

No. 66071-3-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

SHARON HANKS, an individual,

Respondent,

v.

JAMES and JEANNIE GRACE, and the marital community comprised
thereof; EASTSIDE BROKERS, INC., d/b/a RE/MAX EASTSIDE
BROKERS, a Washington limited liability company,

Appellants.

OPENING BRIEF OF RESPONDENT

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I. INTRODUCTION

This case concerns the professional negligence of the defendant James Grace, a real estate broker licensed with defendant RE/MAX. Mr. Grace was the listing broker for the sale of plaintiff Sharon Hanks's home. At that time, her husband was dying of a brain tumor. For her own financial security, it was essential for her to get the best price possible for the house. Because of Mr. Grace's negligence, she was prevented from doing so.

The case was tried to a jury by the same counsel now representing the parties on appeal (Douglas Tingvall for defendants, Craig Blackmon for plaintiff). The jury determined that Mr. Grace was negligent. Unfortunately for everyone, Mr. Grace's negligence occurred from March through May of 2008, right when the local housing market was beginning its long and steep decline. Accordingly, Mrs. Hanks had to wait another 16 months before selling her home for \$158,000 less than the original asking price. As a result, the jury awarded \$195,500 in past economic losses (including interest, taxes, etc.). Because of her unique situation and vulnerability (her husband died of his longstanding brain tumor while in a hospice on March 22), and consistent with the agreed jury instructions, the jury also awarded \$170,500 in non-economic damages.

The defendants now appeal. However, in doing so, they simply ignore serious procedural issues that are dispositive in plaintiff's favor. Defendants' failure to address these procedural issues in their brief is telling.¹ This appeal has little merit and this Court should affirm the trial court in all respects.

II. ASSIGNMENTS OF ERROR

Appellants, defendants in the original action, have identified three assignments of error. However, appellants incorrectly identify the legal issues underlying each asserted error. A more accurate recitation of the issues is as follows:

Issues Pertaining to Assignment of Error No. 1:

1. Are defendants barred from appealing the trial court's denial of their motion for summary judgment, where the court denied the motion because of existing genuine issues of material fact, and the case was subsequently tried to a jury?

2. In this negligence action, is Mrs. Hanks entitled to all of her damages proximately caused by Mr. Grace's negligence, rather than simply the liquidated damages set forth in the contract?

¹ Indeed, of the three assignments of error, two (Nos. 1 and 3) border on frivolous. As explained in detail below, case law clearly and unequivocally resolves No. 1 in plaintiff's favor. Defendants' undeniable failure to comply with the Civil Rules similarly resolves No. 3. One would have expected defendants to address these issues in their brief. Ignoring the issues will of course not make them go away.

Issues Pertaining to Assignment of Error No. 2:

3. Did the trial court correctly render partial summary judgment in favor of Mrs. Hanks on defendants' affirmative defense of waiver, where:

- a. There was no consideration to support the waiver?²
- b. The waiver violates public policy?

Issues Pertaining to Assignment of Error No. 3:

4. Did the trial court correctly deny defendants' motion for judgment as a matter of law, where:

- a. Defendants failed to raise the motion before the case went to the jury, as required by Civil Rule 50?
- b. The jury heard substantial evidence of a causal link between Mr. Grace's negligence and Mrs. Hanks's damages?

5. Did the trial court correctly deny defendants' motion for partial judgment as a matter of law in regards to the jury's award of noneconomic damages, where defendants failed to object to the jury instruction that instructed the jury to award such damages if appropriate?

² The contractual term at issue might be more accurately described as a "release." *See CP at 18.* However, for consistency's sake, Mrs. Hanks will also refer to it as the "waiver."

III. STATEMENT OF THE CASE

This case arises out of real estate brokerage services provided by the defendant real estate salesperson, James Grace, to plaintiff Mrs. Hanks. Mr. Grace was licensed as a broker (at that time a “salesperson,” prior to amendment of the licensing statute) through defendant Eastside Brokers, Inc., doing business as RE/MAX Eastside Brokers. CP at 5.

In 2008, Mrs. Hanks was 56 years old. RP at 16. Her husband, Larry, was dying of brain cancer. *Id.* Their primary asset was their home in Sammamish. *Id.* at 16-17. Mrs. Hanks was acutely aware of the need to sell this asset for its full value, since she was about to lose her primary wage earner. *Id.* She needed funds to pay off accumulated debts, including money spent on Larry’s healthcare. *Id.* at 17-18. She knew she had many years in front of her, initially without Social Security surviving spousal benefits given her age, and she knew that her financial security was at stake. *Id.* She also suspected – correctly – that the housing market was about to end its historic run and that the best time to sell her house was right then. *Id.* Accordingly, she planned on selling their home in Sammamish while the market was still strong and then relocating to South Dakota to be with her family. *Id.* at 16-17.

Mrs. Hanks approached her neighbor, defendant James Grace, about listing the home for sale. *Id.* at 22. Mr. Grace was a real estate agent with 18 years of experience. RP at 228. Mr. Grace agreed to list Mrs. Hanks’s home. CP at 5. At that meeting, Mrs. Hanks specifically informed Mr. Grace that she did not want to receive an offer that was contingent on the sale of the buyer’s home. RP at 25-26, 204. She

absolutely wanted to avoid the uncertainty and delay of a contingent sale. *See* RP at 25-26. Rather, she wanted to sign a contract that was likely to close on a specified date. *See id.* Such a contract, not contingent on the sale of the buyer's home, would allow her to have a degree of certainty in regards to both price, while the market remained solid, and the timing of her relocation to South Dakota. They signed a listing agreement whereby Mr. Grace would earn a 2% commission that would increase to 3% if he also represented the buyer. CP at 5. Mr. Grace then listed the property on the Northwest Multiple Listing Service (NWMLS) on February 29, 2008. RP at 164.

In early March, Mr. Grace was contacted by a prospective buyer, Robert Alia. RP at 327. Mr. Alia had recently driven by the home and was interested in possibly purchasing it. *Id.* at 328. Mr. Grace showed Mr. Alia the property, who indicated a strong interest. *Id.* at 329. Based on their conversation, it was apparent that Mr. Alia was a very solid potential buyer (his lease was about to expire so he wanted to buy right away, his son attended school in the neighborhood, and his finances were solid such that he would not have difficulty in securing a loan). *See id.* at 327. Mr. Alia also informed Mr. Grace that he was not represented by an agent. *Id.* at 329.

