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**ORIGINAL**

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Nos. 58030-2-I & 58031-1-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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DIVISION I  
STATE OF WASHINGTON  
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MICHAEL MILLER; VICKI RINGER; and JOANNE FAYE  
TORGERSON, as trustee for the TORGERSON FAMILY TRUST;

Plaintiffs/Appellants,

v.

ONE LINCOLN TOWER, LLC; BELLEVUE MASTER, LLC; and LS  
HOLDINGS, LLC,

Defendants/Respondents/Cross-Appellants.

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APPEAL FROM THE SUPERIOR COURT  
FOR KING COUNTY  
HONORABLE JEFFREY RAMSDELL

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**BRIEF OF RESPONDENTS;  
OPENING BRIEF OF CROSS-APPEAL**

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## **I. ASSIGNMENT OF ERROR**

1. The trial court erred in denying Respondents' motions for attorney fees. (MCP 1056-57; TCP 384-85.)

## **II. ISSUES RELATED TO ASSIGNMENT OF ERROR**

1. Whether the trial court's interpretation of the attorney fee provisions in the Agreements was unreasonable and contrary to Washington law governing bilaterality of attorney fee provisions (RCW 4.84.330).

2. Whether the trial court erred in not either determining that Respondents were the substantially prevailing party or applying the proportionality approach and awarding Respondents the fees incurred in enforcing the limitation of remedies provision (most or all of the fees incurred in the case).

## **III. INTRODUCTION**

This case involves an unambiguous limitation of remedies provision in two identical real estate purchase and sale agreements ("Agreements" or "Agreement"). Appellant buyers, Michael Miller and Vicki Ringer of one condominium and Joanne "Faye" Torgerson of the other ("Appellants"), were real estate agents purporting to represent the Seller's interests with respect to the property they were purchasing. The Agreement provides, in part:

[A]ny 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 and any nonrefundable sums reasonably paid by Buyer to unrelated third parties.

(MCP 99; TCP 142, emphasis added.)

Appellants first claimed that the provision is ambiguous and does not limit their remedies. When that proved implausible, they claimed that enforcing the unambiguous language is unconscionable. The trial court did not err in enforcing the Agreements as a matter of law. Although Washington courts have not addressed a provision of this type, they enforce clauses much more harsh and one-sided. Further, five of the six states addressing identical language have enforced it. The trial court correctly interpreted Washington law and this Court should affirm the trial court's granting of summary judgment in favor of Respondent sellers One Lincoln Tower, LLC; Bellevue Master, LLC; and LS Holdings, LLC ("Respondents").

The trial court did not abuse its discretion in refusing to permit Appellants to file amended complaints, weeks after the dismissal of their original complaints, where amendment was both futile and untimely.

The trial court's only error was failing to award Respondents their attorney fees. The trial court erroneously interpreted the attorney fee provision not to award fees to the substantially prevailing party, contrary to

Washington law and the provision's plain meaning. The trial court should have either awarded Respondents their fees as the substantially prevailing party or applied the proportionality approach; in either event, Respondents would recover most or all of their fees. The only relief awarded Appellants was already offered—and rejected—by Appellants before they sued.

Appellants were fully aware of the terms of their bargain. Real estate agents with fiduciary duties to their principals are not the parties for whose benefit courts should be rewriting agreements. This Court should affirm the dismissal of Appellants' claims and award Respondents' their attorney fees below and on appeal.

#### **IV. STATEMENT OF THE CASE**

##### **A. Initial Development of Lincoln Tower.**

In 1997, a Canadian developer named Ian Gillespie began the process of developing a large mixed-use project on five acres in downtown Bellevue. He formed Respondent One Lincoln Tower, LLC for that purpose. Gillespie pursued the project with an equity partner named Lend Lease, LLC. The project was to have five major elements. There was to be a five level underground parking garage. The first three levels above grade were to be comprised primarily of retail space. There was to be a 27 story office tower on the north end of the site. The south tower was to have a four-star hotel

(floors 1-19) with 148 luxury residential condominium units (floors 20-42) atop the hotel. (MCP 75-76; TCP 120-21.)

These phases were pursued and excavation began in 2000. Office leases were executed, hotel contracts were procured, City of Bellevue entitlements were obtained, and condominium sales began. Initially, “reservations” were taken for the condominiums. The reservations were later converted to Purchase and Sale Agreements. (MCP 76; TCP 121.)

**B. Appellants Become Real Estate Agents for Development and Purchase Condominiums for Themselves.**

On or about November 20, 2000, Torgerson entered into a “Letter of Authorization” with Respondent Bellevue Master, the legal entity selling the condominium units. (MCP 78-81; TCP 123-27.) Pursuant to the Letter of Authorization, Torgerson’s company, Torgerson and Associates, and Coldwell Banker Bain were authorized to list and sell the units for a specified commission structure. (MCP 82-90; TCP 127-35.)

Early in the sales process, Appellants sought to purchase condominium units for themselves. (MCP 77; TCP 122.) They requested that they only pay \$5,000 in earnest money (less than any other purchaser) and the principal agreed. (MCP 77; TCP 122.) They were offered the same Purchase and Sale Agreement that they had been “selling” as OLT’s listing

agents. (MCP 77; TCP 122.) They applied their expertise in reviewing the document and agreed to its terms. (MCP 77; TCP 122.) They executed Agreements in June 2001; Miller for Unit 2003 and Torgerson for Unit 1904. (MCP 91-107; TCP 136-53.)

Torgerson negotiated for, and received, benefits unique to her in addition to the reduced security deposit. She requested "an independent inspection form" from seller. (TCP 152.) She also negotiated for herself the right to interchange interior finish packages, rather than have to choose from the packages presented to other buyers. (Id.)

**C. The Agreements Limit Appellants' Remedies and Significant Undisputed Evidence Demonstrates Their Knowledge and Acceptance of This Fact without Objection or Question.**

The Agreements unequivocally limit Appellants' remedies in the event of breach by Sellers:

21. DEFAULTS AND REMEDIES.

\* \* \*

Except as otherwise stated in this Agreement, *any default by Seller* under this Agreement which continues to the earlier of (a) fifteen (15) days after Buyer's written notice thereof, or (b) the Closing Date, as the same may be extended pursuant to this Agreement or the written agreement of the parties, *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* and any nonrefundable sums reasonably paid by Buyer to unrelated third parties that are

authorized by Seller in writing to alter or improve the Unit in the manner agreed to by Seller in writing.

(MCP 99; TCP 142, emphasis added.)

Appellants asserted that the above should be read to limit Buyer's remedies only if the project is not built. Torgerson testified in her deposition:

17 A. My understanding of paragraph 21 is that a buyer  
18 will receive their earnest money back should the seller not  
19 build the project.

20 Q. Could you show me where it says that. For  
21 example --

22 A. You asked me what my understanding was, and  
23 that's in general what I feel my understanding is.

24 Q. With respect to the -- what language in section  
25 21 leads you to the understanding that if the project isn't  
1 built seller gets their money back? Which sentence?

2 A. There isn't a specific sentence that says that.  
3 That's my understanding of this paragraph.

\* \* \*

11 Q. If your eyes are on that, you see where it says  
12 "Except as otherwise stated in this agreement," do you see  
13 where it says "any default by seller under this agreement"?

14 A. Yes.

15 Q. The words "any default," doesn't that lead you  
16 to believe it's more inclusive than just failure to build  
17 the unit?

18 A. It isn't to me.

19 Q. So "any default" means only if they don't build  
20 the condominium, is that correct?

21 A. That's correct.

(TCP 78-79.)

Significantly, the Agreement expressly addresses the situation of

which Torgerson spoke. Paragraph 6.1 of the Agreement provides:

6.1. Completion of Construction. Seller estimates, but does not represent or guarantee, that the Unit will be substantially completed by March 31, 2003. If the Unit has not been substantially completed by December 31, 2003, Buyer shall have, as its sole remedy for such failures, the right to rescind this Agreement by giving Seller written notice of revocation. Upon Seller's receipt of a notice of revocation, the Deposit shall be returned to Buyer and except as otherwise stated herein the parties shall have no further rights or liabilities under this Agreement.

