clause requiring joint liability.

2. Lakemont incorrectly applies commercial law cases interpreting a virgule on UCC negotiable instruments to the issue of whether a virgule imposes joint liability to separate parties to a contract.

None of the cases Lakemont cites interpreting a virgule in the context of a check or other negotiable instrument applies to interpretation of whether separate parties to a contract are jointly liable for obligations under a contract when the party who completed the form used a virgule to separate the parties' names. Lakemont incorrectly argues that no distinction exists between the use of a virgule in commercial law and the use of a virgule by the drafter of a contract to separate the names of separate parties to the contract. (Brief of Respondent, 16).[1]

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[1] Lakemont states, "Ms. Lopinto's distinction [between commercial and contract law] has no merit. The court's interpretation of a virgule in *Mumma* was not based on some peculiarity in commercial law." (Brief of Respondent, 16).

Jan Mumma endorsed a check to "Fidelity/ JHL & Associates." *Mumma v. Ranier Nat. Bank*, 60 Wn. App. 937, 938, 808 P. 2d 767 (1991), *reconsid. denied.* After JHL, her investment advisor, became insolvent, she claimed that she intended that Fidelity, as well as JHL & Associates, would have to endorse the check before it was properly endorsed. *Id.*

Mumma contended that the "slash is ambiguous and, therefore, under RCW 62A.3-116, her check was not payable in the alternative." *Id.* at 938-939. Ranier Bank contended that the slash, or virgule, meant "or" and that the check was payable in the alternative. *Id.* at 939. The Court of Appeals stated that the case was "an issue of first impression in Washington." It analyzed the case under RCW 62A.3-116[2] that provided the rule for circumstances in which a negotiable instrument is payable to two people with a virgule between their names.

The entire analysis in *Mumma* dealt with whether the virgule meant that both payees needed to endorse or only one. *See* 60 Wn. App. at 939-40. It cited numerous cases from other jurisdictions that analyzed the use of a virgule on a negotiable instrument. *Id.* at 939-40. For example, *Mumma* cited *Ryland Group v. Gwinett County Bank*, 151 Ga. App. 148,

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[2] 62A.3-116 was recodified with revisions in RCW 62A.3-110. Laws of 1993, ch. 229 § 12.

259 S.E.2d 152 (1979) in which the court dealt with the same issue of the use of a virgule in a negotiable instrument and cited Georgia Commercial Code section 109A-3 116.

Article 3 applies only to negotiable instruments. RCW 62A.3-102 (a). Interpretation under negotiable instruments applies the statutory rules of Article 3, not the rules of contract law interpretation. *See Schwab v. Getty*, 145 Wn. 66, 70, 258 P. 1035 (1927) (pre UCC law involving negotiable instruments does not apply to simple contracts). *See generally Negotiable Instruments - A Comparison of Washington Law and the Uniform Commercial Code*, 38 Wash. L. Rev. 719, 740 (1963). The court does not engage in the same analysis of contract interpretation when it interprets negotiable instruments because the purpose of Article 3 is to eliminate defenses that the maker of negotiable instruments would have against a holder in due course. *See e.g.*, *Wesche v. Martin*, 64 Wn. App. 1, 8-9, 822 P.2d 812 (1992). Additionally, RCW 62A.3-116 contains a specific rule on joint liability.

The Listing Agreement is not a negotiable instrument governed by the rules of construction of Article 3 that limit the court's ability to look at the parties' intent when the entered the contract. As a result, the court does not follow Article 3 rules on payees separated by a virgule to determine liability on the Listing Agreement, but looks at the intent of the

parties to the Listing Agreement to determine if joint or individual liability was intended.

3. Lakemont's argument that the use of a virgule between names on the Listing Agreement creates joint liability without a promise of joint liability is not supported by any reasonable interpretation of law or facts.

No authority supports Lakemont's argument that the use of a virgule in a listing agreement imposes joint liability on separate parties. Therefore, it attempts to graft commercial law rules regarding the interpretation of a virgule on a negotiable instrument to create the illogical conclusion that the virgule created a joint obligation in the Listing Agreement.

