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No. 64402-5

IN THE COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

JOSEPH D. WOODMANSEE and
KIMBERLY A. WOODMANSEE, husband and wife,

Plaintiffs/Respondents,

v.

Robert S. Peterson,

Defendant/Appellant.

APPELLANT'S BRIEF

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2011 APR 25 11:45:50
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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ASSIGNMENTS OF ERROR5

III. STATEMENT OF THE CASE.....10

 A. Overview of the Parties, Transactions and Procedural History.10

 B. This Court Has Already Ruled that No Contract Was Formed by
 PSA 1.11

 C. Peterson’s Longstanding Relationships With His Cotenants.....12

 D. Facts Relating to Transactions for Parcel 3.16

 1. PSA 1 – April 15, 2004.16

 2. PSA 2 – August 17, 2004.18

 3. PSA 3 – September 27, 2004.19

 4. Sale of Peterson’s Undivided One-Half Interest.20

IV. ARGUMENT.....20

 A. Standards of Review.20

 B. Peterson’s Misrepresentations Woodmansees Regarding His Co-
 owner’s Price Demands Are Not Actionable.....21

 1. “Seller’s Talk” By a Principal or an Agent Is Not Actionable.....21

 2. Peterson Was Privileged to Use “Sales Talk” Either As a Principal
 or an Agent.30

 C. Previous Appellate Decision Precludes Damages From Peterson’s
 Voluntary Sale of His Interest in Parcel 3.....33

1. Peterson Had No Contractual Duty to Sell in 2008.....	33
2. This Court’s Prior Decision Disposed of Plaintiffs’ Promissory Estoppel Argument and Claim.....	35
3. Peterson Had No Fiduciary Duty to Sell His Interest in 2008.	36
D. Peterson’s “Promise” to Obtain Hillman and Sherons’ Signatures Does Not Create a Contract by Promissory Estoppel.	39
E. Woodmansees Had No Protected Business Expectancy or Relationship with Hillman and Sherons; Peterson Did Not Wrongfully Interfere With Any Such Relationship.	42
F. The Court Erred In Awarding Prejudgment Interest on Non-Liquidated Damages.	45
V. CONCLUSION.....	47

TABLE OF AUTHORITIES

Cases

<u>Ahearn v. Anderson-Bishop Partnership, et al.</u> , 946 P.2d 417, 423-24 (Wyoming, 1997).....	32
<u>Badgett v. Sec. State Bank</u> , 116 Wn.2d 563, 569, 807 P.2d 356 (1991) ..	39
<u>Bingham v. Lechner</u> , 111 Wn.App. 118, 127, 45 P.3d 562 (2002)	21
<u>Bloedel Timberlands v. Timber Indus.</u> , 28 Wn.App. 669, 674, 626 P.2d 30 (1981).....	38
<u>Bosley v. Monahan</u> , 137 Iowa 650, 112 N.W. 1102 (1907).....	26, 28
<u>Bradley v. Oviatt</u> , 86 Conn. 63, 84 A. 321 (1912).....	27
<u>Broten v. May</u> , 49 Wn.App. 564, 569, 744 P.2d 1085 (1987).....	42
<u>Buckley v. Hatupin</u> , 198 Wash. 543, 89 P.2d 212 (1939).....	passim
<u>Calbom v. Knudtson</u> , 65 Wn.2d 157, 162-63, 396 P.2d 148 (1964).....	42
<u>City of Seattle v. Blume</u> , 134 Wn.2d 243, 250, 947 P.2d 223 (1997)	44
<u>Deeter v. Angus</u> , 179 Cal.App. 3d 241, 251-53, 224 Cal.Rptr.801 (1986)..	31
<u>Des Moines Insurance Co. v. McIntire</u> , 99 Iowa 50, 68 N.W. 565	27
<u>Douglas v. Jepson</u> , 88 Wn.App. 342, 945 P.2d 244 (1997)	31
<u>F. D. Hill & Co. v. Wallerich</u> , 67 Wn.2d 409, 415, 407 P.2d 956 (1965)	43
<u>Firth v. Lu</u> , 103 Wn.App. 267, 276, 12 P.3d 618 (2000), <u>rev'd on other grounds</u> , 146 Wn.2d 608, 49 P.3d 117 (2002).....	41, 42
<u>Firth v. Lu</u> , 146 Wn.2d 608, 49 P.3d 117 (2002).....	42

<u>Flower v. T.R.A. Industries, Inc.</u> , 127 Wn.App. 13, 111 P.3d 1192 (2005)	40
<u>Greaves v. Medical Imaging Systems, Inc.</u> , 71 Wn.App. 894, 862 P.2d 643 (1993), <u>aff'd</u> , 124 Wn.2d 389, 879 P.2d 276 (1994)	41
<u>Hansen v. Rothaus</u> , 107 Wash.2d at 474-78, 730 P.2d 662	46
<u>Harris & Co. v. Weller</u> , 52 App. D.C., 280 F. 980 987 (1922).....	28
<u>Hedges v. Hurd</u> , 47 Wn. (2d) 683, 289 P. (2d) 706 (1955)	35
<u>Hedges v. Hurd</u> , 47 Wn.2d 683, 687-88, 289 P.2d 706 (1951)	34
<u>Hein v. Chrysler Corporation</u> , 45 Wn.2d 586, 277 P.2d 708 (1954)	45
<u>Hertog, ex rel. S.A.H. v. City of Seattle</u> , 138 Wash.2d 265, 275, 979 P.2d 400 (1999).....	21
<u>Houser v. City of Redmond</u> , 16 Wn.App. 743, 746, 559 P.2d 577 (1977), <u>aff'd</u> . 91 Wn.2d 36, 586 P.2d 482 (1978)	44
<u>Hunt-Wesson</u> , 23 Wash.App. at 197, 596 P.2d 666	46
<u>Huttig v. Nessay</u> , 100 Fla. 1097, 130 So. 605, 607-08 (1930)	27
<u>Johnson v. Yousoofian</u> , 84 Wn.App. 755 at 762	39
<u>King Aircraft Sales, Inc. v. Lane</u> , 68 Wash.App. 706, 721-22, 846 P.2d 550, 558-59 (1993):	46
<u>King v. Seattle</u> , 84 Wn.2d 239, 247, 525 P.2d 228 (1974)	44
<u>Leingang v. Pierce County Med. Bureau, Inc.</u> , 131 Wn.2d 133, 157, 930 P.2d 288 (1997).....	42
<u>Liebergessel v. Evans</u> , 93 Wn.2d 881, 890, 613 P.2d 1170 (1980)	36
<u>Lige Dickson Company v. Union Oil Company</u> , 95 Wn.2d 291 (1981) ..	40

<u>Linnemann v Summers</u> , 95 N.J. Eq. 507, 123 A. 539 (1924).....	28, 29
<u>Matson v. Emory</u> , 36 Wn.App. 681, 686-87, 767 P.2d 1029 (1984).....	39
<u>McCarty v. King County Medical Service Corp.</u> , 26 Wn.2d 660, 680-81, 175 P.2d 653 (1947).....	38
<u>McLennan v. Investment Exchange Co.</u> , 170 Mo.App. 389, 156 S.W. 730 (1913).....	25, 28, 37
<u>Micro Enhancement Int’l, Inc., v. Coopers & Lybrand, L.L.P.</u> , 110 Wn.App. 412, 435, 40 P.3d 1206 (2002).....	36
<u>Miller v. Othello Packers, Inc.</u> , 67 Wn.2d 842, 844, 410 P.2d 33 (1966)	39, 41
<u>Morgan Stanley & Co., Inc. v. Texas Oil Company</u> , 40 Tex. Sup. Ct. J. 692, 958 S.W.2d 178 (1998).....	33
<u>Nillson v. McDole</u> , 73 Wash. 312, 131 P. 1141 (1913).....	32
<u>Olson v. Scholes</u> , 17 Wn.App. 383, 391, 563 P.2d 1275 (1977).....	45
<u>Olympic Fish Products, Inc. v. Lloyd</u> , 93 Wn.2d 596, 598, 611 P.2d 737 (1980).....	44
<u>Pacific Cascade Corporation v. Nimmer</u> , 25 Wn.App. 552, 559-60, 608 P.2d 266 (1980).....	41
<u>Pannell v. Food Servs. of Am.</u> , 61 Wash.App. 418, 449, 810 P.2d 952, 815 P.2d 812 (1991), <i>review denied</i> , 118 Wash.2d 1008, 824 P.2d 490 (1992).....	46
<u>Pietz v. Indermuehle</u> , 89 Wn.App. 503, 949 P.2d 449 (1998) (comment to WPI 50.14)	32
<u>Poutre v. Saunders</u> , 19 Wn.2d 561, 143 P.2d 554 (1943)	32
<u>Reed, et al. v. Michigan Metro Girl Scout Council</u> , 201 Mich.App. 10, 12- 13, 506 N.W.2d 231, 233 (1993)	32

