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STATE OF WASHINGTON

No. 58030-2-I
(consolidated with 58031-1-I)

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

MICHAEL MILLER; VICKI RINGER; and JOANNE FAYE TORGERSON,
as trustee for the TORGERSON FAMILY TURST;

Petitioners,

v.

ONE LINCOLN TOWER LLC, a Delaware limited liability company;
BELLEVUE MASTERM LLC, a Delaware limited liability company; LS
HOLDINGS, LLC, a Washington limited liability company

Respondents.

PETITION FOR REVIEW BY THE WASHINGTON SUPREME COURT

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I. PETITIONER'S IDENTITY

Petitioners were the Appellants and purchasers who contracted to purchase residential condominium units to be built by the Respondents. Petitioners will be referred to as "Purchasers" and Respondents will be referred to as "Developers."

II. CITATION TO APPELLATE DECISION TO BE REVIEWED

Purchasers request the Washington State Supreme Court review the Washington State Court of Appeals' opinion and decision terminating review in Miller, et. al v. One Lincoln Tower et. al, Cause No. 58030-2-I, which was consolidated with 58031-1-I, 2007 WL 1733170, Wash. App. Div. I (June 18, 2007) and the Order Denying Purchasers Motion for Reconsideration dated July 25, 2007.

III. ISSUES PRESENTED FOR REVIEW

A. *Unconscionability*. Division One did not address or decide the main issue presented – whether a developer's unilateral provisions limiting only a residential condominium buyer to no damages or specific performance, but only a return of the buyer's deposit was unconscionable.

1. The Opinion in this case conflicts with this court's decisions in *Zuver v. Airtouch Communications, Inc.*, 153 Wn.2d 293, 317-18, 103 P.3d 753 (2004) and *Scott v. Cingular Wireless*, ___ Wn.2d ___, 161 P.3d 1000 (July 12, 2007) that hold provisions

limiting remedies similar to the ones involved in this case are substantively unconscionable.

2. The Opinion in his case's reasoning conflicts with this Court's decisions in *Yakima County (West Valley) Fire Protection Dist. No. 12 v. City of Yakima*;¹ Division Three's decision in *Smith v. Skone & Connors Produce, Inc.*, 107 Wn. App. 199, 205-06, 26 P.3d 981 (2001) and its own reported decision in *Olmstead v. Mulder*, 72 Wn. App. 169, 863 P.2d 1355 (1994), which apply the UCC provisions to non UCC contracts, including real estate contracts..

3. This is a matter that substantially affects the public interests. It affects almost every buyer who buys residential real estate that is yet to be built as well as the developers and builders. Public interest demands this Court examine "the kind of transaction that recurs perhaps more than a million times annually in the country – the purchase of a brand new house."² Courts that have squarely considered whether these exact clauses are unconscionable have struck them down and refused to enforce them because they are unfair.³ Moreover, the Interstate Land

¹ 122 Wn.2d 371, 392, 858 P.2d 245 (1993).

² *Berg*, 79 Wn.2d at 196.

³ *Ocean Dunes of Hutchinson Island Dev. Corp. v. Colangelo*, 463 So.2d 437, 439-40 (Fla. 4th DCA 1985); *Blue Lakes Apartments, Ltd. v. George Gowing, Inc.*, 464 So. 2d 705, 709-10 (Fla 4th DCA 1985); *Seaside Community Development Corp. v. Edwards*, 573 So.2d 142, 147 (Fla. 1st DCA 1991); *Hackett v. JRL Development, Inc.*, 556 So.2d 601, 602-03 (Fla 2nd DCA 1990); *Port Largo Club, Inc. v. Warren*, 476 So.2d 1330, 1333 (Fla 3rd DCA 1985); *Clone Inc. v. Orr*, 476 So.2d 1300, 1302-03 (Fla 5th DCA 1985); and *Busman v. Beeren & Barry Investments, LLC*, 69 Va.Cir. 375 (2005)

Sales Act regulations expressly provide such provisions limiting a buyer's remedy to a return of their deposit are unenforceable.⁴

4. It is also a matter that substantially affects the public interest to determine whether a sale of a dwelling to be built that is going to be used primarily for personal, family or household purposes is a consumer transaction and, therefore, subject to special protections from warranty disclaimers and provisions limiting remedies.

B. *Failing Essential Purpose.* Examining the provision limiting remedies in this case substantially affects public interest because the provision fails its essential purpose. The essential purpose of any remedies provision is to provide "minimum adequate remedies" or "a fair quantum of remedy" if the other contracting party breaches the contract.⁵

C. *Public Policy.* This case substantially affects the public interest because it drastically affects an important public interest – residential condominium home ownership.⁶ Washington specifically regulates remedies in residential real estate contracts⁷

⁴ *Guidelines for Exemptions under the Interstate Land Sales Full Disclosure Act*, 49 Fed.Reg. 31, 375, 31,378 (1984) ("Contracts that permit the seller to breach virtually at will are viewed as unenforceable...Thus, for example, a clause that provides for a refund of the buyer's deposit if the seller is unable to close for any reason within the seller's control is not acceptable..."). See, *also*, *Samara Development Corp. v. Marlow*, 556 So.2d 1097, 1099 (Fla. 1990).

⁵ See RCW 62A.2-719(2), Comment 1.

⁶ RCW 64.34.005(2) stating, in part, a legislative finding that condominium ownership is important because it "ensure[s] that a broad range of affordable homeownership opportunities continue to be available to the residents of the state..."

⁷ See RCW 64.04.005; and 2005 c186, §§ 3 ("This act is necessary for the immediate preservation of the public peace, health or safety.")

as well as residential real estate sales, generally.⁸ It also regulates condominiums.⁹ Our state also strictly reviews for public policy violations limitation and exculpatory contract clauses.¹⁰ Finally, “the Interstate Land Sales Full Disclosure Act was intended to protect the public.”¹¹ The provision limiting remedies in this case affects all these important interests and should be reviewed.

D. *Attorney Fees.* Finally, this is a matter of great public importance because Division One has greatly expanded awards of attorney fees in a contract action by awarding attorney fees to the breaching party and against the non-breaching party.

IV. CASE STATEMENT

In June 2001, Purchasers and Developer signed the Developers’ pre-printed, standard form Contracts.¹² The Contracts contemplated Developer would build a 148 unit condominium complex and that Purchasers would each buy residential units in the condominium complex.¹³ Purchaser Torgerson put up \$5,000 in earnest money and assigned \$126,000 in real estate commission to meet the required 10% deposit of her condominium’s \$1,310,000 purchase price.¹⁴ Purchasers Miller and Ringer also put up \$5,000 in earnest money and assigned \$11,611 in real estate commission

⁸ See RCW ch. 64.06.

⁹ See RCW chs 64.32; 64.34; and 64.35.

¹⁰ *Wagenblast v. Odessa School Dist. No. 105-57-166*, 110 Wn.2d 845, 758 P.2d 968 (1988)

¹¹ *Smara Development Corp v. Marlow*, 556 So.2d 1097, 1100 (Fla. 1990)

¹² TCP 14; MCP 15.

¹³ TCP 13-35; MCP 14-23.

¹⁴ TCP 30, 13.

equaling a 5% deposit of their condominium's \$332,220 purchase price.¹⁵

The Contracts contained a section that unfairly limited Purchasers' remedies if Developer defaulted.¹⁶ This "Provision Limiting Remedies" provided

If Buyer fails, without legal excuse, to close this transaction... Seller may...retain the Deposit...as its sole and exclusive remedy ...any default by Seller...shall enable Buyer, as its sole and exclusive remedy, to...recover from Seller the portion of the Deposit paid by Buyer.¹⁷

That means, if Purchasers breached the Contracts, then Developers could keep Purchasers' money (deposit), but if Developers breached the Contracts, then Purchasers could only get their money back, and could not recover any compensatory damages or sue Developer for specific performance.¹⁸ Developer admits it did not negotiate this Provision Limiting Remedies with either Purchasers or any other prospective buyers.¹⁹ In fact, Developer never pointed out this overly harsh, one-sided provision when Purchasers signed the Contracts.²⁰ Developer did, however, have each buyer, including Purchasers, confirm by a separate sheet that they understood what would happen if Purchasers breached the Contract - that Developer would retain the deposits as liquidated compensatory damages.²¹ This separate sheet neither

¹⁵ MCP 16, 14.

¹⁶ TCP 19, ¶ 21; MCP 22, ¶ 21.

¹⁷ TCP 19, ¶ 21; MCP 22, ¶ 21.

