

58030-2

58030-2

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2006 JUN 22 PM 1:57

80623-3

No. 58030-2-I & ~~No. 58031-1-I~~

COURT OF APPEALS,  
DIVISION I  
OF THE STATE OF WASHINGTON

---

Michael Miller, Vicki Ringer, and Joanne Faye Torgerson,  
Appellants

v.

One Lincoln Tower LLC, et al, Respondents

---

CONSOLIDATED INITIAL BRIEF OF APPELLANTS

---

Olympic Law Group, PLLP  
Dennis J. McGlothin, WSBA #28177  
James C. McGuire, WSBA #28454  
Attorneys for Appellants  
1221 E. Pike Street, Suite 205  
Seattle, WA 98122  
(206) 527-2500

ORIGINAL

## Table of Contents

A. Assignments of Error.....	1
Assignments of Error	
No. 1.....	1
No. 2.....	1
No. 3.....	1
No. 4.....	1
No. 5.....	1
No. 6.....	1
No. 7.....	2
Issues Pertaining to Assignments of Error	
No. 1.....	2
No. 2.....	2
No. 3.....	2
No. 4.....	2
No. 5.....	2
No. 6.....	3
No. 7.....	3
No. 8.....	3
B. Statement of the Case.....	3
C. Standard of Review.....	9

D. Argument .....	9
I. THE PROVISION LIMITING REMEDIES IS PROCEDURALLY UNCONSCIONABLE BECAUSE THE TRANSACTIONS WERE CONSUMER TRANSACTIONS AND THE PROVISION FAILED THE <i>BERG-BAKER</i> SPECIAL RULE. ....	9
A. <u>While Washington courts recognize a distinction between substantive and procedural unconscionability, if either is lacking, then the offending clause is unenforceable as a matter of law.</u> ....	9
B. <u>Courts and commentators agree that the UCC's unconscionability provisions apply to determine the unconscionability of contracts not involving the sale of goods</u> .....	10
C. <u>Washington courts use a special rule, known as the <i>Berg-Baker</i> Special Rule, to determine whether a provision limiting remedies is procedurally unconscionable</u> .....	13
1. <u>In consumer transactions, the <i>Berg-Baker</i> Special Rule requires the proponent of a provision limiting remedies to prove the provision was specifically negotiated and set forth the excluded remedies with particularity</u> .....	13
2. <u>The <i>Berg-Baker</i> Special Rule originated in public policy, was expanded to certain commercial transactions, and remains the standard in Washington for governing provisions limiting remedies in consumer transactions</u> .....	14

D.	<u>Washington Courts must first determine a transaction's character before analyzing the evidence because the <i>Berg-Baker</i> Special Rule applies to consumer transactions.</u> .....	17
1.	<u>This transaction is a consumer transaction because applicable UCC unconscionability provisions define consumer transactions to include purchases for personal and family purposes</u> .....	18
2.	<u>Because the <i>Berg-Baker</i> Special Rule applies to this consumer transaction, the provision limiting remedies is procedurally unconscionable because it was neither explicitly negotiated nor did it set forth the excluded remedies with particularity.</u> .....	20
II.	THE PROVISION LIMITING REMEDIES IS SUBSTANTIVELY UNCONSCIONABLE BECAUSE PERSUASIVE AUTHORITY VIEWS SUCH PROVISIONS AS SUBSTANTIVELY UNCONSCIONABLE .....	22
A.	<u>This Court must rely upon analogous Washington cases and persuasive authority from other jurisdictions because a developer's right to enforce a provision limiting remedies is a matter of first impression for Washington Courts</u> .....	24
B.	<u>The Provision Limiting Remedies is substantively unconscionable under Washington law because it eliminated Purchasers' rights to recover damages, but did not similarly eliminate Developer's right to receive damages.</u> .....	24
C.	<u>The Provision Limiting Remedies is substantively unconscionable because the most relevant authority from Florida views such provisions as antithetical to fair dealing and wholly unenforceable.</u> .....	26

III.	THE PROVISION LIMITING REMEDIES IS UNENFORCEABLE BECAUSE IT FAILS ITS ESSENTIAL PURPOSE. ....	29
IV.	THE PROVISION LIMITING REMEDIES IS UNENFORCEABLE BECAUSE IT CONTRAVENES PUBLIC POLICY .....	31
V.	PURCHASERS ARE THE PREVAILING PARTY AND ARE ENTITLED TO ATTORNEY'S FEES BECAUSE DEVELOPER BREACHED THE CONTRACTS. ....	34
	A. <u>Purchasers are entitled to attorney's fees because Developer is the only party who breached the Contracts.</u> .....	34
	B. <u>Purchasers are entitled to attorney's fees because, in a breach of contract action, the breaching party cannot be the prevailing party.</u> .....	36
VI.	THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING PURCHASERS' LEAVE TO AMEND THEIR COMPLAINT IN THE ABSENCE OF MULTIPLE AMENDMENTS, ANY EVIDENCE OF PREJUDICE, OR FUTILITY. ....	41
VII.	THE TRIAL COURT ERRED IN DENYING PURCHASERS' MOTION TO REVISE THE ORDER GRANTING DEVELOPER'S SUMMARY JUDGMENT. ....	44
VIII.	THE TRIAL COURT ERRED IN DENYING PURCHASERS' MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF RESCISSION BECAUSE THE DEVELOPER ELECTED TO ENFORCE THE CONTRACT. ....	47

IX. PURCHASERS ARE ENTITLED TO  
ATTORNEY'S FEES ON APPEAL.....48

E. Conclusion .....49

## Table of Authorities

### A. Table of Cases

#### Washington Cases

<i>American Fed. Savs. &amp; Loan Ass'n v. McCaffrey</i> , 107 Wn.2d 181, 728 P.2d 155 (1986).....	34
<i>American Nursery v. Indian Wells Orchard</i> , 115 Wn.2d 217, 797 P.2d 477 (1990).....	passim
<i>Baker v. City of Seattle</i> , 79 Wn.2d 198, 484 P.2d 405 (1971).....	11, 15
<i>Berg v. Stromme</i> , 79 Wn.2d 184, 484 P.2d 380 (1971).....	13, 14
<i>CKP, Inc. v. GRS Const. Co.</i> , 163 Wn. App. 601, 821 P.2d 63 (1991).....	35
<i>Cox v. Lewiston Grain Growers, Inc.</i> , 86 Wn. App. 357, 936 P.2d 1191 (1997).....	16, 29
<i>Elliott Bay Seafoods, Inc. v. Port of Seattle</i> , 124 Wn. App. 5, 13, 98 P.3d 491 (2004).....	42
<i>Farm Crop Energy, Inc. v. Old Nat. Bank of Washington</i> , 109 Wn.2d 923, 750 P.2d 231 (1988).....	43
<i>Griffin v. Allstate Ins. Co.</i> , 108 Wn. App. 133, 29 P.3d 777 (2001), <i>rev. den.</i> , 146 Wn.2d 1005 (2002).....	52
<i>Herron v. Tribune Pub'g Co.</i> , 108 Wn.2d 162, 736 P.2d 249 (1987).....	41
<i>Hwang v. McMahill</i> , 103 Wn. App. 945, 15 P.3d 172 (2000).....	49
<i>Ino Ino, Inc. v. City of Bellevue</i> , 132 Wn.2d 103, 937 P.2d 154 (1997).....	41

<i>Labor Hall Ass'n v. Danielsen</i> , 24 Wn.2d 103, 937 P.2d 154 (1997).....	48
<i>Marshall v. Higginson</i> , 62 Wn. App. 212, 813 P.2d 1275 (1991) .....	31
<i>Miles v. F.E.R.M. Enterprises, Inc.</i> , 29 Wn. App. 61, 627 P.2d 564 (1981).....	36
<i>Mieske v. Bartell Drug Co.</i> , 92 Wn.2d 40, 593 P.2d 1308 (1979) .....	11
<i>Owen v. Matz</i> , 68 Wn.2d 374, 413 P.2d 368 (1966).....	47
<i>Puget Sound Fin. LLC v. Unisearch, Inc.</i> , 146 Wn.2d 428, 47 P.3d 940 (2002).....	passim
<i>Puget Sound Service Corp. v. Bush</i> , 45 Wn. App. 312, 724 P.2d 1127 (1986).....	48
<i>Schroeder v. Fageol Motors</i> , 86 Wn.2d 256, 544 P.2d 20 (1975) .....	10, 15, 16, 23
<i>Sheehan v. Transit Auth.</i> , 155 Wn.2d 790, 123 P.3d 88 (2005).....	9
<i>Sprague v. Sumitomo Forestry Co.</i> , 104 Wn.2d 751, 709 P.2d 1200 (1985).....	41
<i>Wallace v. Kuehner</i> , 111 Wn. App. 809, 46 P.3d 823 (2002) .....	34
<i>Whitaker v. Spiegel, Inc.</i> , 95 Wn.2d 661, 623 P.2d 1147 (1981).....	31
<i>Yakima County Fire Protection District No. 12 v. City of Yakima</i> , 122 Wn.2d 371, 858 P.2d 245 (1993).....	10, 11
<i>Zuver v. Airtouch Communs.</i> , 153 Wn.2d 293, 103 P.3d 753 (2004).....	10, 23, 25

## **Federal Cases**

<i>Marr Enterprises, Inc. v. Lewis Refrigeration</i> , 556 F.2d 951 (9th Cir. 1977).....	30
<i>United States for the Use of Palmer Constr., Inc. v. Cal State Elec., Inc.</i> , 940 F.2d 1260, (9th Cir. 1991) .....	39