A day or so later, on March 9, Mr. Alia again told Mr. Grace that he was seriously interested in purchasing Mrs. Hanks's home. *Id.* at 337-38. Mr. Alia informed Mr. Grace that he wanted to make a full-price non-contingent offer to close within 30 days. *Id.* Mr. Grace did not offer to draft a written offer with these terms, nor did Mr. Grace refer Mr. Alia to

another agent who could do so. *Id.* at 336. Mr. Grace took no actions whatsoever to encourage or facilitate a written offer from Mr. Alia. *Id.* at 336-39. Instead, Mr. Grace informed Mr. Alia that he expected to receive a contingent offer within the next day or so, and that Mrs. Hanks would probably have a difficult time with the early closing. *Id.* The next day, March 10, Mr. Grace called Mr. Alia and informed him that Mrs. Hanks could not close within 30 days and instead would be accepting the contingent offer from another buyer. *Id.*

Mr. Grace never asked Mrs. Hanks whether she would be able to accept an early closing. *Id.* at 32-34. Moreover, Mr. Grace never informed Mrs. Hanks of Mr. Alia's keen interest in the home and his clear ability to purchase it. *Id.* at 34-35. Mr. Grace never informed Mrs. Hanks of Mr. Alia's desire to make a full-price, non-contingent offer. *Id.* Had Mr. Grace informed her of these facts, Mrs. Hanks would have followed up with Mr. Alia, whether through Mr. Grace or otherwise, to encourage the presentation of such an offer that she would have then accepted. *Id.* Mrs. Hanks was willing and fully capable of closing any sale within 30 days, and indeed such an early closing would have best suited her situation. *Id.* at 32-33.

During this same period, Mr. Grace met Robert and Norma Jean Grimes, who were also interested in purchasing Mrs. Hanks's house. *Id.* at 207-08. Unlike Mr. Alia, however, they had to sell their home in order to do so. *Id.*

On March 10, the very same day that Mr. Grace inaccurately told Mr. Alia that Mrs. Hanks was not interested in the terms of Mr. Alia's

offer, Mr. Grace prepared the Grimeses' offer for Mrs. Hanks's house. CP at 9. In addition, Mr. Grace agreed to sell the Grimeses' home. RP at 228. Per his listing agreement with the Grimeses, Mr. Grace would earn a 2% commission upon the sale, which would increase to 3% if he also represented the buyer. *Id.* at 229. Thus, if he sold Mrs. Hanks's home to the Grimeses, Mr. Grace would receive more than \$15,000 from Mrs. Hanks (his 3% commission for representing the buyer as well), plus more than \$11,000 from the Grimeses for the sale of their home (his 2% commission as the listing agent).

As completed by Mr. Grace, the Grimeses' offer included a Financing Addendum that was consistent with an offer contingent on the sale of the buyer's home. *Id.* at 162-63. However, the Agreement did not include the NWMLS Form 22B, entitled "Buyer's Sale of Property Contingency Addendum." *Id.* at 161. This form should be used when an offer is contingent on the sale of the buyer's house. *Id.* Had Mr. Grace included this form in the offer, it would have expressly disclosed to Mrs. Hanks – by its title alone – that the Grimeses' offer to purchase was contingent on the sale of their home. *See id.* at 162. Moreover, this form would have allowed Mrs. Hanks to continue receiving offers. *Id.* at 161-62. Had she signed a subsequent offer, she would have had the opportunity to "bump" the Grimeses (they would have had to either waive the contingency or terminate the contract). *See id.*

When he presented the offer, Mr. Grace informed Mrs. Hanks that the Grimeses were financially well qualified to purchase her home. RP at 36. He did not tell her that the Grimeses need to sell their home in order

to purchase hers. RP at 37. In accepting the offer, Mrs. Hanks relied on Mr. Grace's representations and her specific prior instructions to him that she did not want to be presented with an offer contingent on the sale of the buyer's home. *See id.* at 36-38. When she accepted the Grimeses' offer on March 10, Mrs. Hanks believed that the contract was contingent only on financing and an inspection, not on the sale of the Grimeses' home. *Id.*

Following mutual acceptance on March 10, Mr. Grace changed the status of the listing to "Pending Inspection," notwithstanding the fact that the sale was in reality contingent on the sale of the Grimeses' home. *Id.* at 164. As such, the correct status of the listing would have been "Contingent," which would have alerted other potential buyers that the seller was still entertaining offers and would "bump" the Grimeses, the current buyers, upon acceptance. *Id.*

On March 12, Mr. Grace removed the yard sign in front of Mrs. Hanks's home. RP at 167. This further discouraged any additional offers from other buyers. *Id.* Larry Hanks passed away on March 22. RP at 115.

On March 25, following satisfaction of the inspection contingency, Mr. Grace updated the listing status to "Pending." RP at 166-67. Once again, this virtually assured that no other buyers would show interest in the home, even though the sale in reality remained contingent on the sale of the Grimeses' home. *Id.*

Eventually it became apparent that the Grimeses were unable to sell their home, and on May 21 the Grimeses signed a rescission of their contract to purchase Mrs. Hanks's home. CP at 18. As written by Mr.

Grace, the rescission returned all of the earnest money to the Grimeses. *Id.* The rescission, prepared using a standard form document, also purported to release all brokers involved in the transaction from all liability, even though such a release was wholly irrelevant and unnecessary to the rescission. *See id.* On May 26, upon her return from South Dakota, Mr. Grace presented this rescission to Mrs. Hanks for her signature. RP at 50. He informed her that she had to rescind the contract with the Grimeses before she could sign a new contract with the Graces. *Id.* At that same time, Mr. Grace presented an offer from him and his wife to purchase the home. *Id.* Mrs. Hanks signed the rescission and the offer as written. *Id.*

The Graces were also unable to complete the purchase. *Id.* at 52. Mrs. Hanks discharged Mr. Grace shortly thereafter and put her home back on the market with a different broker. RP at 61. Due to the collapsing market, which she would have avoided but for Mr. Grace's negligence, Mrs. Hanks eventually sold her home 16 months later for \$158,000 less than the original sale price. *See id.* at 63-64. In addition, she incurred significant carrying costs and interest on debts that would have been paid but for Mr. Grace's negligence. RP at 93-95. Mrs. Hanks presented evidence to the jury of \$231,180 in economic losses. RP at 67-96. The jury awarded \$195,500. CP at 156. In addition, in accordance with the agreed jury instructions, the jury determined that Mrs. Hanks was entitled to \$170,500 in non-economic damages, for a total verdict of \$366,000. *Id.* This appeal followed.

IV. ARGUMENT

This Court should affirm the trial court's rulings and the jury's verdict in their entirety. The headings below correspond with the issues as framed above pertaining to the Assignments of Error.

1. Defendants cannot appeal the denial of their motion for summary judgment because the trial court found issues of fact and the case was subsequently tried to a jury.

