

No. 80623-3

SUPREME COURT OF WASHINGTON

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

Petitioners,

v.

ONE LINCOLN TOWER, LLC; BELLEVUE MASTER, LLC; and LS
HOLDINGS, LLC,

Respondents.

APPEAL FROM THE COURT OF APPEALS
DIVISION ONE

RESPONDENTS' SUPPLEMENTAL BRIEF

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I. INTRODUCTION

This Court should honor the freedom to contract by adopting the majority rule in the United States and enforcing a provision that limits a real estate buyer's remedy to the return of earnest money plus interest. To reverse and adopt the minority rule would conflict with established Washington law protecting the right of sophisticated parties (and others) to govern their own affairs, as well as unjustly enrich real estate agents who breached their fiduciary duties and have no need of judicial protection.

II. STATEMENT OF THE CASE

Respondents One Lincoln Tower, Bellevue Master, and LS Holdings ("Sellers") hereby incorporate by reference the facts cited in the decision below. (Op. at pp. 2-5¹.) In addition, Sellers offer these supplemental facts.

Petitioners Joanne Faye Torgerson, Michael Miller, and Vicki Ringer ("Buyers") were each real estate agents with years of experience at the time relevant to the case. Ms. Torgerson spent 18 years as an independent contractor agent at Coldwell Banker Bain (CBB), and as the sole owner of Torgerson and Associates, LLC. (TCP 480.) Mr. Miller first began working for Ms. Torgerson and CBB in 1995. (TCP 506.) Ms. Ringer worked as an independent contractor agent with CBB and later as the "community sales manager" for the project at issue. (*Id.*) All three were licensed real estate agents working for the Sellers

¹ See Appendix, Exhibit 1.

when they executed their Agreements. (MCP 1082; MCP 1086.)

On May 3, 2004, LSH terminated the Agreements with Buyers by letter to each. (MCP 111; TCP 157.) LSH learned that Ms. Torgerson had referred at least one unrepresented buyer to an outside agent. This was a blatant breach of fiduciary duty, as each instance of this conduct would cost Sellers, the agents' principals, 3% of the total purchase price of a unit. (MCP 77; TCP 122.)

LSH later learned that their divided loyalties were even more pervasive. An email from Michael Grady, seemingly in response to a request from Torgerson, recommended that she make additional money under the Agreement through a "Buyer Referral Program." (TCP 83-84.) Thus, the breach of fiduciary duty set forth above was systematized and broadened into a "program" that would enrich the agents at the expense of their principal. Torgerson acknowledged receipt of the email and admitted that such a program would be a breach of duty. (TCP 80-82.)

Buyers also refused to increase the amount of their earnest money to match the amount deposited by buyers of comparable units. (MCP 77; TCP 122.) Although Buyers have alleged that they offered more than \$5,000 earnest money, they each admitted in their complaints that the earnest money was only \$5,000. (MCP 9; TCP 8.)

III. SUMMARY OF ARGUMENT

Seven jurisdictions have addressed the enforceability of a purchase and

sale contract that limits a buyer's remedy to the return of earnest money plus interest; six upheld the language. Washington should join this majority.

Such a rule would comport with Washington's long-standing jurisprudential preference for allowing contracting parties to govern their own affairs, as seen in numerous cases to be analyzed below in detail. If the Court wishes to adopt the UCC's unconscionability analysis by analogy, as the court below declined to do but other courts have done, it will find neither procedural nor substantive unconscionability. There is no valid basis on which to permit Buyers to subvert the unambiguous intent of the Agreement that they signed as Buyers and sold as the project's real estate agents.

IV. ARGUMENT

A. The Majority Position Comports with Well Established Law That Protects the Freedom to Contract in Washington.

Although no Washington court has addressed precisely the question presented here, Washington courts have a long, consistent history of protecting the freedom of sophisticated parties to organize their affairs through contract. Adopting the majority view would be consistent with that precedent; adopting the minority view would conflict with that jurisprudence.