Lakemont argues the virgule means "or" in the Listing Agreement[3]; the "or" has an inclusive meaning[4]; and that or can only mean "A or B, or both."[5] Lakemont's argument that the virgule creates joint liability is based on a disjointed application of *Mumma* and cases cited in it and out-of-state cases interpreting out-of-state statutes.

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[3] Brief of Respondent, 15.
[4] Brief of Respondent, 17.
[5] Brief of Respondent, 18.

Lakemont's claim that the virgule means "or" is based *Mumma* v. *Rainier National Bank.*[6] (Brief of Respondent, 15). Lakemont incorrectly claims that "the Court's interpretation of a virgule in *Mumma* was not based on some peculiarity of commercial law. (Brief of Respondent, 16). *Mumma* was not based on a "peculiarity" of commercial law, but on the normal rules of construction that apply to negotiable instruments and is limited to commercial law cases.

The issue in *Mumma* was whether payees on a check, separated by a virgule, were both required to sign the check for it to be properly negotiable. *See* 60 Wn. App. at 768. The "6 cases"[7] that *Mumma* cited and that Lakemont cites for the proposition that a virgule means "or" interpret those jurisdictions' versions of Article 3. *Dynalectron Corp. v. Equitable Trust Co.*, 704 F.2d 737 (4th Cir.1983) (checks payable to Shrader, Inc./ Dynacom" and interpreted under commercial code of Maryland Md. Comm. Law § 3-116 and other sections); *L.B. Smith, Inc. v. Bankers Trust Co. of W. New York*, 80 A.D.2d 496, 439 N.Y.S.2d 543 (1981), *aff'd*, 55 N.Y.2d 942, 449 N.Y.S.2d 192, 434 N.E.2d 261 (1982) ("The narrow question we face . . . is whether a check to the order of two payees whose names are separated by the symbol (/), a slash or diagonal

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[6] 60 Wn. App. 937, 808 P.2d 767 (1991).
[7] Brief of Respondent, 16.

line, known as a virgule, is an alternative direction to pay either or a direction to pay to both jointly."); *Brown Strober Bldg. Supply Corp. v. Living House, Inc.*, 107 Misc.2d 294, 433 N.Y.S.2d 724 (1980) (Under UCC 3-116, "The central issue before the Court is whether an instrument where the payees are "Brown Strober/Moon Raker Construction" is drawn in the alternative."); *Miron Rapid Mix Concrete Corp. v. Bank Hapoalim, B.M.*, 105 Misc.2d 630, 432 N.Y.S.2d 776 (1980) (determining whether a check payable to Revel/ Miron Ready Mix was payable to either or both); *Dynalectron Corp. v. Union First Nat'l Bank*, 488 F.Supp. 868 (D.C.D.C.1980) (check payable to "Shrader, Inc./ Dynacom interpreted under District of Columbia's UCC); *Ryland Group, Inc. v. Gwinnett Cy. Bank*, 151 Ga.App. 148, 259 S.E.2d 152 (1979) (check payable to Jack Harper/ Plymart interpreted under Georgia's UCC) .

Mumma specifically rejected cases that interpreted a virgule as meaning "and" because it was not going to "transport the particularities of a particular business usage into the code of commercial law." 60 Wn. App. at 940. Additionally, *J.R. Simplot, Inc. v. Knight* recognized that *Mumma's* interpretation of a virgule was limited to commercial law cases. *See* 139 Wn. 2d 534, 541, 988 P.2d 955 (1999) (A "virgule unequivocally means 'or' and denotes a choice between the two named payees.").