¹⁸ TCP 19, ¶ 21; MCP 22, ¶ 21.

¹⁹ TCP 244, Pg. 10, Ln. 9 – Pg. 11, Ln. 14.

²⁰ TCP 259: 24-25.

²¹ TCP 137; MCP 15.

explained nor even mentioned what would happen if Developer breached the Contracts.²² Neither this separate sheet nor the Contracts set forth the remedies that were excluded.²³

Developer had to amend its pre-printed standard form contract in December 2001.²⁴ Developer learned that its project was subject to the Interstate Land Sales Full Disclosure Act (“ILSA”),²⁵ As a result, Developer amended the Provision Limiting Remedies to allow all subsequent buyers some meaningful remedy in the event Developer defaulted.²⁶ Developer never mentioned this change in the standard contract to the previous purchasers.²⁷

On May 3, 2003, Developer unilaterally terminated the Contracts.²⁸ Purchasers brought suit for breach of contract.²⁹ Developers sought partial summary judgment enforcing the Provision Limiting Remedies.³⁰ Purchasers resisted and asserted the Provision Limiting Remedies was both procedurally and substantively unconscionable because it provided no meaningful remedy if Developers breached the contract and allowed the Developers to breach the contract at will.³¹ In making its argument, Purchasers specifically argued the Provision Limiting Remedies was regulated by ILSA.³²

²² TCP 137; MCP 15.

²³ TCP 137; MCP 15; TCP 19, ¶ 21; MCP 22, ¶ 21.

²⁴ TCP 245, Pg. 14, Ln. 24 – Pg. 17, Ln. 24.

²⁵ TCP 245, Pg. 15.

²⁶ TCP 245, Pg. 17; TCP 100; MCP 134.

²⁷ TCP 247, Pg. 31, Ln. 12-22.

²⁸ TCP 60; MCP 62.

²⁹ TCP 7-11; MCP 7-12.

³⁰ TCP 158-81; MCP 154-76.

³¹ TCP 196-222; MCP 191-218.

³² MCP 214, In: 3 - 17

The trial court enforced the Provision Limiting Remedies.³³ But, in doing so, it required the Developers to return Purchasers' Deposit and then provided the lawsuit would be dismissed *after* the Deposits were returned.³⁴

Purchasers and Developers both timely appealed.³⁵ Purchasers argued the Provision Limiting Remedies was both substantively and procedurally unconscionable under common law and that it failed its essential purpose. Purchasers suggested the Appellate Court receive guidance from the UCC's unconscionability and remedy limitation provisions. Purchasers also argued the Provisions Limiting Remedies was contrary to public policy. Developers appealed and asserted they were entitled to attorney fees under the contract. Both Purchasers and Developers claimed attorney fees on appeal.

The Appellate Court never addressed Purchaser's procedural or substantive unconscionability arguments. Instead, it said the UCC does not apply to real estate contracts and avoided discussing unconscionability altogether.³⁶ Then, it summarily held without analysis that the Provision Limiting Remedies was not contrary to public policy.³⁷

³³ TCP 326-28; MCP 243-45.

³⁴ TCP 327; MCP 244.

³⁵ TCP 576-77; and 568-69; MCP 674-75; and 678-79.

³⁶ Opinion, Pg. 6.

³⁷ Opinion, Pg. 7.

V. ARGUMENT

A. Conflict With Supreme Court Decision.

The Court of Appeals' Opinion in this case may be reviewed since it directly conflicts with a decision of this State's Supreme Court.³⁸ Here, Division One's Opinion conflicts with numerous Washington Supreme Court reported decisions.

1. *Substantive Unconscionability.* There is a glaring conflict between Division One's Opinion in this case and the case law denying enforcement to clauses that are substantive unconscionable. A contract provision is unenforceable if it is substantively unconscionable.³⁹ In *Zuver*,⁴⁰ an employee claimed a contract clause that prohibited the employee from claiming punitive damages against the employer was substantively unconscionable because it applied only to the employee. Under the contract clause the employer was able to seek punitive damages against the employee.⁴¹ The employee argued the *effect* of this contract provision was so one-sided and harsh that it was substantively unconscionable.⁴²

This Court analyzed the contract clause in *Zuver* under traditional common law substantive unconscionability criteria.⁴³ It held that the remedies limitation provision in that case was

³⁸ RAP 13.4(b)(1)

³⁹ *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 346-47, 103 P.3d 773 (2004)

⁴⁰ 153 Wn.2d 293, 103 P.3d 753 (2004)

⁴¹ *Zuver* 153 Wn.2d at 315-16.

⁴² *Zuver*, 153 Wn.2d at 318.

⁴³ *Zuver* 153 Wn.2d at 304.

substantively unconscionable because the effect was to “bar Zuver [the employee] from collecting and punitive or exemplary damages, for her common law claims but permits Airtouch [the employer] to claim these type of damages...” It allowed “the employer *alone* access to a significant legal recourse.”⁴⁴

Recently this Court has amplified *Zuver* and this amplification supports Purchaser’s Petition. In *Scott v. Cingular Wireless*⁴⁵ this Court held a provision limiting remedies (prohibiting class action lawsuits) “effectively exculpated its drafter from liability for a large class of wrongful conduct,” undermined the “public good” and was substantively unconscionable.⁴⁶ In doing so, it cited *Zuver* and reiterated that “[a] clause that *unilaterally* and severely limits the remedies of only one side is substantively unconscionable under Washington law for *denying any meaningful remedy*.”⁴⁷ The importance was underscored by the dissent, which observed “the majority departs from the usual case-by-case analysis for determining contract unconscionability in favor of a sweeping rule that will invalidate thousands of ...contracts without regard to the specific terms of those agreements.”⁴⁸

Here, the Provision Limiting Remedies is substantively unconscionable for the same reasons the provisions limiting remedies in *Zuver* and *Scott* were unconscionable. The Provision

⁴⁴ *Zuver*, 153 Wn.2d at 318

⁴⁵ ___ Wn.2d ___, 161 P.3d 1000 (July 12, 2007)

⁴⁶ *Scott*, ___ Wn.2d at ___, 161 P.3d at 1006-08.

⁴⁷ *Scott*, ___ Wn.2d at ___, 161 P.3d at 1008.

⁴⁸ *Scott*, ___ Wn.2d at ___, 161 P.3d at 1009 (dissent).

Limiting Remedies unambiguously allows Developers alone significant legal recourse and denies Purchasers any meaningful remedy. The contract required Ms. Torgerson to put \$131,000 at risk and Mr. Miller and Ms. Ringer to put \$16,611 at risk in the form of a deposit. Developers did not have to put their money at risk. If Purchasers breached the contract, then Developers received \$131,000 from Torgerson and \$16,611 from Miller and Ringer. If Developers breached the contract, then neither Torgerson, Miller nor Ringer received anything from Developers. All they received is their own money back. This effectively prohibited Purchasers from receiving any compensatory damages for Developers breach and allowed Developers alone compensatory damages for Purchasers' breach.

If *Zuver* makes a contract clause unconscionable because it allows only one party punitive damages and prohibits the other party from recovering punitive damages, then it should certainly render this Provision Limiting Remedies unconscionable because it allows only one party *compensatory* damages and prohibits the other party from recovering *compensatory* damages. This is especially true since compensatory damages are preferred in Washington and punitive damages are against our public policy.⁴⁹

Moreover, the Provision Limiting Remedies in this case denies Purchasers any meaningful remedy. It allows the Developers to breach the contract with impunity. This is the exact

⁴⁹ *Kammerer v. Western Gear Corp.*, 96 Wn.2d 416, 625 P.2d 708 (1981).

evil *Scott* held was unconscionable in any contract.⁵⁰ As stated by one court considering an almost identical provision,

[the developer's] heads-I-win, tails-you-lose approach to defaults is so rapaciously skewed as to be patently unreasonable. It subverts the contract by permitting one party to breach with impunity. Such provisions are antithetical to the concept of fair dealing in the marketplace and will not be enforced by courts of law.⁵¹

Purchasers made the identical argument enunciate in *Scott* to Division One when requesting the court look to the UCC's unconscionability provisions for guidance.⁵² *Scott* holds a contract clause that denies a party any meaningful remedy is unconscionable.⁵³ RCW 62A.2-719(2), Comment 1 provides,

However, it is of the very essence of a sales contract that at least minimum adequate remedies be available. If the parties intend to conclude a contract for sale within this Article they must accept the legal consequence that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract. Thus any clause purporting to modify or limit the remedial provisions of this Article in an unconscionable manner is subject to deletion and in that event the remedies made available by this Article are applicable as if the stricken clause had never existed.

