

No. 70525-3-I

**COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON**

**NORWOOD GLEN CONDO ASSOC.
(non party)**

vs.

**LINCOLN DAVID, et al
Third Party Plaintiff/Appellant**

vs.

**RICHARD G. NORD, GEORGEAN MADDY, and GENE BRYSON
Third Party Defendants/Respondents**

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APPELLANT'S BRIEF

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C. Assignments of Error

1. The Trial Court erred in holding that the advice of Nord, Maddy and Bryson given to the Davids regarding the application of the federal Fair Housing Act and how it related to the Restrictive Covenant to be the authorized Practice of Law.

2. The Trial Court erred in holding that the Rules of Professional Conduct were not applicable to Nord, Maddy and Bryson’s actions in giving advice as to the application of the federal Fair Housing Act and how it related to the Restrictive Covenant.

3. The Trial Court erred in holding that Nord’s conduct was protected by the corporate shield.

4. The Trial Court erred in holding that misrepresentation that induces a purchaser to purchase is not grounds for rescission of the contract when the seller and seller’s agents know or reasonably should have known that the representation was false and that the purchaser was relying on such representation.

5. The Trial Court erred in granting summary judgment dismissing Davids' claims.

6. The Trial Court erred in not granting Davids' motion for summary judgment on the issues of Unauthorized Practice of Law and violation of the Consumer Protection Act.

D. Statement of the Case

This matter originated with the filing of an action by Norwood Glen Condominium Association against Lincoln and Judith David to enforce the restrictive covenant contained within the Association's bylaws that restricted occupants of the Project to those over the age of 55. In response, the Davids filed an answer, counterclaims and third party claims against the developer, Richard Nord, and the real estate agents involved: Georgean Maddy, the on site agent, and her broker, Gene Bryson. The trial court granted summary judgment to Norwood Glen Association, enforcing the restrictive covenant, and that matter is not on appeal. CP 326-327. The issues on appeal relate to the third party claims against Nord, Maddy and Bryson.

On January 20, 2010, the trial court entered an order permitting the Davids to amend their Third Party Complaint. CP 540-541. That Amended Complaint contained three causes of Action: I. Indemnification, II. Fraudulent or Negligent Misrepresentation, III. Unauthorized Practice of Law, and IV. Violation of the Consumer Protection Act. CP 553-555.

On August 20, 2010, the trial court heard the summary judgment motion of Maddy and Bryson and granted it in part and denying it in part, dismissing all claims except for the Consumer Protection Act violation based on an Unauthorized Practice of Law and the Unauthorized Practice of Law. CP 318-320

On May 10, 2013, the trial court heard cross motions for summary judgment on the remaining issues and granted summary judgment in favor of Nord, Maddy and Bryson, dismissing Davids' claims and denying Davids' motion for summary judgment. CP 6-13. On May 23, 2013, Davids filed a motion for reconsideration on the orders for summary judgment, which the trial court denied on June 12, 2013. CP 14-16. Davids filed an appeal on June 18, 2013. CP 1-2.

E. Statement of Facts

The material facts are not in dispute. The Davids do not deny the language of the restrictive covenant filed with the County nor as contained within the Public Offering Statement. However, the issue before the court is not that language, but the interpretation of that language by Nord, Maddy and Bryson which was given to the Davids and was the basis for the purchasing decision by the Davids. CP 327.

The Restrictive Covenant in pertinent parts state: "2.1. Use of Project. The Project is intended to be and shall operate as "Housing for Older Persons" pursuant to the federal Fair Housing Act Amendments of 1988, 42 U.S.C. Sec. 3607(b)(2)(C) and implementing regulations thereof." And "3.1 School Impact Fee. A school impact fee

shall be paid on a Unit in the manner and amount specified by the City of Arlington school impact fee ordinance in effect *at the time in such Unit of the Project is conveyed or occupied by any person not complying with the restrictions set forth in Article 2 above.*” CP 370-371 (emphasis added).