“It is well settled that when the trial court denies a motion for summary judgment because disputed material facts remain, and a subsequent trial occurs on those same issues, the moving party cannot appeal the summary judgment denial.” *Mathioudakis v. Fleming*, 140 Wn. App. 247, 254 (2007); *see also Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 20 (1993) (citing *Johnson v. Rothstein*, 52 Wn.App. 303 (1988)) (“When a trial court denies summary judgment due to factual disputes ... and a trial is subsequently held on the issue, the losing party must appeal from the sufficiency of the evidence presented at trial,” not from the denial of summary judgment.).

There are two separate reasons for this rule. *See Johnson*, 52 Wn.App. at 306-08. First, granting review would render an injustice:

To deny review seems to be unjust. But to grant it would be unjust to the party that was victorious at trial, which won judgment after the evidence was more completely presented, where cross-examination played its part and where witnesses were seen and appraised. The greater

injustice would be to the party which would be deprived of the jury verdict. Otherwise, a decision based on less evidence would prevail over a verdict reached on more evidence and judgment would be taken away from the victor and given to the loser despite the victor having the greater weight of the evidence. This would defeat the fundamental purpose of judicial inquiry.

Id. at 307 (quotation and citation omitted).

Second, appellate review is inappropriate given the purpose and nature of summary judgment proceedings:

The primary purpose of a summary judgment procedure is to avoid a useless trial. Once a trial on the merits is had, review of a denial of a motion for summary judgment would do nothing to further this purpose. Moreover, the nature of a summary judgment is such that once the issues have been tried to a finder of fact, the summary judgment procedure to determine the presence of genuine, material issues of fact has no further relevance.

Id. (citations omitted).

In the present matter, the trial court explicitly denied defendants' motion for summary judgment because of existing issues of material fact. CP at 95 (“[T]here are genuine issues of material fact presented by this matter. Accordingly, defendants’ motion for summary judgment is hereby denied.”). The matter was subsequently tried to the jury. CP at 188-89 (finding defendants liable for their negligence). Therefore, there should be no appellate review of the trial court’s prior denial of defendants’ motion

for summary judgment.³ Rather, this Court should affirm the trial court's denial of that motion.

2. Mrs. Hanks is entitled to recover all damages proximately caused by defendants' negligence.

Even if the Court is inclined to overlook this procedural bar, it should still affirm the trial court's denial of defendants' motion for summary judgment.⁴ Defendants' arguments are without merit.

First, defendants argue that Mrs. Hanks waived her claim against them when she signed the rescission of the Grimes contract. App. Brief at 16-17. In reality, the trial court concluded just the opposite and rendered summary judgment on this issue in favor of plaintiff. CP at 127-28. As explained below, the trial court was correct in doing so based both on the absence of consideration and public policy concerns. Accordingly, the "waiver" was void and of no effect.

Second, defendants argue that Mrs. Hanks's recovery should be limited to the buyer's earnest money deposit. App. Brief at 17-22. This argument ignores both basic tort principles and the jury's factual findings.

³ Prior to trial, the waiver issue was resolved on summary judgment in plaintiff's favor. CP at 127-28. As explained further below, the trial court was correct in doing so.

⁴ Arguably, this Court should affirm this case in its entirety pursuant to RPC 10.3 given appellants' near total failure to cite to the appellate record. See *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809 (1998). Appellants include just three citations to the appellate record in their Argument. See Apps.' Brief at 16-17. The remaining few citations to the record appear to reference the record as considered by the trial court. See *id.* at 26 (citing "Grace dep."), 39 (citing "Plaintiff's Trial Brief"). In fact, it appears that appellants simply copied and pasted, without further editing, much of their appellate brief from their existing trial briefing right down to the excessive, lengthy quotations from case law. Compare Apps.' Brief at 31-39 with CP at 160-164.

It is a bedrock legal principle that a plaintiff is entitled to recover all damages proximately caused by a tortfeasor. *See Jordan v. City of Seattle*, 30 Wn. 298, 303-04 (1902). Here, it was plaintiff's theory of the case from its inception that Mr. Grace's negligence caused a lengthy delay in the eventual sale of her home for a greatly reduced price. CP at 84 (Amended Complaint at ¶ 25). In other words, but for Mr. Grace's negligence, Mrs. Hanks would have sold her home in the spring of 2008 at or near the list price.

This is exactly the conclusion reached by the jury when it found that Mr. Grace's negligence was a proximate cause of Mrs. Hanks's economic losses totaling \$195,500. CP at 156. Because Mrs. Hanks eventually sold her house for \$158,000 less than the original list price, the jury must have determined that, but for Mr. Grace's negligence, Mrs. Hanks would have sold her home sooner and for a much higher price.

Defendants' argument ignores this factual finding entirely, and defendants cannot avoid a causal link simply by ignoring it. Indeed, defendants' cited legal authority is entirely consistent with the verdict in this case: A tortfeasor is liable for actual damages caused by his tortious conduct. *See* Apps.' Brief at 18-20 (quoting (without the appropriate pinpoint cite) *Puget Power v. Strong*, 59 Wn.App. 430 (1990), and *Monty v. Peterson*, 85 Wn.2d 956 (1975)) The jury was specifically instructed to identify all damages proximately caused by defendants' negligence. CP at 140-152. The jury did so and awarded \$366,000. CP at 155-56. Defendants cannot dramatically reduce their liability to a mere \$2500 for

the harm caused by their negligence simply because there happened to be a contract between plaintiff and a third party. Defendants provide no legal authority whatsoever for this strained proposition, undoubtedly because no such legal authority exists.

Defendants argue that Mrs. Hanks's recovery should have been limited to the earnest money of \$5000 upon failure of the Grimes contract. For purposes of simplifying her case, though, and given the modest amount, Mrs. Hanks did not pursue this theory of recovery at trial. Regardless of her decision to not pursue this recovery, the fact remains that, but for Mr. Grace's negligence, Mrs. Hanks would have sold her home in the spring of 2008 for a substantially greater amount. CP at 156. She is entitled to recover all of her losses proximately caused by Mr. Grace. Her recovery is in no way limited to her contractual rights under the Grimes contract. Accordingly, this Court should affirm the trial court's denial of defendants' motion for summary judgment, whether in whole or in part.

3. The trial court correctly rendered partial summary judgment in favor of plaintiff on defendants' affirmative defense of waiver.

This Court should affirm the trial court's rendering of summary judgment in favor of Mrs. Hanks on defendants' affirmative defense of waiver. This affirmative defense derives from the terms of the rescission signed by Mrs. Hanks following failure of the Grimes contract. While, on

its face, the rescission includes waiver language, the purported waiver is void for two reasons.

a. The waiver fails for lack of consideration.