Almost every court that has squarely considered whether these provisions limiting remedies are unconscionable have struck them down and refused to enforce them because they are unfair.⁵⁴

⁵⁰ *Scott*, ___ Wn.2d at ___, 161 P.3d at 1008.

⁵¹ *Id.* (emphasis added).

⁵² See Appellant's Reply Brief, pps 20-21.r

⁵³ *Scott*, ___ Wn.2d at ___, 161 P.3d at 1008.

⁵⁴ *Ocean Dunes of Hutchinson Island Dev. Corp. v. Colangelo*, 463 So.2d 437, 439-40 (Fla. 4th DCA 1985); *Blue Lakes Apartments, Ltd. v. George Gowing, Inc.*, 464 So. 2d 705, 709-10 (Fla 4th DCA 1985); *Seaside Community Development Corp. v. Edwards*, 573 So.2d 142, 147 (Fla. 1st DCA 1991); *Hackett v. JRL Development, Inc.*, 556 So.2d 601, 602-03 (Fla 2nd DCA 1990); *Port Largo Club, Inc. v. Warren*, 476 So.2d 1330, 1333 (Fla 3rd DCA 1985);

Despite this, Division One held that because this is a residential real estate contract, all the principles enunciated in the UCC, even if they are proper expressions of the common law applicable to all contracts, cannot be applied.⁵⁵ In essence, Division One's holding is there can be no unconscionability if the contract is a real estate contract because unconscionability and meaningful remedies are in the UCC and the UCC cannot be applied to residential real estate contracts even by analogy.⁵⁶

This absurd result also conflicts with decisions by this Court. This Court has routinely applied the Uniform Commercial Code provisions to transactions outside the Uniform Commercial Code context.⁵⁷ Moreover, it has previously observed that the UCC's unconscionability provisions are part of the "general exposition on unconscionability" and are "applicable beyond the Uniform Commercial Code context."⁵⁸ Finally, it has specifically applied the UCC provisions regarding provisions limiting remedies to transactions outside the UCC context.⁵⁹

2. *Procedural Unconscionability.* Similarly, the Opinion in this case refused to consider or apply over 30 years of precedent

Clone Inc. v. Orr, 476 So.2d 1300, 1302-03 (Fla 5th DCA 1985); and *Busman v. Beeren & Barry Investments, LLC*, 69 Va.Cir. 375 (2005)

⁵⁵ Opinion, Pg. 6.

⁵⁶ See Opinion, Pg. 6 ("the UCC does not apply to contracts for the sale of real estate and declined to apply its provisions by analogy.")

⁵⁷ *Liebergessell v. Evans*, 95 Wn.2d 881, 892 619 P.2d 1170 (1980); and *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 572, 807 P.2d 356 (1991).

⁵⁸ *Yakima County (West Valley) Fire Protection Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 392, 858 P.2d 245 (1993).

⁵⁹ *Baker v. City of Seattle*, 79 Wn.2d 198, 484 P.2d 405 (1971) (golf cart lease); *Puget Sound Financial, L.L.C. v. Unisearch, Inc.*, 146 Wn.2d 428, 440, f.n.14, 47 P.3d 940 (2002) (service contracts; and *Mieske v. Bartell Drug Co.*, 92 Wn.2d 40, 593 P.2d 1308 (1979) (film processing contract).

designed to protect consumer transactions. In *Berg v. Stromme*⁶⁰ this Court judicially required special protections to parties in consumer transactions where the seller tried to limit the purchaser's remedies. It required those particular provisions in a consumer transaction be "explicitly negotiated between buyer and seller," and the remedies being excluded must be 'set forth with particularity."⁶¹ Moreover, the burden of proof is on the provision's proponent to establish its enforceability.⁶² Subsequent cases, included *Puget Sound Financial LLC v. Unisearch, Inc.*⁶³ confirmed the *Berg* special protection involving a "noncommercial entity."⁶⁴ It was also applied to non-UCC transactions.⁶⁵ Here, there is no dispute the Provision Limiting Remedies was not negotiated and the excluded remedies were not set forth with particularity.⁶⁶

This was a consumer transaction. If "a transaction is primarily for a personal, family, or household purpose, it will be considered a consumer transaction."⁶⁷ Here, it is undisputed that Purchasers were going to buy the condominiums for personal or family purposes. Ms. Torgerson was going to buy a condominium to live in and retire.⁶⁸ Mr. Miller and Ms. Ringer were going to buy a

⁶⁰ 79 Wn.2d 184, 484 P.2d 380 (1971)

⁶¹ *Berg*, 79 Wn.2d at 196.

⁶² *Berg*, 79 Wn.2d at 194.

⁶³ 146 Wn.2d 428, 47 P.3d 940 (2002)

⁶⁴ *Puget Sound*, 146 Wn.2d at 438.

⁶⁵ *Puget Sound*, 146 Wn.2d at 440, f.n.14.

⁶⁶ TCP 244, Pg. 10, Ln. 9 – Pg. 11, Ln. 14; and TCP 137; MCP 15; TCP 19, ¶ 21; MCP 22, ¶ 21..

⁶⁷ Black's Law Dictionary, 8th Edition – "Consumer Transaction: A bargain or deal in which a party acquires property or services primarily for a personal, family, or household purpose."

⁶⁸ TCP 546.

condominium for their mother to live in since she was advancing in age and needed to be closer to her children.⁶⁹ Additionally, both Purchasers signed reservation agreements stating their purchases were for personal purposes.⁷⁰ Both transactions are, therefore, consumer transactions. The *Berg* special protections apply.

Despite this, Division One never addressed procedural unconscionability because it is codified in the UCC.

3. *Public Policy.* Division One's Opinion in this case also conflicts with this Court's recent pronouncement in *Scott* regarding public policy. It is undisputed that "[a]n agreement that has a tendency 'to be against the public good, or to be injurious to the public' violates public policy" and is "void and unenforceable."⁷¹ *Scott* further provides, "[c]ontract provisions that exculpate the author for wrongdoing, especially intentional wrongdoing, undermine the public good."⁷²

This Court has also taken a keen interest in exculpatory clauses. Exculpatory clauses are contrary to public policy when they exhibit some of the following factors:

It concerns a business of a type generally thought suitable for public regulation. The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. As a result of the essential nature of the service, in the

⁶⁹ MCP 220.

⁷⁰ TCP 516-17; MCP 585-86.

⁷¹ *Scott*, ___ Wn.2d ___, 161 P.3d at 1005.

⁷² *Scott*, ___ Wn.2d ___, 161 P.3d at 1006.

economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents.⁷³

Here, almost all these factors are present. Residential real estate, in general, and earnest money deposits and remedy limitations, in particular, are regulated.⁷⁴ In fact, the enacting legislation behind the statute says, “[t]his act is necessary for the immediate preservation of the public peace, health or safety.”⁷⁵ The State also regulates condominiums.⁷⁶ The federal government regulates residential real estate projects with 100 or more units to protect the public good.⁷⁷ Housing, especially condominiums, is a practical necessity.⁷⁸ Developers not only held themselves out, but marketed themselves, as willing to provide condominium ownership. They presented a pre-printed adhesion contract with the exculpatory Provisions Limiting Remedies. There was no provision for extra protection for an extra fee.

Here, the exculpatory Provision Limiting Remedies violated public policy. Much like the exculpatory class action waiver in *Scott*

⁷³ *Wagenblast*, 110 Wn.2d 845, 851-52, 758 P.2d 968 (1988).

⁷⁴ See RCW 64.04.005; and RCW ch. 64.06.

⁷⁵ 2005 c186, §§ 3

⁷⁶ See RCW chs 64.32; 64.34; and 64.35.

⁷⁷ *Smara Development Corp v. Marlow*, 556 So.2d 1097, 1100 (Fla. 1990)

⁷⁸ See RCW 64.34.005(2) (the Condominium Act was enacted to assure that a broad range of affordable homeownership opportunities continue to be available to the residents of the state...”).

it insulated the author from liability for intentionally breaching the contract. HUD regulations similarly declare such provisions unenforceable

However, the contract must not allow non-performance by the seller at the seller's discretion. Contracts that permit the seller to breach virtually at will are viewed as unenforceable... Thus, for example, a clause that provides for a refund of the buyer's deposit if the seller is unable to close for any reason within the seller's control is not acceptable...⁷⁹

Moreover, the contracts here required purchasers to put their money at risk for years while the Developers built the project and if the market prices go up, the Developers could breach the contract with impunity, sell the units to others and pocket the profits, which they did. The buyer, on the other hand, has no home to buy and no compensation for its loss. If, on the other hand, market prices go down, then the Developers can hold the buyers deposit (Torgerson had \$131,000 at risk) to force the buyer to buy the unit or lose their deposit.