<u>Reninger v. State Dept. of Corrections</u> , 134 Wn.2d 437, 448, 951 P.2d 782 (1998)	44
<u>Sanders v. Stevens</u> , 23 Ariz. 370, 203 P. 1083 (1922)	28
<u>Schweiter v. Halsey</u> , 57 Wn.2d 707, 359 P.2d 821 (1961).....	35
<u>Scymanski v. Dufault</u> , 80 Wn.2d 77, 84-85, 491 P.2d 1050 (1971)..	42, 43, 44
<u>Shah v. Allstate Insurance Co.</u> , 130 Wn.App. 74, 121 P.3d 1204 (2005)	40
<u>Uni-Com Northwest, Ltd. v. Argus Pub. Co.</u> , 47 Wn.App. 787, 737 P.2d 304 (1987).....	38
<u>Woodmansee v. Peterson</u> , 132 Wash.App. 1050, 2006 WL 1195512 (2006)	12

Statutes

R.C.W. 25.05.100	32
------------------------	----

Treatises

Harper and F. James, <u>The Law of Torts</u> § 6.11 (1956), at 510.....	43
<u>Restatement (Second) of Agency</u> §14K.....	37
<u>Restatement [First] of Agency</u> §348.....	21
<u>Restatement of Contracts</u> §472(1) (c) (1932)	36
<u>Restatement of Contracts 2d</u> §139	40
<u>Restatement of the Law of Agency</u> , § 348.....	25
<u>Restatement of Torts 2d</u> §766, §766A	43

I. INTRODUCTION

In this appeal, the Court must address the extent to which a party to a sales transaction is permitted to use his superior knowledge and bargaining position to maximize his profit from the transaction.

In 2004, real estate prices were escalating rapidly in Mount Vernon. At that time, Peterson owned three contiguous parcels of real property with various co-owners. The parcel at issue here is Parcel 3, owned in undivided interests by Peterson (one half), the Hillmans (one quarter) and Sheron (one quarter). Peterson had been a real estate broker and had conducted business for and on behalf of his co-owners in the past.

Mr. Woodmansee was a sophisticated and experienced real estate developer who wished to purchase the three parcels. Peterson knew that Woodmansee needed the parcels to satisfy a contract under which Woodmansee was required to provide buildable lots to a third party.

When it came to Parcel 3, Woodmansee entered into an purchase and sale agreement (PSA) with Peterson at \$65,000 per acre. Since the contract required the signatures of the co-owners, Peterson said that he would obtain their signatures. Instead of taking the offer to the other owners, Peterson told Woodmansee that his partners would not sell the property at the previous price, but required a price of \$100,000 per acre.

In fact, Peterson never told the others about the \$65,000 offer. Peterson's test of Woodmansee's resolve was successful and Woodmansee raised the price to \$100,000 per acre.

This time, Peterson did take the offer to his subtenants, but along the way he appended a paragraph to the contract that would have required them to pay Peterson's son a management fee of \$100,000. The cotenants refused this condition and did not sign the contract.

As some time later, one of the cotenants contacted Woodmansee or his agent to inquire about the contract. This led to a third offer from Woodmansee at \$100,000 per acre. Because Peterson was unwilling to sell at this price, Woodmansee bought the cotenants' interests at that price and three years later purchased Peterson's interest at \$130,000 per acre.

After a bench trial, the court found for Peterson on numerous counts including fraud, interference with business expectancy, failure to perform as Woodmansee's volunteer agent in communicating with the cotenants, contract by promissory estoppels, etc.

Much of the case turns on whether Peterson's status as to Woodmansee changed so as to create legal duties owed to Woodmansee simply because Peterson told Woodmansee he would obtain the cotenants' signatures on the agreement when, in fact, Peterson intended to use that as

a ploy to continue the bargaining process and thereby maximize his and his co-owners return from the sale.

By way of example, on the smaller stage of car dealerships, this drama is played out many times every day. The salesman and the purchaser work out a proposed price for the car, but – sorry! – the salesman needs to run the deal by his sales manager. Inevitably, the salesman returns with the bad news that price needs to be higher, maybe \$500 to \$1,000 or more. Of course, the salesman always knew this would be the closing gambit and most likely the review by a manager was merely a ruse. But if the purchaser still feels like the deal is favorable, he accepts the higher price and buys the car. No court would ever rule that the car salesman had “switched sides” and had become the agent of the purchaser by agreeing to take the offer to the sales manager. No court would ever conclude that the purchaser had been defrauded by the pretense of the review, or that a contract by estoppels had been formed. So why here with Peterson?

While Peterson’s conduct may seem to be sharp dealing to this Court, as it would be seen by many people, under the law it simply is not actionable conduct. Such rough and tumble pervades the business world

and such statements to a sophisticated opponent in a negotiation are recognized as “seller’s talk” and not the basis for legal liability.

As to the other cause of action, Peterson was clearly a party to the first PSA and cannot, by law, interfere with his own contract. This court has already held that no contract was formed by the initial PSA for Parcel 3 in 2006. He was a party to the second PSA, and likewise cannot have interfered with that contract.

The facts do not support a finding that Woodmansees had any relationship or valid business expectancy regarding Peterson’s co-owners of Parcel 3. To the contrary, Woodmansees did not know them and had never had any contact with them.

Finally, even if Peterson were liable for damages arising from the higher price paid to the co-owners, no damages should lie for the increased price that Woodmansee ultimately paid to Peterson, i.e., \$624,475. This court has already held that there was no valid contract arising from the first PSA, meaning that Peterson never had an obligation to sell his interest to Woodmansee. Ironically, had he *not* sold his interest voluntarily in 2008, this element of damages would not even be in the calculation. No damages can accrue from this transaction.

These and other issues on appeal are discussed more fully below.

II. ASSIGNMENTS OF ERROR¹

1. The trial court erred when it concluded that Peterson's actions toward Woodmansees constituted fraud. Conclusion of Law 2 ("CL 2") (CP 2623, ¶ 2)

2. The trial court erred when it concluded that Peterson's actions toward Woodmansees constituted wrongful interference with business expectancy as to both the original PSA and the second PSA. CL 3. (CP 2623, ¶ 3)

3. The trial court erred when it concluded that Woodmansees had the right to rely upon Peterson's statement that he would communicate the original PSA to Hillman and Sherons and to obtain their signatures on it. CL 4, FF8. (CP 2624, ¶4; CP 2608, ¶ 6)

4. The trial court erred when it concluded that Peterson became Woodmansees' agent for the purpose of obtaining the other owners' signatures on the PSA. CL 5; FF 11. (CP 2624, ¶ 5; CP 2609, ¶ 11)

5. The trial court erred when it concluded that Peterson owed a duty to Woodmansees as a volunteer and agent and to act in good faith and

¹ Most of the facts in this case are undisputed, especially as to the actions of the parties and the nature of the transactions. Many of Peterson's assignments of error to the Findings of Fact are directed at those portions that seem more properly classified as Conclusions of Law.

loyalty to attempt to obtain Hillman and Sheron's signatures on the PSA for parcel 3 and to report to Woodmansees truthfully about that subject. CL 6; FF 11. (CP 2624, ¶ 6; CP 2609, ¶ 11) The trial court erred when it concluded that Woodmansees retained the right to control Peterson in how he proceed to obtain Hillman and Sherons' signatures on the PSA for Parcel 3. FF 12; FF 31. (CP 2609, ¶ 12; CP 2615, ¶ 31)

6. The trial court erred when it concluded that Peterson's "promise" to obtain Hillman and Sherons' signatures on the original PSA and Woodmansees' reliance thereon created a contract by promissory estoppel. CL 7. (CP 2624, ¶ 7)

7. The trial court erred when it concluded that Peterson owed a duty to Woodmansees or that he breached the purported duty by interfering with his co-owners' acceptance of the second PSA by inserting the commission provision into the second PSA after Woodmansee signed it. CL 8; FF 21. (CP 2624, ¶ 8; CP 2612, ¶ 21)

8. The trial court erred when it concluded that Woodmansees had a protected business expectancy or relationship with Hillman and Sherons and that Peterson wrongfully interfered with the same by preventing Hillman and Sherons from knowing about either the original PSA or the

Woodmansees. CL 9; FF 25; FF 27. (CP 2624, ¶ 9; CP 2613, ¶ 25; CP 2614, ¶ 27)

9. The trial court erred when it concluded that the doctrine that “a party cannot interfere with its own contract” is inapplicable to the present case. CL 10. (CP 2625, ¶ 10)