The law clearly requires that a release, like any other contract, be sustained by consideration. “A release of claims is a contract whereby one party pays consideration to another in exchange for the latter’s agreement never to bring a civil action against the former on the claims at issue.” *In re Discipline of Kronenberg*, 155 Wn.2d 184, 192 (2005).

The party asserting the existence of the release bears the burden of establishing each element of a valid contract, and one of those elements is consideration. *Trotzer v. Vig*, 149 Wn.App. 594, 605 (2009), *rev. denied*, 2009 Wash. LEXIS 794 (9/8/09). “Consideration is any act, forbearance, creation, modification, or destruction of a legal relationship, or return promise given in exchange.” *Id.* at 605-06 (quoting *King v. Riveland*, 125 Wn.2d 500, 505 (1994)). An act or promise must be bargained for and given in exchange in order to constitute adequate consideration. *Id.* (citing *King*, 125 Wn.2d at 505).

In the present matter, there was no consideration necessary to sustain the release. By the specific terms of the Rescission, Mrs. Hanks was required to release Mr. Grace from all liability associated with the transaction, yet Mr. Grace gave absolutely nothing – whether an act or a promise – in exchange. *See* RP at 50. Absent consideration, the release does not constitute an enforceable agreement. Accordingly, this Court

should affirm the partial summary judgment in plaintiff's favor on defendants' affirmative defense of waiver.

Defendants' counterarguments lack merit. First, without any discussion whatsoever, defendants claim that consideration is not necessary to sustain a release. Defs.' App. Brief at 30. Instead, defendants simply quote at length from *Gorge Lumber Co. v. Brazier Lumber Co.*, 6 Wn.App. 327 (1972).

In *George Lumber*, the Court held that the release was unenforceable because there was no evidence that the defendant was aware of his rights and therefore could not waive them. *Id.* at 336. In other words, the Court voided the release at issue because the defendant did not intentionally and voluntarily waive its right – the very argument that was not raised by Mrs. Hanks in her motion. Indeed, other than its discussion of the general rule that defendants quote in their brief, the Court in *George Lumber* did not even address whether or not consideration was necessary to sustain the release. The quotation included by defendants in their brief is mere dicta, and *George Lumber* is of no assistance to them. Rather, putting aside the dicta in *George Lumber*, the law in Washington is clear: a release is a form of contract and thus requires consideration. *See Stottlemyre v. Reed*, 35 Wn.App. 169, 171 (1983).

Second, defendants argue that Mr. Grace provided sufficient consideration in exchange for the release. This argument borders on the absurd. It is a basic and long-standing legal principle – learned by every

law student – that consideration must be bargained for and given in exchange. See *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 833-34 (2004); *Snyder v. Roberts*, 45 Wn.2d 865, 869 (1955); *Trotzer v. Vig*, 149 Wn.App. 594, 605-06 (2009) (emphasis added). Furthermore, consideration must be an “act, forbearance, creation, modification or destruction of a legal relationship, or return promise.” *Labriola*, 152 Wn.2d at 833.

Mr. Grace argues that his continued representation of Mrs. Hanks, following her execution of the rescission, constitutes sufficient consideration. Apps.’ Brief at 31. This argument fails on its face because he already had an existing, ongoing agency relationship with her. As stated explicitly by the form rescission containing the release: “[N]othing herein shall be construed to terminate any existing agency relationships or agreements unless otherwise agreed in writing.” Trial Exh. No. 7. Thus, Mr. Grace and Mrs. Hanks remained bound to the listing agreement between them that created an agency relationship, notwithstanding Mrs. Hanks’s alleged release. See *id.* Mr. Grace’s continued representation was not sufficient consideration. See *Labriola*, 152 Wn.2d at 833.

Mr. Grace also claims that his subsequent agreement to purchase Mrs. Hanks’s home constitutes consideration sufficient to sustain the release. This argument also fails upon cursory analysis. There is no evidence whatsoever that Mr. Grace agreed to purchase Mrs. Hanks’s home in exchange for her release of his liability associated with the Grimes transaction. See Apps.’ Brief at 31 (failing to provide any factual

citation). Unsupported conclusory statements of fact are insufficient to raise a question of fact. *Grimwood v. University of Puget Sound, Inc.*, 110 Wash.2d 355, 359-60 (1988). Absent a “bargained for” act or promise, there was no consideration such that the waiver is void as a matter of law. Therefore, this Court should affirm.

b. The purported waiver violates public policy.

Summary judgment on this issue is appropriate because the purported waiver at issue violates public policy. *See Marshall v. Higginson*, 62 Wn.App. 212, 217-18 (1991) (setting aside a similar waiver that violated public policy). The Court in *Higginson* set forth the test to be applied in determining whether an agreement, such as a release, is contrary to public policy and thus void:

The test for whether or not an agreement is contrary to public policy is not what the parties did or contemplated doing in order to carry out their agreement, or even the result of its performance; it is whether the contract as made has a tendency to evil, to be against the public good, or to be injurious to the public.

Id. at 216 (quotation omitted).

In *Higginson*, the terms of the release at issue implied that an attorney would voluntarily testify as needed on a client’s behalf in exchange for a release of malpractice liability. In reality, the attorney had an existing obligation to so testify. As noted by the Court: “It is inappropriate for a lawyer to condition an agreement upon misleading representations.” *Id.* at 218. “That sort of agreement promotes disrespect of lawyers and undermines confidence in the legal profession.” *Id.* Thus,

the Court held that the release was void as a matter of public policy. *See id.* at 218.

Higginson is analogous, and the Court should reach the same result here because Mr. Grace is held to the standard of a practicing attorney. *See Cultum v. Heritage House Realtors*, 103 Wn.2d 623 (1985). Like the attorney in *Higginson*, Mr. Grace should not be allowed to shield himself from liability by misrepresenting the circumstances under which the client signed the release.

Admittedly, the attorney's misrepresentation in *Higginson* was explicit, while Mr. Grace's misrepresentation was implicit. However, this is not sufficient to distinguish *Higginson*, as Mr. Grace misrepresented the contents of and need for the purported waiver. Mr. Grace drafted and presented to Mrs. Hanks a form that Mrs. Hanks had to sign in order to sell to another buyer following the Grimeses' failure to complete their purchase, *i.e.*, a rescission of the Grimes contract. The rescission form included the waiver language at issue even though it was completely unrelated to rescission of the Grimes contract,. *See CP* at 18; Trial Exh. No. 7. Moreover, Mr. Grace made no mention whatsoever to Mrs. Hanks of the release language or its implications. *See RP* at 50. There was no need whatsoever for Mrs. Hanks to release Mr. Grace from liability in order to rescind. Inclusion of this unrelated release in the terms of the rescission, where Mrs. Hanks was required to rescind in order to move forward with the Grace transaction, constitutes a misrepresentation

sufficiently analogous to the one in *Higginson* such that this Court should reach the same result.