1. Numerous Washington Cases Have Found No Unconscionability in Provisions More Suspect Than the One At Issue Here.

Despite the urging of Buyers, the Court of Appeals declined to apply the

UCC by analogy to this case. An analysis of Washington cases applying the UCC unconscionability standard should provide Buyers with no comfort. Whether or not this Court applies the UCC by analogy, it should affirm.

In *M. A. Mortenson Company, Inc. v. Timberline Software Corp.*, 140 Wn.2d 568, 585, 998 P.2d 305 (2000), this Court considered the enforceability of a limitation on consequential damages enclosed in a “shrinkwrap license” accompanying computer software. Mortenson purchased software from Timberline Software. A license to use the software was wrapped around the discs and stated that use of the software constituted an agreement that Timberline’s liability was limited to “the license fee paid for the right to use the programs.” *Mortenson*, 140 Wn.2d at 575.

The software erroneously produced a bid \$1.95 million too low, subjecting Mortenson to massive liability. Furthermore, a memorandum revealed that Timberline had learned of a flaw in the program and had sent corrected versions to some customers but not Mortenson. Despite this conduct and significant damages, Timberline moved to limit Mortenson’s remedies to a refund of the amount paid for the software. Mortenson argued that the provision was substantively unconscionable. The trial court granted summary judgment to Timberline. The Court of Appeals and this Court both affirmed.

First, the Court questioned whether a limitation of remedies provision in a commercial transaction can ever be substantively unconscionable. *Id.* at

586. The Court ruled that “even if the doctrine applies, the clause here is conscionable.” *Id.* The Court held that in commercial transactions, exclusionary clauses are *prima facie* conscionable and the burden of establishing unconscionability is on the party attacking it. *Id.* at 585-86. Thus, the party “in breach” was permitted to limit its liability to the money paid by the “non-breaching” party. No interest on that money was awarded.

In *Puget Sound Financial, LLC v. Unisearch, Inc.*, 146 Wn.2d 428, 47 P.3d 940 (2002), Unisearch performed searches for \$25 apiece, with knowledge that their customers lent significant sums. When the plaintiff loaned and lost \$100,000 due to a defective search, Unisearch offered only to reimburse the \$25 cost of the search. Its justification was that its invoices contained the statement “Liability Limited to Amount of Fee.” *Puget Sound*, 146 Wn.2d at 431. The trial court granted summary judgment to Unisearch; the Court of Appeals reversed. This Court reversed the Court of Appeals and affirmed the trial court.

The Court adopted the standard set forth in *American Nursery v. Indian Wells Orchard*, 115 Wn.2d 217, 220, 797 P.2d 477 (1990). The Court expressly noted that “whether the liability limitations clause was negotiated (or bargained for) is merely a factor and it is not necessarily the determinative factor in assessing the enforceability of the clause.” *Id.* at 440. Instead, the focus is on the manner in which the agreement was entered, whether the parties had an opportunity to understand the terms, and whether they were “hidden in a maze

of fine print.” *Id.* Without addressing substantive unconscionability, the Court concluded that the return of funds paid was the sole remedy available.

Another example of Washington authority that provides an analysis instructive to the present case pertains to exculpatory clauses. These cases also favor adopting the majority rule.

In *Scott v. Pacific W. Mountain Resort*, 119 Wn.2d 484, 490, 834 P.2d 6 (1992), a 12 year old boy suffered severe injuries while skiing. *Scott*, 119 Wn.2d at 488. The boy’s mother had filled out an application for the ski school that purported to hold the school and instructor harmless for injuries. *Id.* The Court of Appeals refused to uphold the exculpatory clause; this Court reversed.

In so doing, the Court restated the rule in Washington that exculpatory clauses are enforced unless (1) they violate public policy, (2) the negligent act falls greatly below the standard established by law for protection of others, or (3) they are inconspicuous. *Id.* at 492 (citing *Wagenblast v. Odessa Sch. Dist.* 105-157-166 J, 110 Wn.2d 845, 856, 758 P.2d 968 (1988) and *Shorter v. Drury*, 103 Wn.2d 645, 695 P.2d 116, *cert. denied*, 474 U.S. 827 (1985)).