## **Other State Cases**

<i>Atlantic Richfield Co. v. Long Trusts</i> , 860 S.W.2d 439, (Tex.App.1993).....	40
<i>Blue Lakes Apartments, Ltd. v. George Gowing, Inc.</i> , 464 So. 2d 705 (4th DCA 1985).....	27, 28
<i>Brown v. Richards</i> , 840 P.2d 143, 155 (Utah App. 1992).....	40
<i>Chrysler Corp. v. Quimby</i> , 51 Del. 264, 144 A.2d 885 (1958) .....	43
<i>Clone, Inc. v. Orr</i> , 476 So.2d 1300 (Fla 5th DCA 1985) .....	29
<i>Dennis I. Spencer Contractor, Inc. v. City of Aurora</i> , 884 P.2d 326, 331 (1994).....	36, 37, 38
<i>Hackett v. JRL Development, Inc.</i> , 566 So. 2d 601 (Fla 2nd DCA 1990).....	29
<i>Honolulu v. Midkiff</i> , 62 Haw. 411, 616 P.2d 213 (1980) .....	11
<i>Monetary Funding Group, Inc. v. Pluchino</i> , 87 Conn. App. 401, 867 A.2d 841 (2005).....	12
<i>Nargiz v. Henlopin Developers</i> , 380 A.2d 1361 (1977) .....	33
<i>Nouri v. Wester &amp; Co.</i> , 833 P.2d 848 (1992).....	37, 38
<i>Ocean Dunes of Hutchinson Island Dev. Corp. v. Colangelo</i> , 463 So. 2d 437 (Fla. 4 <sup>th</sup> DCA 1985).....	26, 27

<i>Port Largo Club, Inc. v. Warren</i> , 476 So.2d 1330, 1333 (Fla 3rd DCA 1985).....	29
<i>Samara Dev. Corp v. Marlow</i> , 556 So.2d 1097, (1990).....	33
<i>Seabrook v. Commuter Housing Co., Inc.</i> , 72 Misc.2d 6, 338 N.Y.S.2d 67 (1972).....	11, 12
<i>Seaside Community Development Corp. v. Edwards</i> , 573 So.2d 142 (Fla. 1st DCA 1991).....	29

### **B. Statutes**

RCW 4.84.030.....	37, 49
RCW 62A.9A-102(23) .....	18
RCW 62A.2-103(3).....	18
RCW 62A.2-719(2).....	29
15 U.S.C. § 1701 et. seq. ....	33

### **C. Other Authorities**

Black's Law Dictionary, 8 <sup>th</sup> Edition.....	19
Civil Rule 56(c) .....	9
RAP 18.1(a).....	48
Restatement (Second) of Contracts §208, Reporter's Notes .....	12
Restatement (Second) of Contracts § 329 .....	43
25 Washington Practice, Contract Law and Practice, §9.3.....	12

## **A. Assignments of Error**

### **Assignments of Error**

1. The trial court erred in finding: “The limitation of remedies provision is neither substantively nor procedurally unconscionable.”<sup>1</sup>

2. The trial court erred in granting Developer’s Motion for Summary Judgment to enforce the provision limiting remedies (hereinafter “Provision Limiting Remedies”), and dismissing Purchasers’ Complaint.<sup>2</sup>

3. The trial court erred in denying Purchasers’ Cross Motion for Summary Judgment to hold the Provision Limiting Remedies substantively and procedurally unconscionable.<sup>3</sup>

4. The trial court erred in denying Purchasers’ Motion to Amend Complaint.<sup>4</sup>

5. The trial court erred in denying Purchasers’ Motion to Revise Judgment.<sup>5</sup>

6. The trial court erred in denying Purchasers’ Cross Motion for Summary Judgment on Rescission.<sup>6</sup>

---

<sup>1</sup> FCP 327; MCP 244.

<sup>2</sup> FCP 327; MCP 244.

<sup>3</sup> FCP 566-67; MCP 672-73.

<sup>4</sup> FCP 380-81; MCP 355-56.

<sup>5</sup> FCP 382-83; MCP 353-54.

7. The trial court erred in denying Purchasers' request for attorney's fees.<sup>7</sup>

### **Issues Pertaining to Assignments of Error**

1. Whether the Provision Limiting Remedies is procedurally unconscionable because the Individual Condominium Purchase and Sale Agreements (hereinafter "the Contracts") were consumer transactions that failed the *Berg-Baker* Special Rule. (Assignments of Error "AOE" 1, 3.)

2. Whether the Provision Limiting Remedies is substantively unconscionable because persuasive authority views such provisions as substantively unconscionable. (AOE 1, 3.)

3. Whether the Provision Limiting Remedies is unenforceable because it fails its essential purpose. (AOE 1, 2, 3.)

4. Whether the Provision Limiting Remedies is unenforceable because it contravenes public policy. (AOE 1, 2, 3, 5.)

5. Whether Purchasers are the prevailing party and are entitled to attorney's fees because Developer breached the Contracts. (AOE 2, 3, 7.)

---

<sup>6</sup> FCP 566-67; MCP 672-73.

<sup>7</sup> FCP 326-28; MCP 243-45.

6. Whether the trial court abused its discretion in denying Purchasers' leave to amend their complaint in the absence of multiple amendments, any evidence of prejudice, or futility. (AOE 4.)

7. Whether the trial court erred in denying Purchasers' Motion to Revise the Order Granting Developer's Summary Judgment. (AOE 5.)

8. Whether the trial court erred in denying Purchasers' Motion for Summary Judgment on Developer's rescission claim (AOE 6).

## **B. Statement of the Case**

### **Procedural History**

On October 29, 2004, Purchaser Torgerson and Purchasers Miller and Ringer (collectively "Purchasers") filed Complaints against Defendants/Respondents One Lincoln Tower, LLC; Bellevue Master LLC; and LS Holdings LLC (collectively "Developer") for Breach of Contract.<sup>8</sup> Developer answered and filed a counterclaim for rescission based on breach of fiduciary duty.<sup>9</sup> On March 11, 2005, Developer filed a Motion for Summary

---

<sup>8</sup> FCP 7-11; MCP 7-12.

<sup>9</sup> FCP 64-67; MCP 66-69.

Judgment.<sup>10</sup> Purchasers responded and filed a Cross Motion for Summary Judgment.<sup>11</sup> After a summary judgment hearing on May 6, 2005, the trial court granted Developer's Motion for Summary Judgment and denied Purchaser's Cross Motion for Summary Judgment.<sup>12</sup> Purchasers and Developer filed Cross Motions for Summary Judgment on Developer's rescission counterclaim.<sup>13</sup> The trial court denied both motions and dismissed Developer's counterclaim.<sup>14</sup> Purchasers timely filed their Notice of Appeal on April 4, 2006.<sup>15</sup> Developers timely filed their Cross Notice of Appeal on March 25, 2006.<sup>16</sup>

#### **Statement of Facts**

In June 2001, Purchasers and Developer signed the Developer's pre-printed, standard form Contracts.<sup>17</sup> The Contracts contemplated Developer would build a condominium complex in Bellevue, Washington containing approximately 148 units, and that Purchasers would each buy residential units in the condominium

---

<sup>10</sup> FCP 158-81; MCP 154-76.

<sup>11</sup> FCP 196-222; MCP 191-218.

<sup>12</sup> FCP 322-23, 326-28; MCP 239-40, 243-45.

<sup>13</sup> FCP 530-43, 386-407; MCP 390-410, 357-73.

<sup>14</sup> FCP 567-68; MCP 672-73.

<sup>15</sup> FCP 576-77; MCP 678-79.

<sup>16</sup> FCP 568-69; MCP 674-75.

<sup>17</sup> FCP 14; MCP 15.

complex.<sup>18</sup> Purchaser Torgerson put up \$5,000 in earnest money and assigned \$126,000 in real estate commission to meet the required 10% deposit of her condominium's \$1,310,000 purchase price.<sup>19</sup> Purchasers Miller and Ringer also put up \$5,000 in earnest money and assigned \$11,611 in real estate commission equaling a 5% deposit of their condominium's \$332,220 purchase price.<sup>20</sup>

The Contracts contained a section that unfairly limited Purchasers' remedies if Developer defaulted.<sup>21</sup> This Provision Limiting Remedies provided that Developer could receive liquidated compensatory damages if Purchasers breached the Contracts.<sup>22</sup> On the other hand, if Developer breached the Contracts, Purchasers could only rescind the Contracts, get their money back, and could not recover any compensatory, incidental, consequential, or other damages against Developer or sue Developer for specific performance.<sup>23</sup> Developer admits it did not negotiate this Provision Limiting Remedies with either Purchasers or any other prospective

---

<sup>18</sup> FCP 13-35; MCP 14-23.

<sup>19</sup> FCP 30, 13.

<sup>20</sup> MCP 16, 14.

<sup>21</sup> FCP 19, ¶ 21; MCP 22, ¶ 21.

<sup>22</sup> FCP 19, ¶ 21; MCP 22, ¶ 21.

<sup>23</sup> FCP 19, ¶ 21; MCP 22, ¶ 21.

buyers.<sup>24</sup> In fact, Developer never pointed out this overly harsh, one-sided provision when Purchasers signed the Contracts.<sup>25</sup> Developer did, however, have each buyer, including Purchasers, confirm by a separate sheet that they understood what would happen if Purchasers breached the Contract - that Developer would retain the deposits as liquidated compensatory damages.<sup>26</sup> This separate sheet neither explained nor even mentioned what would happen if Developer breached the Contracts.<sup>27</sup> Neither this separate sheet nor the Contracts set forth the remedies that were excluded.<sup>28</sup>

Developer amended its pre-printed standard form contract for all new purchases in December 2001.<sup>29</sup> Developer learned that its project was subject to Federal HUD registration requirements, which meant it had to register its form contract and amend it to allow buyers some meaningful remedy in the event Developer defaulted.<sup>30</sup> Developer never mentioned this change in the standard contract to the previous purchasers.<sup>31</sup>

---

<sup>24</sup> FCP 244, Pg. 10, Ln. 9 – Pg. 11, Ln. 14.