10. The trial court erred when it concluded that Peterson was not an agent for or partner of Hillman and Sherons in the negotiation with Woodmansees for the sale of Parcel 3. CL 11; FF 53; FF 54. (CP 2625, ¶ 11, 12; CP 2620, ¶ 53; CP 2621, ¶ 54)

11. The court erred when it concluded that Peterson’s misrepresentations to Woodmansees were not privileged “seller’s talk” and that Peterson was Woodmansees’ agent or volunteer to obtain the signatures in any actionable capacity and that Woodmansees’ reliance was reasonable. CL 13. (CP 2625, ¶ 13)

12. The trial court erred in concluding that Peterson’s status as a co-tenant of Hillman and Sherons was a valid basis for concluding that Peterson was not privileged to misrepresent Hillman and Sherons’ acceptable price and to reject the original PSA. CL 14; FF 24. (CP 2626, ¶ 14; CP 2613, ¶ 24)

13. The trial court erred in concluding that Hillman and Sherons had not ratified Peterson's actions. CL 15. (CP 2626, ¶ 15)

14. The trial court erred in concluding that Peterson had not proven his affirmative defense of privilege based upon his relationship with his co-owners. CL 16. (CP 2626, ¶ 16)

15. The trial court erred in concluding that Peterson's affirmative defense of lack of a contractual agreement had no application to this case, especially (but without limitation) to damages assigned to the plaintiffs' acquisition by voluntary purchase of Peterson's interest in Parcel 3. CL 18; FF 61-63. (CP 2626, ¶ 18; CP 2622-2623, ¶ 61-63)

16. The trial court erred in concluding that Peterson's statute of frauds argument is mistaken and/or that it does not bar the calculation of damages of the trial court. CL 19. (CP 2627, ¶ 19)

17. The trial court erred in concluding that Peterson showed a lack of fairness and good-faith dealing throughout. FF 13. (CP 2610, ¶ 13)

18. The trial court erred when it concluded that Woodmansees' had proven the causes of action for fraud, breach of duty and wrongful interference with business expectancy by clear, cogent and convincing evidence. FF 61. (CP 2622, ¶ 61)

19. The trial court erred in concluding that Peterson's failure to disclose the original PSA to the co-owners and his misrepresentations to Woodmansees were the proximate cause of Woodmansees' damages. FF 62. (CP 2623, ¶ 62)

20. The trial court erred in calculating damages due to the Woodmansees, even assuming they were to prevail on certain but not all claims. CL 25-27; FF 63. (CP 2628, ¶ 25 – 27; CP 2623, ¶ 63) Among these errors are the assignment of any damages to Woodmansees arising from the sale of Peterson's half interest in Parcel 3.

21. The trial court erred in finding that Hillman and Sheron's signatures on PSA 1 would have made it a complete contract enforceable against Peterson. FF 10; CL 22. (CP 2609, ¶ 10; CP 2627, ¶ 22) The findings ignore their demonstrated interests in maximizing their investment and Peterson's likely actions had he advised them of the existence of PSA 1 and his belief that Woodmansees would pay a higher price.

22. The trial court erred in concluding that Woodmansees' damages were liquidated and in awarding prejudgment interest thereon. CL 25. (CP 2627, ¶ 25)

III. STATEMENT OF THE CASE

A. Overview of the Parties, Transactions and Procedural History.

Plaintiffs Joseph Woodmansee and Kimberly Woodmansee are husband and wife and reside in Skagit County, Washington. For over 20 years the Woodmansees have been engaged in the development of real property. Finding of Fact (“FF”) 1. (CP 2607, ¶ 1)

Defendant Robert S. Peterson is a single person who resides in Snohomish County, Washington. Mr. Peterson was licensed as a real estate salesperson and worked as a real estate broker for approximately 40 years, before letting his license lapse in 2002. His occupation as a real estate broker involved supervising real estate agents in the negotiation and drafting of real estate deals and documents. Mr. Peterson has personally owned numerous parcels of real property in various Washington counties and handled transactions related to those properties. FF 2. (CP 2607, ¶ 2)

In 2004, Mr. Peterson owned, either jointly with others or individually, three adjoining parcels of property located on E. Division Street in Mount Vernon, totaling approximately 58 acres. In this action, the parties have referred to these properties as Parcel 1, Parcel 2, and Parcel 3. Peterson owned an undivided one-half interest in Parcel 1, the other half being owned by David Welts. Peterson owned Parcel 2

individually. Peterson owned an undivided one-half interest in Parcel 3, James Hillman owned a one-quarter interest, and Ed and Shirley Sheron and their daughter Alayna collectively owned the other one-quarter interest. FF 3. (CP 2607, ¶ 3)

On April 15, 2004, Woodmansees as buyers and Peterson as seller executed Purchase and Sale Agreements for Parcels 1, 2 and 3. The PSAs were prepared by Randy Torset (Joseph Woodmansee's brother-in-law and real estate broker), based on terms as directed by Mr. Peterson. FF 6. (CP 2068, ¶ 6) The sale for Parcel 1 closed in the ordinary course and the Parcel 2 sale closed following litigation and a subsequent appeal. FF 7. (CP 2608, ¶ 7)

This litigation arises out of the business dealings between Woodmansees, Peterson and Peterson's co-owners relating to Parcel 3. A series of purchase and sale agreements (PSA) involving Parcel 3, described more fully below, are hereinafter referred to as PSA 1, PSA 2 and PSA 3.

B. This Court Has Already Ruled that No Contract Was Formed by PSA 1.

This is the second trip to the Appellate Court for these litigants. Woodmansee initially sought specific performance, which the trial court had granted on summary judgment. This court upheld specific performance as to

Parcel 2 but not as to Parcel 3. Woodmansee v. Peterson, 132 Wash.App. 1050, 2006 WL 1195512 (2006).

Although Peterson signed the Woodmansees' April 15, 2004, offer for Parcel 3 on the date it was presented, the offer required the signatures of his partners and expired on the same day or three days later. The Court of Appeals held that no contract was ever formed for the purchase and sale of this property since, among other reasons, Peterson's signature alone was insufficient to convey his interest in Parcel 3 separate from the interests of his partners. *Id.*

C. Peterson's Longstanding Relationships With His Cotenants.

On April 15, 2004, Parcel 3 was owned of record by Robert S. Peterson ("Peterson") as to a one-half interest, James F. Hillman ("Hillman") as to a one-fourth interest and Edward J. Sheron, Shirley K. Sheron and Alayna Sheron ("the Sherons") collectively as to a one-fourth interest. FF 3. (CP 2607, ¶ 3) Hillman acquired his interest in Parcel 3 in 1991 in a transaction arranged by Peterson. Sherons acquired their interest in Parcel 3 in 1992 in a transaction arranged by Peterson.

Hillman had previously purchased other property with Peterson in a transaction in 1984 in Snohomish County, in which transaction Peterson negotiated the price and terms of the purchase of the property on behalf of

himself and Hillman, handled all offers on the property, and negotiated the price and terms of the subsequent sale of the property without the prior approval of Hillman.

In the prior transaction, Hillman looked to Peterson as his source of information on the property and as his spokesman for the property, and testified that the relationship between himself and Peterson was that of a partnership. *James F. Hillman Dep.* p. 34:2-8; p. 71: 7-8. (CP 367, Ln. 2-8; 404, Ln. 7-8)

Sherons had also purchased property with Peterson in a prior transaction in 1989 in Snohomish County, in which transaction Peterson negotiated the price and terms of the purchase of the property on behalf of himself and the Sherons, handled all offers on the property, and negotiated the price and terms of the subsequent sale of the property without the prior approval of the Sherons.

In the prior transaction, Edward J. Sheron and Shirley K. Sheron looked to Peterson as their source for information regarding the property and as their spokesman for the property, and both Edward J. Sheron and Shirley K. Sheron testified that the relationship between themselves and Peterson was that of a partnership. *Edward J. Sheron Dep.* p. 21: 14-25; p. 81: 6-15; *Shirley K. Sheron Dep.* p. 24: 6-12. (CP 1158, Ln. 14-25; 1207, Ln. 6-15;

CP 812, Ln. 6-12)

As in the prior transactions, Peterson solicited investments by Hillman and the Sherons in the Skagit County real property known as Parcel 3 and negotiated the price and terms of the purchase of the property. Peterson was the only one who listed the Parcel 3 property for sale and he did so several times. Peterson handled all offers on the property, and negotiated on behalf of himself, Hillman and the Sherons for the sale of Parcel 3 to the Woodmansees.