4. *Attorney Fees.* Division One's Opinion extends attorney fee awards to an unacceptable level and construes a contract provision beyond its ordinary, plain meaning. This Court has long held that contract construction and interpretation cannot "vary, contradict or modify the written word."⁸⁰ Moreover, ambiguities, if any, are to be construed against the drafter.⁸¹ This is

⁷⁹ *Guidelines for Exemptions under the Interstate Land Sales Full Disclosure Act*, 49 Fed. Reg. 31,375, 31,378 (1984).

⁸⁰ *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005).

⁸¹ *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 7824, 733, 837 P.2d 1000 (1992).

the first case in this State where a party who breaches a contract received an attorney fee award from the party who did not breach the contract in a breach of contract action. Here, the attorney fee provision specifically states attorney fees are to be awarded to the prevailing party and then defines the prevailing party as the party in whose favor a judgment is rendered. There is no dispute a judgment was not rendered against the Purchasers. The summary judgment order in this case *required the Developers to return the Purchasers' deposits* and then agreed to dismiss the lawsuit. Despite the fact the summary judgment order required Developers to return the deposit to the Purchasers, Division One construed the non-breaching party – the Purchasers – to pay the breaching party's – the Developers' – attorney fees and costs.

B. Conflict With A Decision From Another Division.

The Court of Appeals decision in this case may also be reviewed by the Supreme Court because it conflicts with a decision of another division of the Court of Appeals.⁸² This decision's reasoning conflicts with Division Three's decision in *Smith v. Skone & Connors Produce, Inc.*, 107 Wn. App. 199, 205-06, 26 P.3d 981 (2001) and its own reported decision in *Olmstead v. Mulder*, 72 Wn. App. 169, 863 P.2d 1355 (1994). In *Smith*, Division Three found the UCC provides guidance to non-UCC transactions.⁸³ In doing so, it cited *Olmstead*,⁸⁴ wherein Division One held Uniform

⁸² RAP 13.4(b)(2)

⁸³ *Smith*, 107 Wn.App. at 205-06.

⁸⁴ *Smith*, 107 Wn.App at 206.

Commercial Code provisions relating to warranty disclaimers provide guidance in *real estate contracts*.⁸⁵ Warranty disclaimers and provisions limiting remedies are analyzed the same and used interchangeably when determining unconscionability.⁸⁶ Despite this, Division One refused to consider the UCC in this case, either directly or by analogy, and relied on a case decided before *Olmstead*.⁸⁷

C. Public Interest.

A third ground for review would be that this petition involves an issue of substantial public interest that should be determined by the Supreme Court.⁸⁸

This is a matter involving substantial public interest because it affects almost every buyer who buys residential real estate as well as developers and builders. These transactions occur regularly, they are “the kind of transaction that recurs perhaps more than a million times annually in the country – the purchase of a brand new house.”⁸⁹ More and more developers are selling residential real estate long before the dwelling is constructed. These pre-sale residential real estate contracts routinely provide that the buyer has no claim for damages if the seller breaches the pre-sale contract, but the developer can keep the buyer’s deposit as liquidated compensatory damages if the buyer breaches the pre-

⁸⁵ *Olmstead*, 72 Wn. App. At 177.

⁸⁶ *Puget Sound*, 146 Wn.2d at 438, f.n.2.

⁸⁷ *Southcenter View Condominium Owner’s Ass’n v. Condominium Builders, Inc.*, 47 Wn. App. 767, 771, 736 P.2d 1075 (1986).

⁸⁸ RAP 13.4(b)(4).

⁸⁹ *Berg*, 79 Wn.2d at 196.

sale contract. It is especially important in the pre-sale context because the developers keep the buyers' deposit for a long time while the project is being built. In this case it was over 3 years. That is a long deprivation for the most important and expensive purchase decision the average person makes in a life time.

Moreover, enforcing provisions that are designed to protect the public is, by definition, something that substantially affects the public interest. The Interstate Land Sales Full Disclosure Act was "intended to protect the public" and the regulations thereunder expressly provide such provisions limiting a buyer's remedy to a return of their deposit are unenforceable.⁹⁰ In *Scott*, this Court said contracts that exculpate the drafter from wrongdoing, especially intentional wrongdoing, undermine the public good.⁹¹ Finally, this Court developed special protections against warranty disclaimers and provisions limiting remedies in consumer transactions.⁹² Enforcing these procedural protections, especially in consumer transactions, is a matter that substantially affects the public interest.

It also substantially affects the public interest for the courts to provide a meaningful remedy if a provision limiting remedies fails its essential purpose. The essential purpose of any remedies

⁹⁰ *Guidelines for Exemptions under the Interstate Land Sales Full Disclosure Act*, 49 Fed.Reg. 31, 375, 31,378 (1984) ("Contracts that permit the seller to breach virtually at will are viewed as unenforceable... Thus, for example, a clause that provides for a refund of the buyer's deposit if the seller is unable to close for any reason within the seller's control is not acceptable..."). See, *also*, *Samara Development Corp. v. Marlow*, 556 So.2d 1097, 1099 (Fla. 1990).

⁹¹ *Scott*, ___ Wn.2d at ___, 161 P.3d at 1006.

⁹² *Berg*, 79 Wn.2d at 196; and *Baker v. City of Seattle*, 79 Wn.2d 198, 484 P.2d 405 (1971).

provision is to provide “minimum adequate remedies” or “a fair quantum of remedy” if the other contracting party breaches the contract.⁹³ If it does not do so, then the courts should supply a modicum remedy.

Finally, this case substantially affects the public interest because Division One has greatly expanded awards of attorney fees in a contract action by awarding attorney fees to the breaching party and against the non-breaching party. “The general rule in Washington, commonly referred to as the American rule, is that each party in a civil action will pay its own attorney fees and costs.”⁹⁴ “This general rule can be modified by contract...”⁹⁵ Here, the parties’ contract, which was drafted by the Developers, provided the prevailing party is entitled to attorney fees and costs from “the party against whom judgment is rendered.” Developers admitted they breached the contract and that Purchasers did not breach the contract. In the end the court limited Developers liability to a return of the deposit; required the Developers to return the deposit; and provided the action would be dismissed after the deposit was returned.⁹⁶ No judgment was entered against Purchasers, the non-breaching party. Despite this, Division One disregarded the parties’ contract and applied a substantially prevailing party analysis and awarded fees to the Developers.

⁹³ See RCW 62A.2-719(2), Comment 1.

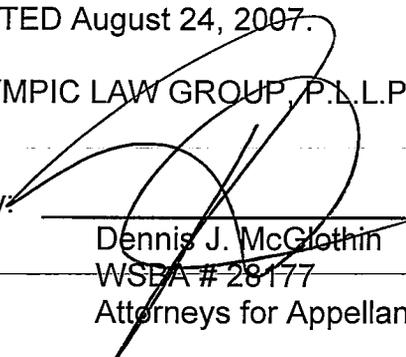
⁹⁴ *Cosmopolitan Engineering Group, Inc. v. Ondeo Degreameont, Inc.*, 159 Wn.2d 292, 297, 149 P.3d 666 (2006).

⁹⁵ *Cosmopolitan*, 159 Wn.2d at 297.

⁹⁶ TCP 322-23, 326-28; MCP 239-40, 243-45.

RESPECTFULLY SUBMITTED August 24, 2007.

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By: 

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Attorneys for Appellants

No. 58030-2-I
(consolidated with 58031-1-I)

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

MICHAEL MILLER; VICKI RINGER; and JOANNE FAYE TORGERSON,
as trustee for the TORGERSON FAMILY TRUST;

Petitioners,

v.

ONE LINCOLN TOWER LLC, a Delaware limited liability company;
BELLEVUE MASTERM LLC, a Delaware limited liability company; LS
HOLDINGS, LLC, a Washington limited liability company

Respondents.

APPENDIX
TO
PETITION FOR REVIEW BY THE WASHINGTON SUPREME COURT

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ORIGINAL

APPENDIX 1

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PLLP

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MICHAEL MILLER; VICKI RINGER;)
and JOANNE FAYE TORGERSON, as)
trustee for the TORGERSON FAMILY)
TRUST;)

Appellants/
Cross-Respondents.)

v.)