In determining whether an exculpatory clause violates public policy, the Court considers six “characteristics” which may be considered in determining whether an exculpatory agreement violates public policy. They are:

- (1) whether the transaction concerns a business of a type generally thought suitable for public regulation;

(2) the party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public;

(3) the party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards;

(4) as a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services;

(5) in exercising a superior bargaining power, the party confronts the public with a standardized adhesion contract of exculpation and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence;

(6) as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents.

Vodopest v. MacGregor, 128 Wn.2d 840, 854-55, 913 P.2d 779 (1996) (citing *Wagenblast*, 110 Wn.2d 845 at 851-52).

While this standard is not directly analogous to the instant facts, it highlights the underlying purpose of all valid limitations on the freedom of contract: to protect those in need of protection from the unjust exercise of superior bargaining power. Thus understood, applying the majority rule to these Buyers is the fair and consistent result.

2. Buyers Are Not Entitled to the Heightened Protection of the “*Berg-Baker* Special Rule”.

Buyers urge this Court to consider the Agreements as “consumer

transactions” for the purpose of invoking an analysis which finds limitations of remedy clauses *prima facie* unconscionable and only to be enforced when they are “explicitly negotiated between buyer and seller” and the remedies excluded are “set forth with particularity.” *American Nursery*, 115 Wn.2d at 220. If this Court holds that real estate agents acquiring the real estate of their principal constitutes a “consumer transaction”, the Court will undermine a vast body of law mandating a lower standard on more worthy contracting parties.

Further, *American Nursery*, the one decision of this Court on which Buyers rely in support of their position, sows the seeds of their argument’s destruction. That decision holds: “[w]e have refused to apply the Berg requirements to negotiations between competent persons dealing at arm’s length, with no claim of an adhesion contract, when the contract contains a specific disclaimer and when the contract language is clear.” *American Nursery*, 115 Wn.2d at 224.

Thus, this Court is not chained to a label as to whether a party to a transaction is a “consumer” or engaged in “commerce.” “Consumers” engage in commerce every day; sometimes they even form entities through which to engage in commerce. For example, Ms. Torgerson chose to have title to her condominium through a “Torgerson Family Trust.” (TCP 8.)

What has mattered to courts, and should continue to matter, in determining whether to limit the freedom of contract is precisely what the Court

stated in *American Nursery*: whether the parties are “competent, dealing at arm’s length, with clear contractual language understood by all parties.” All of these factors favor enforcing the applicable provision here.

Buyers urge a mechanical analysis that ignores the competence of the parties and focuses strictly on whether a buyer acquires a product or service for “personal, family, or household reasons.” (Petition for Review, pp. 18-19.) Such an analysis undermines the purpose of the rule. The *American Nursery* analysis focuses on the parties at the time of contracting. If a sophisticated buyer acquires a lawn mower under a form contract that limits her remedies, courts do not have to “follow her home” to see if she uses the mower to cut her grass or start a landscaping business to cut the grass of her neighbors.²

3. The Provision Is Not Void Against Public Policy.

Courts can refuse to enforce contract language that “has a tendency to do evil, to be against the public good, or to be injurious to the public.” *Marshall v. Higginson*, 62 Wn.App. 212, 216-18, 813 P.2d 1275 (1991), *review dismissed*, 119 Wn.2d 1013 (1992).

In *Marshall*, an attorney compelled a client to sign an agreement not to

² Buyers also cite *American Nursery* in arguing that the remedy “fails its essential purpose.” “[A]n exclusive limited remedy fails of its essential purpose when there are unreasonable delays in providing the remedy or the party required to provide the remedy is unable to do so. An exclusive remedy has also been held to fail of its essential purpose when the party required to provide the remedy, by action or inaction, causes the remedy to fail or when defects in goods are not discoverable upon reasonable inspection.” *Id.* at 228. Here, there is no dispute that the remedy was offered timely and Sellers did not cause the remedy to fail. The doctrine does not apply.

sue her for malpractice before she would testify in a trial on the client's behalf. 62 Wn.App. at 214. The Court of Appeals refused to enforce the agreement.