(MCP 95; TCP 138.)

**D. The Purchase and Sale Agreement Is Revised in Ways Further Highlighting the Nature of the Limitation of Remedies Applicable to Appellants.**

In late 2001, a few months after Appellants entered into their Agreements, the owners decided to revise the Purchase and Sale Agreement. The relevant revisions are simple and compelling: they removed the limitation of remedy provision from the revised agreement. Appellants were acting as the selling agents for the property and were informed of this change in an email that requested their input. (MCP 120-23; TCP 85-89.) Torgerson offered no input; Miller had one comment that demonstrated his review of the document but had nothing to do with the limitation of remedies. (Id.) The revisions were sent to all of the involved brokers, including Miller and Torgerson, in December 2001. (MCP 124-53; TCP 89-118.)

A copy of the revised agreement in redline format shows unequivocally that the intent of the parties to Appellants' Agreements was to limit Buyer's remedies for any breach. Section 6.1 was revised as follows:

**6.1 Completion of Construction.** Seller will be marketing units in the Condominium before completion of construction. Seller estimates, but does not represent or guarantee, that the Unit will be substantially completed by March 31, 2003. ~~If the Unit has not been substantially completed by December 31, 2003, Buyer shall have, as its sole remedy for such failures, the right to rescind this Agreement by giving Seller written notice of revocation. Upon Seller's receipt of a notice of revocation, Seller agrees to construct the Unit and to cause the Unit to be completed and ready for occupancy and use as a residence within two (2) years after the date Buyer executes this Agreement; provided, however, such period shall be extended to the same extent Seller's construction is delayed by acts of God or other force majeure, and provided further, Buyer shall have the right, in addition to its other remedies under this Agreement, to terminate its obligation to purchase the Unit if all portions of the Unit to be constructed by Seller are not substantially completed for any reason not caused by Buyer by June 30, 2004. Seller's obligation to construct the Unit shall not be affected by the failure of inability of Buyer to satisfy any contingency or condition to closing, but Seller shall have the right to terminate this Agreement and its obligation to construct the Unit if, as of the one hundred eightieth (180<sup>th</sup>) day after the date the first purchase contract for a unit in the Condominium was signed by a purchaser, the number of units in the Condominium that are subject to contracts for sale is less than eighty percent (80%) of all of the units in the Condominium. If Seller or Buyer so terminates this Agreement~~ the Deposit shall be returned to Buyer and except as otherwise stated herein the parties shall have no further rights or liabilities under this Agreement.

(MCP 128; TCP 93, emphasis and interlineations in original.)

Section 21 was similarly rewritten to provide buyers with more remedies than are available to Appellants:

**21. Defaults and Remedies.** 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; provided, however, to the extent the Deposit and interest thereon exceed five percent (5%) of the total purchase price under this Agreement or any amendment thereto, the difference represented by such excess shall be returned to Buyer upon Seller's exercise of such remedy. The parties acknowledge that this provision is intended to satisfy the requirement of RCW 64.04.005(1)(a); is not to be construed to be a limitation upon any right or remedy available to Seller under any indemnity or in the event of any other default on the part of Buyer under this or any other agreement; and does not affect the parties' rights to recover attorneys' fees in any action commenced with respect to this Agreement. Except as otherwise stated in this Agreement, any default by Seller under this Agreement which continues to the earlier of (a) fifteen (15) days after Buyer's written notice thereof, or (b) the Closing Date, as the same may be extended pursuant to this Agreement or the written Agreement of the parties, 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 and any nonrefundable sums reasonably paid by Buyer to unrelated third parties that are authorized by Seller in writing to alter or improve the Unit in the manner agreed to by Seller in writing; **provided, however, no such notice or cure period need be given to Seller for Seller's failure to complete construction of the Unit as and when required by this Agreement, and in the event of and for such failure to construct the Unit, and except for any right to recover consequential or punitive**

**damages. Buyer shall have all remedies available at law or in equity.**

(MCP 132; TCP 99, emphasis and interlineations in original.)

These redlined documents and the emails that accompany them demonstrate that Appellants knew, or should have known, two things. First, the “new” agreement had a materially different default and remedy clause. Second, the “old” agreement had a very restrictive limitation of remedies provision. Appellants, experts on real estate law and the Agreement itself, did not object. (MCP 120-23; TCP 85-89.)

Contrary to Appellants’ unsupported assertion in their brief, the Agreement was not changed because it violated the Interstate Land Sales Act or other law. The record contains the contrary explanation of attorney David Rockwell, which was uncontradicted at summary judgment. (MCP 241-42; TCP 324-25.)

**E. The Project Stalls, Is Sold, and Significant Changes Are Made Rendering the Original Agreements Impossible to Perform.**

For a variety of reasons, the project stalled and construction was suspended in June 2002. The project was offered for sale and after one potential sale failed to close, Respondent LS Holdings, LLC (“LSH”) acquired the project in August 2003. When LSH purchased the property, only a 2,000 car underground garage and limited above grade structures had been

completed. (MCP 76; TCP 121.)

After LSH purchased the project, a new commission agreement was entered into on November 7, 2003 with Miller Torgerson & Associates, LLC. (MCP 82-90; TCP 127-35.)

At the time of the purchase there were 86 Purchase and Sale Agreements that LSH assumed. Significantly, and for several reasons, LSH knew that it would be necessary to terminate the 86 contracts and enter into new contracts. Primarily, several changes in the project made the original Purchase and Sale Agreements essentially void because they required Seller to build a condominium that could not, in fact, be built. (MCP 76; TCP 121.)

This was due to numerous changes: the health club was no longer a part of the project and would not be delivered as promised; the promised membership to the Bellevue Art Museum could not be provided because the museum closed; technological benefits could not be delivered because the technology did not yet exist; the cabinet manufacturer went bankrupt and could not deliver the promised cabinetry; entirely new color schemes were developed by a new interior decorator; new appliance packages were developed; and flooring was changed to hardwood. (TCP 315-16.)

Appellants knew that the project would have to be "re-papered". Torgerson testified that she "intuitively" knew that a new owner would need

to redo the contracts. (TCP 79.) Ultimately, LSH entered into new Agreements with 76 of the original 86 buyers. (Eight chose not to sign new agreements and were refunded their earnest money.) (MCP 76; TCP 121.)

**F. LSH Terminates Agreements with Appellants.**

On May 3, 2004, LSH terminated the Agreements with Appellants by letters to each of them. (MCP 111; TCP 157.) LSH learned that Ms. Torgerson had, on at least one occasion, referred an unrepresented buyer to an outside agent. (MCP 77; TCP 122.) This was a blatant breach of fiduciary duty. Appellants also refused to increase the amount of their earnest money to match the amount deposited by purchasers of comparable units. (MCP 77; TCP 122.)

LSH later learned that their divided loyalties were even more pervasive. An email from Michael Grady, seemingly in response to a request from Torgerson, recommends that she make additional money under the Agreement through a "Buyer Referral Program." (TCP 83-84.) Torgerson denied knowledge of what this meant; however, she was unable to explain how such a program could be consistent with her fiduciary duties and acknowledged that such a program would be a breach of duty. (TCP 80-82.)

Respondents' claims against Appellants for rescission supported by the many breaches of fiduciary duty by Miller and Torgerson were dismissed

by the trial court as “moot because of the Court’s prior order limiting Plaintiffs to the return of their earnest money already provides Defendants the same remedy they seek to achieve through their counterclaim.” (MCP 672-673; TCP 566-567.)

**G. Appellants Sue, Lose on Summary Judgment, and Then Move to Amend Their Complaints.**

On November 1, 2004, Appellants commenced lawsuits against the current owner of the project and the two prior sellers. (MCP 1-65; TCP 1-63.) They sought specific performance or money damages. (Id.) LSH answered and contended that Appellants were bound by the limitation of remedies provisions in the Agreements. (MCP 66-69; TCP 64-67.)

