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**MAR 06 2014**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 320065

COURT OF APPEALS, DIVISION III  
STATE OF WASHINGTON

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

Respondent,

v.

WILLIAM T. COX, a single person,

Defendant,

and ANNE M. LOPINTO, as her separate estate,

Appellant.

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BRIEF OF RESPONDENT

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BRAD L ENGLUND  
Attorney for Respondent

Englund Law, P.S.  
105 South Third Street #105  
Yakima, WA 98901  
(509) 452-8686  
WSBA No. 14908

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## ISSUES PRESENTED FOR REVIEW

ISSUE 1: Whether the trial court correctly determined that Respondent earned its commission under the listing agreement.

ISSUE 2: Whether the trial court correctly determined that Respondent is entitled to prejudgment interest on its commission.

ISSUE 3: Whether the trial court correctly determined that Appellant is jointly and severally liable with Defendant William Cox for the commission, and her liability was not discharged under the doctrine of impossibility.

ISSUE 4: Whether Respondent is entitled to recover its attorney fees on appeal.

## STATEMENT OF THE CASE

In 2005, Appellant Anne M. Lopinto, (formerly known as Anne M. Bell) and Defendant William Cox were parties to a dissolution action under Yakima County Superior Court Cause No. 02-3-00389-6. (CP 15 – 18.) A decree of dissolution was entered in that action on April 1, 2005. (*Id.*) The decree did not award the home to either party. The decree required Ms. Lopinto and Mr. Cox to sell the home, and it awarded each

one-half of the future net proceeds that would come from the sale of the home. (CP 19, 21, 25.) The court retained jurisdiction to deal with issues pertaining to the sale of the home that might arise. (CP 25.)

On April 14, 2005, Ms. Lopinto and Mr. Cox entered into an exclusive listing agreement with Respondent Lakemont Real Estate. (CP 139-43.) The relevant provisions of the listing agreement are the following:

“1. EXCLUSIVE RIGHT TO SELL: ANNE BELL/WM COX (hereinafter referred to as “Seller”) employs and grants LAKEMONT REAL ESTATE . . . the exclusive and irrevocable right to sell the real property . . . . (CP 139.)

8. COMPENSATION TO BROKER: . . . Seller hereby agrees to pay Broker, 6% of the purchase price . . . as compensation for Broker’s service, at the time of closing, or upon the occurrence of any action provided for in sections “a” or “f” below. Seller agrees to pay the compensation if (1) a broker procures a buyer on the terms set forth in Paragraph 6 above, or on any other terms acceptable to Seller; or (2) Seller directly or indirectly or through any other person or entity other than Broker, during the term hereof, enters into an agreement to sell the Property.

...

f. Should a sale of the Property be pending under the terms of this Agreement, Seller agrees to pay Broker the above compensation if Seller withdraws the property from the sale or exchange or otherwise prevents performance by buyer or a Broker without the consent

of that broker . . .

Lakemont procured a buyer of the home (CP 4, 6, 148), and on July 19, 2005, Ms. Lopinto and Mr. Cox entered into a Residential Purchase and Sale Agreement with a Mr. Robert Allgaier, under which they agreed to sell their home for \$495,000. (CP 145-155.) The purchase agreement provided that the sale was to close “not later than Aug 15, 2005.” (CP 155.) Paragraph 7 of the purchase agreement provided that the August 15, 2005, date “shall be the termination date of this Agreement.”<sup>1</sup> (CP 144.)

By August 12, 2005, all parties had signed the documents to close the sale of the home to Robert Allgaier, except for Mr. Cox. (CP 64.) The August 15, 2005, deadline for the closing passed without Mr. Cox signing the documents. (*Id.*) He changed his mind and decided he wanted to keep the home. (CP 89.) Because of Mr. Cox’s failure to sign the closing documents the sale of the home did not close. (CP 64.) Lakemont did not consent to Mr. Cox’s failure to sign. (*Id.*)

On August 17, 2005, Ms. Lopinto filed a Rule 70 motion in the dissolution action seeking an order requiring Mr. Cox to sign the closing documents for the sale of the home. (CP 87.) In response to that motion

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<sup>1</sup> The “Sept 30, 2005” date in Paragraph 7 of the agreement was changed to August 15, 2005, by amendment. (CP 155.)

Mr. Cox filed a sworn statement in which he said:

“I have determined that I would like to stay in the residence which is the subject of sale if that is possible.”

(CP 89.) Defendant Cox further offered to pay to Ms. Lopinto “the \$36,250.95 in net proceeds that she has coming from the Allgaier sale.”

(*Id.*) He further asked that an order be entered requiring him to “hold her harmless on any liability relating to the sale not closing with the current buyer.” (*Id.*) Finally, he attached to his sworn statement a copy of a cashier’s check in the amount of \$36,274.79, which he said “is the payoff figure plus two days of interest at the rate of 12%.” (CP 89, 91.) He further stated that this amount:

“would allow Anne to have what she wanted out of this case---the proceeds from the sale of the house---and I would hold her harmless from all liabilities with regard to the house and its current potential sale. . . . This would enable Anne to have all that she is entitled from the house and to allow me to purchase the house if I am able to do so.”

(CP 89.)

The hearing on Ms. Lopinto’s Rule 70 motion was held August 19, 2005. At the hearing the court entered an order stating:

“Dr. Cox will be allowed to purchase the home at 7001 Englewood on the condition that he pays Anne Bell for her interest in the property \$36,247.74 by 8/19/05. If that amount is less than what Anne Bell would receive from the 8/15/05 closing per Pacific Alliance, Dr. Cox will pay the difference w/in one week. Dr. Cox will hold Anne Bell

harmless from all liabilities associated with the purchase and sale agreement with Allgaier and the listing agreement with Lakemont. This is in lieu of the order of sale in the decree Exhibit E. Dr. Cox will provide the deed of trust set forth in Decree Ex. F by 8/23/05. The parties shall cooperate to sign necessary paperwork to accomplish the disposition of this house to Dr. Cox as set forth in this order.”

(CP 93.)<sup>2</sup> On February 27, 2006, Ms. Lopinto conveyed her interest in the home to Mr. Cox. (CP 95.)

Lakemont was not paid a commission on the failed sale to Robert Allgaier. (CP 64.) It sued both Mr. Cox and Ms. Lopinto for the commission. (CP 3-5.) A default was taken against Mr. Cox by Lakemont. (CP 59-60.)

In her Answer, Ms. Lopinto admitted each of the following facts:

“On or about April 14, 2005, Defendants entered into an exclusive listing agreement with Lakemont for the sale of their home . . . .

“Under the exclusive listing agreement Defendants agreed to pay to Lakemont a commission of six percent (6%) if Lakemont procured a buyer who was willing and able to purchase their home for \$495,000, payable in cash or with conventional financing, or on any other terms acceptable to Defendants.

“On or before August 15, 2005, Lakemont performed all its obligations under the listing agreement and procured a buyer who willing and able to purchase Defendants’ home for \$495,000.”

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<sup>2</sup> The August 19, 2005, order is referred to herein as the “August 2005 Order.”

(CP 4, 6.)

Ms. Lopinto asserted eight affirmative defenses: (i) failure to state a claim; (ii) res judicata; (iii) collateral estoppel; (iv) estoppel in pais; (v) payment; (vi) performance; (vii) impossibility; and (viii) interference with contractual performance. Ms. Lopinto also filed a cross claim against Mr. Cox. (CP 6, 9-13.)

Lakemont and Ms. Lopinto each moved for summary judgment. (CP 61-62, 193-94.) Ms. Lopinto also filed a motion against Lakemont for CR 11 sanctions. (CP 193-94.) The trial court granted Lakemont's motion and denied both of Ms. Lopinto's motions. (CP 333-335.)