Woodmansees' agent Randle Torset, who was aware of the property from listings of the property placed by Peterson, as well as a prior failed offer he had made to Peterson on behalf of another buyer, regarded Peterson as the spokesman for the partnership composed of Peterson, Sherons and Hillman. *Randle L. Torset May 5, 2005 Dep.* p. 15:3 to p. 16:4; p. 44: 6-12; p. 45: 2-8. (CP 1310, Ln. 3—1311, Ln. 4; 1339, Ln. 6-12; 1340, Ln. 2-8) Torset was at all times the Woodmansees' agent, authorized by the Woodmansees to negotiate the price and terms of the Woodmansees' purchase of properties from Peterson and his partners. *Joseph Woodmansee 2-23-05 Dep.* p. 9: 9-12; *Joseph Woodmansee 1/12/06 Dep.* p. 33:16. (CP 95, Ln. 9-12; 211, Ln. 16)

Joseph D. Woodmansee and the Woodmansees' agent Randle Torset

both testified that Peterson, Hillman and the Sherons were partners in the Parcel 3 property, and correspondence authored by Joseph D. Woodmansee and the September 27, 2004 PSA and Addendum to that PSA, authored in part by Joseph D. Woodmansee and his agent Randy Torset and signed by the Woodmansees, characterize the relationship between Peterson, Hillman and the Sherons as a partnership throughout. *Trial Exhibits 7, 16; and Randle L. Torset May 3, 2005 Dep:* p. 44:6-12; p. 45: 2-8; *Joseph D. Woomandsee February 23, 2005 Dep.* p. 35: 24 to p. 36: 10; p. 37: 8-9; p. 43: 8-21; *Joseph D. Woodmansee January 12, 2006 Dep:* p. 25: 22-25. (CP 1339, Ln. 6-12; 1340, Ln. 2-8; CP 121, Ln. 24—122, Ln. 10; 123, Ln. 8-9; 129, Ln. 8-21 and CP 203, Ln. 22-25)

Based on his relationship with Sherons and Hillman, as evidenced by the previous transactions he had had with each of them, Peterson had authority from the Sherons and Hillman to try to sell the Parcel 3 property and to bring them offers. *Hillman Dep.* p. 118:17 to 119: 3. (CP 451, Ln. 17—425, Ln. 3)

There is clear evidence in the record that the relationship between Peterson, Hillman and the Sherons in Parcel 3 was that of a partnership, as confirmed by Edward Sheron, who testified that “He [Peterson] was one of my partners” and that “He [Peterson]...was a partner in this....He has the

same responsibility to all of us as each one of us would have to him.”

Edward J. Sheron Dep. p. 32: 22-25 and p. 81: 6-15. (CP 1158, Ln. 22-25; 1207, Ln. 6-15)

Peterson was a common-law agent of the partnership composed of himself, Hillman and the Sherons.

D. Facts Relating to Transactions for Parcel 3.

1. PSA 1 – April 15, 2004.

Mr. Woodmansee met with Mr. Peterson on just one occasion before the execution of the purchase and sale agreements for the three parcels. Peterson said that his signature on the PSA 1 was the only one they needed for Parcel 3, and that the other owners would go along with whatever he recommended. Peterson represented to Woodmansees that he was authorized by the other co-owners to sell Parcel 3. Woodmansee and Torset believed that Peterson was an authorized spokesman for the other owners. FF 8. (CP 2608, ¶ 8) Peterson had previously represented himself to Joseph D. Woodmansee and Torset as the spokesman for his partners in Parcel 3, with the ability to negotiate the price and terms of the transaction on their behalf, and had told Randle Torset his partners “will go along with whatever I say”. *Randle L. Torset May 5, 2005 Dep.* p. 42: 25 to p. 43: 13. (CP 1337, Ln. 25—1338, Ln. 13)

At the time Torset presented the PSA 1 offer to Peterson, the Woodmansees and Torset were aware that Peterson did not have a power of attorney to sign the Parcel 3 PSA offer on behalf of his partners and hence were at all times aware that the partners' signatures would be required on the document. *Randle L. Torset May 5, 2005 Dep.* p. 43: 14 to p. 44: 5; *Joseph D. Woodmansee February 23, 2005 Dep.* p. 14: 16-20. (CP 1338, Ln. 14—1339, Ln. 5; CP 100, Ln. 16-20) Nevertheless, after the parties executed the three agreements, Torset took them to Land Title Company in Burlington, Washington, where he was told by the escrow officer that the other owners of Parcel 3 would have to sign the agreement (PSA 1). FF 8. (CP 2608, ¶ 8)

The purchase price recited in the Woodmansees' April 15, 2004 Parcel 3 PSA offer was \$65,000 per acre, or \$590,525 for each one-half interest in the parcel, for a total price for the parcel of \$1,181,050. PSA 1, Trial Exh. 5.

The first page of Trial Exhibit 5 indicates that the Parcel 3 PSA offer expired by its terms either one day or three days after it was presented to Peterson on April 15, 2004, i.e., either on April 16, 2004 or April 18, 2004. *Id.*

Peterson offered to obtain the signatures of Hillman and Sherons

to save Woodmansees and Torset the time and effort. FF 11. (CP 2609, ¶ 11) However, Peterson did not communicate any information regarding the April 15, 2004, PSA offer to Hillman, who lived in Eastern Washington without a telephone, until late May of 2004 and did not communicate any information to Sherons regarding the Woodmansees' April 15, 2004, offer, i.e., PSA 1. *Hillman Dep.* p. 6:2 to p. 8: 4. (CP 339, Ln. 2—341, Ln. 4)

On August 6, 2004, Mr. Woodmansee wrote to Mr. Peterson that he had heard through Torset's conversation with Peterson that one of the co-owners might not execute the PSA 1. FF 14. (CP 2610, ¶ 14) On August 12, 2004, Peterson wrote back to Woodmansees stating that he (Peterson) had communicated PSA 1 to the co-owners of Parcel 3, that the co-owners had rejected the price of \$65,000 per acre, and that the co-owners demanded a price of \$100,000 per acre. In fact, Peterson had not disclosed the original PSA to Hillman and Sherons, and that they had not rejected it. FF 15. (CP 2610, ¶ 15)

2. PSA 2 – August 17, 2004.

Thereafter, Woodmansees offered \$100,000 per acre for Parcel 3 in reliance on Peterson's misrepresentations. FF 17. (CP 2611, ¶ 17) On August 17, 2004, Woodmansees and Peterson executed a second Purchase and Sale Agreement (PSA 2) for Parcel 3 at the price of \$100,000 per acre.

Trial Exh. 9. The Sheron then signed PSA 2, but then Peterson hand-wrote an additional clause on the PSA 2, a provision requiring Hillman and Sherons to pay Peterson's son a consulting fee of \$100,000 from their proceeds in the transaction. *See* Trial Exh. 10. Peterson added this clause after Sherons had signed the second PSA, and that Sherons did not agree to it. Mr. Hillman expressly rejected it. FF 21. (CP 2612, ¶ 21)

3. PSA 3 – September 27, 2004.

Without telling Peterson, the Sherons independently contacted Torset's broker in an attempt to find Woodmansees. Torset and Woodmansee met with the Sherons on September 27, 2004, and at that time they drew up and executed a third PSA for Parcel 3, i.e. PSA 3. Trial Exh. 16. They agreed on a price of \$100,000 per acre, and omitted any reference to a fee being paid to Peterson. Torset drove the PSA to Hillman in eastern Washington the next day, where he executed it. FF 30. (CP 2614, ¶ 30)

The day after Sherons and Woodmansees executed the third PSA for parcel 3, Peterson wrote a letter to Woodmansees stating that he had not yet gotten the signature of Hillman, and asked Woodmansees to give him more time to do so. Trial Exh. 18; FF 31. (CP 2615, ¶ 31)

Peterson was still in disagreement with his partners over his

compensation claim and refused to sign the September 27, 2004 PSA offer. Because Peterson refused to sign the September 27, 2004 PSA offer, the Woodmansees and Peterson's partners signed an addendum to the PSA on October 25 and 26, 2004, by terms of which the Woodmansees agreed to buy, and Peterson's partners agreed to sell, their interests in Parcel 3 separately from Peterson's interest at the \$100,000 per acre price, *Trial Exhibit 16*.

4. Sale of Peterson's Undivided One-Half Interest.

In March of 2008, Woodmansees purchased Peterson's one-half interest in Parcel 3 for \$135,000 per acre. FF 48. (CP 2618, ¶ 48) This was a voluntary sale and Peterson was under no legal duty to part with the property.