Respondents moved for summary judgment and Appellants cross-moved. On May 9, 2005, the trial court entered orders granting Respondents’ motions for summary judgment. (MCP 243-45; TCP 326-28.) The dismissals of their cases were conditioned only on the return of the earnest money, which was promptly tendered and again rejected. (Id.)

On May 23, 2005, Appellants filed motions for leave to amend their complaints. (MCP 258-59; TCP 334-35.) The two page motions assert that Appellants “wish to amend their complaint to primarily add an additional cause of action for promissory estoppel.” (MCP 258-59; TCP 334-35.) The

proposed amended complaints attached to the motions retained the breach of contract claims already dismissed. (MCP 271-72; TCP 346-47.) They sought all of the same relief as in the original complaint, plus additional relief. (MCP 273-74; TCP 348-49.) The alleged reliance necessary for the promissory estoppel claims was that Appellants “did not exercise [their] option to rescind the Contract.” (MCP 273; TCP 348, emphasis added.) The trial court denied the motions to amend. (MCP 355-56; TCP 380-81.)

#### **H. The Trial Court Denies Respondents’ Motions for Their Fees.**

Thereafter, Respondents filed motions for their attorney fees. The Agreements contain the following provision:

**22. ATTORNEYS’ FEES.** 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.

(MCP 99; TCP 142, emphasis in original.)

Appellants opposed the motions but did not seek their own attorney fees.<sup>1</sup> The trial court denied the motion. (MCP 1056-57; TCP 384-85.)

Rather than viewing Section 22 as a “prevailing party” provision, the trial

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<sup>1</sup> Appellants never requested their fees from the trial court, either by motion or in response to Respondents’ motions. Appellants’ responses to Respondents’ motions are not in the trial court’s docket, which would suggest that Appellants neglected to file them (though they were received by opposing counsel and the trial court). If Appellants persist in seeking their fees on appeal, they should remedy this failure and add the documents to the appellate record.

court construed the language “against whom judgment is rendered” against Respondents. It thus ruled that the Agreement did not entitle Respondents to their fees, regardless of whether they substantially prevailed, because “judgment” was not rendered in their favor. (MCP 1057; TCP 385.)

## V. ARGUMENT AND AUTHORITY

### A. Standard of Review.

Summary judgments are reviewed *de novo*. *Troxell v. Rainier Pub. Sch. Dist. No. 307*, 154 Wn.2d 345, 350, 111 P.3d 1173 (2005). The interpretation of an unambiguous contract is a question of law and reviewed *de novo*. *Dice v. City of Montesano*, 131 Wn. App. 675, 684, 128 P.3d 1253 (2006). The parties’ intent in an unambiguous contract is determined by the contract language itself. *Barnett v. Buchan Baking Co.*, 45 Wn. App. 152, 159, 724 P.2d 1077 (1986), *aff’d*, 108 Wn.2d 405, 738 P.2d 1056 (1987).

“The existence of an unconscionable bargain is a question of law for the courts.” *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 344, 103 P.3d 773 (2004). This is also true where the allegedly unconscionable language is a limitation of remedies provision. *M. A. Mortenson Company, Inc. v. Timberline Software Corp.*, 140 Wn.2d 568, 585, 998 P.2d 305 (2000). Thus, the issue of unconscionability is reviewed *de novo*.

A court's denial of a motion to amend a pleading is reviewed for

"manifest abuse of discretion." *Herron v. Tribune Publishing Co.*, 108 Wn.2d 162, 165, 736 P.2d 249 (1987). Such abuse may be found where the court exercises its discretion "on untenable grounds, or for untenable reasons." *Nepstad v. Beasley*, 77 Wn. App. 459, 468, 892 P.2d 110 (1995).

Whether a particular statutory or contractual provision authorizes an award of attorney fees is a legal question reviewed *de novo*. *Schlener v. Allstate Ins. Co.*, 121 Wn. App. 384, 388, 88 P.3d 993 (2004).

**B. The Limitation of Remedies Provision Is Enforceable as A Matter of Law.**

Although no Washington case has addressed the right of a seller to enforce a Limitation of Remedies provision that limits a buyer's remedies to the return of earnest money, six foreign jurisdictions have done so. Five enforced the provision; the sixth applied a "mutuality of obligation" doctrine expressly rejected in Washington. The Agreement is unambiguous and enforceable as a matter of law.

**1. The Agreement Is Unambiguous as a Matter of Law.**

The Agreement is unambiguous as a matter of law. Appellants appear to have abandoned any contrary claim. However, as it is a matter of *de novo* review, analysis of its unambiguity is necessary.

"A trial court may resort to parol evidence for the limited purpose of

construing the otherwise clear and unambiguous language of a contract in order to determine the intent of the parties." *Bort v. Parker*, 110 Wn. App. 561, 573, 42 P.3d 980, *review denied*, 147 Wn.2d 1013, 56 P.3d 565 (2002) (citing *Berg v. Hudesman*, 115 Wn.2d 657, 669, 801 P.2d 222 (1990)). Extrinsic evidence is admissible "for the purpose of aiding in the interpretation of what is in the instrument, and not for the purpose of showing intention independent of the instrument." *Berg*, 115 Wn.2d at 669.

"Admissible extrinsic evidence does not include (1) evidence of a party's unilateral or subjective intent as to the meaning of a contract word or term, (2) evidence that would show an intention independent of the contract, or (3) evidence that varies, contradicts or modifies the written language of the contract." *Bort*, 110 Wn. App. at 574. "Unexpressed impressions are meaningless when attempting to ascertain the mutual intentions [of the parties]." *Lynott v. National Union Fire Ins. Co.*, 123 Wn.2d 678, 684, 871 P.2d 146 (1994) (internal quotation omitted).

This Court should determine the intent of the parties by viewing the contract as a whole, including: (1) the subject matter and intent of the contract, (2) examination of the circumstances surrounding its formation, (3) subsequent acts and conduct of the parties, (4) the reasonableness of the respective interpretations advanced by the parties, (5) and statements made

by the parties during preliminary negotiations, trade usage, and/or course of dealing. *Adler*, 153 Wn.2d at 344.

In light of these factors and the Agreement's unambiguous language, the Court should rule that the parties intended to limit Buyer's remedies to the return of earnest money and sums paid to third parties.

**i. The Parties' Subsequent Acts Show an Intent to Limit Buyer's Remedies Unconditionally, as Later Versions Did Not So Limit Buyer's Remedies.**

The parties' subsequent acts (while Appellants were acting as the listing agents on the property) demonstrate that the intention of the parties was to unequivocally limit Appellants' remedies. Appellants executed the Agreement in June 2001. In December of that year, Seller specifically elected to remove the Limitation of Remedies provision from its agreements. It did this specifically considering the ramifications of such a comprehensive, unequivocal limitation on the remedies of buyers. This intent to remove the limitation of remedies was clearly communicated to agents Miller and Torgerson, through at least one email and a copy of the revised Agreement in redlined format. (MCP 120-53; TCP 85-118.)

Also pertinent is the utter lack of contemporaneous objection from Appellants about the terms of the Agreement or assertion that the limitation of remedies provision was unenforceable. They held themselves out as

experts on the document. They had extensive training as real estate agents. Had it truly been the parties' intent to only limit Buyer's remedies if Seller failed to complete the project, there would be some contemporaneous evidence of that intent. There is none.

**ii. Respondents' Interpretation Is Reasonable and Appellants' Is Not.**

Appellants seek to avoid Section 21 by positing that it only applies if Seller "fails to complete the project." (TCP 77-79.) In addition to the above, this interpretation is negated by a separate provision that governs that event.

Section 6.1 is called "Completion of Construction." It provides that "[i]f the Unit has not been substantially completed by December 31, 2003, Buyer shall have, as its sole remedy for such failures, the right to rescind this Agreement by giving Seller written notice of revocation." (MCP 95; TCP 138.) Further, Section 21 precludes Appellants' argument that it applies only when the project is not built. This is because it applies to a default that occurs at "Closing," which is defined as after the project is built. (MCP 99; TCP 142.) Appellants' interpretation is incoherent.