ONE LINCOLN TOWER LLC, a)
Delaware limited liability company;)
BELLEVUE MASTER, LLC, a)
Delaware limited liability company; LS)
HOLDINGS, LLC, a Washington)
limited liability company,)

Respondents/
Cross-Appellants.)

No. 58030-2-1
(consolidated with 58031-1-1)

DIVISION ONE

UNPUBLISHED OPINION

FILED: June 18, 2007

AGID, J. -- Appellants were real estate agents for a planned condominium development who bought units for themselves. The contracts provide that if Buyers breach, Sellers are entitled to keep the deposit as liquidated damages, but if Sellers breach, Buyers are limited solely to the return of their deposits. Sellers breached and offered to return Buyers' deposits. Buyers refused and sued, claiming they were entitled to compensatory damages or specific performance. They assert the provision limiting damages is unenforceable because it is unconscionable and fails its essential

purpose under the Uniform Commercial Code (UCC). Alternatively, Buyers assert the provision is contrary to public policy. Sellers prevailed on summary judgment, where they admitted breach but argued that Buyers' remedies were limited by the contract. We decline to extend the UCC's protections to cover real estate contracts and hold that under the circumstances presented here, the provision limiting remedies does not contravene public policy. The contracts were enforceable, and we affirm the trial court's summary judgment decision. But we reverse the trial court's decision not to award Sellers attorney fees and costs because, as prevailing parties, they were entitled to their fees and costs under the contract.

FACTS

Respondent, One Lincoln Tower, LLC, was the developer of a large mixed-use building project in downtown Bellevue of the same name. Respondent, Bellevue Master, LLC, was the legal entity selling the condominium units for One Lincoln Tower, LLC. Appellants Michael Miller, Vicki Ringer, and Joanne Faye Torgerson, were real estate agents authorized to list and sell units in the project. In summer 2001, Appellants contracted to purchase condominium units in One Lincoln Tower for themselves. Buyers Miller and Ringer paid \$5,000 up front and assigned \$11,611 of their real estate commission, to be paid seven days before closing, equaling a five percent deposit on their condominium's \$332,220 purchase price. Buyer Torgerson paid \$5,000 up front and assigned \$126,000 of her real estate commission, to be paid at closing, equaling a 10 percent deposit on her condominium's \$1,310,000 purchase price. Paragraph 21 of the real estate contracts contained a provision limiting remedies in the event of breach, which provided in relevant part:

If Buyer fails, without legal excuse, to close this transaction as and when required by this Agreement, Seller may terminate this Agreement and all of the rights granted to Buyer herein and retain the Deposit and any interest earned thereon as its sole and exclusive remedy . . . any default by Seller under this Agreement . . . shall enable Buyer, as its sole and exclusive remedy, to terminate this Agreement and recover from Seller the portion of the Deposit paid by Buyer

Sellers also had Buyers sign a separate document to confirm that they understood that Sellers would retain their deposits as liquidated damages in the event of Buyers' breach.¹ Neither this document nor the contract explained what remedies were excluded. Buyers' contracts also provided that if their units were not substantially completed by December 31, 2003, they had the right to rescind their contracts and have their deposits returned.

In December 2001, Sellers amended their standard form contract for all later buyers. The amended version of the remedies provision granted those buyers the right to the return of their deposits in the event of Sellers' breach and allowed them to seek any remedies except compensatory or punitive damages. Miller and Torgerson, as real estate agents for the project, were made aware of the sales contract changes by email and asked for their comments.

On August 27, 2003, One Lincoln Tower, LLC, and Bellevue Master, LLC, assigned their interests in the sales contracts to Respondent LS Holdings, LLC. On December 17, 2003, all buyers received a letter from the condominium complex, signed by Appellant Vicki Ringer, stating that, despite the change in ownership and the need to "redocument" the purchases, buyers still had the right to purchase their units for the

¹ For convenience, we refer to Respondents One Lincoln Tower, LLC, and Bellevue Master, LLC, who were both involved in selling the units, as Sellers and refer to Appellants collectively as Buyers.

same price and any changes in the new contracts would be minimal. On May 3, 2004, LS Holdings, LLC, unilaterally terminated the contracts with Buyers and authorized the release of their respective \$5,000 deposits.

On November 1, 2004, Buyers filed complaints against Sellers for breach of contract. They sought compensatory damages or, in the alternative, specific performance, and attorney fees and costs. Sellers answered, admitting breach but asserting that Buyers remedies were limited by contract to the return of their \$5,000 deposits, and filed a counterclaim for rescission based on breach of Buyers' fiduciary duties as real estate agents for the project. On March 11, 2005, Sellers moved for summary judgment, asking the court to enforce the contract provision limiting Buyers' remedies and dismiss the action upon repayment of the \$5,000 deposit plus any interest accrued. On April 26, 2005, Buyers responded and filed a cross motion for summary judgment. They argued that the provision limiting remedies was unconscionable and unenforceable, and asked for leave to amend their complaints to include claims for promissory estoppel. On May 6, 2005, the trial court heard the summary judgment arguments on the provision limiting remedies in both cases together. The court granted Sellers' summary judgment motions, denied Buyers' cross motions, ordered Sellers to return Buyers' deposits within five days, did not award either side attorney fees, and stated it would dismiss the case upon proof that Sellers had returned Buyers' deposits.² On May 20, 2005, Sellers moved for attorney fees and confirmation of dismissal. On May 23, 2005, Buyers again moved to amend their complaints to add claims for

² There is no proof in the record, other than Sellers' assertions, that Sellers tendered and Buyers refused the deposit money, both before Buyers filed suit and in response to the trial court's order granting Sellers summary judgment on the damages issue.

promissory estoppel. That same day, Buyers also moved to revise the order granting summary judgment in favor of Sellers on the issue of damages. On June 7, 2005, the trial court denied Buyers' motions to amend their complaints and denied their motions for revision. Buyers and Sellers also filed cross motions for summary judgment on Sellers' counterclaims for rescission. The court denied both motions and dismissed the counterclaims as moot because the earlier summary judgment motions granted Sellers the same relief. On June 16, 2005, the trial court denied Sellers' requests for attorney fees. Buyers appeal and Sellers cross appeal.

I. Motion to Supplement the Record

As a threshold matter, we must decide whether to consider supplemental documents from a federal case involving some of the same parties. Buyers ask us to take judicial notice of these documents under ER 201 or, alternatively, to supplement the record with these documents under RAP 9.6. Buyers seek to include the documents from this federal case to show that they did not violate any fiduciary duty they owed to Sellers. This information would be relevant only if the trial court granted Sellers' motions for rescission based on the claimed breach of fiduciary duty, which it did not.

We cannot take judicial notice of records from separate judicial proceedings, even if those proceedings involve the same parties.³ RAP 9.11 allows this court to consider additional evidence if it is necessary to fairly resolve the issues on review. But because the additional evidence offered is not relevant to the resolution of this case, we deny the motion and have not considered the documents.

³ Spokane Research & Defense Fund v. City of Spokane, 155 Wn.2d 89, 98, 117 P.3d 1117 (2005) (citing In re Adoption of B.T., 150 Wn.2d 409, 415, 78 P.3d 634 (2003)).

II. Applicability of UCC

Buyers argue the trial court erred in granting summary judgment in favor of Sellers because the contract provision limiting remedies was unconscionable and fails its essential purpose under the UCC.⁴ Buyers contend we should apply these UCC provisions to this contract for the sale of real estate.

When reviewing a summary judgment decision, we engage in the same inquiry as the trial court.⁵ Although the Washington Supreme Court has held that the unconscionability doctrine may be applied by analogy beyond the UCC context,⁶ no Washington court has applied UCC principles in the real estate context. And, in Southcenter View Condominium Owners' Ass'n v. Condominium Builders, Inc. we explicitly stated that the UCC does not apply to contracts for the sale of real estate and declined to apply its provisions by analogy.⁷ Because Buyers present nothing to persuade us that we need to revisit that holding, we decline to consider their UCC-based unconscionability and failure of essential purpose arguments.

III. Public Policy

We can invalidate a contract provision on public policy grounds.⁸ A contract provision contravenes public policy if, regardless of the intent of the parties, the

⁴ See RCW 62A.2-719(3) (dealing with unconscionability); see also RCW 62A.2-719(2) (dealing with failure of essential purpose).

⁵ M.A. Mortenson Co., Inc. v. Timberline Software Corp., 140 Wn.2d 568, 577, 998 P.2d 305 (2000) (citing Hertog v. City of Seattle, 138 Wn.2d 265, 275, 979 P.2d 400 (1999)).