Even if the Court finds *Higginson* distinguishable, thought, it should reach the same result. Courts have applied the “public policy” test as set forth in *Higginson* in a variety of other contexts: (1) Whether a confidentiality statement in a sexual offender treatment program prevented subsequent disclosure to prosecutors of information obtained through the program (*King v. Riveland*, 125 Wn.2d 500, 511-15 (1994), *superseded on other grounds by statute as set forth in In Re: Dependency of Q.L.M.*, 105 Wn.App. 532, 539-40 (2001)); (2) whether a partnership agreement was enforceable (*Goldberg v. Sanglier*, 27 Wn.App. 179, 191 (1980), *rev’d on other grounds*, 96 Wn.2d 874 (1982)); (3) whether an employment agreement mandated arbitration of a discrimination claim (*Tjart v. Smith Barney, Inc.*, 107 Wn.App. 885, 899 (2001)); and (4) whether a party may recover for breach of a contract for marriage (*Grover v. Zook*, 44 Wn. 489, 502 (1906)). Indeed, courts have found contractual clauses to be void as contrary to public policy without even formally applying all of the factors of this test. *Scott v. Cingular Wireless*, 160 Wn.2d 843, 851-54 (2007) (citing *King*, 125 Wn.2d 500).

Thus, regardless of whether this case is analogous to *Higginson*, the Court should apply this long-recognized standard to the facts at issue that is the legal standard to determine whether an agreement is against public policy. There is no reason why the standard should not be applied

to the facts of this matter. Defendants provide no argument to the contrary, other than an ineffectual attempt to distinguish *Higginson*.

Applying this standard, the waiver is contrary to public policy. The waiver is contained within a standard-form document (NWMLS Form 51) used to rescind standard-form residential purchase and sale agreements. *See* CP at 18; Trial Ex. No. 7. It is prudent practice – to say the least – to rescind an apparently failed contract before the seller signs another, as obviously the seller does not want to sell the same house to two different buyers. Thus, a rescission is essentially required before a seller can seek another buyer. Yet, for no related reason, or any reason whatsoever other than protection of the agents involved, the included waiver releases the real estate agents from all liability associated with the failed transaction. Clearly, a seller and a buyer do not need to release their brokers from liability in order to formally rescind their contract. The waiver is a superfluous and unnecessary term, inserted into a form document for the sole purpose of protecting the broker at the expense of the broker's client.

There can be no genuine dispute that this contractual term is injurious to the public. A seller like Mrs. Hanks should be able to rescind a contract without also releasing her agent from liability. There is no valid reason to include such a release in an otherwise unrelated document. Indeed, this case demonstrates the injurious nature of this term: Even though she never would have entered the contract but for Mr. Grace's negligence, even though by entering the contract she sustained injury, and

even though she had to sign a rescission of the contract that included the unrelated waiver in order to mitigate her own damages, defendants claim they are now immune from liability based on that waiver. Such a result is inherently unfair and inconsistent with any notion of justice. Accordingly, this Court should find this term void as contrary to public policy and should affirm the trial court's rendering of partial summary judgment in favor of the plaintiff on this issue.

Defendants miss the boat entirely in arguing that Mr. Grace had no duty to Mrs. Hanks and that her waiver was intentional.⁵ Neither argument is relevant to the trial court's decision in favor of Mrs. Hanks.

The existence of a duty is relevant only to an issue sounding in tort, not contract. *See Eastwood v. Horse Harbor Found., Inc.*, 170 Wn.2d 380, 389 (2010). The existence and enforceability of the waiver is a contract issue. *See Scott*, 160 Wn.2d at 851. Thus, in determining the

⁵ It must be noted that appellants grossly misrepresent the circumstances under which Mrs. Hanks signed the rescission. As claimed by appellants, "Plaintiff initially denied signing the rescission agreement and claimed that Grace had forged her signature. However, when confronted with the original document in deposition, plaintiff admitted that she signed the rescission." Apps.' Brief at 28-29. This is a gross misstatement of the actual facts. In reality, Mrs. Hanks unknowingly signed the rescission in green ink (it was presented as "just another form" by Mr. Grace). RP at 110-12. When Mr. Grace attempted to fax the rescission to escrow, the green ink did not transmit. RP at 268-270. Mr. Grace then forged Mrs. Hanks's signature on a second, identical rescission. *Id.* When presented with the "green ink" rescission for the first time at her deposition (notwithstanding prior discovery requests, only the second, forged rescission had been provided by defendants), Mrs. Hanks admitted that it was her signature. *See* RP at 110-12. However, she denied signing the document knowingly or voluntarily. *Id.* Appellants' strong suggestion that Mr. Grace did not forge a signature is grossly misleading and inappropriate. That said, the issue is ultimately irrelevant since the trial court did not base its ruling on whether Mrs. Hanks signed knowingly or voluntarily.

existence and enforceability of the waiver, it is irrelevant whether Mr. Grace had a duty to Mrs. Hanks in regards to his efforts to secure her signature on the waiver. The issue is only relevant in the context of defendants' argument that *Higginson* is not analogous. As discussed above, though, the "public policy" test has been applied in a variety of contexts, including cases that sounded purely in contract. Accordingly, the scope of Mr. Grace's duty is irrelevant to a determination of this issue.

Similarly, defendants also argue that Mrs. Hanks's waiver was intentional. However, Mrs. Hanks argued and the trial court found that the release at issue was void based on public policy and an absence of consideration, not whether she knowingly agreed to the release. CP at 127-28. Thus, this issue is also irrelevant. Defendants' argument fails because this was not the basis of the trial court's decision. *See* CP at 128 ("The release at issue in the facts presented to the court is void as a matter of public policy. In addition, there was no consideration, which is necessary to create an enforceable release."). Indeed, summary judgment on the basis of an unintentional and involuntary waiver would have been inappropriate because of obvious issues of material fact. Thus, Mrs. Hanks did not seek summary judgment on this basis, nor did the trial court grant it on this basis. Accordingly, any issue of fact regarding whether Mrs. Hanks knowingly waived her claim against Mr. Grace was not a

material issue of fact and thus was irrelevant to the trial court's decision.

Accordingly, this Court should affirm.

4. The trial court correctly denied defendants' motion for judgment as a matter of law.

In appealing the trial court's denial of their motion for judgment as a matter of law, defendants ignore a significant procedural obstacle, presumably because they are unable to surmount it. Ignoring it, of course, does not make it go away. That said, even if this Court looks beyond this otherwise fatal procedural shortcoming, plaintiffs are still entitled to prevail based on the evidence and instructions submitted to the jury.

a. Defendants waived their right to judgment as a matter of law when they failed to raise the motion in a timely fashion.