Mr. David, upon reading this, raised it with his agent, Brad Jessup, of the Arlington Windemere Real Estate office. He told Mr. Jessup that he wasn't interested in purchasing the unit because of this restriction. He then was told by Mr. Jessup that he (Jessup) would inquire of the on site agent, Georgean Maddy (also of the Arlington Windemere office) about the application of the federal Fair Housing Act to the unit at which Mr. David was looking. CP 365. A meeting was set up between Mr. David and Ms. Maddy to discuss the impact of the restrict covenant. In that meeting, Ms. Maddy explained to Mr. David that the statute allowed for 20% of the units to have children, while 80% could not. Mr. David wanted to make sure that this was a correct interpretation of the statute and asked Ms. Maddy to confirm same with her broker, Gene Bryson. Ms. Maddy advised Mr. David the following day that she had checked with her broker, Mr. Bryson, and that the statute and restrictive covenant allowed for 20% of the units to have children. CP 365-366.

Both Ms. Maddy and Mr. Bryson have admitted in their depositions that this “20%” rule was their understanding as to the law, and that they derived that understanding from Richard Nord, the developer and person who filed the restrictive covenant. CP 266-286. They did not seek a legal opinion from an attorney until after the

Dauids had closed on the purchase of the unit, and then learned that the advice they had given to Mr. David was in error. CP 283-284. Ms. Maddy and Mr. Bryson both knew at the time of purchase that the Davids intended to purchase the unit to rent and wanted to rent it to those with children. CP 269-272, 285-286. Based on that legal interpretation by Ms. Maddy and confirmed by Mr. Bryson, the Davids purchased the condominium unit. The Davids would not have purchased the unit but for that advice as they intended to rent the unit to people with children. CP 367. Additionally, this same interpretation of this statute and restrictive covenant was given by Ms. Maddy to Ryan Luther, who also would not have purchased the condominium unit but for that legal advice. CP 379-380.

After purchasing the unit, the Condo association enforced the restrictive covenant and the Davids could no longer rent the unit to persons with children. This dramatically restricted their ability to rent and forced them to rent the unit at a significant financial loss. CP 367-368.

Other material facts that are not in dispute are that Mr. Jessup, Ms. Maddy and Mr. Bryson all work in the same Windemere office, that at no time prior to the Davids purchasing the unit did they suggest, recommend or encourage Mr. David to obtain independent legal advice on the matter (CP 285-286, CP 270-271), that there was a potential conflict of interest and no waiver was ever obtained (CP 273-274), that Ms. Maddy had received training on the federal Fair Housing Act from attorney Doug Tingvall previously but it never entered her mind to seek legal advice prior to giving a legal interpretation of the statute because "It was there. It was clean. It was clear" (CP 277-279), that Ms. Maddy was involved in the selling process of 23 of the 40 units in the

Norwood Glen Condominium project (CP 280), and that Ms. Maddy was involved in the sale of the unit to Ryan Luther giving the same legal advice, that she discussed the restrictive covenant with Mr. Luther, and that a school mitigation fee was paid for his unit allowing him, his wife and child to remain in the project (CP 280-281).

F. Argument

1. Unauthorized Practice of Law by Real Estate Agents not Protected under RCW 18.86.030

It is believed that the defendants will argue, at they did to the trial court, that RCW 18.86.030(2) relieves them of any responsibility to investigate the representations of their principal as it relates to the application of the federal Fair Housing Act and the Restrictive Covenant. However, RCW 18.86.110 specifically excludes any part of the Chapter that involves the unauthorized practice of law. As such, defendants cannot invoke the protection of RCW 18.86.030 if they have engaged in the unlawful practice of law.

2. Defendants' advice as to the application of the federal Fair Housing Act to the Restrictive Covenant was the unauthorized practice of law

The facts are undisputed that Ms. Maddy and her broker Mr. Bryson supplied to Lincoln David the interpretation that the federal Fair Housing Act would allow 20% of the units to have children notwithstanding the Restrictive Covenant.