Lakemont obtained an order under CR 54(b) directing entry of final judgment on its complaint and on all defenses to the complaint. (CP 336-338.) On October 1, 2013, Lakemont was awarded a judgment against both Ms. Lopinto and Mr. Cox, jointly and severally, in the amount of \$75,647.40, which was comprised of: \$29,700.00 in principal, \$28,951.40 of prejudgment interest; \$311.00 of costs; and \$16,685.00 for attorney fees. (CP 339-341.) Ms. Lopinto filed the notice of appeal on October 16, 2013. (CP 342.)

On October 23, 2013, the trial court entered findings of fact, conclusions of law, and a judgment against Mr. Cox on Ms. Lopinto's cross-

claim. (CP 359-366.) No appeal has been taken of that judgment.

#### ARGUMENT

This is an appeal of a summary judgment. The standard of review was succinctly described in *Heg v. Alldredge*, 157 Wn.2d 154, 160-61, 137 P.3d 9 (2006):

When reviewing a summary judgment order we evaluate the matter de novo, performing the same inquiry as the trial court. Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. We consider the facts submitted and all reasonable inferences from those facts in the light most favorable to the nonmoving party. The motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion. (Citations omitted.)

As will be shown below, there are no issues of material fact and Lakemont is entitled to judgment as a matter of law. This Court should affirm.

This case presents four questions. First, did Lakemont earn its commission under the listing agreement? Second, is Lakemont entitled to recover prejudgment interest? Third, does the listing agreement require Anne Lopinto to pay any portion of the commission, and if so, how much? Fourth, is Lakemont entitled to recover its attorney fees on appeal? These four questions will be addressed in Points II – V below. Point I will address a defense raised by Ms. Lopinto for the first time on appeal.

POINT I.  
MS. LOPINTO'S AMBIGUITY ARGUMENT IS RAISED FOR THE  
FIRST TIME ON APPEAL AND SHOULD NOT BE CONSIDERED

RAP 9.12 states: "On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court." Based on this rule, the Court in *Sourakli v. Kyriakos, Inc.*, 144 Wn.App. 501, 509, 182 P.3d 985 (2008), stated: "An argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal." The purpose of RAP 9.12 "is to effectuate the rule that the appellate court engages in the same inquiry as the trial court." *Washington Fed'n of State Employees, Council 28, AFL-CIO v. Office of Fin. Mgt.*, 121 Wn.2d 152, 157, 849 P.2d 1201 (1993).

In Point B(1) of her brief, Ms. Lopinto argues that she has no liability under the listing agreement because "the language regarding whether the 'seller' withdrew the offer to sale is ambiguous." (Appellant's Brief, pp. 8 – 10.) She also asserts the agreement is ambiguous in Point B(2) of her brief. (*Id.*, pp. 12 – 13.) This argument is raised for the first time on appeal.

At the trial court Ms. Lopinto made only the following four arguments: First, the issue of her liability under the listing agreement had been

decided in another action, and the ruling in that action was *res judicata* in the present action. (CP 278-279, 285.) Second, the actions of Mr. Cox and the court in the dissolution action “made it impossible for Lopinto to ensure the conveyance to Allgaier,” thereby excusing her performance. (CP 279-80, 286.) Third, she cannot be jointly liable for the commissions because joint liability would be unfair. (CP 287.) And, fourth, there was no intent to create joint liability. (CP 287-288.) Ms. Lopinto never asserted that the agreement was ambiguous.

Ms. Lopinto’s argument on intent was not based on a claimed ambiguity in the agreement. Her complete argument on the “intent” issue was stated in two sentences:

“Here, Cox and Lopinto were divorced and undertook the dissolution to sever their legal relationship. It would be disingenuous to then apply joint liability under the listing agreement.”

(CP 288.) She provided no discussion of the terms of the listing agreement. She asserted no claim of ambiguity. Because Ms. Lopinto’s ambiguity defense was not raised below, the Court should not consider that defense on appeal.

POINT II.  
LAKEMONT EARNED ITS COMMISSION

Ms. Lopinto does not address the question of whether Lakemont

earned its commission. Because the motion for summary judgment will be reviewed de novo, Lakemont will show that a commission is owed. The question of whether Ms. Lopinto is liable for any portion of the commission is addressed in Point IV.

Although the sale of the home to Robert Allgaier never occurred, Lakemont still earned to its commission. Paragraph 8 of the listing agreement states when the commission is due:

“Seller agrees to pay Broker 6% of the purchase price . . . as compensation for Broker’s service, at the time of closing, or upon the occurrence of any action provided for in sections “a” or “f” below. Seller agrees to pay the commission if (1) broker procures a buyer on the terms set forth in Paragraph 6 above, or on any other terms acceptable to Seller; or (2) Seller directly or indirectly or through any other person or entity other than Broker, during the term hereof, enters into an agreement to sell the Property.”

(CP 139-40.) Under this language, Lakemont earned its commission if an event described in paragraph 8(f) occurs; or if Lakemont procures a buyer under the terms set forth in paragraph 6 of the listing agreement. Both of these events occurred. Therefore, Lakemont was owed its commission.

A. **The “Seller” Withdrew the Property from the Sale. The events described in Paragraph 8(f) occurred.**

Paragraph 8 of the listing agreement states that the “Seller” will pay the commission if the actions described in paragraph 8(f) occur. Paragraph 8(f) states:

“f. Should a sale of the Property be pending under the terms of this Agreement, Seller agrees to pay Broker the above compensation if Seller withdraws the property from the sale or exchange or otherwise prevents performance by buyer or a Broker without the consent of that Broker.”

This provision contains one covenant and two conditions. The covenant is: The Seller will pay the stated commission. The first condition is: The Seller withdraws the property from the sale or otherwise prevents performance by the buyer. The second condition is: Lakemont does not consent to the Seller’s actions. If the two conditions were satisfied, the covenant became operative and “Seller” owed the commission.

The purchase and sale agreement with Robert Allgaier (the “Allgaier Agreement”) required the sale to close no later than August 15, 2005. (CP 155.) The Allgaier Agreement further provided that if the sale did not close by August 15, 2005, the agreement terminated. (CP 144.)

The sale to Mr. Allgaier did not close by August 15, 2005, and the contract terminated. (CP 64.) Ms. Lopinto admitted the contract terminated in her August 17, 2005, affidavit. She stated: “The deadline has now come and gone. Hopefully the realtor can put the deal back together.” (CP 70.)

The reason the sale did not close was because Mr. Cox did not sign the closing documents. (CP 64.) Mr. Cox’s failure to sign the closing

documents by the termination date caused the home to be withdrawn from the sale. Alternatively, his non-performance prevented the buyer, Mr. Allgaier, from being able to perform. Either way, the first condition in paragraph 8(f) was satisfied on August 15, 2005. The second condition was also satisfied because Lakemont did not consent. (CP 64.)

Because both conditions in paragraph 8(f) were satisfied, the covenant by “Seller” to pay Lakemont’s commission became operative, Lakemont is owed its commission. There are no issues of material fact on the operation and effect of paragraph 8(f). The trial court correctly determined that Lakemont was owed its commission.

**B. Lakemont Earned its Commission Under the “Procuring a Buyer” Clause of the Listing Agreement.**

Independent of the provisions of paragraph 8(f), Lakemont also is entitled to its commission because it procured a buyer. Paragraph 8 of the listing agreement states: “Seller agrees to pay the commission if . . . broker procures a buyer on the terms set forth in Paragraph 6 above.” This clause contains a single covenant and a single condition. The covenant is for “Seller” to pay Lakemont’s commission. The condition is that Lakemont procures a buyer on the terms of paragraph 6 of the listing agreement.