<sup>25</sup> FCP 259: 24-25.

<sup>26</sup> FCP 137; MCP 15.

<sup>27</sup> FCP 137; MCP 15.

<sup>28</sup> FCP 137; MCP 15; FCP 19, ¶ 21; MCP 22, ¶ 21.

<sup>29</sup> FCP 245, Pg. 14, Ln. 24 – Pg. 17, Ln. 24.

<sup>30</sup> FCP 245, Pg. 15; FCP 245, Pg. 17; FCP 100; MCP 134.

<sup>31</sup> FCP 247, Pg. 31, Ln. 12-22.

On August 27, 2003, One Lincoln Tower, LLC, assigned all its right, title and interest in and to the Purchase and Sale Agreements to LS Holdings, LLC.<sup>32</sup>

On December 17, 2003 Developer drafted, signed, and delivered a letter to all buyers that signed a contract, including Purchasers.<sup>33</sup> The letter to Purchasers provided, among other things, that they could purchase their units at the same price set forth in the Contracts with minimal changes.<sup>34</sup> The letter also stated that Purchasers, pursuant to Paragraph 6.1 of the Contracts, had the right to terminate the Contracts without consequence on December 31, 2003 if the condominium units were not substantially complete.<sup>35</sup> Purchasers' condominium units were not going to be substantially complete by the December 31, 2003 deadline.<sup>36</sup> Developer knew about this termination provision in the Contracts.<sup>37</sup> This letter induced Purchasers not to cancel their Contracts.<sup>38</sup>

On May 3, 2003, Developer unilaterally terminated the Contracts.<sup>39</sup> Purchasers brought suit and the trial court dismissed

---

<sup>32</sup> FCP 292, Pg. 20, Ln. 4 – Pg. 21, Ln. 9.

<sup>33</sup> FCP 54-55; MCP 56-57.

<sup>34</sup> FCP 54-55; MCP 56-57.

<sup>35</sup> FCP 230; MCP 18.

<sup>36</sup> FCP 54-55; MCP 56-57.

<sup>37</sup> FCP 293, Pg. 19, Ln. 8-22.

<sup>38</sup> FCP 260.

<sup>39</sup> FCP 60; MCP 62.

Purchasers' complaint even though Developer admitted it breached the Contracts.<sup>40</sup> Additionally, the trial court dismissed Purchasers' Complaint despite the fact that Developer's prior order was not properly presented and the required five (5) days' notice was not given.<sup>41</sup> Even though Purchasers pointed this error out to the trial court and requested the court modify its order to show Developer breached the Contracts, the trial court affirmed its prior order.<sup>42</sup>

Purchasers also sought to amend their Complaints to add causes of action for promissory estoppel based on the Developer's representation it was going to sell the units to Purchasers and the undisputed fact that Purchasers relied on these representations in not exercising their right to rescind their Contracts with Developer.<sup>43</sup> Despite having approximately one year prior to trial and despite Developer alleging no prejudice, the trial court denied Purchasers' motion.<sup>44</sup>

Finally, Purchasers sought to dispose of Developer's rescission counterclaim by bringing a summary judgment motion based, in part, on Developer ratifying and enforcing the Contracts

---

<sup>40</sup> FCP 326-28; MCP 243-45; FCP 158; MCP 154.

<sup>41</sup> FCP 328; MCP 245, 319.

<sup>42</sup> FCP 350-55; MCP 252-57; MCP 312-317, 338-45.

<sup>43</sup> FCP 334-35; MCP 258-60.

<sup>44</sup> FCP 380-81; MCP 355-56.

against Purchasers and electing its remedy.<sup>45</sup> The trial court denied Purchasers' motion, but still dismissed Developer's counterclaim as moot.<sup>46</sup>

### **C. Standard of Review**

The standard of review for an Order on Summary Judgment is de novo, and the appellate court performs the same inquiry as the trial court.<sup>47</sup> Thus, summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.<sup>48</sup>

### **D. Argument**

- I. THE PROVISION LIMITING REMEDIES IS PROCEDURALLY UNCONSCIONABLE BECAUSE THE TRANSACTIONS WERE CONSUMER TRANSACTIONS AND THE PROVISION FAILED THE BERG-BAKER SPECIAL RULE.
  - A. While Washington courts recognize a distinction between substantive and procedural unconscionability, if either is lacking, then the offending clause is unenforceable as a matter of law.

Washington divides the doctrine of unconscionability into two distinct classifications: (1) substantive unconscionability; and (2)

---

<sup>45</sup> FCP 467-86.

<sup>46</sup> FCP 566-67; MCP 672-73.

<sup>47</sup> *Sheehan v. Transit Auth.*, 155 Wn.2d 790, 796-97, 123 P.3d 88 (2005).

<sup>48</sup> *Id.*; See CR 56(c).

procedural unconscionability.<sup>49</sup> Substantive unconscionability assesses whether the terms in the contract are one-sided or overly harsh.<sup>50</sup> Procedural unconscionability relates to unfairness during the process of forming a contract.<sup>51</sup> If a contract provision is either procedurally unconscionable or substantively unconscionable, then the contract provision is unenforceable.<sup>52</sup>

B. Courts and commentators agree that the UCC's unconscionability provisions apply to determine the unconscionability of contracts not involving the sale of goods.

Washington's UCC unconscionability provisions apply either directly or by analogy to the Contracts because Washington courts, foreign courts and commentators apply these provisions in various contexts not involving the sale of goods. The Washington Supreme Court has held that the UCC's unconscionability provisions are "part of a general exposition on contracts" and are applicable beyond the UCC context.<sup>53</sup>

---

<sup>49</sup> *Schroeder v. Fageol Motors*, 86 Wn.2d 256, 260, 544 P.2d 20 (1975), citing J. White & R. Summers, *Handbook of the Law Under the Uniform Commercial Code* § 4-2 at 117 (1972).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> See *Zuver v. Airtouch Communs.*, 153 Wn.2d 293, 303, 103 P.3d 753 (2004)

n.4

<sup>53</sup> See *Yakima County Fire Protection District No. 12 v. City of Yakima*, 122 Wn.2d 371, 391, 858 P.2d 245 (1993).

The Washington Supreme Court has consistently applied the UCC's unconscionability provisions to contracts that do not involve the sale of goods. In *Yakima County Fire Protection District No. 12*, the Supreme Court applied the UCC's unconscionability provisions to an annexation agreement to receive sewer service.<sup>54</sup> In *Baker v. City of Seattle*,<sup>55</sup> the Supreme Court held that the UCC's unconscionability provisions applied to a golf cart lease. In fact, the court explicitly recognized that the UCC can be applied to common law contract analysis by analogy, especially when evaluating unconscionability.<sup>56</sup> And finally, in *Mieske v. Bartell Drug Co.*,<sup>57</sup> the Supreme Court applied the UCC's unconscionability provisions to a service agreement to process film.

Courts in foreign jurisdictions have also applied the UCC's unconscionability provisions to transactions outside the sale of goods.<sup>58</sup> In *Seabrook*, the court stated that the UCC, by definition, applies only to the sale of goods, but it recognized that the UCC's unconscionability provisions represent the law's view towards all

---

<sup>54</sup> *See id.*

<sup>55</sup> 79 Wn.2d 198, 484 P.2d 405 (1971).

<sup>56</sup> *See Puget Sound Financial, LLC*, 146 Wn.2d at 440 n. 14.

<sup>57</sup> 92 Wn.2d 40, 593 P.2d 1308 (1979).

<sup>58</sup> *See Seabrook v. Commuter Housing Co., Inc.*, 72 Misc.2d 6, 338 N.Y.S.2d 67 (1972); *Honolulu v. Midkiff*, 62 Haw. 411, 418, 616 P.2d 213 (1980).

contracts, whether for the sale of goods or otherwise.<sup>59</sup> In other words, the UCC's unconscionability provisions, although formally limited to transactions involving personal property, furnish a useful guide for real property transactions.<sup>60</sup>

Finally, the Restatement of Contracts and Washington Commentators agree that the UCC's unconscionability provisions should apply to non-sales cases.<sup>61</sup> Specifically, the Reporter's Notes to the Restatement states that the unconscionability provisions have been used "either by analogy or because it was felt to embody a generally accepted social attitude of fairness going beyond the statutory application to sales of goods."<sup>62</sup> Washington Commentators agree with the Reporter's Notes, and state that the UCC's rules are very influential in areas other than sales, especially considering the large number of Washington cases that have applied the UCC as "part of a general exposition on unconscionability."<sup>63</sup> Because Washington Courts, foreign courts and commentators agree that the UCC's unconscionability

---

<sup>59</sup> 72 Misc.2d at 8.

<sup>60</sup> See *Monetary Funding Group, Inc. v. Pluchino*, 87 Conn. App. 401, 411, 867 A.2d 841 (2005).

<sup>61</sup> See Restatement (Second) of Contracts §208, Reporter's Notes; 25 *Washington Practice, Contract Law and Practice*, §9.3.

<sup>62</sup> See Restatement (Second) of Contracts §208, Reporter's Notes.

<sup>63</sup> See 25 *Washington Practice, Contract Law and Practice*, §9.3 (citations omitted).

provisions are not limited to the sale of goods, these provisions should apply to the present Contracts.

- C. Washington courts use a special rule, known as the Berg-Baker Special Rule, to determine whether a provision limiting remedies is procedurally unconscionable.
  - 1. In consumer transactions, the Berg-Baker Special Rule requires the proponent of a provision limiting remedies to prove the provision was specifically negotiated and set forth the excluded remedies with particularity.