Hillman and Sherons' half interest in Parcel 3 cost an additional \$309,475.00 above what it would have cost under the PSA 1. Peterson's half of Parcel 3 cost an additional \$624,475 above the PSA 1 price. Woodmansees paid a total of \$933,950 above the PSA 1 price for Parcel 3. FF 63. (CP 2623, ¶ 63)

IV. ARGUMENT

A. Standards of Review.

An appellate court reviews findings of fact entered in a bench trial to determine whether they are supported by substantial evidence and whether they support the conclusions of law. Conclusions of law are reviewed de novo to see if they are supported by the trial court's findings of fact. Bingham v. Lechner, 111 Wn.App. 118, 127, 45 P.3d 562 (2002).

The existence of a duty is a question of law. Hertog, ex rel. S.A.H. v. City of Seattle, 138 Wash.2d 265, 275, 979 P.2d 400 (1999).

B. Peterson's Misrepresentations Woodmansees Regarding His Co-owner's Price Demands Are Not Actionable.

1. "Seller's Talk" By a Principal or an Agent Is Not Actionable.

This case can easily be resolved, and ought to be resolved, under clear Washington law adopting Restatement [First] of Agency §348, which provides:

§ 348. Fraud And Duress

An agent who fraudulently makes representations, uses duress, or knowingly assists in the commission of tortious fraud or duress by others, is subject to liability in tort to the injured person although the fraud or duress occurs in a transaction on behalf of the principal.

Comment:

d. "Sellers' talk" by agent. An agent, acting for the benefit of the principal, is privileged to make such misrepresentations in bargaining as are permitted to the principal as a bargainer. Thus, as the principal is permitted to misstate without liability in deceit the lowest price at which he is willing to sell, or the highest price at which he is willing to buy, the agent also, without being liable in

deceit, may make such misrepresentations concerning the state of the principal's mind. If, however, the agent, in making such representations, acts in violation of his duty to the principal and for his own purposes, the agent has no privilege and, in the absence of ratification by the principal, is subject to liability to the other party to the same extent that a third person would be liable for making a similar statement.

Illustrations:

5. P tells A to state to T that P will sell Blackacre for not less than \$10,000 but if A deems it wise, he may accept an offer of \$9,000. A represents that P will not take less than \$10,000 and T buys the land from him for \$10,000. A is not liable to T in deceit.

6. A is instructed to tell T that P will sell Blackacre for \$9,000. A represents to T that the price of the land is \$10,000 and that he will take no less, intending to pay the entire amount to P. T pays A \$10,000. Later A decides to keep the \$1,000 and reports to P that the land was sold for \$9,000. A is subject to liability to P for \$1,000, but is not subject to liability to T.

The Washington Supreme Court adopted Section 348 of the Restatement in Buckley v. Hatupin, 198 Wash. 543, 89 P.2d 212 (1939). In that case, Buckleys, who owned a five-acre chicken ranch, were contacted by Hatupin, a broker and trader, who sold them on the idea of selling the chicken ranch and buying a “bungalow court” owned by Bermudas. Hatupin stated that the Bermudas’ price was \$15,000, consisting of \$3,000 cash, \$2,000 in monthly installments, \$5,000 by the assumption of a mortgage on the bungalow court and the remaining \$5,000 by a conveyance of “city property” Hatupin described as owned by Days. Hatupin stated that Days would accept Buckley’s chicken ranch in trade and then convey their city property to Bermudas, who in turn would convey the bungalow court

property to Buckleys. Later, Hatupin told Buckleys, falsely, that he had authority to accept \$14,500 if Buckleys would pay \$4,500 in cash, although Bermudas had agreed to accept a lesser sum of some \$3,484.52 and Buckleys' assumption of the mortgage. Based on Hatupin's representations, Buckleys paid the money.

During their negotiations with Hatupin, Buckleys asked the name of the owner of the bungalow court so that they could meet him, but Hatupin told them that it would be better if Buckleys did not meet him because he was an odd character and something might happen in such a meeting that would prevent the consummation of the deal. After hearing from one of the tenants that he thought the bungalow court was for sale for \$10,000, Buckleys asked Hatupin about the alleged price. Hatupin stated that anyone who said that the property could be bought for \$10,000 did not know what he was talking about. Frank Buckley testified that he told Hatupin that the Buckleys' appraiser had appraised the property at \$12,000, but that Hatupin had responded: "Well, they always appraise things plenty low, and you can't depend upon that."

The transaction was closed by placing in escrow a deed from Days to Buckleys, who then conveyed their five-acre chicken ranch to the Days, and paid \$4,500 into escrow, which was distributed to Bermudas in the

amount they had agreed to accept. Days then turned the remaining cash over to Hatupin, together with a conveyance of the chicken ranch. The city property that Hatupin had told Buckleys that Days would convey to Bermudas was non-existent and no such property was conveyed to Bermudas

After escrow, the Buckleys sued Hatupin and the Days, alleging that Hatupin's representations to them concerning the price demanded by Bermudas and the other terms of the transaction were false, and that Hatupin had fraudulently appropriated their five-acre tract, valued at \$5,000. Bermudas testified that he had received all of the consideration he had asked for the property and that he did not know until after the deal was closed that any property in addition to the cash had been transferred by Buckleys to anyone.

The trial court, noting that the Buckleys were experienced in business and real estate transactions and had every opportunity to examine the property, had received exactly what they bargained for:

If is, of course, the rule that a principal who has been deceived, to his prejudice, by his agent, may recover from his agent property obtained from him by the agent through false and fraudulent representations. Appellants cite several decisions of this court based upon this rule. We are, however, unable to find in the record any basis for holding that respondent was at any time appellants' agent, and for this reason, the authorities above referred to are not here in point.... [198 Wash. at 550]

While the record shows respondent in a very unpleasant and unfavorable light, it does not show that he was ever appellants' agent, or that any fiduciary relation existed between him and appellants....

Appellants procured, as the result of the deal, exactly the property they expected to obtain, in exactly the condition in which they saw it, and they paid for it precisely the value which they expected to pay.... [198 Wash. at 554-55]

In Restatement of the Law of Agency, § 348, under the title "Third Person v. Agent," comment d, p. 763, it is stated that "An agent, acting for the benefit of the principal, is privileged to make such misrepresentations in bargaining as are permitted to the principal as a bargainer."

Following this comment are stated two illustrations... [quoting verbatim the two illustrations cited above]...The second illustration quoted is very much in point here.... [198 Wash. at 555]

After careful consideration, we are of the opinion that however unethical respondent's conduct may have been, appellants have no legal ground for recovery of judgment against him.... [198 Wash. at 556]

Hatupin was not decided in a vacuum. After rejecting the Buckleys' arguments based on cases involving fiduciary relationships and/or joint ventures with the buyer not present here, the Court cited cases from other jurisdictions in support of its decision, which cases likewise support Peterson's position here. In McLennan v. Investment Exchange Co., 170 Mo.App. 389, 156 S.W. 730 (1913), the buyer of a farm sued the broker to recover a substantial undisclosed profit the broker had made on

the transaction. The Missouri court denied recovery, pointing out that the buyer was familiar with land values and had dealt in real estate in the vicinity, knew what he was buying and received what he bargained for:

...To allow him to recover in this case would be to give him damages when he had sustained none, and to give him a courtmade bargain better than the one had made, or intended to make, for himself....It is idle to talk of plaintiff having a right to buy the land at the lowest price the owner would take for it....Neither [party] has a right to the other's best price, and therefore the representation of either that he has made his best offer cannot be said to be a representation of a material fact. To say otherwise would be to impose a restriction of the right of persons to make their own bargains....

156 S.W. 731-32 (any violation of duty by the broker was to his principal and not to the buyer).

In Bosley v. Monahan, 137 Iowa 650, 112 N.W. 1102 (1907), the defendant misrepresented himself to the purchaser as an agent of the seller, when in fact he had no authority and no such agency relationship, then solicited an offer from the plaintiff and thereafter negotiated a lower price from the owner in a separate contract, thus generating a substantial profit to himself based on his purchase and resale of the property to the plaintiff. On appeal of a judgment for the purchaser, the Supreme Court of Iowa reversed, commenting:

...We are now asked to go one step further, and say that the price at which land is put into the hands of an agent for sale is a material statement of fact with reference to the value of the land, falsity of

which can be made the basis of recovery. No specific authority for such extension of the exception has been called to our attention.... [I]n Des Moines Insurance Co. v. McIntire, 99 Iowa 50, 68 N.W. 565...it was held that a statement by an agent that the owner of a patent right was willing to sell the right for a particular state at \$650, and could not be induced to sell for less, while in fact he was willing to take \$100, was not a statement on which a prospective purchaser had a right to rely, for, as the court says, ***conceding that the prospective purchaser was prevented from going to the owner by the representation of the agent that such action would tend to induce the owner to require a larger amount than that stated, such representation was not a fraud of the agent, by mere "trade talk."*** We reach the conclusion that the statement attributed to defendant would not justify the plaintiff in relying thereon as a material statement of fact with reference to the value of the property, and, as plaintiff would have no right to rescind on account of such misstatement, he could not hold the defendant liable for the damages, if any, resulting to him from acting upon such misstatement, conceding that defendant knew it to be false and intended that the plaintiff should rely thereon.