In her Answer, Ms. Lopinto admits that Lakemont satisfied the condition. In paragraph 5 of her Answer she admits the condition: “De-

fendants agreed to pay to Lakemont a commission of six percent (6%) if Lakemont procured a buyer who was willing and able to purchase their home for \$495,000, payable in cash or with conventional financing . . .” (CP 4, 6.) In paragraph 6 she admits the condition was satisfied: “On or before August 15, 2005, Lakemont performed all its obligations under the listing agreement and procured a buyer who was willing and able to purchase Defendants’ home for \$495,000.” (CP 4, 6.) In short, Ms. Lopinto has admitted all of the facts necessary to establish Lakemont’s entitlement to its commission under the “procure the buyer” provisions of paragraph 8.

Pursuant to the plain language of the listing agreement, Lakemont performed by procuring a buyer and was entitled to a commission of \$29,700 at that time. See *Roger Crane & Associates, Inc. v. Felice*, 74 Wn.App. 769, 776, 875 P.2d 705 (1994): “A real estate broker is entitled to a commission when he or she procures a purchaser who is accepted by the principal and with whom the principal enters into a binding, enforceable contract.” See also *Agranoff v. Jay*, 9 Wn.App. 429, 435, 512 P.2d 1132 (1973) (when real estate broker procures a prospective buyer who is accepted by the seller, the broker has earned the promised commission).

There are no issues of material fact regarding the “procure the buyer” clause. The trial court correctly determined that Lakemont was

owed its commission.

POINT III.  
LAKEMONT IS ENTITLED TO PREJUDGMENT INTEREST

Ms. Lopinto does not assign error to the trial court's award of pre-judgment interest. As is shown above, conditions for paying Lakemont's commission were satisfied on August 15, 2005. Therefore, the commission became due on that date. The commission was never paid. (CP 64.) Lakemont is entitled to prejudgment interest from that date if the amount owing can be computed with exactness, without reliance on opinion or discretion. *Prier v. Refrigeration Engineering Co.*, 74 Wn.2d 25, 32, 442 P.2d 621 (1968). Here, the amount owing can be so calculated. Therefore, Lakemont is entitled to prejudgment interest on its commission from August 15, 2005, at the rate of 12% per annum. RCW 19.52.010(1).

POINT IV.  
MS. LOPINTO IS JOINTLY AND SEVERALLY LIABLE  
FOR LAKEMONT'S COMMISSION AND THE  
PREJUDGMENT INTEREST

Whether Ms. Lopinto has any liability for the commission depends on the meaning of the term "Seller" in the listing agreement. As will be shown below, term "Seller" refers to "Ms. Lopinto, or Mr. Cox, or both." The listing agreement imposes on Ms. Lopinto joint and several liability for the full amount of the commission. Lakemont will also respond to Ms.

Lopinto's argument the listing agreement is ambiguous. Finally, it will address her argument that the listing agreement became void because of the doctrine of supervening impracticability.

**A. The term "Seller" Refers to "Ms. Lopinto or Mr. Cox, or Both."**

In each instance where the listing agreement states that a commission is owed, the agreement specifies that the "Seller" will pay the commission. Ms. Lopinto is liable for the commission if she is considered to be the "Seller."

In the listing agreement the term "Seller" is defined as follows: "ANNE BELL/WM COX (hereinafter referred to as 'Seller')." (CP 139.) Anne Bell is Anne Lopinto. Thus, the nature of Ms. Lopinto's liability for the commission turns on the meaning of the virgule between her name and Mr. Cox's name.

In *Mumma v. Rainier Nat'l Bank*, 60 Wn.App. 937, 808 P.2d 767 (1991), the Court held that a virgule has a plain meaning, which "connotes disjunctive, or alternative, construction." *Id.* at 939 – 40. In short, the Court in *Mumma* ruled that a virgule means "or." This interpretation was approved by the Supreme Court in *J.R. Simplot, Inc. v. Knight*, 139 Wn.2d 534, 541, 988 P.2d 955 (1999), where the Court stated:

"Relying on dictionary definitions and cases from other ju-

risdictions, the court [in *Mumma*] concluded the plain meaning of the mark unequivocally means ‘or’ and denotes a choice between the two named payees.” (Underlining added.)

Ms. Lopinto argues that the *Mumma* case does not apply to the listing agreement because the *Mumma* case was “under the ‘code of commercial law.’” (Appellant’s Brief, p. 14.) Ms. Lopinto’s distinction has no merit. The Court’s interpretation of a virgule in *Mumma* was not based on some peculiarity in the commercial law. It was based on the dictionary definition of the symbol. After citing six cases for the proposition that a virgule means “or,” the court stated:

These decisions rely on dictionary definitions of “virgule”, which state that the symbol connotes disjunctive, or alternative, construction: “a short slanting stroke drawn between two words, usually and or (thus, and/or), and indicating that either may be used by the reader to interpret the sense.” *Ryland Group, Inc.*, 259 S.E.2d at 153 (quoting Webster’s New International Dictionary of the English Language, Second Edition, Unabridged (1961)); “a short oblique stroke (/) between two words indicating that whichever is appropriate may be chosen to complete the sense of the text in which they occur”. *L.B. Smith, Inc.*, 439 N.Y.S.2d at 544 n. 2 (quoting The Random House Dictionary of the English Language, Unabridged Edition [1967, 1966].

*Mumma, supra*, 60 Wn.App. at 940 (underlining added). As is pointed out above, the Supreme Court in *J.R. Simplot* acknowledged that *Mumma*’s interpretation of a virgule was based on dictionary definitions. *J.R. Sim-*

*plot*, 139 Wn.2d at 541. A virgule is not ambiguous. *Mumma, supra*, 60 Wn.App. at 939-40. It means “or.” That is the standard dictionary meaning of the term, not a meaning derived from a code of commercial law.

In the context of the listing agreement, the virgule, i.e., the “or,” has an inclusive meaning. It means “one or the other, or both.”

To say that “or” is “disjunctive” is true enough. But authorities agree that a disjunctive connector can have either an “inclusive” or an “exclusive” sense. Thus, “A or B” can mean one or the other, but not both. But it can also mean one or the other, *or both*.” (Italics in the original.)

*Burke v. State ex rel. Dept. of Land Conservation and Development*, 352 Or. 428, 435-36, 290 P.3d 790 (Or. 2012) (citing Bryan A. Garner, *A Dictionary of Modern Legal Usage*, p. 624 (2d ed. 1995)); *Davis v. Kindred Healthcare Operating, Inc.*, 2011 WL 1467212, n.2, W2010-01575-COA-R3-CV (Tenn.Ct.App. April 19, 2011) (“or” “can be used in both an ‘inclusive’ sense (‘A or B [or both]’) and an ‘exclusive’ sense (‘A or B [but not both]’”). In *Matter of Estate of Dodge*, 685 P.2d 260, 266 (Colo.App. 1984), the court stated:

“[T]he English word ‘or’ has two counterparts in Latin: (1) ‘vel (often referred to as the ‘inclusive or’), meaning A or B, or both; and (2) ‘aut’ (often referred to as the ‘exclusive or’), meaning A or B, but not both.”

See also *State v. Molenda*, 358 Mont. 1, 243 P.3d 387 (Mont. 2010), where the court stated:

“‘Or’ has an inclusive meaning as well as an exclusive meaning. Its meaning is usually inclusive—meaning ‘A or B, or both,’ as opposed to exclusive-meaning ‘A or B, but not both.’