"An interpretation which gives effect to all of the words in a contract provision is favored over one which renders some of the language meaningless or ineffective." *Seattle-First Nat'l Bank v. Westlake Park*

*Associates*, 42 Wn. App. 269, 274, 711 P.2d 361 (1985), *review denied*, 105 Wn.2d 1015 (1986). Here, Section 6.1 specifically governs failure to complete; it is wholly unreasonable and incongruous to interpret Section 21 to be limited to only the circumstances governed by Section 6.1.

**2. The Limitation of Remedies Is Not Unconscionable and No Other Theory Precludes Its Enforcement.**

Appellants argue that Section 21 should not limit their remedies because Respondents are completing the project and thus enforcement of the provision as written is unconscionable. The provision is not unconscionable and Appellants cannot avoid enforcement under any other theory.

“The existence of an unconscionable bargain is a question of law for the courts.” *Adler v. Fred Lind Manor*, 153 Wn.2d at 334. This is also true where the allegedly unconscionable language is a limitation of remedies provision. *M. A. Mortenson*, 140 Wn.2d at 585. Washington law recognizes two separate types of unconscionability that preclude enforcement of otherwise valid agreements; procedural and substantive.

In determining unconscionability under the Uniform Commercial Code (“UCC”), the analysis is limited to whether the provision was unconscionable at the time of contracting. *Jeffery v. Weintraub*, 32 Wn. App. 536, 543-44, 648 P.2d 914 (1982). Subsequent authority found the analysis

in *Jeffery* “applicable beyond the Uniform Commercial Code context.”  
*Yakima County Fire Prot. Dist. No. 12 v. Yakima*, 122 Wn.2d 371, 391, 858  
P.2d 245 (1993).

Appellants assert that the transactions are “consumer” transactions, not “commercial”, and hinge their argument for reversal on the characterization. They argue that because the transactions are consumer, the “Baker-Berg Special Rule” applies and requires Respondents to establish the conscionability of the provision (and, implicitly, that Respondents failed to do so and therefore summary judgment should be reversed). The lynchpin of their argument is a UCC definition of “consumer goods” as “goods that are used or bought primarily for personal, family, or household purposes.” (RCW 62A.9A-102(23); Opening Brief, p. 18.)<sup>2</sup>

This definition does not determine what unconscionability analysis to apply. Rather, the authority creating the higher standard for “consumer transactions” identifies the indicia of when the standard should not be applied: where there are “competent persons dealing at arm’s length, with no claim of an adhesion contract, when the contract contains a specific

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<sup>2</sup> This analysis fails even on its own terms: the UCC specifically defines “goods” as “things that are movable when a security interest attaches.” RCW 62A.9A.102(44). See also *Condon Bros. v. Simpson Timber Co.*, 92 Wn. App. 275, 280-81, 966 P.2d 355 (1998) (citing Article 2 of UCC for same distinction between movable goods and real property).

disclaimer and when the contract language is clear.” *American Nursery Products, Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 224, 797 P.2d 477 (1990). Crucially, this standard is not to be applied mechanically; the inquiry is whether “in truth a meaningful choice existed.” *Nelson v. McGoldrick*, 127 Wn.2d 124, 131, 896 P.2d 1258 (1995).

The purpose of developing a “consumer” exception to the unconscionability rule was to protect unsophisticated, unsuspecting people of limiting bargaining power. Appellants are not such people, regardless of the purpose for which they bought the Property. They had knowledge of the project, the Agreement, and the Sellers. If courts rewrite contracts for parties this sophisticated, they will be rewriting them for everyone.

**i. The Limitation of Remedies Provision Is Not Procedurally Unconscionable, as Appellants Had a Meaningful Choice Not to Purchase the Property or to Negotiate More Favorable Terms.**

Procedural unconscionability derives from the process under which a contract is formed. It is described as the lack of a meaningful choice, considering all the circumstances surrounding the transaction, including “the manner in which the contract was entered, whether each party had a reasonable opportunity to understand the terms of the contract, and whether the important terms were hidden in a maze of fine print.” *Mortenson*, 140

Wn.2d at 588. As stated above, this standard is not to be applied mechanically; the inquiry is whether “in truth a meaningful choice existed.” *Nelson*, 127 Wn.2d at 131.

Appellants cannot establish procedural unconscionability. They were not forced to make agreements with their principal; they did so willingly. They were not unaware of the document’s content; they were real estate experts who sold the Agreement to others for compensation. There were numerous units for sale and the project was not to be completed for several years. Thus, there was no urgency to agree that deprived them of meaningful choice, as is often the case with adhesion contracts. If they were confused about the Agreement, they could have consulted someone whose knowledge of real estate law they trusted (either a fellow agent or an attorney).

Further, Torgerson clearly had the ability to negotiate better provisions because she did so. In addition to the reduced deposit that she and Miller both received, Torgerson negotiated for, and obtained, “an independent inspection form” from seller. (TCP 152.) She also negotiated for herself the right to interchange interior finish packages, rather than have to choose from the packages presented to other buyers. (Id.)

Appellants had an opportunity to understand the Agreement; likely more so than any contracting party before this Court on any matter. They

were listing agents, paid to negotiate dozens of these Agreements on behalf of their principal. They held themselves out as having expertise on the document. This opportunity precludes procedural unconscionability.

Finally, Section 21 is not in a maze of fine print. It is set out and was separately initialed; to ensure its enforceability. All these factors demonstrate a lack of procedural unconscionability. The trial court correctly ruled that there was no procedural unconscionability.

**ii. The Limitation of Remedies Provision Is Not Substantively Unconscionable, as Many Comparable Provisions More One-Sided and Harsh Are Enforced By Washington Courts.**

Substantive unconscionability involves cases where a term in a contract is allegedly one-sided or overly harsh. *Nelson*, 127 Wn.2d at 131. “Shocking to the conscience, monstrously harsh, and exceedingly calloused are terms sometimes used to define substantive unconscionability.” *Id.*

As discussed above, the analysis of a limitation of remedies provision for substantive unconscionability changes if the transaction is a “consumer transaction.” In “consumer” sales transactions, an exclusionary clause will only be upheld if it is “explicitly negotiated between buyer and seller” and the remedies being excluded are “set forth with particularity.” *American Nursery*, 115 Wn.2d at 223.

This rigorous standard is not applied to transactions between “competent persons dealing at arm’s length, with no claim of an adhesion contract, when the contract contains a specific disclaimer and when the contract language is clear.” *American Nursery*, 115 Wn.2d at 224. In these transactions (labeled “purely commercial”), exclusionary clauses are *prima facie* conscionable and the burden of establishing unconscionability is on the party attacking it. *Mortenson*, 140 Wn.2d at 585-86.

Here, the Court can conclude as a matter of law that these are not consumer transactions for purposes of the unconscionability analysis. This is not an adhesion contract. The disclaimer of remedies is specific. The contract’s limitation language is clear. The only *American Nursery* factor potentially contrary is that the parties were not at arm’s length due to Appellants’ fiduciary relationship. However, as fiduciaries Appellants cannot rightly seek to use that factor to their advantage. Although the label “non-consumer” would more accurately reflect the fundamental absence of grounds for special protection of a contracting party, the transaction is deemed “commercial” under Washington law. Appellants bear the burden of demonstrating that the Agreement is “shocking to the conscience, monstrously harsh, and exceedingly calloused.” *Nelson*, 127 Wn.2d at 131.

Appellants fail to make this showing. *Mortenson*, *supra*, and *Puget*

*Sound Financial, LLC v. Unisearch, Inc.* 146 Wn.2d 428, 47 P.3d 940 (2002) provide the clearest examples of why not. In *Mortenson*, a company purchased software. A license to use the software was wrapped around the discs and stated that use of the software constituted an agreement that the seller's liability was limited to "the license fee paid for the right to use the programs." *Mortenson*, 140 Wn.2d at 575.