The *Berg-Baker* Special Rule requires provisions limiting remedies in consumer transactions to be specifically negotiated and set forth with particularity the remedies being excluded. In Washington, the manner in which parties enter into consumer sales transactions is strictly regulated.<sup>64</sup> Thus, for a party to uphold a provision limiting remedies in a consumer sales transaction, the provision must satisfy the *Berg-Baker* Special Rule.<sup>65</sup> That is, the provision must be “explicitly negotiated between buyer and seller,” and the remedies being excluded must be ‘set forth with particularity.’<sup>66</sup> The burden of proof is on the party seeking to enforce the provision.<sup>67</sup> Since this special rule is enormously

---

<sup>64</sup> See *American Nursery v. Indian Wells Orchard*, 115 Wn.2d 217, 220, 797 P.2d 477 (1990).

<sup>65</sup> See *id.*, citing *Berg v. Stromme*, 79 Wn.2d 184, 196, 484 P.2d 380 (1971).

<sup>66</sup> See *id.*

<sup>67</sup> See *id.*

important to the present transaction, its history will be discussed in detail.

2. The *Berg-Baker* Special Rule originated in public policy, was expanded to certain commercial transactions, and remains the standard in Washington for governing provisions limiting remedies in consumer transactions.

The *Berg-Baker* Special Rule began in public policy, was expanded to certain commercial transactions, and remains the standard in Washington for governing provisions limiting remedies in consumer transactions. The *Berg* Rule originated almost forty years ago in a UCC case involving a warranty disclaimer.<sup>68</sup> In that case, a consumer purchased an automobile with numerous mechanical problems, but the dealer claimed the purchaser could not recover because the sales contract contained a warranty disclaimer.<sup>69</sup> The Supreme Court decided the case on public policy grounds and held that, in a consumer transaction, the burden of proof lies on the proponent of the warranty disclaimer to show that it was 1) explicitly negotiated and 2) that the excluded remedies were set forth with particularity.<sup>70</sup> If either of the two elements are not proven, then the disclaimer is procedurally unconscionable.<sup>71</sup>

---

<sup>68</sup> See *Berg v. Stromme*, 79 Wn.2d at 184.

<sup>69</sup> *Id.* at 185.

<sup>70</sup> *Id.* at 194.

<sup>71</sup> *Id.* at 194.

The *Berg* Rule was extended to provisions limiting remedies and to contracts not involving the sale of goods. In *Baker v. City of Seattle*,<sup>72</sup> the Supreme Court applied the two-part rule conceived in *Berg* to a non-UCC service contract.<sup>73</sup> Thus, in any consumer transaction, a provision limiting remedies must be explicitly negotiated and the excluded remedies must be set forth with particularity.<sup>74</sup> This is the *Berg-Baker* Special Rule.

A few years later, the Supreme Court in *Schroeder* extended the *Berg-Baker* Special Rule to commercial transactions.<sup>75</sup> *Schroeder* also modified the *Berg-Baker* Special Rule, but the modifications apply only to commercial transactions; the original two-part rule remained the same in consumer transactions.<sup>76</sup> Specifically, *Schroeder* modified the rule in two ways. First, it placed the burden of proof on the commercial entity attacking the provision limiting remedies to show the provision was procured by “lack of meaningful choice” or, stated another way, “unfair surprise.”<sup>77</sup> Second, it allowed courts to consider the “totality of the

---

<sup>72</sup> 79 Wn.2d at 201.

<sup>73</sup> See *id.*

<sup>74</sup> See *id.*

<sup>75</sup> See *Schroeder*, 86 Wn.2d at 262-63; See also *Puget Sound Financial, LLC*, 146 Wn.2d at 439; *American Nursery Products*, 115 Wn.2d at 224.

<sup>76</sup> See *Puget Sound Financial, LLC*, 146 Wn.2d at 438.

<sup>77</sup> See *Schroeder*, 86 Wn.2d at 262.

circumstances” and not just whether the provision was specifically negotiated and the excluded remedies were set forth with particularity.<sup>78</sup>

Subsequent cases like *American Nursery, Cox*, and *Puget Sound Financial, LLC* did not question, but confirmed, that the *Berg-Baker* Special Rule applies to consumer transactions involving provisions limiting remedies.<sup>79</sup> These cases focused on how far the *Berg-Baker* Special Rule should extend into commercial transactions.<sup>80</sup> The critical point is that, after nearly forty years of case law, the *Berg-Baker* Special Rule and its two-part test for consumer transactions remains the same; the subsequent cases did not transform the *Berg-Baker* Special Rule into a comprehensive “totality of the circumstances” analysis except in commercial transaction cases.<sup>81</sup>

Washington’s current law, therefore, is that in a consumer transaction, there must be specific negotiations and specific disclosure before a provision limiting remedies can be considered

---

<sup>78</sup> See *Puget Sound Financial, LLC*, 146 Wn.2d at 439.

<sup>79</sup> See *Schroeder*, 86 Wn.2d at 262-63; See also *Puget Sound Financial, LLC*, 146 Wn.2d at 439; *American Nursery Products*, 115 Wn.2d at 224; and *Cox v Lewiston Grain Growers, Inc.* 86 Wn. App. 357, 936 P.2d 1191 (1997).

<sup>80</sup> See *id.*

<sup>81</sup> See *Puget Sound Financial, LLC*, 146 Wn.2d at 439-40.

conscionable.<sup>82</sup> In a commercial transaction, a provision limiting remedies can be procedurally conscionable even if these two factors are not present if the “totality of the circumstances” does not show a “lack of meaningful choice” or “unfair surprise.”<sup>83</sup>

D. Washington Courts must first determine a transaction’s character before analyzing the evidence because the *Berg-Baker* Special Rule applies to consumer transactions.

Because the *Berg-Baker* Special Rule applies to consumer transactions, Washington Courts must first determine whether the transaction is a consumer transaction. If the *Berg-Baker* Special Rule applies, then the proponent of the provision limiting remedies must prove the provision was explicitly negotiated and the excluded remedies were set forth with particularity.<sup>84</sup> If the proponent does not prove both these elements, then the provision limiting remedies is unconscionable.<sup>85</sup> If the transaction is a commercial transaction, then the burden of proof is on the party attacking the provision limiting remedies to show “unfair surprise” or “lack of a meaningful choice” and the court considers the “totality of the circumstances.”<sup>86</sup>

---

<sup>82</sup> See *id.*

<sup>83</sup> See *id.*

<sup>84</sup> See *id.*

<sup>85</sup> See *id.*

<sup>86</sup> See *id.* at 440.

This distinction fundamentally affects the way a court analyzes the evidence. Accordingly, it is essential that courts first characterize the transaction as either a consumer transaction or a commercial transaction before analyzing the evidence.

1. This transaction is a consumer transaction because applicable UCC unconscionability provisions define consumer transactions to include purchases for personal and family purposes.

This transaction is a consumer transaction because the UCC's unconscionability provisions define consumer transactions as, among other things, purchases for personal and family purposes. Because courts and commentators agree that the UCC's unconscionability provisions apply to non-sale transactions, the UCC's definitions should be applied here. The UCC is codified in Chapter 62A of Washington's Revised Code. RCW 62A.9A-102(23) defines "consumer goods" as goods that are used or bought primarily for personal, family, or household purposes. RCW 62A.2-103(3) applies this definition of "consumer goods" to all of RCW 62A.2. In addition, Black's Law Dictionary's definition is consistent

with the UCC. If “a transaction is primarily for a personal, family, or household purpose, it will be considered a consumer transaction.”<sup>87</sup>

Here, it is undisputed that Purchasers were going to buy the condominiums for personal or family purposes. Ms. Torgerson was going to buy a condominium to live in and retire.<sup>88</sup> Mr. Miller and Ms. Ringer were going to buy a condominium for their mother to live in since she was advancing in age and needed to be closer to her children.<sup>89</sup> Additionally, both Purchasers signed reservation agreements stating their purchases were for personal purposes.<sup>90</sup> Both transactions are, therefore, consumer transactions.

The inquiry ends here since the transactions are unquestionably consumer transactions. There is no inquiry into the parties’ sophistication. No Washington case that determined whether a provision limiting remedies is conscionable has ever considered a party’s sophistication when the underlying transaction is a consumer transaction. Only commercial transaction cases of this type have considered a party’s sophistication.<sup>91</sup> That is

---

<sup>87</sup> Black’s Law Dictionary, 8<sup>th</sup> Edition – “Consumer Transaction: A bargain or deal in which a party acquires property or services primarily for a personal, family, or household purpose.”

<sup>88</sup> FCP 546.

<sup>89</sup> MCP 220.

<sup>90</sup> FCP 516-17; MCP 585-86.

<sup>91</sup> See *Puget Sound Financial, LLC*, 146 Wn.2d at 439-40; See also, *American Nursery Products*, 115 Wn.2d at 224.

because commercial transaction cases consider “the totality of the circumstances” and not just the two-part test in *Berg-Baker*.<sup>92</sup>

2. Because the *Berg-Baker* Special Rule applies to this consumer transaction, the provision limiting remedies is procedurally unconscionable because it was neither explicitly negotiated nor did it set forth the excluded remedies with particularity.

The Provision Limiting Remedies in the Contracts violated the *Berg-Baker* Special Rule and is procedurally unconscionable because it was neither specifically negotiated nor did it set forth the excluded remedies with particularity. Developer concedes it never explicitly negotiated the Provision Limiting Remedies in the Contracts.<sup>93</sup> The first requirement, therefore, was not met. This, alone, requires a finding the Provision Limiting Remedies is procedurally unconscionable.