In order to seek judgment as a matter of law after the jury returns a verdict, the moving party must have first raised the motion before the case was submitted to the jury. CR 50 (emphasis added).⁶ This was the "most prominent change" to the rule in the 2005 amendment. 4 Wn.Pract., Rules Practice CR 50 (5th ed.). As explained in detail in Washington Practice:

The most prominent change was to add a new provision stating that a motion prior to submitting the case [to] the jury is mandatory if the same party intends to make the same motion later. Thus, if a party makes a CR 50 motion

⁶ The relevant portion reads as follows: "If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment[.]" (emphasis added).

prior to submitting the case to the jury, the party may renew the motion after the jury reaches a verdict. By contrast, a party who fails to make a CR 50 motion before the case is submitted to the jury may not make a similar motion after the jury reaches a verdict.

Id. (emphasis added).

This analysis flows directly from the Drafter's Comment regarding the 2005 amendment to CR 50:

This suggested amendment changes Washington practice and requires that a motion for judgment as a matter of law be made before submission of the case to the jury as a condition to renewing the motion post-verdict. The Committee concluded that requiring a motion for judgment as a matter of law before the case is submitted to the jury enhances the administration of justice because the parties and/or the court can correct possible errors before the verdict. Absent such a motion before submission of the case to the jury, a party may not bring a motion for judgment as a matter of law thereafter.

Id. at Note 15 (emphasis in original).

To the extent that CR 50 is ambiguous, this Court should apply rules of statutory construction. *See Miller v. Arctic Alaska Fisheries*, 133 Wn.2d 250, 258 (1997) ("We construe the terms of an ambiguous court rule as we construe an ambiguous statute."). The Drafter's Comment is the principal guidance for interpretation of a court rule. *See id.* Here, the Drafter's Comment is clear and unequivocal: a motion for judgment as a matter of law is required before the case goes to the jury if the movant wants to seek the same relief once the jury returns.

To date, only one reported case has addressed this issue.⁷ In *Mega v. Whitworth College*, 138 Wn. App. 661 (2007), the Court discussed the 2005 amendment to CR 50:

On September 1, 2005 . . . CR 50 amendments became effective, requiring the motion before submitting the case to the jury. CR 50(a)(2). A movant may “renew” the request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment. CR 50(b). The language “whether or not the party has moved previously for judgment as a matter of law” was deleted from CR 50(b).

Mega, 138 Wn. App. at 668-69 (emphasis added).

Accordingly, the rule is clear, and the defendants failed comply with it. They should have sought judgment as a matter of law before the Court submitted the case to the jury. Their failure to do so bars defendants from raising the motion after the jury has returned its verdict. *See* CR 50(b); *Mega*, 138 Wn. App. at 668-69. Accordingly, the trial court correctly denied defendants’ motion and this Court should affirm on the same basis.

b. Substantial evidence supports the jury’s verdict.

Even if the Court is inclined to consider the merits of defendants’ appeal on this point, it should still affirm the trial court’s denial of the motion. The moving party on a motion for judgment as a matter of law faces an exceptionally high hurdle, as noted by the Supreme Court:

Judgment as a matter of law under CR 50 is appropriate only when no competent and substantial evidence exists to

⁷ There is at least one unreported case squarely on point, but of course that case may not be cited in this brief.

support a verdict. . . . One who challenges a judgment as a matter of law admits the truth of the opponent's evidence and all inferences which can reasonably be drawn from it. [Courts] interpret the evidence against the original moving party and in a light most favorable to the opponent. A judgment as a matter of law requires the court to conclude, as a matter of law, that there is no substantial evidence or reasonable inferences to sustain a verdict for the nonmoving party. Overturning a jury verdict is appropriate only when the verdict is clearly unsupported by substantial evidence.

Faust v. Albertson, 166 Wn.2d 653, 657 (2009) (citations and quotations omitted).

Defendants fail to meet this burden. The following evidence was submitted to the jury: (1) Mr. Grace was negligent in taking the home off the market on March 10, 2008. RP at 163-65. The property remained off the market until June 26 (between March 8 and May 26, Mr. Grace was negligent in taking the home off the market; the home remained of the market from May 26 until June 26 because of the Graces ineffectual effort to buy it). Trial Exh. No. 50. (2) Mrs. Hanks's home was on a greenbelt in a desirable neighborhood, and such houses typically sold quickly and at or above list price. Trial Exh. No. 10. (3) The housing market is, on a historical basis, most active (and thus it is easiest to sell a home) during the period of February to May each year. RP at 418. (4) In the spring of 2008, the housing market had begun to soften before eventually plummeting that fall; the market remained depressed for a year or more, thus rendering it increasingly difficult for Mrs. Hanks to sell her home. RP at 191, 202-03, 418; Trial Exh. No. 4. (5) There were two different and

unrelated buyers (Mr. Alia and the Grimeses) who wanted to make an offer (one full price, one nearly so) on Mrs. Hanks's home within a mere 10 days of its listing (thus indicating very serious buyer interest in the property in March of 2008). RP at 335-36; Trial Exh. No. 5.

These facts constitute substantial evidence, or at a minimum give rise to a reasonable inference, that but for Mr. Grace's negligence Mrs. Hanks would have sold her home in the spring of 2008. Her desirable home would have remained on the market during the prime selling season and before the market tanked entirely. Two buyers were ready to make an offer within mere days of the initial listing. It is reasonable to infer that, had Mr. Grace not been negligent and instead kept the home on the market, Mrs. Hanks would have found a buyer in the spring of 2008. Accordingly, judgment as a matter of law in favor of defendants is inappropriate.

The case upon which defendants rely, *Boguch v. Landover Corp.*, 153 Wn.App. 595 (2009), is distinguishable. In *Boguch*, the property at issue was originally listed in 2001 for \$3.85 million. There was no interest in the property. After six months on the market, the list price was reduced to \$3.475 million. Still, no buyers expressed any interest. After another six months on the market, the listing agent added to the listing an inaccurate photograph of the property boundary (which was the allegedly negligent act). The property remained on the market for another two years – a total of three years after the initial listing – before a single potential buyer expressed any interest. That potential buyer chose not to move

forward based on several factors, the boundary being only one, and he remained uninterested when informed of the correct boundary.

In dealing with this potential buyer, though, the seller finally noticed the error. He then discharged the listing agent, hired another, and relisted the property for \$3.395 million. Finally, about five months later, a buyer made an offer of approximately \$2.8 million, more than \$1.05 million and 28% less than the original list price of three and a half years earlier. The property eventually sold to those buyers for \$2.975 million in 2005, more than four years after the initial listing.