Buyer used the software and it erroneously produced a bid 1.95 million dollars too low, subjecting the company to massive liability. Furthermore, a memorandum revealed that Seller had learned of a flaw in the program and had sent corrected versions to some customers but not Buyer. Despite this conduct and the significant damages, Seller moved to limit Buyer's remedies to a refund of the money it paid for the software. Buyer argued that the provision was substantively unconscionable. The trial court granted summary judgment enforcing the limitation of remedy provision. The Court of Appeals and Washington Supreme Court both affirmed.

First, the Court questioned whether a limitation of remedies provision in a commercial transaction can ever be substantively unconscionable. *Id.* at 586. The Court ruled that "even if the doctrine applies, the clause here is conscionable." *Id.* The Court then set forth facts that meet the standard of substantive unconscionability in a commercial transaction:

An example of the proper focus of the substantive unconscionability doctrine is found in *Brower v. Gateway 2000, Inc.*, 246 A.D.2d 246, 254, 676 N.Y.S.2d 569 (1998). There, a shrinkwrap software license similar to the license in the present case included a mandatory arbitration clause, which required the use of a French arbitration company, payment of an advance fee of \$ 4,000 (half which was nonrefundable), significant travel fees borne by the consumer, and payment of the loser's attorney fees.

*Id.* at 587.

The Court then ruled that the provision at issue did not “shock the conscience” sufficient to preclude its enforcement. *Id.*

In *Puget Sound*, Unisearch performed searches for \$25 apiece, with knowledge that the search would induce their customers to lend significant sums of money. When the buyer lost \$100,000 due to a defective search, Unisearch offered to pay \$25, because their invoices contained the statement “Liability Limited to Amount of Fee.” *Puget Sound*, 146 Wn.2d at 431. The trial court granted summary judgment in favor of Unisearch; the Court of Appeals reversed. The Washington Supreme Court reversed the Court of Appeals and affirmed the trial court.

The Court adopted the standard set forth in *American Nursery*, supra. The Court expressly noted that “whether the liability limitations clause was negotiated (or bargained for) is merely a factor and it is not necessarily the determinative factor in assessing the enforceability of the clause.” *Id.* at 440.

Instead, the focus is on the manner in which the agreement was entered, whether the parties had an opportunity to understand the terms, and whether they were “hidden in a maze of fine print.” *Id.* Without even addressing substantive unconscionability as such, the Court concluded that the return of funds paid was the sole remedy of the aggrieved party.

As in *Mortenson* and *Puget Sound*, the facts here do not rise to the level of substantive unconscionability. The fact that the remedy is limited to the return of funds proffered does not render the provision unconscionable; that very remedy has been approved. Regardless of Appellants’ statements about their subjective beliefs or that the clause was not specifically negotiated, they had ample opportunity to do so. Similarly, the remedy afforded Appellants is not significantly different from that afforded Respondents in the event of Appellants’ breach. There, Seller’s “sole and exclusive remedy” was the retention of \$5,000 in earnest money; a remedy that in Torgerson’s case was less than 0.4% of the purchase price. The remedy permits Buyers the recoupment of expenses incurred to third parties. The remedy simply does not meet the high standard described in *Mortenson* for substantive unconscionability; it is not “shocking to the conscience, monstrously harsh, and exceedingly calloused.” *Nelson*, 127 Wn.2d at 131.

This is not the type of transaction the courts should seek to rewrite.

These experts in the real estate industry contracted to purchase property with an Agreement containing a limitation of remedies clause. This Court should enforce the Agreement.

**iii. The Provision Was Not Unconscionable at the Time of Contracting.**

The remedies provision is not unconscionable regardless of when it is analyzed. However, most of Appellants' analysis of the provision derives from the manner in which it was enforced by Respondents. When the analysis focuses on the appropriate period – the time of contracting – even the semblance of unfairness disappears. *Jeffery*, 32 Wn. App. at 543-44.

Two key elements about the time of contracting merit specific attention. The first is the status of the overall project at the time of contracting. This status explains why such a provision was deemed necessary by the Developers. The second is the status of the Appellants at the time of contracting, their relationship with the project and their familiarity with the Agreement. These facts undermine Appellants' claims of unconscionability.

As set forth above, the Developers wanted flexibility. It was not simply in case the “project was not built.” It was possible that they would have wanted to abandon the residential component completely, or build fewer, more expensive condominiums that would render it imprudent to

honor the existing Agreements.

Conversely, the Agreement provided flexibility for the Buyers. They had the opportunity to rescind the Agreements at any time and walk away with no liability for breach, losing only \$5,000. Thus, the Agreements at the time of contracting were bilaterally flexible, fair Agreements.

Finally, Appellants knew at the time of contracting that the project would not be finished for several years. They knew that they could walk away from the Agreements at any time. At the time of contracting, there was not even the prospect of being able to live in a Unit (or use it for “household purposes,” to use the parlance of their “consumer transaction” analysis). It was not unreasonable to want the limitation language in the Agreements in light of what they knew at the time of contracting.

Appellants’ unconscionability arguments are ultimately unpersuasive. The Agreement was fair at the time of contracting and is fair now. If Appellants wanted a better agreement, they had the capability to influence the process; even to unduly influence it. They chose not to do so. This Court should enforce the Agreement.

**iv. The Provision Does Not Fail Its Essential Purpose or Violate Public Policy.**

After addressing the unconscionability analysis, Appellants proffer

two final theories on which the Court could rewrite the Agreements; that the provision is unenforceable because it “fails its essential purpose” and that it violates “public policy.” The law cited by Appellants does not change the above analysis or result.

The case cited for the first proposition is *Cox-v. Lewiston Grain Growers*, 86 Wn. App. 357, 936 P.2d 1191, *review denied*, 133 Wn.2d 1020, 948 P.2d 387 (1997). *Cox* is a UCC case. After the *Cox* court sets forth the unconscionability standard, it indeed articulates the point of law that a limitation of remedies that fails of its essential purpose is unenforceable. *Cox*, 86 Wn. App. at 370. It then clarifies that such failure exists where “the defect is latent and non-discoverable upon reasonable inspection.” *Id.* Thus, the “failure” is related to the ability of one party to discern the true nature of their remedies at the time of contracting. Here, Appellants had full knowledge of the provision and its effect. It did not “fail of its essential purpose;” it fulfilled its purpose. Appellants simply do not approve of it. The doctrine does not apply.

Finally, Appellants claim that the Agreement violates public policy. They tie this doctrine back to the “Berg-Baker Special Rule,” which leads back to their unconscionability analysis. The “public policy” cases refuse to enforce agreements that have a “tendency to evil, to be against the public

good, or to be injurious to the public.” *Marshall v. Higginson*, 62 Wn. App. 212, 216, 813 P.2d 1275 (1991).

This one case cited by Appellants for the public policy exception demonstrates a higher standard than present in the unconscionability analysis. *Marshall* addressed an agreement that an attorney forced her client to sign agreeing not to sue her for malpractice before she would assist the client at a trial that was already underway when the agreement was signed. *Marshall*, 62 Wn. App. at 214. Thus, the public policy exception was invoked where no other theory of law could fully prevent enforcement of an agreement that violated fiduciary duties as well as basic fairness.

One factual refutation is necessary. Appellants claim that the Agreements at issue violate the Interstate Land Sales Act (“ILSA”). (Opening Brief, p. 33, citing 15 U.S.C. Sec. 1701 et. seq.) This claim is untrue and unsupported by citation. The record contains the contrary explanation of attorney David Rockwell, which was uncontradicted at summary judgment. (MCP 241-42; TCP 324-25.)

Appellants articulate valid reasons why people may not want to agree to a limitations clause like the ones at issue, but they do not demonstrate a basis for this Court to rewrite the Agreements. The doctrines do not apply.

### 3. Foreign Courts Have Repeatedly Enforced Such Clauses.

Six states have addressed agreements with comparable language; five have enforced the agreements. Appellants argue that of these states, only Florida's law is analogous because only Florida applies an unconscionability analysis to invalidate the language. This reasoning is circular and fallacious. The five states enforcing the language have unconscionability doctrines; they simply do not deem them applicable to sophisticated parties choosing to limit remedies in this fashion. Further, Florida uses a doctrine to invalidate the provision (mutuality of remedy) that Washington has expressly rejected. The foreign authority suggests that this Court should affirm the trial court.