In the case of *Estate of Marks, 91 Wn App 325 (1998, Div. III)*, the court found that even friends helping a dying friend to formulate a will where they gave advice as to the effect of the distribution under a will constituted “inadvertent unauthorized practice of law” which required the court to apply the Rules of Professional Conduct to the parties

giving that advice. The court specifically ruled that the unauthorized practice of law is not only the performance of services in a court of law but includes giving legal advice and counsel, and the preparation of legal instruments. And where lay persons engage in the unauthorized practice of law, the rules regulating the conduct of lawyers must be applied. *Marks, at p. 335.*

3. An “honest mistake” does not excuse unauthorized practice of law

Defendants repeatedly testified in their depositions that they relied upon the seller, Richard Nord, for the interpretation of the Restrictive Covenant. It is believed that the Defendants Maddy and Bryson will argue that although the advice given was mistaken, it was an “honest mistake” because they were relying on the Public Offering Statement and Mr. Nord’s representations at sales meetings.

In the case of *Burien Motors Inc. v. Balch, 9 Wn App 573 (1973, Div I)* the court held that a real estate broker had a duty to know the truth and that an “honest mistake” was not a defense. *Burien Motors, at p. 577.*

The court further analyzed the failure of the real estate broker to either investigate the zoning requirements or to advise his client that he didn’t know what the zoning requirements were, and held that the failure to do so breached the standard of care of an attorney. And further, that where a real estate broker is involved in advising a person regarding the purchase of a commercial piece of property, that advice, or lack thereof, was the unauthorized practice of law. *Burien Motors, at p. 578.*

4. Defendants had a duty to advise Davids to seek independent Legal counsel

Defendants testified in their depositions that they did not advise Lincoln David to seek independent legal advice, nor did the Defendants seek independent legal advice until after closing the David transaction. As conceded by Mr. Bryson in his deposition, had he done so he would have learned that the legal advice he and Ms. Maddy were giving to Lincoln David was in error.

In the case of *Graham v. Findall*, 122 Wn App 461 (2004, Div I) the real estate agent modified a purchase and sale agreement involving a sheriff's deed and the redemption statute for a condominium offer and the court held that such did not constitute a qualifying offer because it involved the unauthorized practice of law. As part of its decision, the court noted that where real estate offers involve complex issues the real estate agent has a duty to persuade the client to seek independent legal advice. *Graham*, at pp. 468-469.

The narrow exemption for real estate agents to complete and fill out forms under *Cultum v. Heritage House*, 103 Wn 2d 623 (1985) did not extend to giving legal advice or modifying stock forms (other than simply filling them out). In *Cultum*, the court analyzed the benefits of allowing real estate agents to fill out sales and purchase forms compared to the dangers of agents engaging in the unauthorized practice of law. The key factor the court looked at was the "simple" act of filling out a form, but maintained that where complex legal issues arise the real estate agent had a duty to persuade the client to seek legal advice. *Cultum*, at p. 647. This exception to the unauthorized practice of law

statute was specifically narrow and applied to the circumstances of the case which involved the filling out of a stock form approved by a lawyer. It did not involve the agent advising the client as to the meaning or application of a federal statute to a restrictive covenant. Such a complex legal analysis would, and did, require an attorney. And had the defendants advised Mr. David to seek independent legal counsel or if they had sought an attorney's advice as to the application of the statute to the restrictive covenant, this entire debacle would have been avoided.

5. Defendants had a duty to disclose a potential conflict

As testified by Ms. Maddy, she did not disclose to Lincoln David that she and Mr. Jessup were from the same office and shared office space. Pursuant to RPC 1.8 and 1.10, she was required to do so and to provide such disclosure in writing so as to allow the Davids to select a different agent.