*Molenda*, 243 P.3d at 390 (quoting Bryan A. Garner, *A Dictionary of Modern Legal Usage* 624, (2d ed. 1995)).

As is stated in *Molenda*, when used in a legal context, the word “or” usually has the inclusive meaning, i.e., the word “or” it contemplates “A or B, or both.” See also *Estate of Dodge, supra*, where the court stated: “[O]bservation of legal usage suggests that in most cases ‘or’ is used in the inclusive, rather than the exclusive, sense.” *Estate of Dodge*, 685 P.2d at 266 (quoting R. Dickerson, *The Fundamentals of Legal Drafting* 77 (1965)). The court in *Dodge* further stated:

“In fact, it simply ‘is not usual to interpret the ‘or’ in an alternative proposition as expressing the exclusion of one alternative. That is, ‘or’ is consistent with ‘perhaps both’; [and] the onus probandi lies on those who assert the logical interpretation of ‘or’ should be exclusive.”

*Estate of Dodge, supra* at 266, n. 1 (quoting Stebbing, *A Modern Introduction to Logic* 70-71 (6th ed. 1948)).

“Whether the disjunctive ‘or’ is inclusive or exclusive will depend on its context.” *Burke*, 352 Or. at 437, 290 P.3d 790 (Or. 2012); *Noell v. American Design, Inc. Profit Sharing Plan*, 764 F.2d 827, 833 (11th Cir. 1985); *Atchison v. City of Englewood*, 193 Colo. 367, 568 P.2d 13, 18

(Colo. 1977) (“In some usages, the word ‘or’ creates a multiple rather than an alternative obligation. Where necessary in interpreting an instrument, ‘or’ may be construed to mean ‘and’”).

“This rule is particularly applicable ‘if the remainder of the agreement shows that a reasonable person in the position of the parties would so understand it.’” *Noell, supra* (quoting 4 S. Williston, W. Jaeger, A Treatise on the Law of Contracts, Sec. 619 at 738 (1961)).

In applying these principles to the language of the listing agreement, it is clear that the virgule, i.e., the “or,” used in the definition of “Seller” has an inclusive meaning. The first sentence of the listing agreement shows this to be the case:

“1. EXCLUSIVE RIGHT TO SELL: ANNE BELL/WM COX (hereinafter referred to as “Seller”) employs and grants LAKEMONT REAL ESTATE . . . the exclusive and irrevocable right to sell the real property . . .”

It makes no sense for this clause to read: “Anne Lopinto *or* William Cox, *but not both*, employs and grants Lakemont the exclusive and irrevocable right to sell the real property.” The more natural and only reasonable reading of the clause is: “Anne Lopinto *or* William Cox, *or both*, employs and grants Lakemont the exclusive and irrevocable right to sell the real property.” That is how a reasonable person in the position of the parties would have so understood it. It does violence to the agreement to

interpret the virgule as meaning either Ms. Lopinto *or* Mr. Cox, but not both.

The plain meaning of the phrase “Anne Bell/Wm Cox” is actually “Anne Bell *or* Wm Cox *or both*.” Every place in the listing agreement where the word “Seller” is used, that word can be replaced with “Anne Lopinto or Mr. Cox, or both.” Using this substitution, paragraph 8(f) is correctly read as follows:

“. . . [Anne Lopinto or Mr. Cox, or both] agrees to pay Broker the above compensation if [Anne Lopinto or Mr. Cox, or both] withdraws the property from the sale. . .”

Importantly, Ms. Lopinto never says what she thinks the virgule means. She simply ignores its existence. But, the virgule has significance. It means “or,” in its inclusive sense.

**B. Ms. Lopinto has Joint and Several Liability for the Commission and Prejudgment Interest.**

When two people sign a contract promising a single performance the obligation is presumed to be a joint obligation. *Smith v. Doty*, 91 Wash. 315, 322, 157 P. 881 (1916) (“the joint note of the three persons who signed it, as the law, in the absence of a showing to the contrary, will presume it to be”); *Falaschi v. Yowell*, 24 Wn.App. 506, 509, n.2, 601 P.2d 989 (1979)(“when two or more persons undertake a contractual obligation they are presumed to undertake it jointly rather than severally or

jointly and severally”); *Abbott v. CUNA Mutual Ins. Soc.*, 102 Wn.App. 519, 522, 7 P.3d 852 (2000) (“Both Abbott and Epperly signed the loan documents. Thus, they became joint obligors of the credit union.”). In *Smith v. Washington Ins. Guar. Ass’n*, 77 Wn.App. 250, 258, 890 P.2d 1060 (1994), the Court stated the rule as follows:

“At common law, a joint contract is an agreement by all of the promissors that the act promised shall be done. It is treated as the single obligation of all jointly and the individual obligation of none. For any breach of the contract, there is but one cause of action and the joint obligors are jointly liable for the damages suffered by the obligee.”

In determining whether a contract creates a joint obligation, or a several obligation, or a joint and several obligation, the Court looks to the intent of the parties. *Smith v. Washington Ins. Guar. Ass’n, supra*. That intent is determined from the objective manifestations of the parties’ intent. *Lynott v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 123 Wn.2d 678, 684, 871 P.2d 146 (1994). “The terms of a binding agreement between parties are evidenced by their objective manifestation of mutual intent.” *Washington Federal Savings & Loan Association, v. Alsager*, 165 Wn. App. 10, 12, 266 P.3d 905 (2011). A party’s “unexpressed impressions are meaningless when attempting to ascertain the mutual intentions of the parties.” *Lynott, supra* (quoting *Dwelley v. Chesterfield*, 88 Wn.2d 331, 335, 560 P.2d 353 (1977)). Rather, a party is deemed to have “an

intention corresponding to the reasonable meaning of the words used.” *Hearst Communications, Inc., v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005). Courts “generally give words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent.” *Id.*

Here, there is nothing in the agreement that would suggest that Ms. Lopinto has a different obligation from Mr. Cox. Both agreed to perform a single obligation—i.e., to pay the commission if certain events occurred. The reasonable meaning of the words used by the parties in the listing agreement shows an intent that Ms. Lopinto and Mr. Cox are to be jointly liable.

In fact, the words used in the listing agreement show an intent that Ms. Lopinto and Mr. Cox be jointly and severally liable for the commission owed to Lakemont. As shown above, the virgule has an inclusive meaning, and the term “Seller” means “Ms. Lopinto, or Mr. Cox, or both.” In other words, when it comes to collecting its commission, Lakemont can seek collection from either Ms. Lopinto or Mr. Cox, or from both. This is the definition of joint and several liability. *Gerrard v. Craig*, 122 Wn.2d 288, 292, n. 6, 857 P.2d 1033 (1993) (joint and several liability is “when the creditor may sue one or more of the parties to such liability separately,

or all of them together at the creditor's option").

But, Ms. Lopinto argues, the contract cannot impose joint liability because "the obligee, Lakemont, knew it had to have two separate approvals by Ms. Lopinto and Mr. Cox to sign the purchase and sale agreement with Allgaier and two separate signatures to sell the property to Allgaier." (Appellant's Brief, p. 14.) This argument is based on the faulty assumption that an obligation under a contract is joint only if *all* obligations under the contract are joint.

The cases cited above speak in terms of a single obligation or a single act, rather than all obligations under the contract. See, e.g., *Smith v. Washington*, 77 Wn.App. at 258 ("At common law, a joint contract is an agreement by all of the promissors that *the act* promised shall be done")(emphasis added). The listing agreement imposes a single performance on Ms. Lopinto and Mr. Cox, which is to pay the commission if certain events occur. That is the single act at issue here. The listing agreement does not segregate Ms. Lopinto's obligation to pay the commission from Mr. Cox's obligation. Only a single performance is required. Either Ms. Lopinto will pay the commission, or Mr. Cox will, or both will.