Id., 112 N.W. at 1104 (emphasis supplied).

The other cases relied on by Buckley are to the same effect: Bradley v. Oviatt, 86 Conn. 63, 84 A. 321 (1912) (agent who represented seller's price higher than seller was expected to accept and personally profited by the difference obtained best price available for property and was not liable to the buyer); Huttig v. Nussy, 100 Fla. 1097, 130 So. 605, 607-08 (1930) (parties to a sale are business antagonists dealing at arm's length; neither has a legal right to the other's best price; the representation of either that he has made his best offer is not a representation of a material fact and to hold otherwise would restrict the right of persons to make their own

bargains); Linnemann v Summers, 95 N.J. Eq. 507, 123 A. 539 (1924) (purchaser not wronged where broker bought property in her own name while misrepresenting price demanded by seller and thereafter conveyed to purchaser at a personal profit); Harris & Co. v. Weller, 52 App. D.C., 280 F. 980 987 (1922) (agent for undisclosed owner who demanded more than the principal would accept held not liable, otherwise, “The validity of the purchase would depend, not upon what ...[the buyer] was willing to pay, but upon the price at which the property might be purchased”); and Sanders v. Stevens, 23 Ariz. 370, 203 P. 1083 (1922) (to same effect, citing McLennan, supra (a representation of a party’s “best price” is not a representation of material fact).

The subterfuges detailed in the above cases dwarf anything plaintiffs have complained of here -- simply put, that Peterson misrepresented the price at which his partners were willing to sell to the Woodmansees. In Buckley, the “seller’s agent” was not an agent for anyone in the transaction, but acted as a principal while representing otherwise, and arranged the escrow to receive the buyer’s trade property for himself without the buyer’s knowledge. In both McLennan and Bosley, the defendant, who was not an agent for either party, but an arranger and a participant in the transaction, told the buyer that he was an agent of the

seller, negotiated as a principal with the seller for a lower price than the price he had told the buyer the seller would accept, then purchased the property and conveyed it to the buyer at the higher price, profiting by the difference. In Linnemann, the defendant started the transaction as an agent of the seller, but after arranging a price higher than the seller required, bought the property herself and thereafter conveyed to the buyer at a profit. The cases are consistent in holding that: (1) the “arranger” of a transaction does not make a statement of fact, much less of material fact, in representing a seller’s supposed “minimum price” to a prospective buyer, even though the arranger knows the seller would take less; (2) the fact that the arranger may not have an agency relationship with the seller is not actionable; (3) it is up to a buyer, especially a sophisticated buyer, to determine for himself or herself what the property is worth, and may not later complain that the price paid was more than the price the seller would have accepted, so long as the arranger did not misrepresent the property itself; and (4) if the arranger is an agent of the seller, the arranger will be liable to the seller for any undisclosed profit on the transaction.

Here, of course, Peterson would not have made any profit that his partners would not also have shared and he violated no duties to them. Peterson’s representation that the partners had rejected the Woodmansees’

\$65,000 per acre offer and would only sell for \$100,000 per acre did not constitute a representation of material fact and is not actionable by the Woodmansees. Even in the absence of the foregoing controlling authority, however, Peterson is not liable to the Woodmansees under any of the causes of action pleaded by them, as shown below.

2. Peterson Was Privileged to Use “Sales Talk” Either As a Principal or an Agent.

There are situations in which a seller is permitted to make statements regarding the intentions of his partners or co-owners, even though untrue, to another party to negotiations without liability therefor. This would surely be true in the case of husband-and-wife property owners. If Peterson had owned Parcel 3 in common with a spouse who had never met the Woodmansees, instead of with the Sherons and Hillman, whose only relationship was with Peterson at the time of the acts complained of, and made the same representations to the plaintiffs (“my wife wants more money” or “my wife wants \$100,000 per acre”, contrary to either her consent or knowledge), no buyer relying on such statements could have asserted causes of action for tortious interference, breach of fiduciary duty or fraud, since it is generally accepted that such statements are not actionable, even though a spouse is a separate person and capable of owning separate property, and only she could complain if her husband did not communicate

an offer to her that she might have otherwise accepted. See, e.g., Deeter v. Angus, 179 Cal.App. 3d 241, 251-53, 224 Cal.Rptr.801 (1986) (wife who was a party to an alleged prospective economic relationship with purchaser established on behalf by her husband could not “interfere” with the relationship).

The law did not recognize a cause of action in Deeter for tortious interference, and should not do so here, since there was no relationship between the Woodmansees and Peterson’s partners that could be interfered with. Neither could there be a breach of fiduciary duty, because any duties Peterson had, other than not to misrepresent the property itself, clearly were to his partners and not to the Woodmansees. The Washington Supreme Court’s refusal to recognize a cause of action for fraud where the seller obtains a higher price from the buyer by making the representations made by Peterson here is simply another way of saying a party cannot interfere with a contract or expectancy to which one is a party or has an interest.

In this case, the Court should have found a partnership between Peterson and his co-owners based solely on their past dealings in buying, holding and reselling their prior investments. Douglas v. Jepson, 88 Wn.App. 342, 945 P.2d 244 (1997) (comment to WPI 50.12) (court can find partnership based on actions and conduct), or at a minimum, a joint venture,

which is the equivalent under Washington law. Pietz v. Indermuehle, 89 Wn.App. 503, 949 P.2d 449 (1998) (comment to WPI 50.14). Contrary to the findings of the trial court, Peterson, the Sherons, Hillman and the Woodmansees all recognized the partnership, both in writing and in their testimony, and those statements are conclusive on the issue. Nillson v. McDole, 73 Wash. 312, 131 P. 1141 (1913) (admissions of partnership are competent against persons making them). As such, Peterson was an agent of the partnership. R.C.W. 25.05.100; Poutre v. Saunders, 19 Wn.2d 561, 143 P.2d 554 (1943) (law of partnership is a branch of the law of agency).

Even in the absence of a partnership, tortious interference will not lie against a party to a contract, as Peterson obviously was, as noted above. Even assuming contrary to fact that Peterson had *no* interest in the subject matter of the contract, however, the partnership and attendant agency relationship between him and his partners would bar the tort. See, e.g., Ahearn v. Anderson-Bishop Partnership, et al., 946 P.2d 417, 423-24 (Wyoming, 1997) (partner of original purchaser who was an interested party in transaction was not an outsider to the proposed contract and therefore could not tortiously interfere with it); Reed, et al. v. Michigan Metro Girl Scout Council, 201 Mich.App. 10, 12-13, 506 N.W.2d 231, 233 (1993) (corporate agent cannot be liable for tortious interference with

the corporation's contracts unless agent acts solely for his/her own benefit with no benefit to the corporation) and Morgan Stanley & Co., Inc. v. Texas Oil Company, 40 Tex. Sup. Ct. J. 692, 958 S.W.2d 178 (1998) (to same effect).

C. Previous Appellate Decision Precludes Damages From Peterson's Voluntary Sale of His Interest in Parcel 3.

1. Peterson Had No Contractual Duty to Sell in 2008.

The May 1, 2006 decision of the Court of Appeals clearly held that the parties never reached an agreement with regard to Parcel 3:

...Here, there was a valid and enforceable agreement between Robert S. Peterson and Joseph and Kimberly Woodmansee to sell what these parties describe as "Parcel 2"But there was never any enforceable agreement between these parties to sell Peterson's undivided one-half interest in what they describe as "Parcel 3." Thus, there was no authority to order specific performance to require Peterson to convey his undivided one-half interest in Parcel 3.... [05/01/06 Opinion, pp. 1-2 (emphasis supplied)]

...Because we hold that there was no agreement for the sale of Peterson's undivided one-half interest in Parcel 3 for the trial court to specifically enforce, we reverse the summary judgment order and decree of specific performance with respect to that parcel....[05/01/06 Opinion, pp. 11-12 (emphasis supplied)]

...Here, Peterson did not contract to convey all interests in Parcel 3.... [10/05/06 Opinion, p. 2 (emphasis supplied)]

...Moreover, it is also the rule that a contract signed by less than all of the intended signers is not binding on even the signers where the contract is indivisible. Here, there is no reasonable argument that the PSA for Parcel 3 was divisible. The parties contemplated one transaction with all owners signing. Accordingly,

Peterson was not bound to convey his interest alone to the Woodmansees. [10/05/06 Opinion, p.3 (emphasis supplied)]

The Court of Appeals has held that there was no agreement for plaintiffs to acquire any interest in Parcel 3 from Peterson and Peterson was not obligated to sell it to them.