In the case of *Bowers v. Transamerica Title*, 100 Wn 2d 581 (1983), the court held that the interests of the seller and buyer are diametrically opposed such that the escrow agent had a duty to advise of the potential conflict of interest and to obtain legal counsel. *Bowers*, at pp. 589-590. Whenever a lay person engages in the practice of law, he or she is required to comply with the same standards imposed on an attorney, including the rules of professional conduct. *Bowers*, at p. 590.

6. Those engaging in the unauthorized practice of law are held to the same standard of care as an attorney and are liable for their acts of negligence

Where a lay person engages in the unauthorized practice of law, he or she is held to the same standard of care as that of an attorney and is liable

for their negligence. Further, it is proper for the court to take judicial notice of the standard of care of an attorney in determining the negligence of the person engaging in the unauthorized practice of law. *Hecomovich v. Nielsen*, 10 Wn App 563, 572 (1974, Div III).

It is clear from Mr. Bryson's deposition testimony that an attorney would not have given the legal advice that Ms. Maddy gave (and confirmed first with Mr. Bryson) as such advice was in error. Such clearly establishes that Ms. Maddy and Mr. Bryson did not exercise the same standard of care as an attorney and, therefore, were negligent when they gave the erroneous legal advice to Mr. David.

7. The Consumer Protection Act applies

The case of *Hangman Ridge v. SAFECO*, 105 Wn 2d 778 (1986) sets out the elements of a Consumer Protection Act case: (1) deceptive or unfair act, (2) in trade or commerce, (3) affecting the public interest, (4) proximate cause, and (5) damage to business or property. *Hangman*, at p. 784.

A deceptive act is one that has the capacity to deceive. Actual deception is not a necessary element. *Testo v. Dunmire Olds*, 16 Wn App 39, 42 (1976 – Div II). In applying the test to the unauthorized practice of a profession (medical or legal), the court has held that the unauthorized practice is a per se deceptive act. *State v. Pacific Health Center*, 135 Wn App 149, 171-172 (2006, Div. I). Maddy and Bryson repeatedly represented a false statement of the application of the statute to the restrictive covenant to prospective buyers as demonstrated by Ms. Maddy providing Ryan Luther the

exact same erroneous legal advice. As such, the defendants' conduct had a substantial capacity to deceive the public.

Trade or commerce includes real estate transactions which are commercial transactions. *Hangman*, at p. 793.

Public Interest is an element that is decided by the trier of fact based on a number of factors outlined by the *Hangman* court. However, Public Interest is established where the complainant shows that the conduct is a course of conduct and where the defendant has engaged in that conduct previously. *Hangman*, at p. 790, *McRae v. Boldstad*, 101 Wn 2d 161, 166 (1984).

The *McRae* case is particularly pertinent as it is a real estate case and involves the misrepresentation of a material fact. The *McRae* case is often times referred to within consumer protection conferences as the "exploding toilet" case because the septic system was effectively non-existent and would back up into the residence. This was known to the real estate agent who failed to disclose it to a subsequent purchaser. It was this failure to disclose that was held to be a material misrepresentation that affected the public interest. *McRae*, pp. 166-167.

In the present case, the testimony of Maddy and Bryson clearly shows that they gave the same erroneous legal advice to everyone because they believed it to be true notwithstanding their failure to seek a legal opinion. The fact that Ryan Luther and his family purchased a condominium after receiving the exact same erroneous legal advice

from Ms. Maddy as was given at a later date to the Davids demonstrates the potential for repetition and meets the *Hangman* and *McRae* tests.

Finally, the evidence is clear that Davids would not have purchased the condominium if they had been accurately advised as to the effect of the restrictive covenant. Even the defendants concede that Lincoln David told them he was purchasing the condo with the intent to rent it out, and particularly intended to rent it to families with children. When he did so, he was then informed that he could not and had to cancel the lease. The Davids have lost rental revenue or potential future renters which is an injury to their business of renting the property. Thus the requirement of proximate cause and injury to business or property is established.