Lakemont's argument that a virgule has an inclusive meaning of "one or the other, or both" is based only on a conglomeration of out-of-state cases that interpret state statutes and a power of attorney. *Burke v. State ex rel. Dept. of Land Conservation and Development*[8] deals with the use of the word "or" in the context of the interpretation of Oregon Measure 49 that was codified in Oregon Revised Statute (ORS) 195.300(18). It is instructive on the ambiguity created with the use of the term "or" in legislative drafting, but does not provide any guidance on issue of the intent of the parties to this case. Similarly, while interesting for their consideration of the semantics of "or" in statutory construction, the unpublished Tennessee court of appeals case interpreting a power of attorney,[9] the Colorado case interpreting "or" in the context of Colorado's homestead statute,[10] and the Montana case considering "or" in in a Montana criminal statute regarding lesser included offenses[11] do not provide any assistance on the issues in this case.

Based on Washington law and the parties' intent that Ms. Lopinto and Mr. Cox sell their house, the only construction that makes sense is that

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[8] 352 Or. 428, 435-36, 290 P.3d 790 (2012).

[9] *Davis v. Kindred Healthcare Operating Inc.*, 2011 WL 1467212 (Tenn. Ct. App. 2011) (interpreting the use of "and" in a power of attorney).

[10] *In re: Matter of Estate of Dodge*, 685 P.2d 260, 265-66 (Colo. App. 1984).

[11] *State v. Molenda*, 358 Mont. 1, 243 P.3d 387 (2010) (consideration of "or" in a statute for lesser included offenses).

they both employed Lakemont and contracted to sell. Each was responsible for his or her performance, but not the other's. Lakemont has failed to offer any testimony on the evidence of the parties to contradict this interpretation.

C. Washington law does not assume a joint obligation when separate people enter an agreement regarding real property.

Contrary to Lakemont's bald assertion, that "*Turner* is not applicable to the facts of this case[,]"[12] *Turner* controls and prevents joint liability without some promise or intent to impose joint liability. In *Turner v. Gunderson*, the Court of Appeals recognized that a contract that did not contain any express statement that two separate parties to a contract agreed to be jointly liable for the other's performance created separate obligations. *See* 60 Wn. App. 696, 704, 807 P. 2d 370 (1991). Therefore, the court recognized that the selling party could not seek damages from Turner, the purchasing party who performed his obligation under the contract, for Ingram's failure to perform his obligations under the same contract. *Id.*[13]

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[12] Brief of Respondent, 25.

[13] Lakemont incorrectly claims that Ms. Lopinto misstates *Turner* in her brief. (Respondent's Brief, 24). The court can see that Ms. Lopinto correctly infers that *Turner* supports the proposition that "a contract is ambiguous when it does not explain whether joint purchasers are liable." (Brief of Appellant, 10).

Lakemont incorrectly claims, "In *Turner* the Court found the contract ambiguous on the question of joint liability, not because of the [sic] contract failed to expressly state that the two parties were liable." (Brief of Respondent, 24). In *Turner,* court noted that Turner and Ingram signed an agreement to purchase property individually. *Id.* at 698. There was no mention of a partnership agreement. *Id.*

The trial court ruled that Turner was not liable for Ingram's breach of contract to purchase the property. *Id.* at 699. The Gundersons, the sellers of the property, appealed and argued that Turner was liable for Ingram's failure to perform the contract as a "joint obligor." *Id.* at 704. The court noted that the contract did not "**expressly state**" whether the Gundersons agreed to look to Ingram for one-half of the down payment and to Turner for the other half . . . ." *Id.* (emphasis added). It also noted that there was "no reference in the contract to partnership liability." *Id.*

Lakemont correctly quotes the part from *Turner* in which the court indicates that Turner was not liable for the Ingram's breach because the contract did not expressly state that he was; however, it fails to apply the quoted language correctly. Additionally, it omits the fact that the court noted that there was no reference in the contract to partnership liability. *Id.*

As in *Turner*, Lakemont's contract does not contain any term creating joint liability. Furthermore, the only extrinsic evidence, the fact that they were ordered to sell the property in a divorce decree, supports Ms. Lopinto's claim that she was not jointly liable to sell the property.