It is obvious why it would harm the public good if attorneys could induce their clients to exculpate them for malpractice.³ However, Buyers cannot establish that their Agreements are void against public policy. The Court of Appeals noted that while the Agreement tended to invite breach by Sellers if the market went up, it also invited breach by Buyers if the market went down. (Op. at p. 7.) The court was comfortable with that allocation of risk.

Here, the undisputed facts show that Sellers did not terminate these Agreements because the market went up. 78 buyers signed the original agreements; LS Holdings honored all of them but the two with its fiduciaries, who had previously breached their fiduciary duties to Sellers. Thus, even if the Court disfavors the use of a provision like this to terminate an agreement based on market forces, it should still adopt the majority rule and make clear that the provision is not to be used in bad faith.

4. There is No Conflict Between the Instant Case and Any Appellate Decision, Although Clarity Governing Whether the UCC May Be Applied to Real Estate Cases May Assist Future Courts.

Buyers claims that three decisions of this Court conflict with the Court of Appeals' decision here: *Zuver v. Airtouch Communications, Inc.*, 153 Wn.2d

³ Indeed, the Rules of Professional Conduct specifically forbid making such agreements "unless permitted by law and the client is independently represented in making the Agreement." RPC 1.8(h)(1).

293, 317, 103 P.3d 753 (2004); *Scott v. Cingular Wireless*, 160 Wn.2d 843, 161 P.3d 1000 (2007); and *Yakima County (West Valley) Fire Protection Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 858 P.2d 245 (1993). They also cite two Court of Appeals decisions that allegedly conflict: Division Three's *Smith v. Skone & Connors Produce, Inc.*, 107 Wn.App. 199, 26 P.3d 981 (2001) and Division One's *Olmsted v. Mulder*, 72 Wn.App. 169, 863 P.2d 1355 (1994).

None of these cases conflict with the Court of Appeals' decision here. At most, they invite clarification from this Court about the applicability of the UCC by analogy to cases involving the sale of real estate.

In *Zuver*, an employee claimed a clause in her employment contract was substantively unconscionable. The provision barred her from collecting damages for her common law claims, but permitted Airtouch to recover such damages. *Zuver*, 153 Wn.2d at 318. The instant case does not conflict with *Zuver*. There, the Court was addressing a situation involving a vast power differential and a large disparity between the remedies afforded the two parties. Here, both sides were experts on the subject matter of the Agreement; if either side had superior bargaining power, it was Buyers, who were the trusted fiduciaries of Sellers.

The facts and reasoning in *Scott* are similarly not analogous. In *Scott*, Cingular Wireless inserted contractual language in agreements with cellular phone customers that forbade class action lawsuits and compelled individual

arbitrations. Given the small amount of individual damages, this virtually exculpated Cingular from any liability. Thus, the Court accepted direct review and found the provision substantively unconscionable.

Buyers claim that *Scott* is incongruous with the decision below because it held that “[c]ontract provisions that exculpate the author for wrongdoing, especially intentional wrongdoing, undermine the public good.” *Scott* at 854. However, the differences are manifest. The Agreement in the instant case specifically acknowledges the possibility that Buyers or Sellers may terminate the Agreement, and also limits the remedy of the other party. Second, it was not “wrongdoing” for Sellers to avoid the self-dealing transactions perpetrated by their fiduciaries. The fact that the enforcement was intentional does not make it wrongful.