7. Third parties can engage in the unauthorized practice of law

It is anticipated that the third party defendants will argue that they were “adversarial” to the Davids and, therefore, had no duty to provide accurate advice, hence there was no unauthorized practice of law. This flies in the face of caselaw and logic.

Initially, it should be noted that logically, when a person gives legal advice, even if in an adversarial position, where that person has reason to believe that the recipient of the advice will follow it, the artificial construct that no reasonable person should have relied on the advice breaks down. This is essentially the gravamen of our Supreme Court’s holding in *Jones v. Allstate 145 Wn 2d 291 (2002)*.

In *Jones* an Allstate adjuster for the motor vehicle driver at fault in a motor vehicle accident, persuaded Jones to sign a settlement and release notwithstanding that

the adjuster was adversarial to Jones.

In analyzing the situation in *Jones*, the court cited *In Re Droker & Mulholland*, 59 Wn 2d 707, 719 (1962) citing in pertinent part that the practice of law "... includes legal advice and counsel" And held that the Allstate adjuster by encouraging Jones to sign the release without advising her of the legal consequences of same to have been the practice of law. *Jones*, at p. 302.

The court then analyzed whether or not this practice of law was unauthorized. The court used a modified *Bohn* test, looking at six factors: (1) the extent to which the transaction was intended to benefit the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury sustained by the plaintiff, (5) the public policy in preventing future harm, and (6) the extent to which the profession would be unduly burdened by finding liability. *Jones*, at p. 307. The court concluded that the adjuster's conduct met these six factors when the adjuster persuaded Jones to sign the release.

The court also examined, alternatively, the independent duty that exists when a layperson engages in the practice of law. Specifically, the court stated at p. 308 that "... an independent duty exists where the court finds such activity, though not provided by an attorney, actually constitutes the practice of law ... provided persons engaged in that activity are held to the standard of a practicing attorney." The court held that if the practice is authorized, the lay person engaging in that practice must still meet the standard of an attorney, including meeting the requirements of the rules of professional

conduct for attorneys.

8. Davids meet the six factor Test enunciated in Jones

In the present case, Davids meet all six of the factors to be considered under the modified *Bohn* test as enunciated by the *Jones* court. Initially, it should be noted that the issue in the case at bar is that Nord, Bryson and Maddy all provided in some manner to the Davids legal advice in that they provided an interpretation of the Federal Fair Housing Statute that was incorrect. The providing of that interpretation of a statute and its application to the Davids' intended use was the practice of law. Whether it was "unauthorized" practice of law is dependent on the six factor test in *Jones*.

(1) The transaction was beneficial to the Davids in that they relied on the advice in making their purchase decision; just as Jones did in relying on the advice of the Allstate adjuster in executing the release.

(2) The harm was foreseeable in that Nord, Bryson and Maddy knew or reasonably should have known that the advice was incorrect and that the public was reasonably relying on their interpretation; this is specifically the case given that section 2 of the Restrictive Covenant cites 42 USC 3607(b)(2)(C), but also contains with section 2.3 an apparent exception based on the payment of School Impact Fees. Additionally, the Declaration of the Norwood Glen Condominium Association was filed with the County, and contained in Section 17 is the description of the Restrictive Covenants including section 17.1 which references 42 USC 3607(b)(2)(C) and in section 17.4 provides for the exception referencing School Impact Fees. These sections caused Mr. David to inquire

as to whether or not children under the age of 18 could live in the project, and was told by Maddy, after checking with her broker Bryson, that they could. And not only were the Davids influenced by this legal advice, but so were others; specifically the Luthers.

(3) The certainty of injury is demonstrated by the fact that after purchasing the condo and renting to a family with children, the Davids were sued by the Condo Association to terminate the lease with that family. The Davids lost not only a renter but also the ability to rent to a broader market of potential renters; ie, families with children under the age of 18. This caused the Davids to have the condo left unrented for a substantial period of time while seeking renters that complied with the age limits, and then having to accept a lower rate of rent to secure such a renter.