Lakemont fails to cite one case that imposes joint liability in a contract from the use of a virgule to separate names in the contract. Instead, it attempts to impose joint liability by applying the use of a virgule on negotiable instruments.[14] Lakement also misinterprets Ms. Lopinto's position.[15]

Ms. Lopinto does not assume that all obligations under a contract must be joint in order for a contract to be joint. She argues that, as in *Turner,* separate liability exists when no evidence or intent shows any promise of joint liability when separate people enter a contract. As in *Turner*, because Ms. Lopinto and Mr. Cox had to separately perform, separate liability is the only reasonable conclusion in this case.

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[14] Lakemont claims that the virgule is inclusive and creates joint liability. (Brief of Respondent, 22).

[15] Lakemont claims that Ms. Lopinto assumes that "an obligation under a contract is joint only if all obligations under the contract are joint." (Brief of Respondent, 23).

D. The doctrine of supervening impracticability in the Restatement (Second) of Contract sections 261 and 264 applies to discharge Ms. Lopinto of the obligation to pay damages because a court order made her performance impracticable.

The general rule governing impracticability of performance is stated in section 261 of the Restatement (Second) of Contracts. Restatement (Second) of Contracts, 11, intro. note (1981). The three common specific instances of impracticability are contained in sections 262, 263 and 264. *Id.* The rationale of the doctrines of impracticability and frustration is that there was a "basis assumption on which the contract was made." *Id.*; *see also* Restatement (Second) of Contracts, §2 cmt. f. In order for them to have such a basic assumption, it is "not necessary for them to have been conscious of the alternatives." Restatement (Second) of Contracts, 11, intro. note. Under the rationale of the Restatement, "the obligor is relieved of his duty because the contract, having been made on a different 'basic assumption,' is regarded as not covering the case that has arisen." *Id.* Ordinarily, the way to deal with the omitted case is to hold the obligor's duty is discharged. *Id.*

Section 264 of the Restatement (Second) of Contracts is the specific Restatement (Second) section applicable to this case because the superior court order that allowed Mr. Cox to purchase the property

prevented Ms. Lopinto from selling the property.[16] As stated in comment 1 to section 264 of the Restatement (Second) of Contracts, "if supervening governmental action prohibits a performance or imposes requirements that make it impracticable, the duty to render that performance is discharged, subject to the qualifications of § 261." Under the Restatement, the regulation or order may emanate from "any level of government." Restatement (Second) of Contracts § 264, comment b. The only requirement is that the party seeking to invoke Section 264 must have observed a duty of good faith and fair dealing, where appropriate, to avoid its application. *Id.*

Restatement sections 261 and 264 directly apply to discharge Ms. Lopinto's duty to pay a commission because the basic assumption of the listing agreement was that she would be able to sell the house. Ms. Lopinto filed a motion to force the sale of the property when Mr. Cox would not sign the purchase and sale agreement. (CP 70).[17] The basic assumption of the Listing Agreement, the ability to sell the house, was

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[16] Mr. Cox cannot use the Restatement (Second) of Contracts to relieve himself of the obligations of the Listing Agreement because he caused the event that led to his failure to perform. *See* Restatement (Second) of Contracts § 261 cmt. f.

[17] Ms. Lopinto stated in her motion to force a sale that she was fearful that she would be subject to a lawsuit and have to defend herself for failure to abide by the terms of the offer to purchase. (CP 70).

changed when the court entered the order allowing Mr. Cox to buy the house. (CP 29).

Lakemont offers no reasonable argument to prevent the application of section 264 to this case.[18] Instead, Lakemont spends approximately 4 pages of its Brief of Appellant arguing that Ms. Lopinto should have applied Restatement (Second) of Contracts § 265 (1981). (See Brief of Appellant, 31-35). Ms. Lopinto did not argue section 265 of the Restatement (Second) because the comments to section 265 show that it does not apply to this case. Section 265 "deals with the problem that arises when a change in circumstances **makes one party's performance virtually worthless to the other**, frustrating his purpose in making the contract. It is distinct from the problem of impracticability dealt with in the four preceding sections because there is no impediment to performance by either party." Restatement (Second) of Contracts § 265 cmt. a (emphasis added).