Ms. Lopinto next raises an argument not raised in the trial court.

She argues that the obligation to pay the commission cannot be joint because the listing agreement is ambiguous, and an ambiguous contract is interpreted against the drafter. In support of her claim that the contract is ambiguous she cites *Turner v. Gunderson*, 60 Wn.App. 696, 807 P.2d 370 (1991). She says that *Turner* supports the proposition that a “contract is ambiguous when it does not explain whether joint purchasers are liable.” (Appellant’s Brief, p. 10.) Ms. Lopinto misstates *Turner*.

In *Turner* the Court found the contract ambiguous on the question of joint liability, not because of the contract failed to expressly state that the two parties were jointly liable. Rather, because the contract acknowledged receipt of one-half the required down payment from one of the two buyers. The relevant quote from *Turner* is:

The March 13, 1986 contract is ambiguous. It does not expressly state whether Gundersons agreed to look to Ingram for one-half of the down payment and to Turner for the other half, although it acknowledges one-half payment by Turner. However, subsequent correspondence reflects the parties’ intentions. For example, in their letter of January 21, 1987, Gundersons state that Turner performed by paying “his half”. He was not jointly obligated with Ingram.

*Turner, supra*, 60 Wn.App. at 704. The facts in this case are not the same as *Turner*. Nothing in this case suggests that the obligation to pay the commission is anything other than a single obligation. In fact, the use of

the term “Seller,” which was defined to mean either Ms. Lopinto or Mr. Cox, or both, refutes any suggestion that the listing agreement allocated the obligation to pay a commission between Ms. Lopinto and Mr. Cox.

*Turner* is not applicable to the facts of this case. In this case the listing agreement reflects a single obligation to pay a commission. It is a joint contract. “[A]n agreement by all of the promisors that the act promised shall be done, it is a joint contract.” *Turner, supra*, at 704. There is nothing in the agreement that shows a different intention.

The case of *Smith v. Washington Ins. Guar. Ass’n*, 77 Wn.App. 250, 890 P.2d 1060 (1994) is instructive on the type of evidence needed to overcome the presumption of joint liability. In *Smith v. Washington* a number of insurance companies agreed to fund a single large payment under a settlement agreement of \$750,000. Prior to a full funding of that amount some of the insurance companies became insolvent. The plaintiffs sought to impose joint liability on the remaining insurance companies so that the full \$750,000 would be paid. The Court held that there was no joint liability because settlement agreement’s arbitration provision would “establish each insurer’s percentage of responsibility for funding this Settlement Agreement.” *Smith v. Washington, supra* at 258. The settlement agreement in that case contemplated that each insurer would be responsi-

ble for a specific percentage of the total. Consequently, the Court concluded “that the parties did not intend to make the insurers jointly liable for the total amount.” *Id.*

Ms. Lopinto cites *Hanna v. Savage*, 8 Wash. 432, 36 P. 269 (1894), in support of her position. *Hanna* is not applicable for the same reason *Smith v. Washington* is not applicable. In *Hanna* the bond being sued upon set forth opposite each surety’s name the specific amount for which that surety would be liable. *Hanna*, 36 P. at 270. In this case the listing agreement does not allocate a separate amount of the commission that each Ms. Lopinto and Mr. Cox would owe. Rather, it lists a single, joint obligation.

The case of *Harrison v. Puga*, 4 Wn.App. 52, 65, 480 P.2d 247 (1971), is more to the point. The contract in *Harrison*, uses language similar in nature to the listing agreement:

The contract recitals state that ‘Harrison & Davis’ are desirous of entering into a cable television business in the Portland, Oregon market; that ‘Harrison & Davis’ desire ‘to form an Oregon corporation \* \* \*’ and ‘secure the personal services of Puga \* \* \* for said corporation.’ In the operative portion, paragraph four B states ‘Harrison and Davis agree.’ Defendant’s letter notice of December 13, 1967 treated the obligations of plaintiffs as joint. *It treated both plaintiffs as in default without attempt at segregation* even though plaintiff Harrison had paid more than his half share of the \$20,000.

*Harrison, supra* at 64-65 (italics added). In *Harrison*, the contract treated “Harrison & Davis” as a single obligor. There was no attempt to segregate their individual liability. As a result, they were held to be jointly liable.

The listing agreement treats Ms. Lopinto and Mr. Cox as a single obligor. They are identified by a single title “Seller.” References to Seller throughout the agreement are always in the singular. Nowhere in the listing agreement are the obligations of Seller divided between Ms. Lopinto and Mr. Cox. Under *Harrison*, Ms. Lopinto’s liability is joint. Because the virgule has an inclusive meaning, her liability is joint and several on both the commission, and on the prejudgment interest that accrued on the commission.

C. **The Listing Agreement is not Ambiguous.**

In the event the Court considers Ms. Lopinto’s argument that the listing agreement is ambiguous, Lakemont provides the following responsive argument.

A contract is ambiguous if it is susceptible of two different, reasonable interpretations. *Ladum v. Utility Cartage, Inc.*, 68 Wn.2d 109, 116, 411 P.2d 868 (1966). A court should not read an ambiguity into a contract that is otherwise clear and unambiguous. *Mayer v. Pierce County Medical Bureau, Inc.*, 80 Wn.App. 416, 420, 909 P.2d 1323 (1995).

Ms. Lopinto's claim of ambiguity is limited to the following language of paragraph 8(f):

“. . . Seller agrees to pay Broker the above compensation if Seller withdraws the property from the sale . . . .”

She says that this language is not clear as to “whether both sellers are liable if one seller withdraws from the sale, or if only one seller is [liable].” (Appellant's Brief, p. 9.)

The problem with Ms. Lopinto's claim is that the Agreement has only one “Seller,” not two “sellers.” Further, there is only one performance required by the “Seller” under paragraph 8(f), not two. Paragraph 8(f) contains a single condition and a single covenant. The condition is that the “Seller” withdraws the property from the sale. The covenant is that the “Seller” will pay the commission if that condition occurs.

As is pointed out above, the clause in paragraph 8(f) can be properly understood as follows:

“. . . [either Anne Lopinto or Wm. Cox, or both will] pay Broker the above compensation if [either of them, or both of them] withdraws the property from the sale . . . .”

This is the only reasonable interpretation.

For there to be an ambiguity, there must be two different, *reasonable* interpretations. Ms. Lopinto does not even suggest an alternative interpretation. So, there is no way to measure whether her interpretation is

reasonable, in light of the words used.

What Ms. Lopinto implies, but does not state, is that paragraph 8(f) should be read to require Mr. Cox to pay the commission if he is the one who caused the property to be withdrawn from the sale. This is not a reasonable interpretation. Nothing in the agreement supports that interpretation.

In order to find the ambiguity, Ms. Lopinto must ask the Court to ignore the virgule. If the Court considers the virgule, paragraph 8(f) is perfectly clear. Ignoring the virgule to create an ambiguity is not reasonable.