(4) The closeness of connection between the legal interpretation of the statute given by Nord to Bryson, Bryson confirming it to Maddy, and Maddy giving that advice to the Davids which resulted in the Davids purchasing the condo is clear. But for this legal interpretation, the undisputed fact that the Davids would not have purchased the condo *but for* that advice further establishes the connection between the erroneous legal advice and the purchasing decision by the Davids.

(5) Public policy in preventing future harm is also established by the fact that where laypersons give an interpretation of a statute that is erroneous, buyers can and are induced into making purchases. This harm not only occurred to the Davids but also to the Luthers. The very essence of giving legal advice (interpreting a statute) is clearly the practice of law which, if erroneous, has the capacity to deceive consumers. *See State v. Pacific Health Center, 135 Wn App 149, 171-172 (2006).*

(6) The extent to which the profession would be unduly burdened is a one of balancing between the potential benefits and harm from allowing the specific practice of law. In *Jones*, the court found that the benefit of allowing settlements to occur without attorneys was insufficient to outweigh the benefits to society that adversarial or conflicted persons be allowed to give legal advice that would benefit that person at the expense of the unrepresented party. The court specifically looked at the issue of protecting the public from future potential harm in like circumstances. *Jones, at p. 307*. In the present case, the benefit of allowing real estate developers, real estate brokers, and real estate salespersons to provide an interpretation of a statute to third parties pales in comparison to the type of harm such would potentially cause. The resolution would be simply not to give that advice, but instead refer the third party to an attorney. Balancing the two, the obvious benefits of preventing those who have a pecuniary interest in a consumer making a purchase giving legal advice so as to induce that purchase is compelling compared to the burden of requiring those with a pecuniary interest simply stating that they cannot give legal advice and referring the potential purchaser to an attorney.

In the present case, there really is no benefit in allowing those with a pecuniary interest to use their position to influence a third party with whom their interest may conflict. It is interesting to note that in *Jones*, Mr. Jones admitted that he knew that the adjuster was not representing his wife, that the adjuster was not an attorney, that he did not expect the adjuster to give them legal advice, and that he understood that the adjuster

was adversarial to her. *Jones, at p. 324*. Notwithstanding these admissions, the Court still held that the conduct of the adjuster in seeking to have the Jones sign the release without advising them of the consequences of doing so to be the unauthorized practice of law. This indicates a strong public policy in not allowing those in adversarial or conflicting positions to engage in the practice of law with third parties so as to influence their decision making notwithstanding the purported disclaimer of such advice.

9. Independent duty to comply with rules of professional conduct

The second manner in which the court evaluates the unauthorized practice of law cases is where the court holds that the party is engaging in the authorized practice of law (such as filling out forms), but is then held to the standard of an attorney including the duty to comply with the rules of professional conduct. Specifically the Court stated “In addition to Bohn and Trask, an independent basis for a duty exists where this court finds that an activity, though not provided by an attorney, actually constitutes the practice of law, yet we allow that activity to continue provided that the persons engaged in that activity are held to the standard of care of a practicing attorney.” *Jones, at p. 308*. The *Jones* court then went on to discuss the rules of professional conduct and their application citing RPC 4.3 (dealing with unrepresented parties) and RPC 1.8(g), holding that the adjuster had a duty to inform the Jones that she could not represent them, was adverse to their interest, and that they should seek independent legal counsel. *Jones, at pp. 310-311*. In specifically finding that the adjuster failed to meet the standard of care of a practicing

attorney, the court stated:

“Allstate’s employees who prepare legal documents and give advice affecting legal rights should be held to the standard of care of practicing attorneys. Allstate’s claims adjuster here fell below that standard when she advised the Joneses to sign the release, did not properly advise them that there were potential legal consequences in signing the release and check, or alternatively refer them to independent counsel, did not properly disclose to the Joneses that she had an interest which conflicted (was adversarial) with theirs, and followed Allstate’s policy of discouraging attorney involvement in the claims process. *Jones, at p. 312*