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[18] Lakemont claims that Ms. Lopinto "overlooked" the supreme court opinion at *Washington State Hop Producers, Inc., Liquidation Trust v. Goschie Farms, Inc.*, 112 Wn. 2d 694, 773 P.2d 70 (1989) that affirmed the court of appeals' decision in *Washington State Hop Producers, Inc., Liquidation Trust v. Goschie Farms, Inc.*, 51 Wn. App. 484, 489-90, 757 P.2d 139 (1988). (Brief of Respondent, 31). Ms. Lopinto did overlook the subsequent history; however, it does not affect the validity of her statement that the court of appeals adopted the Restatement (Second) of Contracts § 261. (Brief of Appellant, 17).

The Order modifying of the Decree of Dissolution did not make Ms. Lopinto's performance worthless to Lakemont. The Order prevented the sale; therefore, section 264 applied, not section 265. Under section 264 Ms. Lopinto was discharged from any obligation to pay a commission by the court's order allowing Mr. Cox to purchase the property.

Lakemont makes numerous arguments as to why section 265 of the Restatement (Second) of Contracts does not apply. (Brief of Respondent, 31-43). Ms. Lopinto has never claimed that section 265 applies. Therefore, she will not address Lakemont's arguments, except the argument that it should receive restitution. (Brief of Respondent, 42-43).[19] RAP 9.12 states that on review of an order granting or denying summary judgment that "the appellate court will consider only evidence and issues called to the attention of the trial court." Lakemont not only failed to argue restitution in its summary judgment briefing, it failed to make a claim for restitution in its complaint. (CP 3-5).

Lakemont makes only a cursory argument in its brief that Restatement (Second) of Contracts § 264 does not apply. (Brief of Respondent, 46-47). Lakemont makes two main arguments in an attempt

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[19] Lakemont argues that the decree of dissolution did not award Ms. Lopinto and Mr. Cox separate property interests in the home. (Brief of Respondent, 35). The home was ordered sold, and each would receive half of the net proceeds from the sale. (CP 18, 25). The right to proceeds from the court ordered sale of a house is an interest in the house.

Ms. Lopinto's duties under section 264. First, it argues that "the sale of the home to Mr. Cox did not prevent Ms. Lopinto from paying the commission. She could still perform that duty." (Brief of Respondent, 46).

Lakemont does not apply a proper section 264 analysis. The assumption was that Ms. Lopinto would have a house to sell, as ordered in the Decree. When the court modified the Decree to allow Mr. Cox to buy the house, it destroyed the basic assumption of the contract. Therefore, Ms. Lopinto's duties under the contract were discharged. She has no legal obligation to pay a commission if the court finds she is discharged, even though nothing specifically prevents her from paying the commission.

Lakemont argues, without citation to authority, "In order to establish the defense of impossibility Ms. Lopinto must show the existence of four elements." (Brief of Respondent, 43-44).[20] The four elements that Lakemont claims apply appear to be a general summary of the elements of a claim from *Cannon v. Huhnforf*, 67 Wn. 2d 778, 409 P.2d 865 (1966) (pre Restatement (Second)) and sections 261 and 263 of the Restatement (Second) of Contracts. *See Public Utility Dist. No. 1 of Lewis Co. v. Washington Public Power Supply System*, 104 Wn. 2d 353,

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[20] It does not specifically say that section 261 requires those four elements, but seems to imply it. (Brief of Appellant, 43-44).

363-64, 705 P.2d 1195 (1985) (court explained elements of impossibility or impracticability claim).

The claimed elements are not the same as the Restatement (Second) sections in 261 and 264. Section 261 states,

> Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

Section 264 of the Restatement (Second) states, "If the performance of a duty is made impracticable by having to comply with a domestic or foreign governmental regulation or order, that regulation or order is an event the non-occurrence of which was a basic assumption on which the contract was made."