Idaho enforced an agreement limiting the buyer's remedy to return of earnest money and reimbursement of costs in *Doyle v. Ortega*, 125 Idaho 458, 872 P.2d 721 (1994). Ortega owned property but refused to sell it to Doyle. When Doyle sued for specific performance, Ortega argued both that no agreement existed and that, if one existed, Doyle was limited to the return of earnest money and recoupment of expenses in the event of Ortega's breach<sup>3</sup>. The trial court granted summary judgment to Doyle. Idaho's

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<sup>3</sup> The provision provides in pertinent part: "If the Seller, having approved said sale fails to consummate the same as herein agreed, the Earnest Money shall be returned to the Buyer less such charges and other costs or fees incurred or committed for use by or on behalf of the Buyer hereunder and Seller shall pay for the cost of title insurance, escrow and legal fees, if any, and reimburse Buyer for that portion of the Earnest Money expended or committed on

Supreme Court reversed and remanded.

Considering contractual language less explicit than present in the instant case, the Court nevertheless held that the buyer's remedy was limited to return of earnest money and payment of expenses. The Court applied a contract interpretation standard similar to that used in Washington:

The primary objective in construing a contract is to discover the intent of the parties, and in order to effectuate this objective, the contract must be viewed as a whole and considered in its entirety. The primary consideration in interpreting an ambiguous contract is to determine the intent of the parties. The determination of a contract's meaning and legal effect are questions of law to be decided by the court where the contract is clear and unambiguous. However, where a contract is determined to be ambiguous, the interpretation of the document presents a question of fact which focuses upon the intent of the parties. The determination of whether a contract is ambiguous or not is a question of law over which we may exercise free review, and in determining whether a contract is ambiguous, our task is to ascertain whether the contract is reasonably subject to conflicting interpretation.

*Doyle*, 125 Idaho at 461 (citing *Bondy v. Levy*, 121 Idaho 993, 996-97, 829 P.2d 1342 (1992)).

The Court applied that standard to the cited provision and concluded that it was unambiguous and subject to enforcement as a matter of law. The Court declined to find the provision unenforceable, although Idaho has

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behalf of Buyer which cannot be refunded." *Doyle*, 125 Idaho at 460.

similar standards governing unconscionability and the obligation of good faith and fair dealing. See *Lovey v. Regence Blue Shield of Idaho*, 139 Idaho 37, 72 P.3d 877 (2003) (unconscionability analyzed as substantive and procedural and determined as a matter of law) and *Idaho First Nat'l Bank v. Bliss Valley Foods, Inc.*, 121 Idaho 266, 289, 824 P.2d 841 (1991) (duty of good faith and fair dealing violated if party violates, nullifies or significantly impairs any benefit of the contract).

Illinois enforced a similar provision as a matter of law in *O'Shield v. Lakeside Bank*, 335 Ill. App. 3d 834, 781 N.E.2d 1114 (2002). The agreement in *O'Shield* is directly analogous to the subject Agreement in that each contained separate provisions for failure to complete the structure and for defaults generally.<sup>4</sup> Seller "in breach of contract, refused to complete the

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<sup>4</sup> The two provisions at issue in *O'Shield* provide in full:

"3. Date of Completion. \*\*\* If the Townhouse has not been substantially completed within one hundred eighty (180) days after the Estimated Completion Date \*\*\*, then Purchaser may, as its sole remedy, terminate this Agreement upon five (5) days prior written notice to Seller and the Earnest Money, and all interest which may have been earned thereon, and all other sums paid by Purchaser to Seller shall be refunded to Purchaser, whereupon this Agreement shall be null and void without further liability to Seller.

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#### 14. Defaults and Termination. \*\*\*

If Seller fails to perform any of Seller's obligations under this Agreement and such failure continues for ten (10) days after Purchaser delivers to Seller written notice of such failure, Purchaser's only remedy shall be to terminate this Agreement by written notice delivered to Seller. Upon such termination resulting from Seller's failure to perform any of its obligations under this Agreement, all payments made by Purchaser to Seller under this Agreement shall

sale of the townhouse to plaintiffs.” *Id.* at 1116. Plaintiffs sought specific performance and the trial court granted summary judgment to Defendants.

The Appellate Court affirmed the dismissal. The Court noted that Illinois permits contracting parties to “limit their rights, duties, and obligations by express agreement.” *Id.* at 1119. It concluded that the Agreement was unambiguous and enforced its terms. *Id.*

Illinois also has an unconscionability doctrine. See, e.g., *Razor v. Hyundai Motor America*, 2006 Ill. LEXIS 1095, 37-38 (comparing procedural and substantive unconscionability). Illinois courts simply do not find these circumstances sufficient to rewrite an agreement.

Alabama addressed and enforced such language in *Hunter v. Wilshire Credit Corp.*, 927 So. 2d 810 (Ala. 2005). Alabama’s Supreme Court noted the state’s duty of good faith and fair dealing, but nevertheless permitted the seller to limit the buyer’s remedy to the return of earnest money for an unexcused breach. *Hunter*, 927 So. 2d at 813-14. Alabama also has an unconscionability doctrine, though it uses terms that suggest a stricter threshold for its application than Washington and the other states addressed herein. *Williams v. E.F. Hutton Mortg. Corp.*, 555 So. 2d 158, 160 (Ala.

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be returned to Purchaser and thereupon this Agreement shall be null and void, and of no further force and effect, and neither party shall have any further rights or obligations thereunder.” *O’Shield*, 335 Ill. App. 3d at 1116 (asterisks and truncation in original).

1989) (defining an unconscionable agreement as one “such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other”).

Two other states expressly addressed similar provisions and reached the same conclusion. In *Washburn v. Thomas*, 37 P.3d 465, 2001 Colo. App. LEXIS 909 (2001), certain property was sold at auction. As a condition to bidding on the property at auction, the buyers had to agree to a subsequent purchase and sale agreement that contained a limitation of remedies provision permitting only the return of earnest money. Even absent specific execution of those terms before bidding would be permitted, the Colorado Court of Appeals affirmed summary judgment limiting buyer’s remedies. *Washburn*, 37 P.3d at 468. New York’s Supreme Court also affirmed summary judgment dismissing a claim where the agreement limited recovery to the return of earnest money and expenses. *Scerbo v. Robinson*, 63 A.D.2d 1096, 406 N.Y.S.2d 370 (1978).

As Appellants discuss at length, Florida takes a contrary view. Its courts decline to enforce such language in such cases as *Seaside Community Development Corp. v. Edwards*, 573 So.2d 142 (Fla. 1991). There, the court interpreted law only allowing limitations of remedy where remedies are “mutual, unequivocal, and reasonable.” *Seaside*, 573 So.2d at 147. In

Florida, “remedies provided by the parties are susceptible to scrutiny by the courts, to determine whether they are, in fact, mutual and reasonable.” *Id.*

However, this “mutuality of obligation” theory has been expressly rejected in Washington. “Washington courts have long held that mutuality of obligation means both parties are bound to perform the contract's terms--not that both parties have identical requirements.” *Zuver v. Airtouch Communs., Inc.*, 153 Wn.2d 293, 318, 103 P.3d 753, 766-67 (2004).

Thus, the authority is distinguishable. The five states enforcing this limitation did so interpreting comparable law on unambiguous contracts and affirming the right of private parties to limit remedies. Florida reached a contrary result based on a doctrine expressly rejected in Washington. Foreign authority should assuage any concerns this Court may have in enforcing the applicable provision.

The Agreement is unambiguous and conscionable. The trial court was correct to enforce it and this Court should do the same.

**C. The Trial Court Correctly Denied the Motions to Amend Complaints After Summary Judgment Was Entered.**

To obtain reversal of the trial court’s denial of Appellants’ motions to amend their complaints, they must demonstrate a manifest abuse of discretion. *Herron*, 108 Wn.2d at 165. Appellants do not make this showing.