There are several sharp distinctions to the present matter. First and foremost, the pool of potential buyers for a multi-million dollar property is dramatically smaller than the pool for a home priced at \$538,000. Second, Mr. Grace took the property off the market entirely. RP at 165-69. He did so just as the historically prime selling season was getting underway, when buyers are most active. RP at 418. In addition, the market continued to soften and eventually collapsed, thus further reducing the pool of potential buyers each day it remained off the market. RP at 191, 202-03, 418. Even Mr. Grace knew that the market was off the precipice and headed down, so any delay in marketing the home would make it increasingly difficult to find another buyer at or near the list price. RP at 202-03.

In the ten days that the property was on the market, two different and unrelated buyers (the Grimeses and Mr. Alia) were ready, willing, and able to make essentially full-priced offers. RP at 335-36; Trial Exh. No. 5. In other words, they were far more interested in the property than the

single potential buyer in *Boguch*. Quite simply, *Boguch* is easily distinguished and its holding should not apply to this matter.

Unlike the plaintiff in *Boguch*, Mrs. Hanks produced evidence tending to show, at least by inference, that a transaction different from the eventual conveyance would have occurred absent the defendant's negligence. Based on these distinctions, *Boguch* is inapposite. Thus, even if this Court is inclined to consider the merits of this argument, notwithstanding defendants' failure to comply with the civil rules, the Court should affirm the trial court's denial of defendants' motion for judgment as a matter of law.

5. The trial court correctly denied defendants' motion for partial judgment as a matter of law in regards to the jury's award of noneconomic damages.

Defendants argue that noneconomic damages are not recoverable on a claim of professional negligence, thus entitling defendants to judgment as a matter of law. Apps.' Brief at 39-43. This argument fails on several counts.

First and foremost, the defendants' motion for partial judgment as a matter of law suffers from the same infirmity as defendants' motion for judgment in its entirety: Defendants failed to raise this motion before the case went to the jury. Defendants' failure to do so bars this motion following the jury's verdict. *See Mega*, 138 Wn. App. at 668-69; 4 Wn.Pract., Rules Practice CR 50 (5th ed.). Because defendants' failed to move for judgment as a matter of law at the close of all evidence, whether in whole or in part, they are barred from doing so now.

Once again, though, even if this Court is inclined to overlook this procedural bar, the Court should still affirm.

First, the law allows for an award of emotional distress on a claim of professional negligence absent objective symptomatology. *See Whaley v. State*, 90 Wn.App. 658, 673-74 (1998). Specifically, a plaintiff may seek damages for emotional distress in an action based on “the breach of an established professional duty so long as avoiding emotional distress was within the scope of that duty.” *Id.* at 673-74; *see also Berger v. Sonneland*, 144 Wn.2d 91, 117 (2001) (citing *Whaley*, 90 Wn.App. at 672-74). Of note, defendants do not even attempt to distinguish *Whaley*, thus essentially conceding its applicability to the present matter.

In *Whaley v. State*, 90 Wn.App. 658 (1998), a mother filed a negligence action against a day care center and its director alleging that the defendants had been negligent in reporting suspected child abuse, causing mother and child emotional distress. There was no physical injury at issue in the case. The Court rejected the defendants’ contention that the plaintiff had to establish the elements of a claim for negligent infliction of emotional distress, including objective symptomatology. *Id.* at 673. In so holding, the Court noted:

The only different or artificial legal standard [between a claim of negligence and a claim of negligent infliction of emotional distress] is that mental and emotional suffering, to be compensable in an action for negligent infliction of emotional distress, must be manifested by objective symptomatology. Otherwise, the traditional concepts of duty, breach, causation and damages govern the right to recover when emotional distress is the only damage claimed. There is no reason why [plaintiff], though

claiming only emotional distress damages, should not be able to pursue her action for the breach of an established professional duty so long as avoiding emotional distress was within the scope of that duty.

Id. at 673-74 (citations and quotations omitted).

Like *Whaley*, this case involves a claim of professional negligence, not a claim for negligent infliction of emotional distress. Like the plaintiff in *Whaley*, who alleged only damages that were “mental and emotional in nature,” *id.* at 672-73, Mrs. Hanks did not allege any physical harm or any threat of physical harm. However, given that her husband succumbed to cancer during the events at issue and her own impending financial difficulties, the jury concluded that Mr. Grace’s duty as a real estate broker included the duty to avoid Mrs. Hanks’s emotional distress. *See* CP at 156. Thus, like the Court in *Whaley*, this Court should allow plaintiff to recover for her emotional distress suffered as a result of defendants’ professional negligence.

The Supreme Court case of *Berger v. Sonneland*, 144 Wn.2d 91 (2001), provides further guidance. In *Berger*, the plaintiff sued her physician for the unauthorized release of medical information. There was no physical injury at issue. The case presented four issues on appeal, including the following: “Whether objectively verifiable symptoms are required to support a cause of action for emotional distress under chapter 7.70 RCW,” *i.e.*, a claim of medical professional negligence. *Berger*, 144 Wn.2d at 94. As noted by the Court, “Washington cases have limited the objective symptom requirement to negligent infliction of emotional distress claims.” *Id.* at 113. Because the claim at issue in *Berger* was one

of professional negligence, and not negligent infliction of emotional distress, the Court held that the plaintiff did not have to demonstrate objective symptoms of emotional distress in order to recover for emotional injury. *Id.* In so holding, the Court specifically noted that the appellant cited “no authority for his proposition that the [objective symptomatology] requirement should be extended to other causes of action.” *Id.*

The issue is also addressed by Washington Practice:

One court has stated that the only difference between the standard for mental or emotional suffering and other kinds of damages cases is that the emotional harm must be “manifested by objective symptomatology.” [Quoting *Whaley*, 90 Wn.App. at 673.] However, this rule only applies to claims for negligent infliction of emotional distress in the absence of some other basis for recovery. Where the plaintiff’s claim is based upon a duty other than the general obligation to avoid the negligent infliction of emotional distress, the objective symptomatology requirement does not apply. [Citing *Berger*, 144 Wn.2d 91.]

16 Wn.Pract., Tort Law and Practice § 5.7 (3d ed.).

Mrs. Hanks has not asserted a claim of negligent infliction of emotional distress, but rather a claim of professional negligence. Accordingly, there is no “objective symptomatology” requirement. *See id.*

Second, the case upon which defendants rely, *Kloepfel v. Bokor*, 149 Wn.2d 192 (2003), is inapposite. *Kloepfel* does not even concern a claim of professional negligence. Rather, that case involves a claim of intentional infliction of emotional distress. Given the split in authority between appellate courts, the Court in *Kloepfel* noted, “The issue here is whether the tort of outrage requires proof of severe emotional distress by

subjective symptomatology and a medical diagnosis.” *Kloepfel*, 149 Wn.2d at 193. The Court went on to hold that “the objective symptomatology requirement, which properly applies to the tort of negligent infliction of emotional distress, is not a requirement for proof of intentional infliction of emotional distress or outrage.” *Id.* at 194 (emphasis in original).