In the present case, there was only one generalized boilerplate disclaimer in the Public Offering Statement that suggested the buyer seek legal advice:

“This public offering statement is only a summary of some of the significant aspects of purchasing a unit in this condominium and the condominium documents are complex, contain other important information and create binding legal obligations. *You should consider seeking the assistance of legal counsel.*” (emphasis added)

This disclaimer does not address the specific issue of federal Fair Housing Act or any issue of legal advice. It is generic, inconspicuous, and not something a reasonable person would realize its relation to an interpretation of a federal statute and its application to the restrictive covenant as evidenced not only by the Davids acceptance of that legal advice, but also that of the Luthers. Such a disclaimer is effectively a boilerplate disclaimer that is not known or bargained for as part of the transaction.

Additionally, none of the other contractual documents contain any statements that the purchaser should seek independent legal counsel. Only the POS contains this very brief statement. The Condominium Purchase and Sale Agreement Specific Terms, addresses a wide variety of contractual obligations, but makes no mention of advising the

purchaser to seek independent legal advice. Even the Windemere Additional Clauses Addendum does not advise the Buyer to seek independent legal advice. Instead, its section 7 “Recommendations and Referrals” only involves home inspectors, contractors and lenders. The only other disclaimer that possibly would contain an obtuse reference to seeking independent legal advice is that of the “Disclosure” that Gene Bryson is the listing broker and would receive a share of any profits from the sale of the condominium. Its only direction to seek independent advice is “Buyer and Seller acknowledge that they have received this disclosure and been advised to seek any independent advice they consider prudent regarding Mr. Bryson’s interest.” Such a “disclaimer” does not relate to the federal Fair Housing Act, but solely to the issue of Mr. Bryson’s intent to receive a share of profits from the sale of the condominium units.

These “disclaimers” are not sufficient to adequately advise the Davids of the conflict of interest, the need for independent legal advice on the specific subject at issue (the application of the Federal Fair Housing Act), nor properly advise them as to the practical effect of that statute. Disclaimers to be effective must be conspicuous, known to the buyer, and specifically bargained for; which includes at a minimum a discussion of the waiver. The purpose of this rule is to prevent sellers from hiding disclaimers in fine print boilerplate language. *Mattingly v. Palmer Ridge Homes LLC*, 157 Wn App 376, 395-396 (2010 Division II).

10. Nord's acts were the unauthorized practice of law for which he is personally liable and cannot use the corporate shield to evade responsibility

The trial court's order dismissing Nord was that the Davids failed to show evidence as to why Nord should be personally liable. This was ostensibly based on the court's finding that no unauthorized practice of law occurred. As that finding is in error, the court's underlying premise does not support the dismissal and is contrary to case law; specifically *Grayson v. Nordic Constr.* 92 Wn 2d 548, 553-554 (1979 – President of corporation's unlawful acts imposed personal liability as a matter of law notwithstanding the corporate structure).

11. A misrepresentation that involves the Unauthorized Practice of Law provides grounds for a rescission of the contract as such a negligent misrepresentation is an independent theory not subject to the economic loss rule.

It is believed that the trial court dismissed the Davids' misrepresentation claims based on a recent Court of Appeals decision that specifically applies the economic loss rule to both negligent and fraudulent misrepresentation cases. Under *Carlile v. Harbour Homes*, 147 Wn App 193, 203-205 (2008 – Div. I), the court ruled that negligent and fraudulent misrepresentation claims could not be maintained where the damages are purely economic. However, such case is distinguished from the present case as the gist of the present case is the unauthorized practice of law and violation of the consumer protection act; specifically, *Carlile* did not address the issue of unauthorized practice of law and further held that consumer protection claims could be maintained notwithstanding the ruling that negligent and fraudulent misrepresentation claims could

not. *Carlile*, at p. 222. As such, where a statutory violation occurs, the economic loss rule cannot be applied to defeat the claims under that statute as the economic loss rule applies to common law issues.