Alternatively, the *Berg-Baker* Special Rule’s second requirement was not met because the excluded remedies were never set forth with particularity. The provision was buried in Developer’s standard form contract and was buried in the proverbial “maze of fine print.” Specifically, the provision appeared in the twenty-first paragraph of a nine-page contract in the middle of an eighty-eight word sentence.

---

<sup>92</sup> See *American Nursery Products*, 115 Wn.2d at 224.

<sup>93</sup> FCP 244, Pg. 10, Ln. 9 – Pg. 11, Ln. 14.

This non-conspicuous, buried provision does not explicitly set forth what remedies were excluded. It does not mention the fact specific performance was excluded. It does not mention the fact Purchasers could not recover incidental and consequential damages. It does not even mention the fact Purchasers could not recover compensatory damages.

Developer also treated the Provision Limiting Remedies differently than the liquidated damages remedy available to Developer. It explicitly drew Purchasers' attention to the fact Developer could recover liquidated compensatory damages from Purchasers if Purchasers breached the Contract, but did not draw Purchasers' attention to the fact Purchasers were precluded from recovering any compensatory damages from Developer if Developer breached the Contracts. Developer, in its pre-printed standard form contract, placed a clause immediately above Purchasers' signature line that reads:

SELLER AND BUYER INITIAL THIS PAGE TO CONFIRM THEIR AGREEMENT IN SECTION 21 OF THIS AGREEMENT, WHICH PROVIDES THAT IF THE BUYER FAILS, WITHOUT LEGAL EXCUSE, TO CLOSE THIS TRANSACTION AS AND WHEN REQUIRED BY THIS AGREEMENT, SELLER MAY TERMINATE THIS AGREEMENT AND RETAIN THE DEPOSIT AND ANY

INTEREST EARNED THEREON AS ITS SOLE AND EXCLUSIVE REMEDY.<sup>94</sup>

Developer did not go further and explain what would happen if Developer breached the Contracts.

The Provision Limiting Remedies was, therefore, procedurally unconscionable because it violated both tests in the *Berg-Baker* Special Rule. The Provision Limiting Remedies was neither explicitly negotiated nor did it set forth the excluded remedies with particularity.

II. THE PROVISION LIMITING REMEDIES IS SUBSTANTIVELY UNCONSCIONABLE BECAUSE PERSUASIVE AUTHORITY VIEWS SUCH PROVISIONS AS SUBSTANTIVELY UNCONSCIONABLE.

This is an issue of first impression in Washington – whether a developer can limit a purchaser of a residential condominium to be built to rescission and only a return of their deposit if the developer breaches the contract and, thereby, eliminate the purchaser's right to specific performance and any damages, including compensatory damages, and, at the same time, provide the developer can receive liquidated compensatory damages if the purchaser breaches the contract. If allowed, this would grant

---

<sup>94</sup> FCP 137; MCP 15.

residential developers the right to sign contracts with purchasers, collect deposits, leverage the pre-sales and deposits to obtain financing and then determine what they want to do with the purchasers after the project is built. If the market prices go up, then the developers can breach the contracts with impunity and sell the units to other purchasers for more money. If market prices go down, then the developers can force the purchasers to buy the built condominium units or else pay liquidated damages to the developer.

The Provision Limiting Remedies in the present matter is substantively unconscionable. Substantive unconscionability exists when a provision is overly harsh.<sup>95</sup> Whether a provision limiting remedies is unconscionable is determined as a matter of law.<sup>96</sup> As shown below, analogous Washington law and persuasive authority from other jurisdictions is sound and views such provisions as unconscionable and wholly unenforceable.

---

<sup>95</sup> *Zuver*, 153 Wn.2d at 303, citing, *Schroeder*, 86 Wn.2d at 260.

<sup>96</sup> *Puget Sound Financial. LLC*, 146 Wn.2d at 438, citing *American Nursery Products*, 115 Wn.2d at 222.

- A. This Court must rely upon analogous Washington cases and persuasive authority from other jurisdictions because a developer's right to enforce a provision limiting remedies is a matter of first impression for Washington Courts.

There is no precedent that allows a developer the right to enforce a clause it puts in its standard, pre-printed, form contract that limits a purchaser's remedy if the developer breaches the contract and thereby eliminates the purchaser's right to recover any damages, even compensatory damages, and, at the same time, allows the developer the right to recover liquidated compensatory damages if the purchaser breaches the contract. As such, this Court must examine other Washington cases and persuasive authority from other jurisdictions.

- B. The Provision Limiting Remedies is substantively unconscionable under Washington law because it eliminated Purchasers' right to recover damages, but did not similarly eliminate Developer's right to receive damages.

The Provision Limiting Remedies is substantively unconscionable because it limits Purchasers' rights to rescission in the event Developer breaches the Contracts, but does not similarly limit the Developer's rights to rescission if Developer breaches the Contract. If a provision limiting remedies favors one party "in that it allows [that party] alone access to a significant legal recourse," then

it is substantively unconscionable.<sup>97</sup> The Provision Limiting Remedies in this case allows Purchasers only one remedy for Developer's breach – rescission and restitution (the ability to recover their deposit from Developer).<sup>98</sup>

Applying the Provision Limiting Remedies to this instance, Purchasers do not have the right to any damages for Developer's admitted repudiation and breach. They cannot collect actual (compensatory) damages, incidental damages or consequential damages. The Provision Limiting Remedies does not similarly restrict Developer if Purchasers breached the Contracts. In fact, Developer has the specified right to liquidated, compensatory damages because it can keep Purchasers' deposit.<sup>99</sup> The bottom line is Developer can reach into Purchasers' pockets and collect Purchasers' money if they breach, but Purchasers cannot collect any money from Developer if it breaches. This is substantively unconscionable.

---

<sup>97</sup> *Zuver*, 153 Wn.2d at 303.

<sup>98</sup> FCP 19, ¶ 21; MCP 22, ¶ 21.

<sup>99</sup> *Id.*

- C. The Provision Limiting Remedies is substantively unconscionable because the most relevant persuasive authority from Florida views such provisions as antithetical to fair dealing and wholly unenforceable.

The Contract's Provision Limiting Remedies is substantively unconscionable because persuasive authority from Florida is the most relevant and views such provisions as antithetical to fair dealing and wholly unenforceable. Since 1985, all the Florida Courts of Appeal have agreed that provisions limiting remedies almost identical to the present matter are unconscionable and unenforceable. They did so without looking at the procedure behind the transaction. Because these Florida decisions are both on point and critical to resolving the matter at hand, this brief will examine the leading Florida cases.

In *Ocean Dunes of Hutchinson Island Dev. Corp. v. Colangelo*,<sup>100</sup> a developer and a purchaser entered into a contract for the sale of a condominium unit. That contract contained a provision limiting remedies virtually identical to the provision in the present matter. Thus, in the event of default, the purchaser's remedy was limited to a refund of his/her deposit. The developer, on the other hand, could retain the deposit as liquidated damages or seek any other legal or equitable remedy to which the developer

---

<sup>100</sup> 463 So. 2d 437 (Fla. 4<sup>th</sup> DCA 1985).

may be entitled.<sup>101</sup> Despite the contract's provision limiting remedies, the trial court ordered the developer to convey a condominium unit to purchasers.<sup>102</sup>

The Appellate Court agreed, stating that while parties to a contract may limit their respective remedies, such provisions must be reasonable to be enforced.<sup>103</sup> The Appellate Court went on to say that "because the developer's obligations were wholly illusory in that it could breach the agreement with no consequences whatsoever (save returning the deposit), but the buyer's obligations were very real in that, in the event of a breach, the developer could choose between retaining the buyer's deposit or seeking other legal or equitable remedies," the provision was unreasonable.<sup>104</sup> In sum, the court in *Ocean Dunes* found a provision limiting remedies virtually identical to the present matter unconscionable.<sup>105</sup>

*Blue Lakes Apartments, Ltd. v. George Gowing, Inc.*,<sup>106</sup> presented the same issue with similar facts. Gowing, the purchaser, entered into a contract with the developer for the sale of a condominium. The developer terminated the contract citing, inter

---

<sup>101</sup> See *id.* at 239-40.

<sup>102</sup> See *id.* at 239.

<sup>103</sup> See *id.* at 239-40.

<sup>104</sup> See *id.*

<sup>105</sup> See *id.* at 240.

<sup>106</sup> 464 So. 2d 705 (4th DCA 1985).

alia, its ability to do so pursuant to a bargained-for provision limiting remedies that restrict purchaser's remedy to recovering the deposit.<sup>107</sup> The Florida Appellate court again rejected the provision limiting remedies, saying:

[the developer's] heads-I-win, tails-you-lose approach to defaults is so rapaciously skewed as to be patently unreasonable. It subverts the contract by permitting one party to breach with impunity. Such provisions are antithetical to the concept of fair dealing in the marketplace and will not be enforced by courts of law.<sup>108</sup>

Specific performance was not possible because the developer sold the condominium unit to a third party prior to trial.<sup>109</sup> The court did, however, award compensatory damages measured as the difference between the contract purchase price and the purchase price the developer received when it sold the condominium unit to the third party.<sup>110</sup>

As mentioned, *Ocean Dunes* and *Blue Lakes Apartments, Ltd.* are just two examples in a series of cases striking down similar provisions limiting remedies. While both these opinions originated in the Fourth District Court of Appeals, the First, Second, Third, and Fifth District Court of Appeals analyzed similar issues and arrived at

---

<sup>107</sup> See *id.* at 709.

<sup>108</sup> *Id.* (emphasis added).

<sup>109</sup> *Id.* at 710.