In *Yakima County*, the Court found neither substantive nor procedural unconscionability in a series of “Outside Utility Agreements.” *Yakima County*, 122 Wn.2d at 392. However, the Court made a statement that putatively gives hope to Buyers’ attempt to find error in the lower court’s refusal to impose a UCC analysis. In citing the UCC unconscionability analysis in *Schroeder v. Fageol Motors, Inc.*, 86 Wn.2d 256, 544 P.2d 20 (1975), the Court stated:

Although the unconscionability issue in *Schroeder* arose under the Uniform Commercial Code, the above quoted portion as “part of a general exposition on unconscionability”, *Jeffery v. Weintraub*, 32 Wn.App. 536, 542, 648 P.2d 914 (1982) is applicable beyond the Uniform Commercial Code context.

Yakima Valley at 391.

Of course, the mere fact that the UCC's unconscionability analysis is applicable "beyond the UCC context" does not establish that it applies to the sale of real estate. Indeed, courts have held the contrary. *Olmsted*, 72 Wn.App. at 177; *Southcenter View Condominium Owners' Association v. Condominium Builders, Inc.*, 47 Wn.App. 767, 771, 736 P.2d 1075 (1986). In *Southcenter*, Division One expressly refused to apply the UCC by analogy to the sale of real estate. As the Court of Appeals points out in its opinion, this Court denied review. Op. at p. 6; *Southcenter*, 107 Wn.2d 1028 (1987).

Thus, there is no conflict: the UCC does not apply to the sale of real estate, but may be of assistance by analogy in some circumstances to aid courts in their common law analyses. If the Court finds the UCC's unconscionability analysis useful, it should apply it and affirm the result below.

The Court of Appeals cases cited by Buyers also pose no conflict with the instant case. *Olmsted* held that "[a]lthough the Uniform Commercial Code is not directly applicable to the sale of real estate . . . [w]e believe the reasoning of the UCC on the disclaimer of warranties is persuasive and can be applied by analogy in this case." *Id.* at 177-78. This Court denied review. *Olmsted*, 123 Wn.2d 1025 (1994).

Here, there is no conflict between a court using the UCC for "guidance" on disclaimers of warranty and a court declining to apply the UCC's

unconscionability analysis to the sale of real estate. The court found the analogy useful in one instance and uninformative in the other.

Smith bears even less relation to the instant case. In *Smith*, the court stated: “Although the UCC is not directly applicable to a consignor/commission merchant agreement, it can provide guidance on the definition of a written contract.” 107 Wn.App. at 205-06. But *Smith* does not at all pertain to real estate. Further, it was not the Court of Appeals that imposed a UCC analysis on the case; the trial court “assumed” that the UCC applied, and the Court of Appeals was justifying in hindsight what it acknowledged was an erroneous conclusion. *Id.*

In conclusion, Washington law strongly favors affirming the courts below and adopting the majority rule enforcing this contractual language.

B. Six of the Seven Foreign Jurisdictions That Have Considered “Return of Earnest Money” Clauses Have Enforced Them.

An overwhelming majority of courts that have addressed a “return of earnest money” limitation provision have enforced the language. This Court should adopt the majority view.

Buyers argue that such a rule would allow “the seller to breach virtually at will.”⁴ This has not resulted in the other jurisdictions, which still honor the

⁴ Petition for Review, p. 3 (citing *Guidelines for Exemptions under the Interstate Land Sales Full Disclosure Act*, 49 Fed.Reg. 31, 375 (1984)). As the Court of Appeals noted, Buyers did not claim that the ILSFDA applied until their reply brief on appeal, and thus the issue is not properly before the Court. (Op. at p. 7, fn. 12; RAP 2.5(a).)

freedom of contract while protecting their citizens from acts of bad faith.