Furthermore as the gravamen of this a action is the misrepresentation of the federal Fair Housing Act and its affect on the Restrictive Covenant through the unauthorized practice of law, the foundation for the misrepresentation claim lies within a violation of RCW 2.48.180. As such, this is a statutory violation and therefore not subject to the economic loss rule.

However, this exercise is unnecessary because the Supreme Court overruled the portion of *Carlile* relating to fraud and negligent misrepresentation in *Jackowski v.*

Borchelt, 174 Wn 2d 720, 738 (2012) where it held

After our decision in *Eastwood*, the Court of Appeals reliance on the economic loss rule is in error. Because the duty to not commit fraud is independent of the contract, the independent duty doctrine permits a party to pursue a fraud claim regardless of whether a contract exists. (citation omitted) The same is true for a claim of negligent misrepresentation, but only to the extent the duty to not commit negligent misrepresentation is independent of the contract.

There was an independent duty imposed on Nord, Bryson and Maddy, both under the unauthorized practice of law theory and a theory of negligent misrepresentation in the inducement.

The theory of negligent misrepresentation in the inducement is best reflected in the case of *Haberman v. WPPSS*, 109 Wn 2d 107, 161-164 (1987) when the court enunciated its adherence to Restatement of Torts II, section 552 (1) where one provides

false information to another in a business transaction. In *Haberman*, the court found a third party liable for failing to provide material information that affected (induced) the purchasing decision of bondholders. The court applied section 552 (1) and allowed the bondholders to pursue an action against the attorneys who wrote the prospectus.

In the present case Nord, Maddy and Bryson all acted in the capacity of an attorney in which they gave false information intending that the Davids rely upon it in purchasing the condominium unit which created an independent duty relating to representations. Therefore the trial court erred in dismissing the negligent misrepresentation claims.

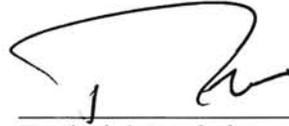
G. Conclusion

Because the advice given by Nord, Maddy and Bryson to the Davids was the Unauthorized Practice of Law, was erroneous, and negligently given, they are liable under independent theories of Unauthorized Practice of Law, Consumer Protection Act, and Negligence. Accordingly, the trial court's orders on summary judgment dismissing Davids claims were in error and should be reversed.

Additionally, because there are no material issues of fact that Nord, Maddy and Bryson provided the erroneous advice to the Davids that the federal Fair Housing Act would allow the Davids to rent to people with children, the Davids relied on that advice and purchased the condominium unit that otherwise, had they been given accurate legal advice, would not have purchased, the trial court's orders denying Davids motion for partial summary judgment on the issue of Unauthorized Practice of Law and Consumer

Protection Act was in error and should be reversed with the instruction to enter judgment for the Davids on those issues of liability.

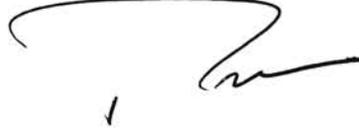
Respectfully submitted this 15th day of October, 2013.

A handwritten signature in black ink, appearing to read 'F. Ockerman', written over a horizontal line.

Frederick H. Ockerman #12248
Attorney for Appellants David

CERTIFICATE OF SERVICE

Frederick H. Ockerman certifies that on October 15, 2013, he caused the foregoing Appellant's Brief to be filed with the Court of Appeals, Division I, by delivery via legal messenger, and served Respondent Richard G. Nord, Pro Se, and Respondents' Georgean Maddy and Gene Bryson attorneys Matthew F. Davis and Bryan Cossette via email per parties' agreement

A handwritten signature in black ink, appearing to read 'F. Ockerman', written over a horizontal line.

Frederick H. Ockerman