<sup>110</sup> *Id.*

similar results.<sup>111</sup> Together, these opinions represent a firm stance that provisions limiting remedies similar to the present matter are overly harsh and, therefore, unconscionable. Furthermore, because Florida courts engage in an extensive analysis of provisions limiting remedies and their potential for abuse by developers, these opinions are the most persuasive foreign authority for resolving the matter at hand.

### III. THE PROVISION LIMITING REMEDIES IS UNENFORCEABLE BECAUSE IT FAILS ITS ESSENTIAL PURPOSE

Even if the Provision Limiting Remedies is procedurally and substantively conscionable, it is still unenforceable because it fails its essential purpose. A provision limiting remedies is unenforceable if it fails its essential purpose.<sup>112</sup> When a limitation of remedy provision deprives a party of the substantive value of its bargain, it is ineffectual.<sup>113</sup> Thus, when a provision is unenforceable, a buyer may disregard that term of the contract and

---

<sup>111</sup> See *Seaside Community Development Corp. v. Edwards*, 573 So.2d 142, 147 (Fla. 1<sup>st</sup> DCA 1991); *Hackett v. JRL Development, Inc.*, 566 So. 2d 601, 602-03 (Fla 2nd DCA 1990); *Port Largo Club, Inc. v. Warren*, 476 So.2d 1330, 1333 (Fla 3rd DCA 1985); *Clone, Inc. v. Orr*, 476 So.2d 1300, 1302-03 (Fla 5th 1985).

<sup>112</sup> RCW 62A.2-719(2); *American Nursery Products*, 115 Wn.2d at 226; *Cox*, 86 Wn. App. at 370.

<sup>113</sup> *Cox*, 86 Wn. App. at 370.

pursue other remedies.<sup>114</sup> Finally, a provision limiting remedies fails its essential purpose if there is no minimum adequate remedy.<sup>115</sup>

Here, the Provision Limiting Remedies not only fails its essential purpose by depriving Purchasers of the substantive value of its bargain, but it also fails to provide a minimum adequate remedy. Purchasers contracted to buy a condominium unit, subject to it being built. While the condominium unit was under construction, the unit's fair market value increased dramatically. Developer then terminated the Contracts with Purchasers and sold the unit to third parties for substantially more money than Developer had agreed to sell the units to Purchasers for. Purchasers were, therefore, deprived of any adequate remedy under the Contracts. They received nothing for their deposit and patience in waiting four (4) years for a condominium unit. This deprivation occurred not because Developer could not deliver, but because it was unwilling to deliver and blatantly and intentionally breached the Contracts. Returning Purchasers' own money is wholly inadequate. Developer should not be allowed to withhold

---

<sup>114</sup> *Marr Enterprises, Inc. v. Lewis Refrigeration*, 556 F.2d 951 (9th Cir. 1977) (interpreting Washington law, court held that were limitation was part replacement or repayment, such remedy did not fail its essential purpose.)

<sup>115</sup> See *id.* at 955, n. 13.

Purchasers' money for four (4) years, use it to finance the condominium project, and then cancel the Contract with Purchasers after the project has appreciated. Because Purchasers were deprived of the substantive value of their bargain and there is no adequate remedy, the Provision Limiting Remedies is unenforceable.

#### IV. THE PROVISION LIMITING REMEDIES IS UNENFORCEABLE BECAUSE IT CONTRAVENES PUBLIC POLICY

The Provision Limiting Remedies is unenforceable because it violates Washington's public policy. While parties to a contract are free to negotiate specific terms, a specific contractual provision can be invalidated if it contravenes public policy.<sup>116</sup> "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 do evil,' to be against the public good, or to be injurious to the public."<sup>117</sup>

This is the basis for the *Berg-Baker* Special Rule.

Washington's public policy is, therefore, to not enforce provisions

---

<sup>116</sup> *Whitaker v. Spiegel, Inc.*, 95 Wn.2d 661, 667, 623 P.2d 1147 (1981).

<sup>117</sup> *Marshall v. Higginson*, 62 Wn. App. 212, 216, 813 P.2d 1275 (1991).

limiting remedies in consumer transactions unless those provisions are explicitly negotiated and set forth with particularity.

Here, the Provision Limiting Remedies has both a tendency to do evil and be injurious to the public. The Provision Limiting Remedies has a tendency to do evil because it gives Developer the ability to exploit residential housing purchasers by having them contract to buy a residential housing unit to be built and pay a deposit. Developer can then use the presales and deposits as leverage with a lender to help finance the development of the project. This can deprive the purchasers of their money for a long time. Here, the amount of time was four (4) years.

Developer can then decide what to do with the purchasers after re-analyzing the market values after the project has been built. If the market prices increased, then it can simply refuse to perform with impunity. All the purchaser can do is recover from Developer the deposit the purchaser actually paid. Developer can then sell to a third party for more money and pocket the difference between the increased market price and the price it agreed to sell the unit to the purchaser for. If the market prices go down, Developer can force the purchaser to buy the unit or else the purchaser loses his or her deposit.

This is, in fact, the exact evil the federal government has regulated against. The Interstate Land Sales Act ("ILSA")<sup>118</sup> requires condominium projects in excess of one-hundred units to register with HUD.<sup>119</sup> According to HUD guidelines, the developer must have a meaningful obligation to construct the condominium units within two years.<sup>120</sup> "[C]ontracts that permit the seller to breach virtually at will are viewed as unenforceable because the construction obligation is not an obligation in reality."<sup>121</sup>

This explains why Developer amended its standard pre-printed form contracts in December 2001. Specifically, Developer amended the default and remedies provisions to replace the Provision Limiting Remedies and thereby allow all future buyers a meaningful remedy in the event Developer breached the contract.<sup>122</sup> Despite this, the amended contract did nothing for Purchasers and others who signed Developer's standard pre-printed contracts prior to December 2001.<sup>123</sup> These older contracts, including the Contracts at issue, still violated the ILSA

---

<sup>118</sup> 15 U.S.C. § 1701 et. seq.

<sup>119</sup> *Nargiz v. Henlopen Developers*, 380 A.2d 1361, 1363 (1977); FCP 245, Pg. 15, Ln. 8-17.

<sup>120</sup> *Samara Dev. Corp. v. Marlow*, 556 So.2d 1097, 1100 (1990).

<sup>121</sup> *See id.* at 1099.

<sup>122</sup> FCP 245, Pg. 17, Ln. 8-25; FCP 288, Pg. 18, Ln. 1-15.

<sup>123</sup> FCP 247, Pg. 31, Ln. 5-22.

and, therefore, the Provision Limiting Remedies also violates public policy.

V. PURCHASERS ARE THE PREVAILING PARTY AND ARE ENTITLED TO ATTORNEY'S FEES BECAUSE DEVELOPER BREACHED THE CONTRACTS

No matter what the ultimate ruling on how much Purchasers can recover from Developer, Purchasers are entitled to attorney's fees because Developer breached the Contracts. The Contracts provided that attorney fees and court costs are to be awarded to a prevailing party who receives a judgment in their favor.<sup>124</sup> This is consistent with Washington law that states: "A prevailing party is generally one who receives a judgment in its favor."<sup>125</sup>

A. Purchasers are entitled to attorney's fees because Developer is the only party who breached the Contracts.

This is a breach of contract action against Developer and Developer admitted it breached the Contracts by refusing to perform. Anticipatory breach is synonymous with repudiation.<sup>126</sup> It requires, "a positive statement or action indicating distinctly and unequivocally that the repudiating party will not substantially

---

<sup>124</sup> FCP 19; MCP 22.

<sup>125</sup> *American Fed. Savs. & Loan Ass'n v. McCaffrey*, 107 Wn.2d 181, 195, 728 P.2d 155 (1986) (citation omitted).

<sup>126</sup> *Wallace v. Kuehner*, 111 Wn. App. 809, 816, 46 P.3d 823 (2002).

perform his contractual obligations.”<sup>127</sup> Here, Developer sent Purchasers a letter dated May 3, 2004 stating “The purpose of this letter is to inform you that the above referenced Purchase and Sale Agreement which was assigned to LS Holdings, LLC by One Lincoln Tower, LLC is hereby terminated.”<sup>128</sup> To be sure, Developer, in its Motion for Summary Judgment, admitted “they unequivocally stated that they would not be selling a condominium to [purchasers].”<sup>129</sup> Developer also plainly conceded it defaulted on the Contracts.<sup>130</sup> Accordingly, Purchasers are, at a minimum, entitled to recover from Developer the amount of the deposits they paid.<sup>131</sup>

Even if Developer successfully enforces the Provision Limiting Remedies, Purchasers are still entitled to fees. Nowhere has Developer alleged Purchasers breached the Contracts. To the contrary, Developer bases its motion on a provision that limited Purchaser’s remedy to a recovery of the earnest money

---

<sup>127</sup> *CKP, Inc. v. GRS Const. Co.*, 163 Wn. App. 601, 620, 821 P.2d 63 (1991).

<sup>128</sup> FCP 60; MCP 62.

<sup>129</sup> FCP 161, Ln. 3-4; MCP 156-57.

<sup>130</sup> FCP 158, Ln. 21; MCP 154, Ln. 21.

<sup>131</sup> In the event Developer breaches, Purchasers are entitled to recover, from the seller, the portion of the deposit they paid. Here, Purchaser Torgerson paid \$5,000 plus a commission assignment equivalent to 10% of the purchase price (\$1,310,000). Purchasers Miller and Ringer deposited \$5,000 plus commission assignments totaling 5% of the purchase price of \$156,000.

deposits.<sup>132</sup> This clause is only effective if Developer defaulted on its contractual obligations.<sup>133</sup> The trial court must, therefore, have found that Developer defaulted on its contractual obligations in order to give the provision limiting remedies any effect. The Provision Limiting Remedies may limit the amount Purchaser may recover, but it does not erase Developer's breach or eliminate Purchaser's recovery in its entirety – Purchaser has the right to “recover from [Developer] the amount of the deposit [Purchasers] actually paid.”<sup>134</sup>

B. Purchasers are entitled to attorney's fees because, in a breach of contract action, the breaching party cannot be the prevailing party.

