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No. 80623-3

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SUPREME COURT
OF
THE STATE OF WASHINGTON

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

Appellants,

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.

BRIEF IN ANSWER TO AMICUS CURIAE BRIEF FILED BY
MASTER BUILDERS ASSOCIATION
OF
KING AND SNOHOMISH COUNTIES

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I. Introduction

While MBA advances sound public policies underlying homeownership, the policies actually support Petitioner's arguments. The Provision Limiting Remedies in this case actually detrimentally affects the policies. The incidental effect on the freedom to contract is minimal because it only affects provisions limiting remedies that eliminate only one party's right to a significant legal recourse. Moreover, the procedural safeguards Petitioner's advance only apply to consumer transactions involving warranty disclaimers or provisions limiting remedies. Finally, any arguments suggesting Respondent's can negate any sales contract with their real estate professionals based on their fiduciary relationship is not an issue that was presented for review and is otherwise procedurally improper.

II. Argument in Response

A. The Provision Limiting Remedies in this case should not be enforced because it defeats the public policies supporting homeownership.

1. Petitioners agree homeownership is beneficial to the homeowner, community, and our country.

The MBA, an association that promotes the interests of home developers and constructors, wrote extensively about the value

homeownership provides to the public.¹ Specifically, the MBA stated that homeownership is good for America and good for local communities.² Petitioners (also purchasers) agree homeownership is important to the public and this State's public policy should be to protect homeownership.

2. The Provision Limiting Remedies in this case is contrary to the policies underlying homeownership.

The Provision Limiting Remedies in this case not only does not advance, but contravenes, the public policies underlying homeownership. When a developer breaches a contract to sell a purchaser a residential dwelling, the developer deprives the purchaser of the ability to realize the valuable homeownership benefits identified by the MBA. It is axiomatic that developers are more likely to intentionally breach a contract with a homeowner, and thereby deprive the homeowner of the benefits homeownership offer if the developer can breach without legal consequences.

The MBA argued that homeownership helps stabilize neighborhoods and strengthen communities by creating incentives to maintain and improve private property and public spaces.³ What incentive is there for a contract purchaser to be invested in a

¹ Amicus Brief at 2-3.

² *Id.* at 3.

³ Amicus Brief at 2-3.

community or neighborhood if the Developer can unilaterally and intentionally not sell the residential unit to the contract purchaser and, thereby, displace the purchaser from his or her chosen neighborhood?

In this case, the Provision Limiting Remedies is contrary to the public policy supporting a person's right to exercise control and responsibility over their living environment. The MBA argued that homeownership strengthens families and good citizenship, because families "have greater control...and can exercise more responsibility over their living environment."⁴ Here, Respondents unilaterally took away Petitioners' ability to exercise responsibility over their living environment by unilaterally terminating the PSAs.

Moreover, the Provision Limiting Remedies allowed Developers to intentionally breach their Purchase and Sales Agreements with Purchasers [PSAs] with impunity and without legal consequences.⁵

The Provision Limiting Remedies also runs contrary to the policy that homeownership is important because homeowners can use the equity in their home, caused by appreciation, for capital investment and financial security. The MBA described how homeownership aids personal financial security in the following way:

⁴ Amicus Brief at 2.

⁵ FCP 546; MCP 220; FCP 516-17; MCP 585-86

By purchasing a home, a family acquires a place to live, raise children, and invest in an asset that grows in value. A home can provide capital to start a small business, finance college tuition, and generate financial security for retirement. Homeowners own more than \$4 billion in equity in their homes.⁶

Here, Developers deprived Purchasers' ability to build equity or realize growth in value. Developers unilaterally and intentionally terminated, and breached, the PSAs three years after the parties signed the PSAs.⁷ During the intervening three years, the condominium units grew in value and created equity for the Purchasers. Ronald Smith, the Developers' General Manager, testified at his deposition that Developers, after they repudiated the PSAs, resold the units, or were going to resell the units, for \$700,000.00 more than the sales prices in the PSAs. Specifically, he testified that Developers already re-sold the Miller/Ringer unit for approximately \$200,000 more than the PSA sales price and had listed the Torgerson unit for \$500,000 more than the PSA sales price.⁸ By reselling the units at prices higher than the sales prices

⁶ Amicus Brief at 2.