Motions to amend are governed by CR 15. It provides that "leave [to amend] shall be freely given when justice so requires." CR 15(a). It "was designed to facilitate the amendment of pleadings except where prejudice to the opposing party would result." *Caruso v. Local Union No. 690 Int'l Brotherhood of Teamsters*, 100 Wn.2d 343, 349, 670 P.2d 240 (1983).

Untimeliness and futility are factors properly considered by the Court in exercise of its discretion. *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 142, 937 P.2d 154 (1997). Failing to seek leave to amend until two weeks before a summary judgment hearing date has been considered sufficient to render untimely a motion to amend. *Donald B. Murphy Contrs., Inc. v. King County*, 112 Wn. App. 192, 199, 49 P.3d 912 (2002) (affirming denial of amendment after filing of dispositive motion and deadline for filing confirmation of joinder).

An instructive analog is *Travis v. Tacoma Pub. Sch. Dist.*, 120 Wn. App. 542, 85 P.3d 959 (2004). Travis sued for damages and injunctive relief. Defendant moved for summary judgment. Travis opposed summary judgment on the merits and lost; the complaint was dismissed. Ten days after summary judgment was entered, Travis moved to amend his complaint to add new claims. The motion was denied and the Court of Appeals affirmed.

In affirming, the appellate court noted:

Travis did not object to the summary judgment procedure; nor did he ask for time to conduct discovery before the summary judgment. And he did not propose his amendments until after the court had ruled on the summary judgment. In short, Travis willingly engaged in the summary judgment battle, the court had his essential theories before it, and he does not demonstrate prejudice for lack of discovery.

*Travis*, 120 Wn. App. at 554.

Here, the trial court did not commit a manifest abuse of discretion in ruling the motion untimely. As in *Travis*, Appellants waited until after the denial of summary judgment to seek leave to amend. There are no new facts; Appellants knew the basis for their claims and did not originally assert any claim for promissory estoppel. As a result, Respondents did not press Appellants in discovery regarding the alleged reliance on any particular letter.

The trial court also did not abuse its discretion in ruling that the motion was futile. Appellants have no entitlement to specific performance or compensatory damages as a matter of law. Promissory estoppel requires five elements: (1) a promise, (2) a reasonable expectation that the promisee will change his or her position, (3) a change in his or her position, (4) justifiable reliance by the promisee, and (5) an injustice that can be avoided only by enforcing the promise. *Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wn.2d 255, 259 n.2, 616 P.2d 644 (1980). The only reliance claimed by Appellants was in not terminating the contract; the very result against which

they so vigorously fight in this action.

While Appellants assert, without citation to authority, that “because a promisee’s damages are not limited to his or her reliance damages, the court should not focus on what a plaintiff gave up in reliance on the promise” (Opening Brief, p. 43), this exhortation demonstrates how the trial court could conclude that the amendment was futile. First, the notion that Appellants would have rescinded the Agreements is dubious and could be rejected within the exercise of the trial court’s discretion; were they so keen to rescind, they would likely not oppose rescission so vigorously now. Second, the trial court could conclude that Appellants did not change their position in any meaningful way based on the alleged promise by choosing not to obtain a refund of their earnest money.

The trial court had two grounds for denying amendment; timeliness (with its resultant prejudice) and futility. Appellants fail to demonstrate a manifest abuse of discretion in the denial.

**D. The Trial Court Committed Reversible Error by Denying Respondents’ Motion for Fees and Not Either Deeming Respondents the “Substantially Prevailing Party” or Applying the “Proportionality Approach.”**

The trial court ruled that the Agreement did not provide for an award of attorney fees to the substantially prevailing party to this action. This is a

question of law that is reviewed *de novo*. *Schlener*, 121 Wn. App. at 388. The trial court's ruling was erroneous and this Court should reverse.

The Agreements have a straightforward prevailing party attorney fee provision. (MCP 99; TCP 142; p. 14, *infra*.) Crucially, in denying the motion the trial court did not deny that the Respondents were the "substantially prevailing parties" to the actions. Rather, the trial court construed the applicable attorney fees provision against Respondents and ruled that the absence of a "judgment" entered against Appellants precluded the possibility of an attorney fees award against them. (TCP 797.)<sup>5</sup>

In construing the Agreement to provide fees only to one party if they prevailed, the trial court violated RCW 4.84.330 and such cases as *Herzog Aluminum, Inc. v. General American Window Corp.*, 39 Wn. App. 188, 692 P.2d 867 (1984). The instant case was about the extent of available remedies. Had Appellants invalidated the remedies provision, the Agreement would have awarded them their fees. Because Respondents prevailed on that primary issue, authority requires that the Agreements award fees to them. While this requirement belies the trial court's reading, it comports with the Agreement's plain language, which awards fees and costs to "the prevailing

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<sup>5</sup> Because Respondents should have been awarded their fees regardless of whether "judgment" is entered in Appellants' favor, any error by the trial court in failing to enter such judgment was harmless.

party in any litigation concerning this agreement.” (MCP 99; TCP 142.)

The rationale of Appellants and the trial court would categorically remove disputes about remedies from the rules governing bilaterality. This would improperly incentivize the prosecution of actions with conceded liability but speculative damages. By Appellants’ reasoning, they could sue at a defendant’s expense regardless of the validity of the damage claim. This is inconsistent with the purpose and application of RCW 4.84.330.

The trial court should have awarded fees and costs under either the “substantially prevailing party” approach of *Rowe v. Floyd*, 29 Wn. App. 532, 629 P.2d 925 (1981) or the “proportionality approach” of *Marassi v. Lau*, 71 Wn. App. 912, 916, 859 P.2d 605 (1993) and *Transpac Development, Inc. v. Oh*, 132 Wn. App. 212, 130 P.3d 892 (2006). While a trial court can award fees to neither party if each prevails on “major issues,<sup>6</sup>” it would be an abuse of discretion to so find here, when the only issue on which Appellants prevailed was not “major” by any standard; it was not even contested.

**1. RCW 4.84.330 and Subsequent Authority Demonstrate that the Trial Court’s Interpretation of the Attorney Fees Provision Was Erroneous.**

RCW 4.84.330 provides in part:

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<sup>6</sup>*Marassi*, 71 Wn. App. at 916.

In any action on a contract or lease. . . where such contract or lease specifically provides that attorneys' fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract or lease or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.

The statute thus provides that an attorney fee provision will be interpreted bilaterally, even if its language indicates a unilateral intent. Courts have gone further and held that the statutory language "on a contract or lease" includes an action in which a party alleges that a party is liable on a contract. The seminal Washington case is *Herzog*, supra.

In *Herzog*, a supplier sued a contractor for damages based on an alleged contract that contained an attorney fee provision. The contractor contended that there was no meeting of the minds. The trial court agreed and held that no contract existed. *Herzog*, 39 Wn. App. at 190-91. Contractor sought its attorney fees pursuant to RCW 4.84.330 and the court awarded them despite the lack of a contract. *Id.* at 197.

Subsequent cases affirm this bilaterality principle. See *Yuan v. Chow*, 96 Wn. App. 909, 918, 982 P.2d 647 (1999) ("purpose of the bilateral fee provision of RCW 4.84.330 is to provide mutuality of remedy") and *Bogle and Gates, PLLC v. Holly Mountain Resources*, 108 Wn. App. 557, 32 P.3d 1002 (2001) (awarding fees where party proved absence of contract).

Here, the trial court construed a bilateral attorney fees provision as unilateral. Even if it had been written as the trial court construed it, Washington law does permit such provisions to operate to provide only one party the opportunity to recover its fees. The trial court erred in using such an interpretation to deny Respondents their fees.

The trial court was required to conduct a more thorough analysis before reaching a decision on attorney fees. While an award of no fees is within the trial court's discretion where it finds both sides prevailed on "major issues", the trial court made no such finding here and to so find would also have been error. Appellants did not prevail on any contested issue; let alone a major one.