Plaintiffs have also alleged in their Complaint and Amended Complaint that the uncompleted Parcel 3 PSA's were part of an overall oral agreement obligating Peterson to sell his interests in both parcels, but none of the PSA's at issue recite any obligation on the part of the seller to sell any parcel other than the one identified, nor do they reference any other PSA that does so. In any event, such a "global contract" is precluded by the Court of Appeals decision, since Peterson would have been obligated to sell his interest in Parcel 3 according to the initial April 15, 2004 offer of \$65,000 per acre had such an enforceable contract existed, and the Court of Appeals has already held that no such obligation existed. Finally, although an action for damages may lie when specific performance of an alleged contract is not available, the Washington Supreme Court has limited a buyer's damage remedy to cases where a seller had contracted to sell to the plaintiff, noting that "If the uncertainty is so great as to prevent the giving of any legal remedy, direct or indirect, there is no contract...." Hedges v. Hurd, 47 Wn.2d 683, 687-88, 289 P.2d 706 (1951) (damage

award affirmed in that case because each essential element was included in the parties' written agreement). Damages are not available where the contract never existed, as the Court of Appeals in this case has already held.

In Schweiter v. Halsey, 57 Wn.2d 707, 359 P.2d 821 (1961), the Washington Supreme Court reiterated that an agreement meeting the requirements of a contract is a prerequisite for a claim for damages:

Appellants cite *Hedges v. Hurd*, 47 Wn. (2d) 683, 289 P. (2d) 706 (1955), in support of the proposition that even though an earnest-money agreement may be insufficient to meet the legal test for specific performance, it can still form the basis for an action for damages for breach thereof.

The rule contended for by appellants applies to those situations where the contract involved is too indefinite in its terms to be specifically enforced, but yet is certain enough to constitute a valid contract for breach of which damages may be recovered. ***The rule has no application where the contract fails to satisfy the statute of frauds.***

57 Wn.2d at 712 (emphasis supplied). In our case, of course, the Court of Appeals has specifically held ***not*** that a contract failed due to the lack or imprecision a required term, but that ***there was no agreement of any kind between Peterson and the Woodmansees*** for the sale of Parcel 3.

2. This Court's Prior Decision Disposed of Plaintiffs' Promissory Estoppel Argument and Claim.

The Court of Appeals decision likewise constitutes a rejection of an argument for a claim for damages based on promissory estoppel

(inapplicable in any event for reasons set forth elsewhere herein), since the Parcel 3 specific performance remedy would have been affirmed had promissory estoppel been applicable to the negotiations and documents at issue.

3. Peterson Had No Fiduciary Duty to Sell His Interest in 2008.

Typical examples of fiduciaries are trustees, executors, agents, attorneys and trusted business advisors or a relationship in which one party “*occupies such a relation to the other party as to justify the latter in expecting that his interests will be cared for . . .*” Restatement of Contracts §472(1) (c) (1932). Parties to a business transaction, however, deal at arm’s length. Liebergesell v. Evans, 93 Wn.2d 881, 890, 613 P.2d 1170 (1980). A fiduciary relationship may also arise from particular facts, Micro Enhancement Int’l, Inc., v. Coopers & Lybrand, L.L.P., 110 Wn.App. 412, 435, 40 P.3d 1206 (2002), but one party's testimony that he “trusted the other” to perform a “pre-contractual” act, as Woodmansees assert here, would not be sufficient to create a fiduciary relationship. Micro, 110 Wn.App. at 435.

Our courts have not found a fiduciary relationship based on an accommodation between opposite parties to a transaction, such as occurred here when Peterson offered to facilitate “getting the signatures” of his

partners on Woodmansees' PSA. Peterson's relationship to his partners, at all times recognized by the Woodmansees, the adverse interests of the parties, Woodmansees' status as experienced developers, and the participation of Woodmansees' own agent Randy Torset in the transaction do not allow such a fanciful argument. In McLennan, supra, cited with approval by the Washington State Supreme Court in Buckley, the court rejected the same argument Woodmansees make here:

...Plaintiff endeavored to establish the existence of some sort of confidential relationship between defendants and himself, but his evidence on this issue amounts to nothing. He admits that he knew defendants were acting, not as his agents, but as agents of the vendor, and, being a man of more than ordinary experience and acumen in business affairs, he dealt with them at arm's length....

McLennan, 156 S.W. at 731.

Here, Peterson's actions were for the benefit of himself and his partners and there was no agreement between the Woodmansees and Peterson that he was to act primarily for the Woodmansees' benefit. Whatever fiduciary duties Peterson had were to his partners and not to the Woodmansees. See, Restatement (Second) of Agency §14K (one who contracts to acquire property from a third person and convey it to another is the agent of the other only if it is agreed that he is to act primarily for the benefit of the other and not for himself).

Rather than control Peterson, the evidence shows that Woodmansee

complaint that they had no control over Peterson's actions, which is likewise fatal to an agency theory because one of the requirements of an agency is that the principal have control of the agent. Uni-Com Northwest, Ltd. v. Argus Pub. Co., 47 Wn.App. 787, 737 P.2d 304 (1987) (two elements of agency relationship are mutual consent and control of the agent by the principal). Control is the vitally essential element in the relationship of principal and agent. McCarty v. King County Medical Service Corp., 26 Wn.2d 660, 680-81, 175 P.2d 653 (1947). "*Control is not established if the asserted principal retains the right to supervise the asserted agent merely to determine if the agent performs in conformity with the contract.*" Bloedel Timberlands v. Timber Indus., 28 Wn.App. 669, 674, 626 P.2d 30 (1981). Plaintiffs' very complaint that Peterson did not obtain his partners' signatures as they say he told them he would do and their alleged reliance on such an expectation for a period of four months demonstrate the lack of control necessary to create an agency relationship in any event.²

Fiduciary duties likewise do not spring from pre-contract negotiations, and, although contracting parties have a mutual obligation of good faith and fair dealing, those duties do not arise absent a completed contract, since the duty of good faith and fair dealing "*...requires only*

² The April 15, 2004 PSA expired either the day after or three days after it was submitted to Peterson, so collecting all signatures, including one from Eastern

that the parties perform in good faith the obligations imposed by their agreement.” Badgett v. Sec. State Bank, 116 Wn.2d 563, 569, 807 P.2d 356 (1991) (bank not obligated to restructure loan agreement for borrower); Miller v. Othello Packers, Inc., 67 Wn.2d 842, 844, 410 P.2d 33 (1966) (parties have duty to cooperate with each other to obtain the full benefit of performance of the contract); Matson v. Emory, 36 Wn.App. 681, 686-87, 767 P.2d 1029 (1984) (the duty only arises with respect to terms agreed to by the parties); Johnson v. Yousoofian, 84 Wn.App. 755 at 762 (implied duty of good faith applies to specific performance of specific contract obligations; if there is no contractual duty, there is nothing that must be performed in good faith). The lack of a contract in this case is likewise fatal to plaintiffs’ fiduciary duty argument.

Even if Peterson had a fiduciary duty to plaintiffs and breached it, the Woodmansees have cited no authority for the proposition that Peterson had a fiduciary or any other duty to sell them his own property and there is none.

D. Peterson’s “Promise” to Obtain Hillman and Sherons’ Signatures Does Not Create a Contract by Promissory Estoppel.

The trial court found that Peterson should be liable under principles of promissory estoppel for not selling the Woodmansees his

Washington, would have been a near impossibility in any event.

own property, earlier and at a lower price, but the essence of that tort is that the plaintiff must have shifted his/her position as a result of the other party's promises ***and must have already incurred a loss and not a future expectancy as a result.*** Flower v. T.R.A. Industries, Inc., 127 Wn.App. 13, 111 P.3d 1192 (2005); Shah v. Allstate Insurance Co., 130 Wn.App. 74, 121 P.3d 1204 (2005) Here, the Woodmansees did not change any position as a result of Peterson's statements to them. Joseph Woodmansee testified that prior to September 27, 2004, when plaintiffs submitted their third offer to Peterson's partners, he knew Mr. Peterson had been lying to to him. VRP 157. But the Woodmansees ***thereafter*** bought the partners' property ***knowing that they were not going to reach an agreement with Peterson for the purchase of his interest in Parcel 3.*** The Woodmansees "lost" nothing except their hoped-for acquisition of Peterson's property at a favorable price.