⁷ Both Miller Ringer and Torgerson purchased condominium units in June 2001 FCP 14; MCP 15 Respondents breached the terms of the PSA on May 3, 2003. FCP 60; MCP 62.

⁸ FCP 255 (Smith Dep. 67:19 – 68:14). Smith stated, at his deposition, that Ms. Torgerson's unit was on sale for \$1.8 Million (\$500,000.00) about her purchase price; and Mr. Miller's and Ms. Ringer's unit had been sold for \$200,000.00 more than their purchase price.)

in the PSAs, Developers shifted the growth in value, and resulting equity, from the Purchasers into their own pockets.

3. Because homeownership is so important, the Washington State Legislature has subjected developers to regulation.

Because homeownership is so important to individuals, communities and our nation, real estate transactions are regulated by the Washington State legislature and federal government. This State regulates: Residential real property transfers;⁹ earnest money deposits;¹⁰ and condominium sales.¹¹

Moreover, Washington common law recognizes public policy exceptions to freedom of contract when a provider of housing tries to contractually exculpate themselves from liability. *In Shields v. Sta-Fit, Inc.*¹² the court summarized prior cases that found a public policy exception to contracted exculpatory clauses by stating:

A common thread runs through those cases in which exculpatory agreements have been found to be void as against public policy. That common thread is they are all essential public services-hospitals,¹³ housing,¹⁴ public utilities,¹⁵ and public education.¹⁶

⁹ RCW Chapter 64.06.

¹⁰ RCW 64.04.005

¹¹ RCW Chapter 64.34.

¹² 79 Wn. App. 584, 903 P.2d 525 (1995).

¹³ See *Wagenblast v. Odessa School District*, 110 Wn.2d 845, 854 n. 23, 758 P.2d 968 (1988) (citing *Tunkl v. Regents of University of California*, 32 Cal. Rptr. 33, 39, 383 P.2d at 447 (1963)).

In *Shields*, this Court overtly referred to housing as an "essential public service" subject to a public policy exception limiting the freedom to contract and limited a party's ability to use exculpatory clauses.

4. Because homeownership is so important, it is regulated by the Federal government.

a. ILSA regulates residential condominium projects of more than 100-units.

The United States Congress created the Interstate Land Sales Full Disclosure Act [ILSA or "the Act"], to protect against predatory developers.¹⁷ ILSA applies to residential condominium projects of over 100-units.¹⁸ One Lincoln Square falls squarely within ILSA's purview, because the complex contains 148-condominium units.¹⁹

b. ILSA closely regulates provisions limiting remedies and requires legally significant recourse if developers breach their contracts.

Regulations and case law addressing ILSA exemptions squarely address provisions limiting remedies and clearly states a provision

¹⁴ *McCutcheon v. United Homes Corp.*, 79 Wn.2d 443, 486 P.2d 1093 (1971); *Thomas v. Housing Auth.*, 71 Wn.2d 69, 426 P.2d 836 (1967).

¹⁵ *Reeder v. Western Gas & Power Co.*, 42 Wn.2d 542, 256 P.2d 825 (1953).

¹⁶ 110 Wn.2d 845, 758 P.2d 968 (1988).

¹⁷ See *McCown v. Heidler*, 527 F.2d 204, 207 (10th Cir. 1975) ("The purpose of [ILSA] is "to prohibit and punish fraud in ... land development enterprises ...").

¹⁸ 15 U.S.C. § 1702(b)(1)

¹⁹ FCP 13-35; MCP 14-23.

limiting a purchaser's remedy to a return of their deposit is not acceptable.