**2. The Trial Court Should Award Fees Under Either the "Substantially Prevailing Party" Method or the "Proportionality" Method; under Either Analysis, Respondents Will Recover Most or All of Their Fees.**

An award of attorney fees to a prevailing party under RCW 4.84.330 is mandatory; the discretion of the trial court is limited to deciding the amount. *Singleton v. Frost*, 108 Wn.2d 723, 729, 742 P.2d 1224 (1987).

Appellants' alleged entitlement to its fees has two parts (neither of which were argued below in support of a claim for their fees). First, they assert that "a prevailing party is generally one who receives a judgment in his

favor.” (Opening Brief, p. 34, emphasis added; citing *American Fed. Savs. & Loan Ass’n v. McCaffrey*, 107 Wn.2d 181, 195, 728 P.2d 155 (1986).) They cite no other cases or otherwise elaborate on the vast body of Washington law that goes beyond the word “generally” in that statement.

Second, Appellants assert that Washington law provides that a “breaching party cannot be the prevailing party.” (Opening Brief, p. 36.) For this proposition, Appellants cite only one Washington case: *Miles v. F.E.R.M. Enterprises, Inc.*, 29 Wn. App. 61, 627 P.2d 564 (1981). *Miles* patently does not stand for the asserted proposition. *Miles* involved an action under RCW Chapter 49.60 and applicable federal discrimination law. Where the jury found discrimination, an award of attorney fees under RCW 4.84.030 was upheld even in the absence of damages.

Appellants seemingly cite *Miles* because Colorado authority citing it states that “where a claim exists for a violation of a contractual obligation, the party in whose favor the decision or verdict on liability is rendered is the prevailing party for purposes of awarding attorney fees.” *Dennis I. Spencer Contractor, Inc. v. City of Aurora*, 884 P.2d 326, 327 (Colo. 1994).

However, Washington declines to take such a narrow, mechanistic approach to fee awards. Rather, while it “generally” deems the prevailing party to be the party in whose favor judgment is rendered, it applies other

criteria when “neither party wholly prevails.” *Marassi*, 71 Wn. App. at 916.

Specifically, there are two approaches appropriate under Washington law. The first is the “substantially prevailing party” approach, which requires a “determination that turns on the extent of the relief afforded the parties.” *Piepkorn v. Adams*, 102 Wn. App. 673, 686, 10 P. 3d 428 (2000). The trial court then exercises its discretion in determining the appropriate amount. The second is the “proportionality approach” enumerated in *Transpac*; it is appropriate where “multiple distinct and severable contract claims are at issue.” 132 Wn. App. at 218. In such circumstances, the trial court should “determine the fees each party would be entitled to for prevailing against the other’s claim, and then to offset.” *Id.* at 220. This approach is “consistent with the general trend in Washington law toward establishing more specific standards for awarding attorney fees, thus facilitating more meaningful appellate review.” *Id.* at 219.

Use of these criteria does not require that affirmative relief be granted to both sides. It is appropriate when “in its practical effect, both parties were favored by the order appealed from.” *Rowe*, 29 Wn. App. at 535.

*Marassi* provides further insight into this fact fatal to Appellants’ claim for their fees. In *Marassi*, Marassi made multiple claims; Defendant had only one counterclaim, for \$300. *Marassi*, 71 Wn. App. at 914. The

counterclaim was ultimately settled in a way that created a net credit for Marassi in the amount of \$153. *Id.*

The Court applied the proportionality approach by comparing the relief received by Marassi with what he sought; the counterclaim was not a factor. To avoid the application of the substantially prevailing party analysis, Appellants would have to have wholly prevailed. To so find would be obvious error, as demonstrated by Appellants' appeal.

Appellants make much of the fact that the summary judgment had "nothing to do with the issue of liability". (Opening Brief, p. 39, emphasis in original.) Appellants prove too much. Not only did the summary judgment have nothing to do with the issue of liability: the entire case had nothing to do with the issue of liability. This fundamental difference separates the instant case from *Miles, Piepkorn*, and other cases where a party prevailed because it proved liability regardless of damages. In those cases, liability was disputed. Here, the entire case turned on the issue of remedies: on the issues in the case, Respondents wholly prevailed. *A fortiori*, they substantially prevailed and should receive their fees.

It is unclear whether the trial court must apply the substantially prevailing party method, must apply the proportionality method, or has the discretion to choose. On the one hand, *Marassi* purports to limit the

proportionality approach to “multiple contract claims” where it is “difficult” to determine who prevailed. This is not the case here, where it is obvious who substantially prevailed. Thus, it could reasonably be concluded that the substantially prevailing party approach is required. On the other hand, *Transpac* suggests that the proportionality approach is superior and the “general trend” in Washington. *Transpac*, 132 Wn. App. at 219.

If the trial court applies the proportionality approach, Respondents will be awarded most or all of its fees. Under this approach, Appellants would be entitled only to fees spent obtaining the remedy they were offered before the action began. As one would expect in light of the conceded nature of this relief, little if any money was so expended. The vast majority of the case was spent litigating the damages issue on which Respondents prevailed.

Even if Appellants obtain a reversal of the summary judgment, they should not be awarded their attorney fees on appeal. Appellants did not argue for their attorney fees below and should not be permitted to raise the issue for the first time on appeal.<sup>7</sup> RAP 2.5(a).

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<sup>7</sup> Appellants claim that the trial court erred in denying their request for fees. (Opening Brief, p. 2.) However, their citation to the record is to the trial court’s granting of Respondents’ Motions for Summary Judgment, which has no bearing on any request for fees by Appellants. (MCP 243-45; TCP 326-28.)

**E. Respondents Request Their Attorney Fees on Appeal.**

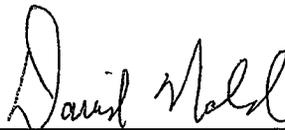
Respondents respectfully request their fees incurred on appeal. The basis is RCW 4.84.330, the authority addressed in detail above, and the Agreements. RAP 18.1.

**VI. CONCLUSION**

Courts are appropriately reluctant to rewrite the agreements of sophisticated private parties. While Appellants strain to persuade the Court that they are mere “consumers” and should be given special protection, the facts indicate otherwise. Consequently, the law places an appropriately high burden on them before it will rewrite the Agreements. Appellants fail to meet this burden. The trial court ruled correctly and its order should be affirmed. Respondents should be awarded their attorney fees below and on appeal.

RESPECTFULLY SUBMITTED this 22nd day of August, 2006.

NOLD & ASSOCIATES, PLLC



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**ORIGINAL**

NO. 58030-2-I & 58031-1-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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

Plaintiffs/Appellants,

v.

ONE LINCOLN TOWER, LLC;  
BELLEVUE MASTER, LLC; and LS  
HOLDINGS, LLC,

Defendants/Respondents/  
Cross-Appellants.

NO. 58030-2-I & 58031-1-I

DECLARATION OF SERVICE OF  
BRIEF OF RESPONDENTS;  
OPENING BRIEF OF CROSS-  
APPEAL

2006 AUG 22 PM 4:10  
FILED  
COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON  
#1

I, Jodi Graham, declare that I am an employee of the firm of Nold & Associates, PLLC, am over the age of 18 and am not a party to the above entitled action. On August 22, 2006, I caused a true and correct copy of the BRIEF OF RESPONDENTS; OPENING BRIEF OF CROSS-APPEAL to be served upon the following in the manner indicated:

Dennis McGlothin  
Olympic Law Group  
1221 East Pike, Suite 205  
Seattle, WA 98122

Washington Court of Appeals  
Division One  
One Union Square  
600 University St.  
Seattle, WA 98101-1176

~~X~~ Via Legal Messenger on Tuesday, August 22, 2006.

I declare under penalty of perjury under the laws of the State of  
Washington that the foregoing is true and correct.

Signed at Bellevue, Washington this 22nd day of August, 2006.

A handwritten signature in black ink, appearing to read "Jodi Graham", enclosed within a large, hand-drawn oval.

Jodi/Graham

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