⁶ Yakima County (W. Valley) Fire Protection Dist. No. 12 v. City of Yakima, 122 Wn.2d 371, 391, 858 P.2d 245 (1993) (citing Jeffery v. Weintraub, 32 Wn. App. 536, 542, 648 P.2d 914 (1982)).

⁷ 47 Wn. App. 767, 771, 736 P.2d 1075 (1986), review denied, 107 Wn.2d 1028 (1987) (citing RCW 62A.2-102).

⁸ Marshall v. Higginson, 62 Wn. App. 212, 216-18, 813 P.2d 1275 (1991), review dismissed, 119 Wn.2d 1013 (1992).

provision as written "has a 'tendency to evil,' to be against the public good, or to be injurious to the public."⁹

We are not convinced that a contract provision limiting remedies for breach of a real estate contract has a tendency to promote evil. Buyers rely on our holding in Marshall v. Higginson that it is against public policy to allow an attorney to make a contract conditioning her willingness to testify at a former client's trial on his promise not to sue her for malpractice.¹⁰ Allowing contracts like the one in Marshall clearly promotes injury to the public by allowing attorneys to limit their liability by misleading their former clients and undermines respect for the legal profession.¹¹ In contrast, here, the provision limiting remedies is not clearly injurious to the public. While allowing condominium sellers to limit buyers' damages in the event of a breach to the return of their deposits would tend to promote breach by sellers whenever the fair market value of the condominium increases between presale and completion, allowing buyers to limit their damages to the loss of a deposit tends to promote breach by buyers if the housing market takes a downturn. We hold that this agreed upon allocation of risk, which limits liability for both parties, does not violate public policy.¹²

⁹ Id. at 216 (quoting Golberg v. Sanglier, 27 Wn. App. 179, 191, 616 P.2d 1239 (1980), rev'd on other grounds, 96 Wn.2d 874, 639 P.2d 1347, 647 P.2d 489 (1982)).

¹⁰ 62 Wn. App. 212, 218, 813 P.2d 1275 (1991).

¹¹ Id.

¹² In their reply brief, Buyers also argue the limitation on remedies provision is not enforceable because it violates the Interstate Land Sales Act (ILSA). Buyers did not raise this argument below, and we decline to consider it under RAP 2.5(a).

IV. Denial of Leave to Amend Complaint

We review a trial court's denial of a motion to amend for abuse of discretion.¹³ A trial court abuses its discretion when its decisions are manifestly unreasonable or based on untenable grounds or reasons.¹⁴ Civil Rule 15(a), which governs amendments to pleadings, states that leave to amend "shall be freely given when justice so requires." But a court "may consider whether the new claim is futile or untimely."¹⁵

Here, Sellers contend that Buyers' motions to amend were both untimely and futile. We agree. Buyers filed their motions to amend after the court denied their cross motions for summary judgment. Buyers argue that they first asked to amend in their motions for summary judgment. Although Buyers included a request to amend their complaint to add a promissory estoppel claim in their initial cross motions for summary judgment, they failed to attach a proposed amended pleading as required by CR 15(a), which explains why the trial court did not rule on this request in its order denying Buyers' cross motions for summary judgment.

Further, justice did not require the court to allow Buyers to add a promissory estoppel claim because such a claim would not have succeeded on the merits. Buyers' promissory estoppel claim is based on their supposed reliance on the December 17, 2003 letter to One Lincoln Tower buyers, designed to assure them that, despite the change in ownership and the need to "redocument" their purchases, the contract price of their units would not go up and any changes to the contracts would be minimal. Nothing in the letter modifies the earlier contract provision limiting Buyers' remedies in

¹³ Travis v. Tacoma Pub. Sch. Dist., 120 Wn. App. 542, 554, 85 P.3d 959 (2004) (citing Ino Ino, Inc. v. City of Bellevue, 132 Wn.2d 103, 142, 937 P.2d 154, 943 P.2d 1358 (1997), cert. denied, 522 U.S. 1077).

¹⁴ Id. (citing Boeing Co. v. Heidy, 147 Wn.2d 78, 90, 51 P.3d 793 (2002)).

¹⁵ Id. (quoting Ino Ino, Inc., 132 Wn. 2d at 142).

the event of Sellers' breach. Additionally, the letter was signed by Vicki Ringer, one of the Buyer-Appellants. Clearly, Buyers were aware of the letter when they filed their initial complaints. If Buyers wanted to claim that one of them induced the others to rely to their detriment on this letter, they could have raised a promissory estoppel claim in their original complaints. Thus, it was not manifestly unreasonable for the trial court to deny Buyers' motions to amend.

V. Denial of Motions to Revise

Buyers claim that the trial court erred by denying their motions to revise the orders granting Sellers' summary judgment motions on the limitation of remedies issue and ordering that the complaint would be dismissed upon proof that Sellers returned Buyers' deposits within five days of the order. Buyers argue the court should not have dismissed their complaints because Sellers admitted to breaching the contract. Instead, they contend the trial court should have entered judgment in their favor but limited damages to the return of their deposits. Buyers cite no case law, statute, or court rule to suggest that the court's decision to dismiss these cases, where the only issue was decided against Buyers on summary judgment, rather than entering a formal judgment constitutes reversible error. Under RAP 10.3(a)(6), this court will not address arguments that are unsupported by authority.¹⁶

Further, Buyers fail to explain why it matters that the trial court chose to dismiss the cases upon proof of return of the deposits instead of entering judgment in their favor. Presumably, Buyers sought a judgment to claim prevailing party status under the attorney fees provision of the contract. But allowing such a result would thwart the

¹⁶ Hines v. Todd Pac. Shipyards Corp., 127 Wn. App. 356, 368, 112 P.3d 522 (2005).

purpose of the attorney fees provision by allowing the losing party to claim attorney fees based on an uncontested issue.

Buyers also claim the court entered the order in violation of CR 54(f)(2) because they were given only four days' notice rather than five. Buyers did not raise this argument in their original motion for revision, and we decline to consider it under RAP 2.5(a). Finally, Buyers contend that under the contract they were entitled not only to the return of their earnest money deposits but also to an amount equal to their assigned commissions. But since their assigned commissions were not due until closing or immediately before closing, this value never passed to Sellers. We hold that the trial court did not err in denying Buyers' motions for revision.

VI. Sellers' Rescission Claims

The trial court denied both Buyers' and Sellers' motions for summary judgment and dismissed Sellers' claims for rescission as moot because the court had already granted Sellers the same relief by granting their summary judgment motions on the damages issue. When an issue becomes moot before trial, we generally decline to review it in order to "avoid the danger of an erroneous decision caused by the failure of parties, who no longer have an existing interest in the outcome of a case, to zealously advocate their position."¹⁷ Because the trial court had already granted relief, it correctly determined the rescission issue was moot.

¹⁷ Orwick v. City of Seattle, 103 Wn.2d 249, 253, 692 P.2d 793 (1984).

VII. Attorney Fees

"The general rule in Washington is that parties may not recover attorney fees except under a statute, contractual obligation, or some well-recognized principle of equity."¹⁸ Here, the contract provides for attorney fees and costs at trial and on appeal:

The prevailing party in any litigation concerning this Agreement shall be entitled to be paid its court costs and reasonable attorneys' fees by the party against whom judgment is rendered, including such costs and fees as may be incurred on appeal.

The trial court ruled that Sellers were not entitled to attorney fees below under the contract because "judgment" was not rendered against Buyers.

The court erred in interpreting "judgment" so narrowly. A more flexible reading of the attorney fees provision is supported by our holding in Piepkorn v. Adams that the term "prevailing party" in a bilateral contract should be interpreted to mean the substantially prevailing party.¹⁹ Summary judgment is a kind of "judgment." Here, the court entered summary judgment in favor of Sellers and against Buyers and dismissed the case. Thus, Sellers are the prevailing party under the contract and the court should have ordered Buyers, as the parties against whom summary judgment was rendered, to pay Sellers' reasonable attorney fees and costs. For the same reason, Sellers are entitled to attorney fees and costs on appeal under RAP 18.1.

¹⁸ Quality Food Centers v. Mary Jewell T, LLC, 134 Wn. App. 814, 817, 142 P.3d 206 (2006) (citing N. Pac. Plywood, Inc. v. Access Rd. Builders, Inc., 29 Wn. App. 228, 236, 628 P.2d 482, review denied, 96 Wn.2d 1002 (1981)).