In order for Ms. Lopinto's implied interpretation to be reasonable, the Court will have to make many substantial changes to language of the agreement. The Court will have to change the virgule in the opening paragraph into a comma. It will also have to change the defined term "Seller" into "Sellers." And, it will have to change the first sentence of paragraph 8(f) to read as follows:

**"Should a sale of the Property be pending under the terms of this Agreement, the Applicable Seller, as that term is defined below, agrees to pay Broker the above compensation if the Applicable Seller withdraws the property from the sale . . . or otherwise prevents performance by buyer or a Broker without the consent of that Broker . . . . As used herein, the term "Applicable Seller" means the Seller who withdraws the property from the sale or otherwise**

**prevents performance. If both Sellers act to withdraw the property from the sale or act to prevent the sale, then Applicable Seller means both Sellers, but in that case each individual Seller will be liable for only one-half of the compensation.]”<sup>3</sup>**

Those changes will not be the only required changes. To change the term “Seller” is changed to “Sellers,” the Court will have to analyze every place where that term appears and make the appropriate adjustments to the text to describe the specific liability each will have under that clause.

For example, in paragraph 8 the Court will have to change: “Seller hereby agrees to pay Broker 6% of the purchase price . . .” into: “Sellers hereby agree to pay Broker 6% of the purchase price, **with each seller being responsible for only one-half of the 6%** . . .” Similar examples could be provided in almost every place the word “Seller” appears.

An interpretation that requires a substantial reworking of the agreement is not reasonable.

Finally, even if paragraph 8(f) is deemed ambiguous, summary judgment still was appropriate. Lakemont was entitled to recover its commission from the “Seller” under the “procure a buyer” provisions of paragraph 8. Therefore, regardless of how the Court resolves the claimed

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<sup>3</sup> The bolded language shows the changes Ms. Lopinto is asking the Court to make.

ambiguity of paragraph 8(f), the summary judgment below should be affirmed.

**D. The Doctrine of Supervening Impracticability does not Excuse Ms. Lopinto From Paying the Commission.**

Ms. Lopinto argues that the listing agreement is void for impracticability under Restatement (Second) of Contracts, § 261. She cites the Court of Appeals decision in *Washington State Hop Producers, Inc. Liquidation Trust v. Goschie Farms, Inc.*, 51 Wn.App. 484, 754 P.2d 139 (Wash. Ct. App. 1988), to support her position that Restatement (Second), § 261 is the proper rule.

Ms. Lopinto appears to have overlooked the Supreme Court's decision in that case. The Supreme Court held that Restatement (Second), of Contracts, § 265 applied to the facts of that case, and not section 261:

“The [Court of Appeals] cited Restatement (Second) of Contracts § 265 (1979) which states the rule for supervening frustration. We conclude that the appeal was denied on the basis of supervening frustration, although referred to as ‘supervening impracticability’ by the court.”

*Washington State Hop Producers, Inc., Liquidation Trust v. Goschie Farms, Inc.*, 112 Wn.2d 694, 696, 773 P.2d 70 (1989). Regarding the Court of Appeals' treatment of section 261 of the Restatement, the Supreme Court stated:

“The Court of Appeals referred also to section 261 of the

Restatement ("supervening impracticability"). Because we conclude that section 265 is dispositive of this case, we do not further consider the applicability of section 261.”

*Id.* at 696, n. 1.

Ms. Lopinto provides no argument about Restatement (Second), § 265, relying instead on Restatement (Second), § 261. But, she provides a lengthy discussion of the facts of *Washington State Hop Producers*. Thus, it is unclear whether she is relying on supervening impracticability doctrine of Restatement (Second), § 261, or the supervening frustration doctrine of Restatement (Second), § 265. Accordingly, Lakemont will address both doctrines.

**1. The Supervening Frustration Defense of Restatement (Second), § 265 does not Apply.**

The application of the doctrine of frustration is a question of law and not a question of fact. *Washington State Hop Producers*, 112 Wn.2d at 704. Ms. Lopinto describes the facts of *Washington State Hop Producers* in great detail, but she never explains how the facts of that case are relevant to the facts of this case. Because Restatement (Second), § 265 is fact specific, she cannot simply apply by way of analogy the outcome of *Washington State Hop Producers* to the facts of this case.

Restatement (Second), § 265, describes the supervening frustration defense as:

“Where, after a contract is made, a party's principal purpose is substantially frustrated 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 remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.”

*Washington State Hop Producers*, 112 Wn.2d at 700.

In order for this defense to apply, there must be: (i) a substantial frustration; (ii) of a principal purpose; (iii) which was a basic assumption on which the contract was made; (iv) the frustrating event must be without the fault of the party asserting the defense; and (v) the language of the contract or circumstances do not indicate that the defense should not apply.

The supervening frustration defense is not applicable to the listing agreement for six reasons. First, there was no substantial frustration of a principal purpose. Second, the principal purpose asserted by Ms. Lopinto was not a basic assumption on which the contract was made. Third, Ms. Lopinto provided no evidence that she objected to the entry of the order. Fourth, the language of the contract indicates that the defense should not apply. Fifth, the August 2005 Order contemplates that Lakemont's commission remained owing. Sixth, the obligation of restitution requires Ms. Lopinto to pay Lakemont's commission, so the defense serves no practical

purpose. These reasons will be discussed separately below.

**a. Ms. Lopinto has not Shown a Substantial Frustration of Ms. Lopinto's Principal Purpose for Entering into the Listing Agreement.**

In her brief Ms. Lopinto never identifies what her principal purpose was for entering into the listing agreement. She simply states:

“The parties assumed that [Ms.] Lopinto would be able to sell the house when they signed the Listing Agreement. The Court’s August 19, 2005, order prevented Ms. Lopinto from performing her contract with Lakemont because it allowed Mr. Cox to purchase the property.”

(Appellant’s Brief, p. 19-20.) Perhaps Ms. Lopinto is arguing that her principal purpose for entering into the listing agreement was to sell the property to a third party so that the sale would generate sufficient gross proceeds to enable her and Mr. Cox to pay the commission. If that was her principal purpose, that purpose was not substantially frustrated.

In order for an event to constitute a substantial frustration, there must be “a change in circumstances [that] makes one party’s performance virtually worthless to the other . . .” *Washington State Hop Producers*, 112 Wn.2d at 700 (quoting Restatement (Second), § 265, cmt. a). That condition does not exist here. Lakemont’s performance under the listing agreement was not only beneficial to Ms. Lopinto, it was critical to determining the amount she would receive from the home.

The dissolution decree did not award to Ms. Lopinto and Mr. Cox separate property interests in the home. Rather, it required them to sell the home, and it only awarded to each one-half of the net proceeds that would come from the sale of the home. (CP 19, 21, 25.) Under the terms of the dissolution decree, the only way Ms. Lopinto would receive anything for her interest in the home was to have a sale that would produce net proceeds. Her interest in the home was to be measured solely by the net proceeds generated from the sale. Thus, the only way Ms. Lopinto would receive anything from the home is if Lakemont procured a buyer who would pay a sufficient purchase price that would produce net proceeds.

Ms. Lopinto acknowledges that “Mr. Cox paid Ms. Lopinto for her equity” in the property. (Appellant’s Brief, p. 6.) She was paid \$36,247.79. (CP 93.) That amount was based strictly on the amount she would have received had the sale to Robert Allgaier gone through. (CP 93.) Without Lakemont’s performance, there would have been no pending sale to Mr. Allgaier, there would have been no basis under the dissolution decree to determine the amount Ms. Lopinto was to receive for her interest in the home. Additionally, if Lakemont had procured a buyer with a lower purchase price, the amount Ms. Lopinto would have received would have been less. Lakemont’s performance under the listing agreement was a

critical element in determining the exact dollar amount Ms. Lopinto received for her interest in the home.

There was no frustration of purpose. The \$36,247.79 Ms. Lopinto received is directly attributable to Lakemont's efforts. Ms. Lopinto has no basis to argue that Lakemont's performance was virtually worthless to her.