Seven jurisdictions have addressed contractual provisions in real estate agreements that limit a buyer's remedy to the return of earnest money plus interest accrued thereon. Of those, six have upheld the language; only Florida has adopted Buyers' position. The jurisdictions where courts have upheld the language are: Alabama, Colorado, Idaho, Illinois, New York, and Utah (the latter through a federal district court case applying Utah law).⁵

1. A Case Applying Utah Law Provides the Most Thorough, Analogous Analysis.

The most factually analogous and recent of these decisions illustrates well why the provision should be enforced. In *Goodwin*, buyers proffered \$5,000 in earnest money. Their agreement provided:

If Seller defaults, Buyer agrees that Buyer's sole and exclusive remedy shall be to receive a return of Buyer's Earnest Money Deposits, the Options & Extras Deposit(s), if any, plus 10% interest thereon from the original deposit with Seller.

Goodwin, pp. 4-5.

Thereafter, Seller ("Hole No. 4") determined that it would take a loss on the Property if it sold to the Goodwins at the agreed price, so it chose to breach the Agreement and return the earnest money plus interest. *Id.*, p. 8.

⁵ *Hunter v. Wilshire Credit Corp.*, 927 So. 2d 810, 811 (Ala. 2005); *Washburn v. Thomas*, 37 P.3d 465 (Colo. 2001); *Doyle v. Ortega*, 125 Idaho 458, 872 P.2d 721 (1994); *O'Shields v. Lakeside Bank*, 335 Ill. App. 3d 834, 781 N.E. 2d 1114 (2002); *Scerbo v. Robinson*, 63 A.D. 2d 1096, 406 N.Y.S. 2d 370 (1978); *Goodwin v. Hole No. 4, LLC*, 2007 U.S. Dist. LEXIS 56271 (2007).

The Goodwins sued for specific performance or damages, but the trial court granted summary judgment to the Seller. The court held that the agreement “consistently and unambiguously refers to the Goodwins’ limited remedies . . . this finding of unambiguity is consistent with those of other jurisdictions.” *Id.* at 18.

The court rejected the alleged breach of the implied covenant of good faith and fair dealing. The court noted that, in addition to bargaining for the transfer of real estate, “the parties also bargained for the limitation of the Goodwins’ remedies in the event of Hole No. 4’s default.” *Id.* at 28. The court expressly denied that this purchase was a “consumer transaction”. *Id.* at 29.

The court rejected the claim of substantive unconscionability. After citing a standard similar to Washington’s, the court noted that: “[t]he Goodwins only succeed in showing that they agreed to a bargain that severely limits their legal remedies while providing advantages to Hole No. 4. This is not enough . . . [to] establish substantive unconscionability.” *Id.* at 31.

Then the court applied evidence in a way that this Court should find highly instructive: “Moreover, the court notes that there is no indication [the limitation of remedies provision] had a harsh or unreasonable effect on the Goodwins.” *Id.* Finally, the court rejected an argument made at length by Buyers in the instant case:

The Goodwins argue that paragraph 16 violates [Utah law] because

it allows Hole No. 4 to pick its deal. In other words, if a unit turns out to be worth more than the agreed upon price, Hole No. 4 can return the deposit and benefit from the appreciation of the property. But if the unit is worth less than the agreed upon price, Hole No. 4 can bind the buyers to the deal, forcing them to bear the loss from the depreciation. **But this argument is inapposite, if only because there is no evidence this occurred.**

Id. at 32 (emphasis added).

Here, the facts are similar in several respects. There is no harsh or unreasonable outcome for Buyers. Like the Goodwins, none of the Buyers took steps to move into their properties. Their housing situations were undisturbed. Like the Goodwins, Buyers were offered the return of their earnest money, plus interest accrued. Thus, they received the remedy provided for by the Agreement.

Finally, the facts are analogous because in both cases, while there was the *possibility* that a seller could use the provision to “pick its deal,” in neither case did that occur. Specifically, the evidence is that Sellers terminated the Agreements following knowledge of breaches of fiduciary duty by its agents. Buyers presented no evidence that Sellers either had the intent or achieved the effect of “picking its deal.”

The facts here are even more compelling in favoring enforcement. Unlike the Goodwins, Buyers are experts on real estate law. Not only were they generally knowledgeable, they were paid to be experts on this very Agreement.