¹⁹ 102 Wn. App. 673, 686, 10 P.3d 428 (2000) (citing Marassi v. Lau, 71 Wn. App. 912, 916, 859 P.2d 605 (1993)).

We affirm the trial court's entry of summary judgment in favor of Sellers and reverse its decision not to award attorney fees and costs. We remand with instructions to award Sellers reasonable attorney fees and costs incurred below and on appeal.

Aziz, J.

WE CONCUR:

Cox, J.

Baker, J.

APPENDIX 2

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MICHAEL MILLER; VICKI RINGER;)
and JOANNE FAYE TORGERSON, as)
trustee for the TORGERSON FAMILY)
TRUST;)

No. 58030-2-1
(consolidated with 58031-1-1)

DIVISION ONE

Appellants/
Cross-Respondents,)

v.)

ORDER DENYING MOTION
FOR RECONSIDERATION

ONE LINCOLN TOWER LLC, a)
Delaware limited liability company;)
BELLEVUE MASTER, LLC, a)
Delaware limited liability company; LS)
HOLDINGS, LLC, a Washington)
limited liability company,)

Respondents/
Cross-Appellants.)

Appellants, Michael Miller, Vicki Ringer, and Joanne Faye Torgerson, as trustee for the Torgerson Family Trust, having filed a motion for reconsideration of the opinion filed June 18, 2007, and the court having determined that said motion should be denied; Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

DATED this 25th day of July 2007.

FOR THE COURT:

Ajid J.

Judge

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STATE OF WASHINGTON
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APPENDIX 3

RCW 62A.2-719**Contractual modification or limitation of remedy.**

(1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,

(a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and

(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Title.

(3) Limitation of consequential damages for injury to the person in the case of goods purchased primarily for personal, family or household use or of any services related thereto is invalid unless it is proved that the limitation is not unconscionable. Limitation of remedy to repair or replacement of defective parts or non-conforming goods is invalid in sales of goods primarily for personal, family or household use unless the manufacturer or seller maintains or provides within this state facilities adequate to provide reasonable and expeditious performance of repair or replacement obligations.

Limitation of other consequential damages is valid unless it is established that the limitation is unconscionable.

[1974 ex.s. c 180 § 2; 1974 ex.s. c 78 § 2; 1965 ex.s. c 157 § 2-719. Subd. (1)(a) cf. former RCW 63.04.720; 1925 ex.s. c 142 § 71; RRS § 5836-71.]

Notes:

Lease or rental of personal property -- Disclaimer of warranty of merchantability or fitness: RCW 63.18.010.

APPENDIX 4

RCW 64.34.005

Findings — Intent — 2004 c 201.

(1) The legislature finds, declares, and determines that:

(a) Washington's cities and counties under the growth management act are required to encourage urban growth in urban growth areas at densities that accommodate twenty-year growth projections;

(b) The growth management act's planning goals include encouraging the availability of affordable housing for all residents of the state and promoting a variety of housing types;

(c) Quality condominium construction needs to be encouraged to achieve growth management act mandated urban densities and to ensure that residents of the state, particularly in urban growth areas, have a broad range of ownership choices.

(2) It is the intent of the legislature that limited changes be made to the condominium act to ensure that a broad range of affordable homeownership opportunities continue to be available to the residents of the state, and to assist cities' and counties' efforts to achieve the density mandates of the growth management act.

[2004 c 201 § 1.]

APPENDIX 5

Chapter 64.06 RCW

Residential real property transfers — seller's disclosures

RCW Sections

64.06.005 Application -- Definition of residential real property.

64.06.010 Application -- Exceptions for certain transfers of residential real property.

64.06.020 Seller's duty -- Format of disclosure statement -- Minimum information.

64.06.021 Notice regarding sex offenders.

64.06.022 Disclosure of possible proximity to farm.

64.06.030 Delivery of disclosure statement -- Buyer's options -- Time frame.

64.06.040 After delivery of disclosure statement -- Additional information -- Seller's duty -- Buyer's options -- Closing the transaction.

64.06.050 Error, inaccuracy, or omission in disclosure statement -- Actual knowledge -- Liability.

64.06.060 Consumer protection act does not apply.

64.06.070 Buyer's rights or remedies.

64.06.900 Effective date -- 1994 c 200.

APPENDIX 6

Chapter 64.32 RCW**Horizontal property regimes act (condominiums)****RCW Sections**

- 64.32.010 Definitions.
- 64.32.020 Application of chapter.
- 64.32.030 Apartments and common areas declared real property.
- 64.32.040 Ownership and possession of apartments and common areas.
- 64.32.050 Common areas and facilities.
- 64.32.060 Compliance with covenants, bylaws and administrative rules and regulations.
- 64.32.070 Liens or encumbrances -- Enforcement -- Satisfaction.
- 64.32.080 Common profits and expenses.
- 64.32.090 Contents of declaration.
- 64.32.100 Copy of survey map, building plans to be filed -- Contents of plans.
- 64.32.110 Ordinances, resolutions, or zoning laws -- Construction.
- 64.32.120 Contents of deeds or other conveyances of apartments.
- 64.32.130 Mortgages, liens or encumbrances affecting an apartment at time of first conveyance.
- 64.32.140 Recording.
- 64.32.150 Removal of property from provisions of chapter.
- 64.32.160 Removal of property from provisions of chapter -- No bar to subsequent resubmission.
- 64.32.170 Records and books -- Availability for examination -- Audits.
- 64.32.180 Exemption from liability for contribution for common expenses prohibited.
- 64.32.190 Separate assessments and taxation.
- 64.32.200 Assessments for common expenses -- Enforcement of collection -- Liens and foreclosures -- Liability of mortgagee or purchaser.
- 64.32.210 Conveyance -- Liability of grantor and grantee for unpaid common expenses.
- 64.32.220 Insurance.
- 64.32.230 Destruction or damage to all or part of property -- Disposition.
- 64.32.240 Actions.
- 64.32.250 Application of chapter, declaration and bylaws.
- 64.32.900 Short title.
- 64.32.910 Construction of term "this chapter."
- 64.32.920 Severability -- 1963 c 156.

Notes:

Condominiums created after July 1, 1990: Chapter 64.34 RCW.

Conversion of apartments into condominiums, notice required: RCW 59.18.200.

Mutual savings banks, powers as to condominiums: RCW 32.04.025.

APPENDIX 7

Chapter 64.34 RCW
Condominium act
RCW Sections

ARTICLE 1

GENERAL PROVISIONS

- 64.34.005 Findings -- Intent -- 2004 c 201.
- 64.34.010 Applicability.
- 64.34.020 Definitions.
- 64.34.030 Variation by agreement.
- 64.34.040 Separate interests -- Taxation.
- 64.34.050 Local ordinances, regulations, and building codes -- Applicability.
- 64.34.060 Condemnation.
- 64.34.070 Law applicable -- General principles.
- 64.34.073 Application of chapter 64.55 RCW.
- 64.34.080 Contracts -- Unconscionability.
- 64.34.090 Obligation of good faith.
- 64.34.100 Remedies liberally administered.

ARTICLE 2

CREATION, ALTERATION, AND TERMINATION OF CONDOMINIUMS

- 64.34.200 Creation of condominium.
- 64.34.202 Reservation of condominium name.
- 64.34.204 Unit boundaries.
- 64.34.208 Declaration and bylaws -- Construction and validity.
- 64.34.212 Description of units.
- 64.34.216 Contents of declaration.
- 64.34.220 Leasehold condominiums.
- 64.34.224 Common element interests, votes, and expenses -- Allocation.
- 64.34.228 Limited common elements.
- 64.34.232 Survey maps and plans.
- 64.34.236 Development rights.
- 64.34.240 Alterations of units.
- 64.34.244 Relocation of boundaries -- Adjoining units.
- 64.34.248 Subdivision of units.
- 64.34.252 Monuments as boundaries.
- 64.34.256 Use by declarant.
- 64.34.260 Easement rights -- Common elements.
- 64.34.264 Amendment of declaration.
- 64.34.268 Termination of condominium.
- 64.34.272 Rights of secured lenders.
- 64.34.276 Master associations.
- 64.34.278 Delegation of power to subassociations.