Purchasers are entitled to attorney's fees because a breaching party cannot be the prevailing party. Washington follows the majority view that a party prevails in an action if it can prove liability even if there are no damages.<sup>135</sup> In *Miles*, purchasers of a mobile home brought a race discrimination lawsuit against the vendor.<sup>136</sup> The jury found discrimination, but awarded zero dollars

---

<sup>132</sup> FCP 19; MCP 22.

<sup>133</sup> FCP 19; MCP 22.

<sup>134</sup> FCP 19, ¶ 21; MCP 22, ¶ 21.

<sup>135</sup> See *Miles v. F.E.R.M. Enterprises, Inc.*, 29 Wn. App. 61, 73, 627 P.2d 564 (1981); *Dennis I. Spencer Contractor, Inc. v. City of Aurora*, 884 P.2d 326, 331 (1994).

<sup>136</sup> 29 Wn. App. at 62.

for both general and punitive damages.<sup>137</sup> Even though no damages were awarded to the plaintiff, the Court, relying on RCW 4.84.030, determined the plaintiff was the prevailing party and therefore entitled to his costs, including attorney fees.<sup>138</sup>

The Colorado Supreme Court applied *Miles* to a breach of contract case. In *Dennis I. Spencer Contractor, Inc.*,<sup>139</sup> defendant breached a construction contract and a settlement agreement, but the plaintiff was not awarded any damages. The trial court determined that the plaintiff was the prevailing party and entitled to attorney fees.<sup>140</sup>

In *Spencer*, the Colorado Supreme Court also affirmed the outcome in *Nouri v. Wester & Co.*<sup>141</sup> In *Nouri*, a tenant sued the landlord for a breach of lease between the parties.<sup>142</sup> The trial court found that the landlord breached the lease, but did not award the tenant any damages or an injunction.<sup>143</sup> Most importantly, the court held that “[the landlord] was not entitled to recover attorney fees incurred in defense of [tenant’s] action because of [the court’s]

---

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 73.

<sup>139</sup> 884 P.2d 326 (1994).

<sup>140</sup> *Id.*

<sup>141</sup> 833 P.2d 848 (1992).

<sup>142</sup> 884 P.2d at 330.

<sup>143</sup> *Id.*

determination that [the landlord] had violated the lease in spite of an attorney fees provision authorizing attorney fees to the successful party in legal proceedings brought to enforce the lease.”<sup>144</sup> Thus, the Colorado Supreme Court, relying on the decision in *Nouri*, held that “Where a claim exists for a violation of a contractual obligation, the party in whose favor the decision or verdict on liability is rendered is the prevailing party for purposes of awarding attorney fees.”<sup>145</sup>

The Colorado Supreme Court went on to say “it would be an unjust result to uphold an award of attorney fees to [defendant] where [plaintiff], the innocent party, was required to pay attorney fees to the breaching party.”<sup>146</sup> Continuing, the Court said, “The fact that [defendant] was not required to pay damages attributable to its breach does not constitute a favorable verdict or convert [defendant] into a prevailing party.”<sup>147</sup>

Here, the factual scenario is analogous to *Spencer*. A breach of contract was committed by Developers. Due to the Provisions Limiting Remedies set forth in the Contracts, Purchasers’ damages for Developer’s breach may be limited to an amount equal to the

---

<sup>144</sup> *Id.*

<sup>145</sup> *Spencer*, 884 P.2d at 327.

<sup>146</sup> *Id.* at 333.

<sup>147</sup> *Id.*

portion of the deposit the Purchasers paid. Like *Spencer*, it is inconsistent with basic contract law to award attorney's fees in a breach of contract action to the party who breached the contract.<sup>148</sup>

To allow the breaching Developer in this case to recover attorney fees from the non-breaching Purchasers would lead to the same absurd conclusion that the Colorado Supreme Court was trying to avoid in *Spencer*.

It is critical to distinguish between Developer prevailing on the issue of limiting Purchasers' remedy and Purchasers prevailing on the issue of liability. The trial court's Order Granting Summary Judgment, even if affirmed, has nothing to do with the issue of liability; it only pertains to limiting Purchasers' remedy for Developer's breach. In other words, Purchasers prevailed on the issue of liability since Developers breached the Contracts. Unfortunately for Developers, it is the issue of liability that is dispositive for awarding attorney's fees and costs.

Other jurisdictions are in agreement with the Colorado Supreme Court's holding. The Utah Court of Appeals added, "It is the determination of culpability, not the amount of damages, that

---

<sup>148</sup> *Id.*, citing *United States for the Use of Palmer Constr., Inc. v. Cal State Elec., Inc.*, 940 F.2d 1260, 1261 (9th Cir. 1991).

determines who is the prevailing party.”<sup>149</sup> Additionally, a Texas Court of Appeals stated, “When a party prevails and establishes a valid claim, the party can be entitled to attorney’s fees without achieving a monetary recovery on the claim itself. The jury’s finding of zero damages does not preclude the awarding of attorney’s fees when the party has prevailed under the terms of the contract.”<sup>150</sup>

Based upon the Developer’s admitted breach of the Contracts, it is liable to Purchasers. The central question is to what degree? Whether Purchasers are entitled to compensatory damages measured by the difference between the price Developer sold the units to third parties and the price Developer promised to sell the units to Purchasers or just the amount of the deposit Purchasers paid, Purchasers are entitled to judgment against Developer for that amount. The supporting authorities in *Spencer, Miles, Brown, and Atlantic Richfield Co.*, deem Purchasers the overall prevailing party on liability and Developer, therefore, as the non-prevailing party. Purchasers are, therefore, entitled to their attorney fees and costs and Developer cannot be awarded attorney’s fees and costs.

---

<sup>149</sup> *Brown v. Richards*, 840 P.2d 143, 155 (Utah App. 1992).

<sup>150</sup> *Atlantic Richfield Co. v. Long Trusts*, 860 S.W.2d 439, 450 (Tex.App.1993).

VI. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING PURCHASERS' LEAVE TO AMEND THEIR COMPLAINT IN THE ABSENCE OF MULTIPLE AMENDMENTS, ANY EVIDENCE OF PREJUDICE, OR FUTILITY.

Courts should allow amendments to pleadings unless the party opposing the amendment can show multiple attempts to amend, prejudice or the amendment would be futile.<sup>151</sup> The first two grounds to deny a motion to amend are simply not present in this case. This was Purchasers first request to amend their complaints.<sup>152</sup> Developer also never even alleged any prejudice if the requested amendments were allowed.<sup>153</sup>

Purchaser's proposed amendment was not futile. Purchasers moved to amend their complaints to add claims for promissory estoppel.<sup>154</sup> Under the facts presented, promissory estoppel was a viable cause of action. "A party seeking recovery under a theory of promissory estoppel must prove five prerequisites: (1) A promise that (2) the promisor should reasonably expect to cause the promisee to change his position and (3) that does cause the promisee to change his position (4) justifiably

---

<sup>151</sup> *Herron v. Tribune Pub'g Co.*, 108 Wn.2d 162, 166, 736 P.2d 249 (1987); *Sprague v. Sumitomo Forestry Co.*, 104 Wn.2d 751, 763, 709 P.2d 1200 (1985); *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 141, 937 P.2d 154 (1997).

<sup>152</sup> FCP 334-349; MCP 258-274

<sup>153</sup> FCP 365-74

<sup>154</sup> FCP 334-35; MCP 258-59.

relying upon the promise, in such a manner that (5) injustice can be avoided only by enforcement of the promise.”<sup>155</sup>

Each element has been met. Developer undeniably made a promise by telling Purchasers they had the right to purchase their Units for the same price and on substantially the same terms.<sup>156</sup> Developer admits it understood the Purchasers had the right to rescind their Contracts.<sup>157</sup> It was therefore reasonable for Developer to understand that Purchasers would not exercise their rescission rights when they received the Developer’s December letter fourteen (14) days prior to their rescission rights ripening. This letter did, in fact, cause Purchasers to change their position by not exercising their rescission rights.<sup>158</sup> Their reliance was justifiable and injustice can only be avoided by enforcing Developer’s promise.

Promissory estoppel could also have afforded Purchasers a full and complete remedy. The remedy for promissory estoppel is to “place the promisee in as good a position as that which would

---

<sup>155</sup> *Elliott Bay Seafoods, Inc. v. Port of Seattle*, 124 Wn. App. 5, 13, 98 P.3d 491 (2004).

<sup>156</sup> FCP 54-55; MCP 56-57.

<sup>157</sup> FCP 295, Pg. 46, Ln. 17 – Pg. 47, Ln. 3.

<sup>158</sup> FCP 260.

have been occupied had the promisor performed.”<sup>159</sup> The Washington Supreme Court has held that when the requirements of the doctrine of promissory estoppel are met, “the reliance on the promisee creates a contract and damages may be awarded for the loss that directly results from the breach.”<sup>160</sup> Thus, “[a] promisee in some circumstances should be allowed to recover the benefit of the bargain on a promissory estoppel theory.”<sup>161</sup> Because a promisee’s damages are not limited to his or her reliance damages, the court should not focus on what a plaintiff gave up in reliance on the promise, but should focus on what he or she would have received if the promise had been performed.