The only difference to Ms. Lopinto in the sale to Mr. Allgaier and a sale to Mr. Cox was that Mr. Allgaier had to come up with cash. Mr. Cox was allowed to pay with both cash and credit. He paid cash in the amount of Ms. Lopinto's *net* equity. The remainder of her *gross* equity he agreed to pay on credit, pursuant to a hold harmless agreement.<sup>4</sup> (CP 89, 93.) Had Mr. Cox complied with his hold harmless obligation under the August 2005 Order, Lakemont's commission would have been paid. Ms. Lopinto's frustration in purpose did not come from the August 2005 Order, it came from the fact that Mr. Cox failed to comply with the order.

Mr. Cox's failure to perform does not constitute a *substantial* frustration of Ms. Lopinto's principal purpose.

"It is not enough that the transaction has become less profitable for the affected party or even that he will sustain a

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<sup>4</sup> The fact that the August 2005 Order required Mr. Cox to hold Ms. Lopinto harmless from Lakemont's commissions does not prevent Lakemont from seeking its commissions from Ms. Lopino. Lakemont, was not a party to the dissolution proceeding and is not bound by the allocation of the debts made by the court in that proceeding. *Arneson v. Arneson*, 38 Wn.2d 99, 101, 227 P.2d 1016 (1951).

loss. The frustration must be so severe that it is not fairly to be regarded as within the risks that he assumed under the contract.”

*Felt v. McCarthy*, 130 Wn.2d 203, 208, 922 P.2d 90 (1996)(quoting Restatement (Second), §265, cmt. a.) Mr. Cox’s credit worthiness was a risk she assumed under the contract since Ms. Lopinto agreed to be jointly liable for the commission, and agreed that the commission would be paid even if the property was not sold.

Ms. Lopinto’s principal purpose for entering into the listing agreement was not “substantially frustrated.” This element of supervening frustration is not present.

**b. Ms. Lopinto’s Principal Purpose for Entering into the Listing Agreement is not a Basic Assumption of the Agreement.**

In order for supervening frustration to exist, Ms. Lopinto principal purpose for entering into the listing agreement must have been a basic assumption on which all three parties (Ms. Lopinto, Mr. Cox, and Lakemont) entered into the contract. *Felt v. McCarthy*, 130 Wn.2d 203, 208, 922 P.2d 90 (1996). It must be “so completely the basis of the contract that, as both parties understand, without it the transaction would make little sense.” *Id.* (underlining added). “[B]oth parties to the contract [must] share in the assumption that the particular purpose would not be

frustrated.” *Id.* at 209.

In *Felt*, a buyer of property wanted to develop the property into a business park. The buyer claimed commercial frustration when the county changed the zoning regulations that prevented that purpose and caused the value of the property to drop from \$310,000 to \$50,000. The Court held there was no frustration because the seller did not share in the buyer’s goal. The Court stated: “Even though the Felts knew of McCarthy’s business park goal, the Felts did not enter into the sales contract on the assumption that McCarthy would be successful in fulfilling his goal.” *Felt*, 130 Wn.2d at 209.

Lakemont did not enter into the listing agreement on the assumption that the property would be sold to someone who would pay the commission at the time of sale. The agreement does not require the commission to come from the sale, and it contemplates that the property may not be sold.

On a more fundamental level—Ms. Lopinto has not met her burden of proof on this issue. She has the burden of establishing each elements of this affirmative defense. *August v. U.S. Bancorp*, 146 Wn.App. 328, 343, 190 P.3d 86 (2008). She has presented no evidence of what Lakemont’s understanding was regarding her principal purpose in entering

into the agreement. It is not enough that she had some specific object in mind, without which she would not have entered into the agreement. She must also show that Lakemont was aware that she had that object in mind. She presented no evidence to the trial court of Lakemont's understanding. Ms. Lopinto cannot show that this element of supervening frustration is present.

**c. Ms. Lopinto Provides no Evidence that she Objected to the Order or Sought Relief from the Order.**

In order to show that the frustrating event was not her fault, Ms. Lopinto must show that she did not agree to the entry of the order. Restatement (Second), § 265, cmt. b, Illus. 7. Ms. Lopinto provided no evidence at the trial court showing that she objected to the entry of the order. The only evidence she provided was that she sought an order under CR 70 requiring Mr. Cox to sign the closing documents in the Allgaier transaction. (CP 87.) However, that motion came before Mr. Cox offered to pay her the net amount she would have received from the Allgaier sale, and offered to hold her harmless from any liabilities. (CP 89.) In the face of that offer, Ms. Lopinto cannot rely on reasonable inferences to establish that she resisted the entry of the August 2005 Order.

Even if Ms. Lopinto can rely on reasonable inferences to show that she objected to the entry of the August 2005 Order, such an objection

would not be sufficient to comply with her duty to avoid the supervening event. She also is required to seek relief from the order, either by way of a request for reconsideration or by an appeal. See Restatement (Second), § 265, cmt. b, Illus. 7, which provides that where there is a process to obtain relief from an order, a party is not without fault if the party does not seek relief. “Unless it is found that such an application would have been unsuccessful, [Ms. Lopinto’s] duty . . . is not discharged, and [she] is liable to [Lakemont] for breach of contract”). *Id.*

**d. The Risk of the Supervening Event Was Assumed by Ms. Lopino.**

Another element of supervening frustration is that the frustration cannot be “within the risks that [Ms. Lopinto] assumed under the contract.” Restatement (Second), § 265, cmt. a. See also, *Felt*, 130 Wn.2d at 209. “A party may, by appropriate language, agree to perform in spite of impracticability . . .” Restatement, § 261. cmt. c.<sup>5</sup>

The Listing Agreement expressly addresses the circumstances that occurred here—i.e., the withdrawal of the property from the Allgaier sale. Under the listing agreement Ms. Lopinto assumed the risk that the property would be withdrawn from the sale. Ms. Lopinto cannot establish that

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<sup>5</sup> Restatement (Second), § 265, cmt. a, cross-references comment c to § 261 as authority.

“the non-occurrence of the frustrating event must have been a basic assumption on which the contract was made.” Restatement (Second), § 265, cmt. a.

Ms. Lopinto’s supervening frustration defense fails where “the language . . . indicate the contrary.” Restatement, § 265. Here, the language of the listing agreement indicates Ms. Lopinto assumed the risk of a court order requiring a sale of the property to Ms. Cox.

e. **The August 2005 Order Contemplates that the Duty to Pay Lakemont’s Commission is not Discharged.**

Ms. Lopinto’s supervening frustration defense also fails where the “circumstances indicate the contrary.” Restatement, § 265. In this case the circumstances indicate the contrary.

If the listing agreement was rescinded because of the August 2005 Order, no commission would be owing under the listing agreement. However, the payment of Lakemont’s commission was assumed by the court in calculating Ms. Lopinto’s net equity in the home. The \$36,247.79 paid to Ms. Lopinto was calculated as follows:

Purchase Price:	\$495,000.00
Net tax proration:	-827.42
Rent holdback:	-2,450.00
Mortgage payoff:	-379,819.78
Lakemont’s commission:	-29,700.00
Various fees and charges:	<u>-9,700.91</u>
	72,501.89

	÷            2
	\$36,250.95
Two days interest as 12%	23.84
	\$36,274.79

(CP 89, 231.)