The contract must not allow nonperformance by the seller at the seller's discretion. Contracts that permit the seller to breach virtually at will are viewed as unenforceable because the construction obligation is not an obligation in reality. Thus, for example, a clause that provides for a refund of the buyer's deposit if the seller is unable to close for reasons normally within the seller's control is not acceptable for use under this exemption. Similarly, contracts that directly or indirectly waive the buyer's right to specific performance are treated as lacking a realistic obligation to construct. HUD's position is not that a right to specific performance of construction must be expressed in the contract, but that any such right that purchasers have must not be negated. For example, a contract that provides for a refund or a damage action as the buyer's sole remedy would not be acceptable.²⁰

Even though this action was not brought under ILSA, ILSA clearly underscores homeownership's importance because the federal government regulates residential real estate sales, including condominium sales. Specifically, ILSA regulates a developer's contractual provisions limiting remedies when, like the Developers

²⁰ Supplemental Information to Part 1710: Guidelines for Exemptions Available Under the Interstate Land Sales Full Disclosure Act, Part IV, ¶ 5. See also, *Dorchester Development, Inc. v. Burk*, 439 So.2d 1032, 1033-35 (Fla. 3rd DCA 1983) (disapproving a provision limiting remedies that did not allow the purchaser to affirm the contract and sue for damages; See also, *Stein v. Paradigm Marisol, LLC*, 551 F. Supp.2d 1323, 1331 (M. D. Fla. 2008) (disapproving a provision limiting remedies that does not allow the purchaser "benefit of the bargain" damages.).

in this case, the developer intends to construct more than 100 units and do not want to comply with ILSA requirements.²¹ In these cases, provisions limiting remedies to a return of the deposit are not acceptable.

B. The MBA's contention that this case should be decided in Respondents' favor solely on the principle of freedom to contract is misguided.

The MBA mistakenly argues parties should have freedom to contract no matter what the effect might be.²² The MBA ignored, however, the fact that Washington courts have, on many occasions, limited freedom of contract when the contract between parties includes a provision limiting remedies.²³ By doing so, Washington courts have exercised a vital function that has ensured that parties will be protected from unscrupulous actors. Specifically, this Court has, unwaveringly, over the last two and one-half years refused to

²¹ CP 286-287 (Richard Leider's Dep. 14:19-17:19).

²² Amicus Brief at 4.

²³ See *Vodapest v. McGregor*, 128 Wn.2d 840, 849, 913 P 2d 779 (1996) (there are instances where public policy reasons for preserving an obligation..to another outweigh traditional regard for the freedom of contract); and *Keystone Land and Development Company v. Xerox Corporation*, 152 Wn.2d 171, 176, 94 P 3d 945 (2004) ("Under the principle of freedom of contract, parties are free to enter into and courts are generally willing to enforce contracts that do not contravene public policy.").

enforce provisions limiting only one party's rights to significant legal recourse because they are substantively unconscionable.²⁴

Moreover, the MBA made this sweeping legal argument without citing any supporting cases or statutes. As such, it should not be considered.²⁵

Washington courts have also established procedural safeguards in consumer transactions involving provisions limiting remedies by creating the *Berg-Baker* Special Rule.²⁶

Purchasers do not suggest a wholesale or substantial interference with a party's freedom to contract. Substantively, purchaser only suggest the same substantive unconscionability analysis this Court has utilized on three separate occasions , which refuse to enforce, a provision limiting only one party's right to a significant legal recourse,²⁷ be applied to residential real estate

²⁴ See e.g., *Zuver v Airtouch Communications*, 153 Wn.2d 293, 103 P.3d 753 (2004); and *Scott v Cingular Wireless*, 160 Wn.2d 843, 161 P.3d 1000 (2007).

²⁵ RAD 10.3(a)(6).

²⁶ *Berg v. Stromme*, 79 Wn.2d 184, 484 P.2d 380 (1971).