Here, had Developer performed as promised, then Purchasers would have received new contracts to purchase their units at the same price as the original Contracts with minimal changes to the terms.<sup>162</sup> The new contracts would not have contained a provision limiting Purchasers’ remedy to a return of their deposits.<sup>163</sup> Since Developer breached the promise to sell the

---

<sup>159</sup> *Farm Crop Energy, Inc. v. Old Nat. Bank of Washington*, 109 Wn.2d 923, 940, 750 P.2d 231 (1988), *citing* RESTATEMENT (SECOND) OF CONTRACTS § 329 (1932).

<sup>160</sup> *Farm Crop Energy*, 109 Wn.2d at 940, *citing Chrysler Corp. v. Quimby*, 1 Storey 264, 51 Del. 264, 144 A.2d 123, 144 A.2d 885 (1958).

<sup>161</sup> *Farm Crop Energy*, 109 Wn.2d at 941.

<sup>162</sup> FCP 154I MCP 108.

<sup>163</sup> MCP 327-29.

units to Purchasers on the same price terms, but without the offending Provision Limiting Remedies, Purchasers should be placed in this position and awarded damages for Developer's breaching its promise.

Moreover, the Contracts attached to the original complaint showed the earnest money deposits were more than the \$10,000 cash held in escrow. It also included an assignment of Purchasers' commissions equal to 10% of the purchase price for Torgerson,<sup>164</sup> and 5% of the earnest deposit for Miller and Ringer<sup>165</sup> (less the \$5,000 cash each of them paid).

VII. THE TRIAL COURT ERRED IN DENYING  
PURCHASERS' MOTION TO REVISE THE ORDER  
GRANTING DEVELOPER'S SUMMARY JUDGMENT.

The May 9, 2005 Order on Summary Judgment provided the Court would dismiss Purchasers' breach of contract claim against Developer despite the fact Developer admits it breached the Contracts.<sup>166</sup> The dismissal is based on the Provision Limiting Remedies the Court determined was enforceable.<sup>167</sup> However, nothing in the Provision Limiting Remedies stated that Purchasers could not sue Developer for breach; rather, it limited Purchasers'

---

<sup>164</sup> FCP 30

<sup>165</sup> MCP 93.

<sup>166</sup> FCP 326-28; MCP 243-45.

<sup>167</sup> FCP 327; MCP 244.

relief to recovery of the portion of the deposits Purchasers actually paid. Under these circumstances, the trial court erred in entering an order that would dismiss the action; rather, it should have entered judgment against Developer for breaching the Contracts in the amount of the deposits the Purchasers actually paid.

Developer's summary judgment motion relied, in part, on *Puget Sound Financial, L.L.C. v. Unisearch*.<sup>168</sup> In *Puget Sound*, the parties' contract had a provision limiting remedies on each invoice that stated, "Liability Limited to Amount of Fee."<sup>169</sup> There, as here, Developers were sued, inter alia, for breach of contract.<sup>170</sup> The Supreme Court held the provision limiting remedies enforceable.<sup>171</sup> It did not, however, dismiss the plaintiffs' action; rather, it enforced the provision and limited the defendant's liability to the amount of the fee.<sup>172</sup> Here, if the trial court believed the Provision Limiting Remedies was enforceable, then it should not have provided the action would be dismissed. Instead, it should have taken the *Puget Sound* approach and enforced the provision as written by limiting Purchasers' remedy to a recovery against Developer in an amount

---

<sup>168</sup> 146 Wn.2d 428.

<sup>169</sup> *Id.* at 431.

<sup>170</sup> *Id.* at 432.

<sup>171</sup> *Id.* at 444.

<sup>172</sup> *Id.* ("We...affirm the trial court's grant of summary judgment limiting Unisearch's liability, if any, to the amount of the fee charged for such service.")

equal to the portion of the deposits Purchasers actually paid. To refuse to do so was error.

Further, the trial judge signed and entered the Order Granting Developer's Motion for Summary Judgment on May 9, 2005, only four court days after Purchasers received the Order<sup>173</sup>, violating Civil Rule 54(f)(2) by giving Purchasers insufficient time to object to the order. It was an error of law for the trial judge to enter this Order without allowing Purchasers five days notice to comment to the form of the Order.

Moreover, the Order on Summary Judgment should have awarded Purchasers recovery against Developer of the entire amount of the deposit they actually paid and not just the \$10,000 being held in escrow. The Purchasers' Contracts specifically provided, by negotiated addendum, that Purchasers also assigned a portion of their commission equal to 5% earnest money deposit for Miller and Ringer<sup>174</sup> and 10% earnest money deposit for Torgerson<sup>175</sup>, less the \$5,000 already on deposit. As such, the judgment should have awarded each Purchaser recovery against Seller not only for their \$5,000 in cash held in escrow, but an

---

<sup>173</sup> FCP 328; MCP 245, 319.

<sup>174</sup> MCP 16.

<sup>175</sup> FCP 30.

amount equal to the assignment of their commissions used to satisfy the deposit requirement. It was error for the trial judge to not correct this error and modify the judgment.

VIII. THE TRIAL COURT ERRED IN DENYING PURCHASERS' MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF RESCISSION BECAUSE THE DEVELOPER ELECTED TO ENFORCE THE CONTRACT.

In Washington, when a party claiming to have been defrauded enters, after discovery of the fraud, into new arrangements or engagements concerning the subject matter of the contract claimed to have been procured by fraud, he is deemed to have waived any claim for rescission.<sup>176</sup>

Developer suggests that it was defrauded by Purchasers' breach of their fiduciary duty. Thus, even if the court were to believe the Purchasers breached their fiduciary duties, Developer had to inform Purchasers within a reasonable time that it intended to avoid the Contract. Instead, Developer moved the trial court to enforce the Contracts through summary judgment.<sup>177</sup> In so doing, Developer waived any claim for rescission of the Contracts.

---

<sup>176</sup> *Owen v. Matz*, 68 Wn.2d 374, 379-77, 413 P.2d 368 (1966).

<sup>177</sup> FCP 158-81; MCP 154-76.

In moving to enforce the Contracts through summary judgment, Developer also elected its remedy. There are three elements required for election of remedies. First, there must be two or more remedies. Second, the remedies must be inconsistent with one another. Third, the party to be bound must have chosen one of the remedies.<sup>178</sup> Where one has available to him the choice of affirming a contract and suing for damages for an alleged breach thereof, or disaffirming the contract and bringing his action for rescission, the two remedies are inconsistent. Selection of one of those remedies and proceeding thereunder is a bar to resorting to the other remedy.<sup>179</sup> Thus, once Developers elected to enforce the Contracts per Paragraph 21, they should have been barred, as a matter of law, to attempt to rescind the Contracts.

The trial court erred when it denied Purchasers' second Motion for Summary Judgment on the Developer's breach of fiduciary duty counterclaim.

IX. PURCHASERS ARE ENTITLED TO THEIR APPELLATE ATTORNEY FEES AND COSTS.

RAP 18.1(a) allow parties to request attorney fees on appeal. The Contracts at issue here provide attorney fees to the

---

<sup>178</sup> *Puget Sound Service Corp. v. Bush*, 45 Wn. App. 312, 319, 724 P.2d 1127 (1986).

<sup>179</sup> *Labor Hall Ass'n v. Danielsen*, 24 Wn.2d 75, 81, 163 P.2d 167 (1945).

prevailing party who receives a judgment in their favor. This is consistent with RCW 4.84.030. "A party is entitled to attorney fees on appeal if a contract...permits recovery of attorney fees at trial and the party is the substantially prevailing party."<sup>180</sup> Here, Purchasers were entitled to fees at trial based on the Contracts and, as the substantially prevailing parties on appeal, are entitled to attorney fees on appeal.

#### **D. Conclusion**

Based on the foregoing, Purchasers respectfully request this Court:

1. Determine the Provision Limiting Remedies is unenforceable for one or more of the following reasons: 1) substantive unconscionability; 2) procedural unconscionability; 3) failure of its essential purpose and/or; 4) public policy grounds.
2. No matter whether the Provision Limiting Remedies is enforceable or not, remand the matter to the trial court to enter judgment in Purchasers' favor and to award Purchasers their attorney fees and costs at trial and on appeal.
3. If the Court does not determine the Provision Limiting Remedies is unenforceable, then determine the trial court abused

---

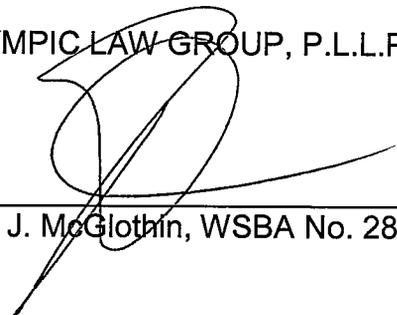
<sup>180</sup> *Hwang v. McMahon*, 103 Wn. App. 945, 954, 15 P.3d 172 (2000), review denied, 144 Wn.2d 1011 (2001).

its discretion when it denied Purchasers motion to amend and remand the matter to the trial court to allow the Purchasers' proposed amendment.

4. Determine Developer waived its right to rescind the Contracts based upon Purchasers' alleged breach of fiduciary duty either because it sought to enforce the Contracts with full knowledge about its alleged right to rescind the Contracts or because it elected its legal remedy.

FILED  
COURT OF APPEALS DM #1  
STATE OF WASHINGTON  
2006 JUN 22 PM 4: 57

DATED June 22, 2006 OLYMPIC LAW GROUP, P.L.L.P

BY:   
Dennis J. McGlothlin, WSBA No. 28177

**DECLARATION OF SERVICE**

**The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on the below date, I mailed or caused delivery of a true copy of the foregoing to**

DAVID NOLD

**at the regular office or residence thereof**

**Dated this 22<sup>nd</sup> day of JUNE, 2006 at**

**Seattle, Washington.**