In affirming the decision below, the Court may wish to make clear that it has no intent of allowing someone to “pick its deal” in bad faith. Sellers

believe that existing doctrines (such as the implied duty of good faith and fair dealing) already protect buyers in such circumstances.

2. Florida Refuses to Enforce Such Provisions with a Different Analysis Than Is Applied in Washington.

Florida generally accepts Buyers' arguments on the enforceability of these provisions.⁶ *Seaside Community Development Corp. v. Edwards*, 573 So. 2d 142 (1991) held that limitations of remedy are allowed only where the remedy is "mutual, unequivocal, and reasonable." *Seaside*, 573 So.2d at 147.

However, this "mutuality of obligation" theory has been expressly rejected in Washington. "Washington courts have long held that mutuality of obligation means both parties are bound to perform the contract's terms--not that both parties have identical requirements." *Zuver*, 153 Wn.2d at 317. Thus, Florida's analysis lacks persuasive value to this Court.⁷

C. Sellers Were the Prevailing Party in the Litigation Below and, If They Prevail Before This Court, Are Entitled to an Award of Attorney Fees Under Existing Law.

Buyers claim that the award of attorney fees to Sellers is not justified by

⁶ All of the cases Buyers cited in support of their quoted statement come from Florida courts except one: *Busman v. Beeren & Barry Investments, LLC*, 69 Va. Cir. 375 (2005). *Busman* does not apply, however, because in invalidating the limitation of remedies provision, the Court hinged its finding on the fact that interest was not included in the amount returned to the buyer. *Id.* at 379. Here, Buyers are entitled to all funds in the escrow account, including interest.

⁷ Even Florida courts will enforce an earnest money limitation of remedies provision if the facts sufficiently justify it. *Ament v. One Las Olas, Ltd.*, 898 So. 2d 147, 150 (2005) (where a purchaser "expressly waived the right to collect more" than the return of earnest money, "such a waiver must be enforced").

existing law because Sellers were a “breaching” party. They cite no Washington authority in support of this contention.

The trial court should have awarded fees and costs under either the “substantially prevailing party” approach of *Piepkorn v. Adams*, 102 Wn.App. 673, 10 P.3d 428 (2000) or the “proportionality approach” of *Marassi v. Lau*, 71 Wn.App. 912, 916, 859 P.2d 605 (1993) and *Transpac Development, Inc. v. Oh*, 132 Wn.App. 212, 130 P.3d 892 (2006).

The Court of Appeals correctly awarded Sellers their fees pursuant to RCW 4.84.330 under the former analysis. In discussing why the trial court did not err in refusing to enter a judgment in Buyers’ favor, the court explains well why the award of fees to Sellers is appropriate and not extraordinary:

Presumably, Buyers sought a judgment to claim prevailing party status under the attorney fees provision of the contract. But allowing such a result would thwart the purpose of the attorney fee provision by allowing the losing party to claim attorney fees based on an uncontested issue.

Op. at p. 13.

This litigation has always been about whether the real estate agents who sought to acquire the interest of their principal would be allowed to receive the property or limited to the remedy provided in the Agreement. As the courts below refused to reward the agents, Sellers prevailed in the litigation; the “judgment” per RCW 4.84.330 was a summary judgment. Pursuant to the Agreement, Sellers are entitled to their fees. Should this Court affirm that

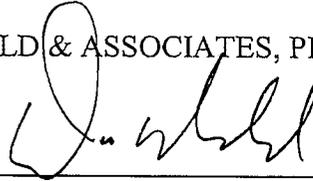
holding, fees are similarly appropriate both here and below.

V. CONCLUSION

Washington should adopt the majority rule and enforce the provision that limits a buyer's remedies to the return of her earnest money plus interest. To do otherwise would be to undermine decades of established law and unjustly enrich experienced real estate agents who breached fiduciary duties to their principals. The rule will allow the citizens of Washington the freedom to contract as they see fit, while still protecting people of substantially inferior bargaining power from abuse. Sellers' award of attorney fees should be affirmed.