The present case does not involve a claim of outrage. Nor does it involve a claim of negligent infliction of emotional distress, which is its own unique tort claim. *See Colbert v. Moomba Sports, Inc.*, 163 Wn.2d 43, 49 (2008) (“The tort of negligent infliction of emotional distress is a limited, judicially created cause of action that allows a family member a recovery for ‘foreseeable’ intangible injuries caused by viewing a physically injured loved one shortly after a traumatic accident.”). Given that the present case involves a claim of professional negligence, while *Kloepfel* involves a claim of outrage with a discussion of the related claim of negligent infliction of emotional distress, *Kloepfel* simply does not apply.

Defendants further miss the mark when they argue that the “alleged” conduct by Grace (which in reality has been proven) does not rise “to the level of outrageous behavior necessary to award damages for emotional distress.” Apps.’ Brief at 39 (citing *Kloepfel*). Once again, *Kloepfel* involved a claim of “outrage,” so of course the Court noted that the conduct must be outrageous. Indeed, that is an element of such a claim. *Kloepfel*, 149 Wn.2d at 195. Needless to say, the present case does not involve a claim of outrage. Accordingly, *Kloepfel* is irrelevant.

Third, plaintiff's request for emotional distress damages was specifically submitted to the jury, and defense counsel did not object at that time. *See* CP at 152 (Jury Inst. No. 16). Failure to object to jury instructions waives that objection. *See Valdez-Zontek v. Eastmont Sch. Dist.*, 154 Wn. App. 147, 165 (2010). Accordingly, defendants waived any argument that Mrs. Hanks was not entitled to damages for her emotional distress. If they believed otherwise, they had an obligation to object to the applicable jury instruction so as to preserve this issue for appeal. *See id.*

Defendants attempt to avoid this bar by asserting that “the court may correct errors of law at any time prior to final judgment.” Apps.’ Brief at 42 (citing – without a pinpoint cite – *Anderson v. Farmers’ Ins. Co. of WA*, 83 Wn. App. 725 (1996)). Defendants grossly overstate the rule.

Anderson involved an award of costs to the plaintiff following confirmation of an arbitration award. After the trial court ruled in favor of the plaintiff, the defendant filed a motion for reconsideration, which was denied by the trial court in an oral ruling. Before the trial court issued a written order, the defendant filed a supplemental brief raising for the first time the issue of whether the award of costs was permitted by the applicable insurance policy. The trial court struck the supplemental brief and affirmed its initial ruling. On appeal, the plaintiff argued that the defendant failed to raise the issue before the trial court and thus was barred from raising it on appeal. The Court held that the defendant had properly raised the issue because it filed the supplemental brief before the

Court issued a written ruling. *Id.* at 734. In this context, the Court noted that “the court may correct errors of law at any time prior to final judgment.” *Id.*

Needless to say, *Anderson* bears no resemblance to the present matter. This case involves a jury verdict following submission of agreed jury instructions, not a court’s oral ruling prior to entry of a signed order. *Anderson* is irrelevant.

Moreover, other than their out-of-context quotation from *Anderson*, defendants provide no legal authority whatsoever for their contention that they are entitled to judgment as a matter of law despite having failed to object to the very jury instruction that allowed the jury to reach its now disputed finding. Once again, defendants provide no such authority because none exists.

Finally, it must be noted that defendants had a remedy for this alleged error, yet they chose not to pursue it. Specifically, regardless of their failure to timely raise their motion for judgment as a matter of law, nothing prevented the defendants from seeking a new trial on the same basis. *See* CR 59(a)(7) (allowing a party to seek a new trial where “there is no evidence or reasonable inference from the evidence to justify the verdict . . . or that it is contrary to law”); CR 59(b) (allowing such a motion to be raised not later than 10 days after entry of judgment).

Had defendants sought a new trial based on either the alleged absence of a causal connection between Mr. Grace’s negligence and Mrs. Hanks’s injury, or on the award of emotional distress damages, or both, the defendants would have adequately preserved these issues for appeal (at

least the former but perhaps not the latter given their failure to object to the applicable jury instruction). For reasons unknown, defendants failed to raise such a motion. Instead, they sought judgment as a matter of law only after the jury returned its verdict, contrary to CR 50. Defendants failed to preserve this issue on appeal. Accordingly, this Court should affirm the trial court in all respects.

V. CONCLUSION

Mr. Grace was negligent. Mrs. Hanks put forth substantial evidence showing that Mr. Grace's negligence caused her substantial injury. The defendants did not object to instructing the jury to award non-economic damages if appropriate. Moreover, they failed to seek judgment as a matter of law before the case went to the jury. When the jury returned, it awarded Mrs. Hanks \$195,500 in economic damages and \$170,500 in non-economic damages. By failing to timely seek judgment as a matter of law, and by failing to timely object to the jury instruction, defendants failed to preserve these issues for appeal. Accordingly, this Court should affirm the trial court in all respects.

SIGNED this 14 day of March, 2011.

BLACKMON HOLMES PLLC



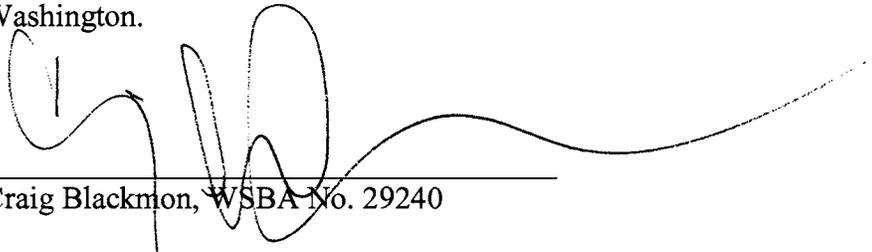
Craig Blackmon, WSBA No. 29240
Attorney for Respondent

DECLARATION OF SERVICE

I, the undersigned, certify under penalty of perjury under the laws of the State of Washington, that on the below date, and pursuant to prior agreement between counsel regarding electronic service, I sent the foregoing by email as a .pdf attachment, followed no later than the following day by mailing with postage prepaid, addressed as follows:

Douglas Tingvall
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DATED this 14 day of March, 2011, at Seattle, Washington.



Craig Blackmon, WSBA No. 29240

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