²⁷ *Zuver* 153 Wn.2d 318 (refusing to enforce a provision in an employment contract that limited only the employer's right to claim punitive damages); *Scott*, 160 Wn.2d 857 (refusing to enforce a class action waiver because it does "not ensure that a remedy is practically available" and because it "functions to exculpate the drafter from liability for a broad range of undefined wrongful conduct, including potentially intentional wrongful conduct" and finally, because it "effectively prevents one party to the contract, the consumer, from pursuing valid claims, effectively exculpating the drafter from potential liability"); and *McKee v. At&t Corp*, --- Wn.2d ---, --- P.3d --- (2008) (refusing to enforce an attorney fee provision that effectively only allows one party to receive attorney fees).

contracts that attempt to eliminate only a buyer's right to compensatory damages. Procedurally, Purchaser only suggest the *Berg-Baker* Special Rule be applied to residential real estate transactions where the developer seeks to limit the buyer's remedies or disclaim warranties. Because these infringements on a parties freedom to contract are so narrow, the policy supporting freedom to contract should not be used to invalidate legitimate protections for residential homebuyers.

C. Because Developers actually built the project and resold the units for additional profit, they cannot assert risk aversion as a ground to enforce the Provision Limiting Remedies.

The MBA, in its Amicus Brief, asserts risks, like a project's failure, to justify enforcing the Provision Limiting Remedies.²⁸ The MBA ignores, however, the fact Developers' project did not fail; rather, Developers resold the units for a higher price and kept the additional profit for themselves after holding the Purchasers' deposits for three years.²⁹

Moreover, even if a court were to be faced with a project failure or other hypothetical situation, the Court can still provide conscionable relief. If a contract clause is unconscionable, then a court may "refuse to enforce that contract, or may enforce the

²⁸ Amicus Brief at 4-5.

²⁹ See CP 255 (Ron Smith's Deposition, 67:19-68:14)

remainder of the contract without the unconscionable clause, or it may so limit the application of the any unconscionable clause as to guard any unconscionable result."³⁰ A Court could, therefore, still limit both parties' rights to rescission if the project was not built or only one-half the units were allowed by valid government action. Because courts have flexibility when it finds a clause unconscionable, the proverbial parade of "what ifs" suggested by the MBA, which did not happen in this case, should not dissuade this Court from revising to enforce the unconscionable result in this case. What happened here is plain and simple: condominium prices went up; the Developers breached the PSAs and refused to sell the units to the Purchasers for the stipulated contract prices; the Developers resold the units to other purchasers for \$700,000 more than the stipulated contract prices; and Developers kept the additional profits for themselves, with impunity. Indeed, this is an unconscionable result and this Court should refuse to enforce the Provision Limiting Remedies under this case's facts.

³⁰ RCW 64.34.080(1) (applying unconscionability to "all condominiums"); *Adler v. Fred Lind Manor*, 133 Wn.2d 331, 358, 103 P.3d 773 (2004); and Restatement (Second) of Contract's §208 (1981)

D. The MBA's suggestion that Developers can breach the PSAs with impunity because Purchasers are real estate agents for the project is contrary to the MBA's freedom of contract arguments and are not supported by law or by the record.

The MBA's brief suggests Developers may breach the PSAs with impunity because Purchasers were real estate agents for the project.³¹ The MBA, however, cited no legal authority to support this argument neither does it cite the record to support its argument. This violates RAP 10.3(a)(6) which requires legal arguments be grounded by citations to legal authority and relevant parts of the record. Therefore, there is no proper basis for this Court to consider MBA's argument.

Moreover, Developers' counterclaim for rescission based on an alleged breach of fiduciary duty was previously dismissed and this dismissal is not subject to review. Developers brought a counterclaim for rescission alleging Purchasers breached their fiduciary duty.³² The trial court dismissed Developers' counterclaim.³³ Neither party assigned error to the dismissal, and the issue was not part of the issues presented for review by this Court.³⁴ As such, it is procedurally improper to review this issue.³⁵

³¹ Amicus Brief at 4.

³² CP 65-67; 183-85; 187-89.

³³ CP 566.