Promissory estoppel cannot be applied here in any event because it cannot be used to circumvent the Statute of Frauds. In Lige Dickson Company v. Union Oil Company, 95 Wn.2d 291 (1981), the Washington Supreme Court specifically ***rejected*** Restatement of Contracts 2d §139, which would have allowed a claim based on promissory estoppels notwithstanding the Statute of Frauds. Also see, Greaves v. Medical

Imaging Systems, Inc., 71 Wn.App. 894, 862 P.2d 643 (1993), aff'd, 124 Wn.2d 389, 879 P.2d 276 (1994); Firth v. Lu, 103 Wn.App. 267, 276, 12 P.3d 618 (2000), rev'd on other grounds, 146 Wn.2d 608, 49 P.3d 117 (2002) (rejecting both promissory estoppel and “part performance” as a legal basis to take the agreement out of the Statute); and Pacific Cascade Corporation v. Nimmer, 25 Wn.App. 552, 559-60, 608 P.2d 266 (1980) (oral promise to execute lease, conditioned upon the execution of a written document incorporating the terms of the oral agreement, not enforceable).

In Firth v. Lu, cited above, the seller of a cooperative apartment signed a purchase and sale agreement that lacked a legal description, and then refused to close, demanding a higher price for the apartment. After holding that the agreement was subject to the Statute of Frauds and therefore unenforceable, the court rejected both promissory estoppel and “part performance” as a legal basis to take the agreement out of the Statute:

...Firth argues that the statute of frauds should not apply in this cause because Lu acted deceptively in seeking extensions of the closing date when he had already decided not to honor the price stated in the written agreement....

... [A] party seeking relief from the statute of frauds must do more than point to misleading conduct by the other party. The purpose of the statute is not the prevention of fraud or deception in general, but the prevention of fraud "arising from *uncertainty* inherent in oral contractual undertakings." *Miller*, 78 Wn.2d at 829....

Id., 103 Wn.App. at 276. Although the Firth decision was subsequently reversed, Firth v. Lu, 146 Wn.2d 608, 49 P.3d 117 (2002), the reversal was on other grounds (shares in a cooperative apartment do not constitute an interest in land subject to the Statute of Frauds), and the Washington Supreme Court left intact the holding of the Court of Appeals that promissory estoppel cannot be used to circumvent the Statute of Frauds where, as here, it applies.

E. Woodmansees Had No Protected Business Expectancy or Relationship with Hillman and Sherons; Peterson Did Not Wrongfully Interfere With Any Such Relationship.

An essential element of a claim for tortious interference with a contract or business expectancy is the existence of a valid contractual relationship or business expectancy and resultant damage. Calbom v. Knudtson, 65 Wn.2d 157, 162-63, 396 P.2d 148 (1964); Leingang v. Pierce County Med. Bureau, Inc., 131 Wn.2d 133, 157, 930 P.2d 288 (1997). Here, this first element of the tort is clearly lacking because a valid expectancy can only arise out of “...*a relationship between parties contemplating a contract*, with at least a reasonable expectancy of fruition...” Brotten v. May, 49 Wn.App. 564, 569, 744 P.2d 1085 (1987) (emphasis supplied); Scymanski v. Dufault, 80 Wn.2d 77, 84-85, 491 P.2d 1050 (1971) (existing business relationship between the parties).

Following a discussion of the Restatement of Torts 2d §766, §766A and other authorities, the Washington Supreme Court addressed the requirements of the tort of intentional interference with “reasonable expectations of economic advantage”:

...The interest protected is different here than that considered in the preceding sections. Instead of the interest in the security of contracts already made, it is the interest in reasonable expectations of economic advantage... [citing 1. F. Harper and F. James, *The Law of Torts* § 6.11 (1956), at 510].

Our cases also adopt this principle. The elements outlined above speak in terms of “a valid contractual relationship or *business expectancy*.” And, as pointed out in *F. D. Hill & Co. v. Wallerich*, 67 Wn.2d 409, 415, 407 P.2d 956 (1965):

In brief, the tort consists in the wrongful interference with an existing *business relationship between parties, in which inhered a reasonable expectancy of fruition* except for such interference, and damage resulted therefrom... [Italics in original and emphasis added].

We conclude that an existing enforceable contract is not necessary to support an action for interference with business relationships. ***All that is needed is a relationship between parties contemplating a contract***, with at least a reasonable expectancy of fruition. And ***this relationship*** must be known, or reasonably apparent, to the interferor....

Scymanski, 80 Wn.2d at 84-85 (bold emphasis supplied; italics in the original).

The Woodmansees, whose very contention is that Peterson kept them from communicating with his partners, have acknowledged that they

at all times dealt solely with Peterson and had no communication or relationship with his partners until well after the alleged interference occurred. A *relationship* between the prospective parties to a contract, not just a hoped-for profit on the part of the prospective buyer, is a requirement of the tort. King v. Seattle, 84 Wn.2d 239, 247, 525 P.2d 228 (1974), overruled on other grounds, City of Seattle v. Blume, 134 Wn.2d 243, 250, 947 P.2d 223 (1997) (a required element of the tort of interference with prospective economic advantage is that the plaintiff have had a relationship with others contemplating a contract, citing Scymanski, supra).

The Woodmansees' tortious interference claim fails for the second and independent reason that it is based on contractual negotiations between the Woodmansees and Peterson for the purchase and sale of property owned by Peterson and his partners and it is legally impossible to interfere with one's own contract. Reninger v. State Dept. of Corrections, 134 Wn.2d 437, 448, 951 P.2d 782 (1998); Olympic Fish Products, Inc. v. Lloyd, 93 Wn.2d 596, 598, 611 P.2d 737 (1980) (a party to a contract cannot be liable in tort for inducing its own breach); Houser v. City of Redmond, 16 Wn.App. 743, 746, 559 P.2d 577 (1977), aff'd, 91 Wn.2d 36, 586 P.2d 482 (1978) (as between the contracting parties, the contract itself provided a sufficient

remedy and a defendant's breach of his own contract with the plaintiff is not a basis for the tort); Hein v. Chrysler Corporation, 45 Wn.2d 586, 277 P.2d 708 (1954) (the remedy of tortious interference lies only with respect to the contracts of *others* and not against the other party to the contract); Olson v. Scholes, 17 Wn.App. 383, 391, 563 P.2d 1275 (1977) (“...*an action for inducing a breach of contract will lie against a third party but a party to the contract itself cannot be held responsible [in tort] for inducing himself to commit a breach of that contract or for conspiring to breach it*”) (emphasis supplied).

Judicial acceptance of plaintiffs’ contention that they had a protected expectation of acquiring an interest in property from persons with whom they had no relationship, did not know, had not met and with whom they had never communicated would eliminate any requirement for a court to define what a protectable “business expectancy” is and would allow recovery for any intention, hope, dream or desire that was known or potentially known to the alleged tortfeasor. Washington courts have not gone that far and this Court should not do so here either.

F. The Court Erred In Awarding Prejudgment Interest on Non-Liquidated Damages.

The trial court in its findings of fact and conclusions of law went to great lengths to express its belief that Woodmansees' conduct in acquiring Parcel 3 at the elevated prices was reasonable and necessary to mitigate its damages. See, e.g., Findings of Fact 41, 48, and 60. (CP 2617, ¶ 41; CP 2619, ¶ 48; CP 2622, ¶ 60) Because the court was required to exercise discretion in determining the appropriate amount of damages, the damage amount is unliquidated and therefore no pre-judgment interest should have been awarded.

As noted in King Aircraft Sales, Inc. v. Lane, 68 Wash.App. 706, 721-22, 846 P.2d 550, 558-59 (1993):

The requirement that damages be liquidated or determinable limits awards of prejudgment interest to situations where no discretion on the part of the trier of fact is required to determine the reasonable amount of damages. Hunt-Wesson, 23 Wash.App. at 197, 596 P.2d 666; *see also* Hansen v. Rothaus, 107 Wash.2d at 474-78, 730 P.2d 662. In contrast, in those cases where the amount of recovery depends on the findings of fact, prejudgment interest cannot be awarded. Pannell v. Food Servs. of Am., 61 Wash.App. 418, 449, 810 P.2d 952, 815 P.2d 812 (1991), *review denied*, 118 Wash.2d 1008, 824 P.2d 490 (1992).

Here, the trial court findings indicated alternative grounds for “damages.” Besides making a discretionary decision as to which ground to award as the “value”, *i.e.*, the lost profit mode, the court considered factors such as the costs of sale, corrosion proofing the engine, and arguably speculation at the “potential” sales prices King would have received. We conclude that with the exception of the \$10,000 good faith

deposit held by Lane, the damages were neither liquidated nor determinable and therefore prejudgment interest does not lie.

V. CONCLUSION

For the reasons stated herein, Defendant/Appellant Robert S. Peterson prays that this court reverse the verdict of the trial court and dismissal all claims against him.

RESPECTFULLY SUBMITTED this 26th day of April, 2010.

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