64.34.280 Merger or consolidation.

ARTICLE 3

MANAGEMENT OF CONDOMINIUM

64.34.300 Unit owners' association -- Organization.

64.34.304 Unit owners' association -- Powers.

64.34.308 Board of directors and officers.

64.34.312 Control of association -- Transfer.

64.34.316 Special declarant rights -- Transfer.

64.34.320 Contracts and leases -- Declarant -- Termination.

64.34.324 Bylaws.

64.34.328 Upkeep of condominium.

64.34.332 Meetings.

64.34.336 Quorums.

64.34.340 Voting -- Proxies.

64.34.344 Tort and contract liability.

64.34.348 Common elements -- Conveyance -- Encumbrance.

64.34.352 Insurance.

64.34.354 Insurance -- Conveyance.

64.34.356 Surplus funds.

64.34.360 Common expenses -- Assessments.

64.34.364 Lien for assessments.

64.34.368 Liens -- General provisions.

64.34.372 Association records -- Funds.

64.34.376 Association as trustee.

ARTICLE 4

PROTECTION OF CONDOMINIUM PURCHASERS

64.34.400 Applicability -- Waiver.

64.34.405 Public offering statement -- Requirements -- Liability.

64.34.410 Public offering statement -- General provisions.

64.34.415 Public offering statement -- Conversion condominiums.

64.34.417 Public offering statement -- Use of single disclosure document.

64.34.418 Public offering statement -- Contract of sale -- Restriction on interest conveyed.

64.34.420 Purchaser's right to cancel.

64.34.425 Resale of unit.

64.34.430 Escrow of deposits.

64.34.435 Release of liens -- Conveyance.

64.34.440 Conversion condominiums -- Notice -- Tenants.

64.34.443 Express warranties of quality.

64.34.445 Implied warranties of quality -- Breach.

64.34.450 Implied warranties of quality -- Exclusion -- Modification -- Disclaimer -- Express written warranty.

64.34.452 Warranties of quality -- Breach -- Actions for construction defect claims.

64.34.455 Effect of violations on rights of action -- Attorney's fees.

64.34.460 Labeling of promotional material.

64.34.465 Improvements -- Declarant's duties.

ARTICLE 5

MISCELLANEOUS

64.34.900 Short title.

64.34.910 Section captions.

64.34.920 Severability -- 1989 c 43.

64.34.921 Severability -- 2004 c 201.

64.34.930 Effective date -- 1989 c 43.

64.34.931 Effective date -- 2004 c 201 §§ 1-13.

64.34.940 Construction against implicit repeal.

64.34.950 Uniformity of application and construction.

Notes:

Condominiums created prior to July 1, 1990: Chapter 64.32 RCW.

APPENDIX 8

Chapter 64.35 RCW
Condominiums — qualified warranties
RCW Sections

ARTICLE 1

GENERAL PROVISIONS

- 64.35.105 Definitions.
- 64.35.106 Qualified warrantees -- Application of RCW 48.01.040.
- 64.35.110 No duty to offer a qualified warranty -- Insurer sets terms -- Scope of inquiry -- Conditions.
- 64.35.115 Attorneys' fees.
- 64.35.120 Change of ownership -- Coverage transfers.

ARTICLE 2

REMEDY, PROCEDURE, AND DISCLOSURE UNDER A QUALIFIED WARRANTY

- 64.35.205 Qualified warranty -- Remedy and procedure -- Application of chapter 64.50 RCW.
- 64.35.210 Notice of qualified warranty -- History of claims.

ARTICLE 3

MINIMUM COVERAGE STANDARDS FOR QUALIFIED WARRANTIES

- 64.35.305 Two-year materials and labor warranty -- Noncompliance with building code.
- 64.35.310 Five-year building envelope warranty.
- 64.35.315 Ten-year structural defects warranty.
- 64.35.320 Beginning dates for warranty coverage.
- 64.35.325 Beginning dates for warranty coverage -- Special cases -- Declarant control.
- 64.35.330 Living expense allowance.
- 64.35.335 Warranty on repairs and replacements.

ARTICLE 4

QUALIFIED WARRANTY TERMS

- 64.35.405 Provisions a qualified insurer may include.
- 64.35.410 Authorized exclusions -- General.
- 64.35.415 Authorized exclusions -- Defects.
- 64.35.420 Limits on amounts -- Calculation of costs -- Adjustments.
- 64.35.425 Prohibited policy provisions -- Exclusions.

ARTICLE 5

DUTIES OF PARTIES REGARDING COVERAGE AND CLAIMS

- 64.35.505 Failure to provide information -- Conditions or exclusions may not apply.
- 64.35.510 Schedule of expiration dates must be provided.
- 64.35.515 Duty to mitigate may be required.
- 64.35.520 Notice of claim -- Reasonable timeliness and detail -- Contents.
- 64.35.525 Handling of claim -- Prompt response -- Procedures.

ARTICLE 6

MEDIATION OR ARBITRATION OF DISPUTES

- 64.35.605 Disputed claim -- Notice -- Mediation procedures -- Duties of parties.

64.35.610 Disputed claim -- Notice -- Arbitration procedures -- Duties of parties.

ARTICLE 9

MISCELLANEOUS

64.35.900 Captions not law -- 2004 c 201.

64.35.901 Severability -- 2004 c 201.

APPENDIX 9



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RAP RULE 13.4

DISCRETIONARY REVIEW OF DECISION TERMINATING REVIEW

(a) How to Seek Review. A party seeking discretionary review by the Supreme Court of a Court of Appeals decision terminating review must file a petition for review or an answer to the petition that raises new issues. A petition for review should be filed in the Court of Appeals. If no motion to publish or motion to reconsider all or part of the Court of Appeals decision is timely made, a petition for review must be filed within 30 days after the decision is filed. If such a motion is made, the petition for review must be filed within 30 days after an order is filed denying a timely motion for reconsideration or determining a timely motion to publish. If the petition for review is filed prior to the Court of Appeals determination on the motion to reconsider or on a motion to publish, the petition will not be forwarded to the Supreme Court until the Court of Appeals files an order on all such motions. The first party to file a petition for review must, at the time the petition is filed, pay the statutory filing fee to the clerk of the Court of Appeals in which the petition is filed.

(b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

(c) Content and Style of Petition. The petition for review should contain under appropriate headings and in the order here indicated: (1) Cover. A title page, which is the cover. (2) Tables. A table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with reference to the pages of the brief where cited. (3) Identity of Petitioner. A statement of the name and designation of the person filing the petition. (4) Citation to Court of Appeals Decision. A reference to the Court of Appeals decision which petitioner wants reviewed, the date of filing the decision, and the date of any order granting or denying a motion for reconsideration. (5) Issues Presented for Review. A concise statement of the issues presented for review. (6) Statement of the Case. A statement of the facts and procedures relevant to the issues presented for review, with appropriate references to the record. (7) Argument. A direct and concise statement of the reason why review should be accepted under one or more of the tests established in section (b), with argument. (8) Conclusion. A short conclusion stating the precise relief sought. (9) Appendix. An appendix containing a copy of the Court of Appeals decision, any order granting or denying a motion for reconsideration of the decision, and copies of statutes and constitutional provisions relevant to the issues presented for review.

(d) Answer and Reply. A party may file an answer to a petition for

review. If the party wants to seek review of any issue that is not raised in the petition for review, including any issues that were raised but not decided in the Court of Appeals, the party must raise those new issues in an answer. Any answer should be filed within 30 days after the service on the party of the petition. A party may file a reply to an answer only if the answering party seeks review of issues not raised in the petition for review. A reply to an answer should be limited to addressing only the new issues raised in the answer. A reply to an answer should be filed within 15 days after the service on the party of the answer. An answer or reply should be filed in the Supreme Court. The Supreme Court may call for an answer or a reply to an answer.

(e) Form of Petition, Answer, and Reply. The petition, answer, and reply should comply with the requirements as to form for a brief as provided in rules 10.3 and 10.4, except as otherwise provided in this rule.

(f) Length. The petition for review, answer, or reply should not exceed 20 pages double spaced, excluding appendices.

(g) Service and Reproduction of Petition, Answer, and Reply. The clerk will arrange for the reproduction of copies of a petition for review, an answer, or a reply, and bill the appropriate party for the copies as provided in rule 10.5. The clerk will serve the petition, answer, or reply if the party has not done so.

(h) Amicus Curiae Memoranda. The Supreme Court may grant permission to file an amicus curiae memorandum in support of or opposition to a pending petition for review. Absent a showing of particular justification, an amicus curiae memorandum should be received by the court and counsel of record for the parties and other amicus curiae not later than 60 days from the date the petition for review is filed. Rules 10.4 and 10.6 should govern generally disposition of a motion to file an amicus curiae memorandum. An amicus curiae memorandum or answer thereto should not exceed 10 pages.

(i) No Oral Argument. The Supreme Court will decide the petition without oral argument.

[Amended September 1, 1999; December 5, 2002; September 1, 2006.]

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