³⁴ See Petition for Discretionary Review

The MBA's unsupported argument also runs contrary to its freedom to contract arguments. If accepted, the MBA's argument would mean developers can contract with their real estate agents to sell property to the real estate agents, but the real estate agents cannot enforce the contract against the developers. A real estate licensee's duties are embodied in RCW 18.86.030, .040, .050, and .060. Nowhere is a real estate licensee prevented from contracting with a party to the real estate transaction or enforcing a contract against a party to the real estate transaction. The most these statutes provide is for the real estate licensee to disclose his or her connection with the transaction.³⁶ Purchasers did disclose their connection to the instant transaction.³⁷

E. The Provision Limiting Remedies in this case does not allow purchasers to request interest on their deposit.

The MBA further argued that this Court should enforce contractual provisions that: "limit the homeowner's remedies to the return of earnest money, *plus interest*, plus any amount the buyer has spent in reliance on the contract."³⁸ The Provision Limiting Remedies in this case, however, does not allow Purchaser to

³⁵ RAP 13.7(b).

³⁶ RCW 18.56.030(1)(g).

³⁷ FCP 29; See also, CP 19, ¶ 24 of the PSAs entitled, "Agency Disclosures"; and CP 13 identifying selling and listing brokers.

³⁸ Amicus Brief at 3.

receive interest on their deposit. Specifically, the Provision Limiting Remedies limits Purchasers' remedy to recover from Developers "the portion of the Deposit paid by Buyer..."³⁹ Since the Purchasers did not pay the interest that may have accrued on their deposit, they were not entitled to recover interest.

II. Conclusion

The MBA's policy arguments actually support Purchaser's arguments. Homeownership is important so people can choose where they live and can develop equity in their homes as real estate values increase. The Provision Limiting Remedies in this case thwarted both these laudable policies by allowing Developers to intentionally breach the PSAs with impunity. Developers, not Purchasers, got to choose where the Purchasers could live and Developer, not Purchasers, got the equity caused by the \$700,000 increase in real estate values during the three years that ensued between the time the PSAs were signed and the time the Developer intentionally breached the PSAs. The MBA's other arguments were without cite to authority or the record. Finally, any

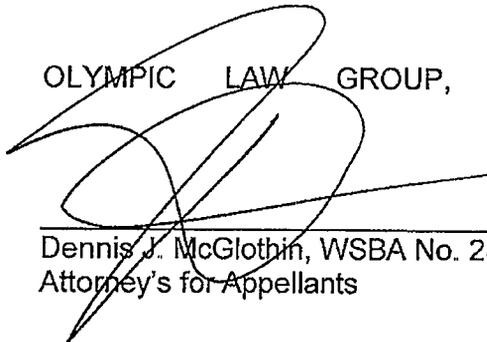
³⁹ FCP 19, ¶ 21; MCP 22, ¶ 21.

claim for breach of fiduciary duty was not properly presented for review.

For these reasons, the Court of Appeals Opinion, and the trial court's Order Granting Defendant's Motion for Summary Judgment should be reversed and remanded with instructions to enter Summary Judgment in Purchasers' favor concluding the Provision Limiting Remedies in this case is substantively and procedurally unconscionable; concluding Developers cannot enforce the Provision Limiting Remedies to limit Purchasers' remedies to a return of their deposits; awarding Purchasers compensatory damages equal to the difference between the price Developers resold the units for and the PSAs' contract price; awarding Purchasers' pre-judgment interest on the compensatory damage award from the date Developers resold the units until the date Judgment is entered; denying Developers' attorney fee and cost request; and awarding Purchasers their attorney fees and costs at trial and on appeal, subject to this Court's Commissioner determining the reasonable amount of appellate attorney fees under RAP 18.1(d) and the trial court determining reasonable attorney fees at the trial level.

RESPECTFULLY SUBMITTED September 12, 2008.

OLYMPIC LAW GROUP, PLLP

A large, stylized handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

Dennis J. McGlothlin, WSBA No. 28177
Attorney's for Appellants

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