Under the dissolution decree, Ms. Lopinto was entitled to one-half of the net proceeds. (CP 21, 25.) If no commission was owing to Lakemont from Ms. Lopinto, her equity in the home (i.e., the gross proceeds) would not have been reduced by Lakemont’s commission. If the gross proceeds were not reduced by Lakemont’s commission, the amount she would have received from Mr. Cox would have been \$50,224.79 (\$36,274.79 + \$14,850). She received the lesser amount because she still had an obligation to pay Lakemont’s commission. The effect of the August 2005 Order was to allocate the payment of that commission to Mr. Cox, but the commission was still owed.

The very order that Ms. Lopinto points to as a supervening event contemplates that the commission will remain owing. Consequently, “circumstances indicate the contrary,” and the August 2005 Order does not constitute a supervening event.

**f. Even if a Supervening Frustration Occurred, Lakemont would be Entitled to Restitution, in the Amount of its Commission.**

None of the elements of supervening frustration are present.

Therefore, Ms. Lopinto's defense fails. However, even if all of the required elements were present, a rescission of the listing agreement does not end the matter. Under Restatement (Second) of Contracts, §§ 272 and 240, Lakemont would be entitled to the "agreed equivalents" of its performance. Lakemont has fully performed. Therefore, the agreed equivalents of its performance is the \$29,700 set forth in the contract. Even if the listing agreement is rescinded, Ms. Lopinto is obligated to pay restitution in the amount of the commission by way of restitution. Applying the defense of supervening frustration has no practical benefit to Ms. Lopinto.

**2. The Supervening Impracticability Defenses of Restatement (Second), §§ 261 and 264 do not Apply.**

The defense of supervening impracticability described in Restatement (Second), § 261, was adopted in *Public Utility Dist. No. 1 of Lewis County v. Washington Public Power Supply System*, 104 Wn.2d 353, 363-64, 705 P.2d 1195 (1985) ("*WPPSS*"). The Court described the defense as follows:

"The doctrine of supervening impossibility or impracticability of performance discharges a party from contractual obligations when a basic assumption of the contract is destroyed or deteriorated, such destruction or deterioration makes performance impossible or impractical, and the party seeking relief does not bear the risk of the unexpected occurrence."

In order to establish the defense of impossibility Ms. Lopinto must

show the existence of four elements. First, that a supervening event occurred that destroyed a basic assumption of the contract. Second, destruction of that assumption made performance impossible or impractical. Third, the destruction was an unexpected occurrence. Fourth, she did not bear the risk of the event not occurring. None of these elements are present.

The performance Ms. Lopinto claims has been made impracticable is the payment of Lakemont's commission. While she likely assumed that the commission would be paid in cash from the proceeds of the sale of the home, that assumption was her assumption alone. It is not a basic assumption of the listing agreement. As is pointed out several times above, the listing agreement contemplates the commission would be due even if the sale did not occur. Therefore, the August 2005 Order did not destroy a basic assumption of the listing agreement.

Furthermore, Ms. Lopinto is required to establish that the non-occurrence of the supervening event "was a 'basic assumption' on which *both* parties made the contract." Restatement (Second), § 261, cmt. b. (italics added). She has provided no evidence showing what Lakemont's assumptions were regarding the possible order allowing Mr. Cox to purchase the property. The only evidence on that point is the listing agree-

ment, which refutes Ms. Lopinto's assertion that a third party purchasing the property was a basis assumption of Lakemont in entering into the agreement.

Additionally, under Restatement (Second), § 261, a "party may, by appropriate language, agree to perform in spite of impracticability." *Id.*, cmt. c. That is what Ms. Lopinto did under paragraph 8(f) of the listing agreement.

Finally, the required performance, the payment of the commission, was not made "impracticable" by August 2005 Order. "The mere fact that a contract becomes more difficult or expensive than originally anticipated does not justify setting it aside." *WPPSS*, 104 Wn.2d at 364. The change must involve "extreme and unreasonable difficulty, expense or injury." *Id.* Ms. Lopinto has made no showing that payment of the commission would involve an extreme and unreasonable difficulty or expense.

Furthermore, the fact that Ms. Lopinto cannot afford to pay the commission is not relevant. The proper inquiry is whether anyone is capable of paying the commission. Restatement (Second), § 261, cmt. e. Since it is possible for someone to pay the commission, Ms. Lopinto is not released from the obligation to pay the commission.

The defense of supervening impracticability, as stated in Restate-

ment (Second), § 261, does not apply to the facts of this case.

In connection with her argument about Restatement (Second), § 261, Ms. Lopinto also makes several references to Restatement (Second) of Contracts, § 264. She points to illustration 1 of that section and then states: “This situation is no different than if after the listing agreement the property was taken by eminent domain.” (Appellant’s Brief, p. 19.) Ms. Lopinto misstates illustration 1. That illustration reads as follows:

“A sells land to B, who, as part of the contract, promises that the land shall not be built upon. The land is taken by eminent domain under statutory authority and a building is built on it. B’s duty not to build on the land is discharged, and B is not liable to A for breach of contract.”

The illustration has no applicability to the facts of this case. The duty not to build was discharged, not because the property was taken by eminent domain. It was discharged because, once the property was taken, B no longer had the ability to prevent building on the land. Here, the sale of the home to Mr. Cox did not prevent Ms. Lopinto from paying the commission. She could still perform that duty.

Furthermore, under Restatement (Second), § 264, cmt. b., the person asserting the defense has a duty to avoid its application. Since Ms. Lopinto provides no evidence that she attempted to set aside the August 2005 Order, or that she did not consent to it, she cannot assert the defense

under Restatement (Second), § 264.

Finally, under Restatement (Second), § 264, cmt. b, in order for Ms. Lopinto to assert a defense under that section, she has to show that “it is impracticable for [her] to both comply with the . . . order and to perform.” Nothing in the August 2005 Order prohibits her from paying the commission under the listing agreement. She can perform under the listing agreement and comply with the order. Restatement (Second), § 264 does not apply to the facts of this case.

#### POINT V.

#### THE COURT SHOULD AWARD LAKEMONT’S ATTORNEY FEES

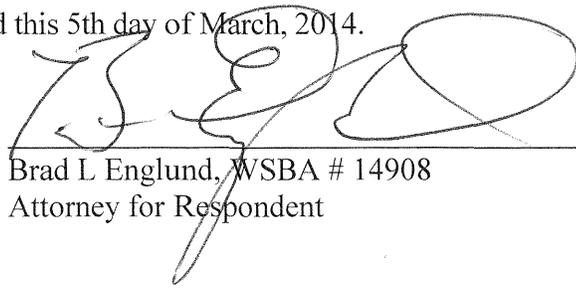
Paragraph 18 of the listing agreement provides: “Should any dispute arise regarding the terms of this Agreement, the prevailing party shall be entitled to reasonable attorneys fees and costs, including those for appeals. (CP 140.) The Court should affirm the decision of the trial court. In that event Lakemont will be the prevailing party. The Court should award Lakemont’s attorney fees pursuant to RAP 18.1.

#### CONCLUSION

For the foregoing reasons Lakemont requests that the Court affirm the summary judgment entered by the trial court in all respects and award Lakemont its attorney fees.

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Respectfully submitted this 5th day of March, 2014.



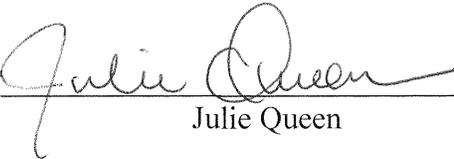
Brad L Englund, WSBA # 14908  
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that on this date I sent by U.S. Mail, postage prepaid a copy of the foregoing Respondents' Brief to the Appellants' attorney, Kevan T. Montoya, Montoya Hinckley PLLC, at 4702 A Tieton Drive, Yakima, Washington, 98908.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct:

Dated March 5, 2014, at Yakima, Washington.

  
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Julie Queen