Ms. Lopinto's claim that the court order prevented her from selling the property falls squarely within section 264 of the Restatement (Second). As a result, the court should discharge her of the obligation to pay the commission.

Lakemont offers no applicable authority or reasonable justification to avoid application of section 264. It claims that there was no frustration of purpose by alleging that the frustration was in Mr. Cox not paying as he

was required.[21] The Listing Agreement was entered sell the house. When the court prohibited the sale, it destroyed the basic assumption, that the parties had a house to sell. Mr. Cox not paying is a separate issue from whether the court order discharged Ms. Lopinto's duty.

Lakemont incorrectly claims that Ms. Lopinto presented "no evidence at the trial court that she objected to entry of the order."[22] Ms. Lopinto moved for an order to force the sale of the house. (CP 87). After she lost and the court allowed Mr. Cox to purchase the house, no authority required her to make futilely object to entry of the order. Similarly, Ms. Lopinto had no duty to appeal the order as Lakemont claims.[23] In support of its claim that Ms. Lopinto had an obligation to appeal, Lakemont cites section 265 of the Restatement (Second), not section 264.[24] Also, the section 265 comment cited by Lakemont does not support its position. The comment indicates that if there is a procedure for an exemption from a regulation that the person affected by the regulation has the duty to apply for the exemption. Restatement (Second) of Contracts § 265 cmt. b, ill. 7. Any level of order will suffice as a basis for discharge under section 264. Restatement (Second) of Contracts § 264 cmt. b.

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[21] Brief of Respondent, 36.
[22] Brief of Respondent, 39.
[23] Brief of Respondent, 40 ("She is also required to seek relief from the order, either by way of a request for reconsideration or appeal.").
[24] Brief of Respondent, 40.

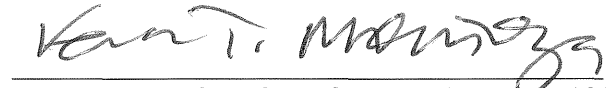
Lakemont illogically argues that Ms. Lopinto is liable for the commission because the amount Mr. Cox paid her was net of the commission. (See Brief of Respondent, 41-42). The payment to Ms. Lopinto net of the commission supports her position. If the court deducted the commission before Ms. Lopinto's payoff was calculated, she did not receive the money to pay the commission. The court reducing her equity by the commission means that the court assumed Mr. Cox, not Ms. Lopinto, would pay the commission from the value that he was required to pay her.

II. CONCLUSION

Based on the foregoing and the Brief of Appellant, Ms. Lopinto respectfully requests that the Court of Appeals reverse the order of the trial court, award attorney's fees and costs to Mr. Lopinto for the appeal and remand to the trial court for entry of an order of dismissal of Lakemont's claims, with fees and costs to Ms. Lopinto.

Respectfully submitted this 7th day of April, 2014.

MONTOYA HINCKLEY PLLC
Attorneys for Appellant Anne Lopinto



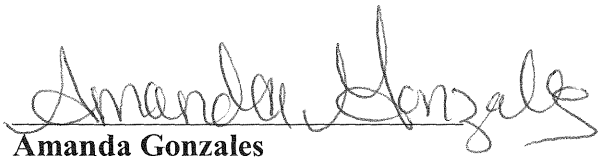
KEVAN TINO MONTOYA, WSBA No. 19212

CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury under the laws of the state of Washington that on the date stated below I served a copy of this document in the manner indicated:

Brad L Englund Englund Law P.S. 105 S. Third St., # 105 Yakima, WA 98901	☒ First Class U.S. Mail ☐ Email ☐ Hand Delivery ☐ FedEx Next Day
Clerk of Court Court of Appeals, Division III 500 N. Cedar Street Spokane, WA 99201-2159	☒ First Class U.S. Mail ☐ Email ☐ Hand Delivery ☐ FedEx Next Day

DATED at Yakima, Washington, this 7th day of April, 2014.



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