RESPECTFULLY SUBMITTED this 21st day of July, 2008.

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No. 80623-3

SUPREME COURT OF WASHINGTON

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

Petitioners,

v.

ONE LINCOLN TOWER, LLC; BELLEVUE MASTER, LLC; and LS
HOLDINGS, LLC,

Respondents.

APPEAL FROM THE COURT OF APPEALS
DIVISION ONE

**APPENDIX TO RESPONDENTS' SUPPLEMENTAL BRIEF
UNPUBLISHED OPINION OF DIVISION ONE IN
*MILLER V. ONE LINCOLN TOWER***

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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

Appellants/
Cross-Respondents.)

v.

ONE LINCOLN TOWER LLC, a
Delaware limited liability company;
BELLEVUE MASTER, LLC, a
Delaware limited liability company; LS
HOLDINGS, LLC, a Washington
limited liability company,

Respondents/
Cross-Appellants.)

No. 58030-2-1
(consolidated with 58031-1-1)

DIVISION ONE

UNPUBLISHED OPINION

FILED: June 18, 2007

AGID, J. -- Appellants were real estate agents for a planned condominium development who bought units for themselves. The contracts provide that if Buyers breach, Sellers are entitled to keep the deposit as liquidated damages, but if Sellers breach, Buyers are limited solely to the return of their deposits. Sellers breached and offered to return Buyers' deposits. Buyers refused and sued, claiming they were entitled to compensatory damages or specific performance. They assert the provision limiting damages is unenforceable because it is unconscionable and fails its essential

purpose under the Uniform Commercial Code (UCC). Alternatively, Buyers assert the provision is contrary to public policy. Sellers prevailed on summary judgment, where they admitted breach but argued that Buyers' remedies were limited by the contract. We decline to extend the UCC's protections to cover real estate contracts and hold that under the circumstances presented here, the provision limiting remedies does not contravene public policy. The contracts were enforceable, and we affirm the trial court's summary judgment decision. But we reverse the trial court's decision not to award Sellers attorney fees and costs because, as prevailing parties, they were entitled to their fees and costs under the contract.

FACTS

Respondent, One Lincoln Tower, LLC, was the developer of a large mixed-use building project in downtown Bellevue of the same name. Respondent, Bellevue Master, LLC, was the legal entity selling the condominium units for One Lincoln Tower, LLC. Appellants Michael Miller, Vicki Ringer, and Joanne Faye Torgerson, were real estate agents authorized to list and sell units in the project. In summer 2001, Appellants contracted to purchase condominium units in One Lincoln Tower for themselves. Buyers Miller and Ringer paid \$5,000 up front and assigned \$11,611 of their real estate commission, to be paid seven days before closing, equaling a five percent deposit on their condominium's \$332,220 purchase price. Buyer Torgerson paid \$5,000 up front and assigned \$126,000 of her real estate commission, to be paid at closing, equaling a 10 percent deposit on her condominium's \$1,310,000 purchase price. Paragraph 21 of the real estate contracts contained a provision limiting remedies in the event of breach, which provided in relevant part:

If Buyer fails, without legal excuse, to close this transaction as and when required by this Agreement, Seller may terminate this Agreement and all of the rights granted to Buyer herein and retain the Deposit and any interest earned thereon as its sole and exclusive remedy . . . any default by Seller under this Agreement . . . shall enable Buyer, as its sole and exclusive remedy, to terminate this Agreement and recover from Seller the portion of the Deposit paid by Buyer

Sellers also had Buyers sign a separate document to confirm that they understood that Sellers would retain their deposits as liquidated damages in the event of Buyers' breach.¹ Neither this document nor the contract explained what remedies were excluded. Buyers' contracts also provided that if their units were not substantially completed by December 31, 2003, they had the right to rescind their contracts and have their deposits returned.

In December 2001, Sellers amended their standard form contract for all later buyers. The amended version of the remedies provision granted those buyers the right to the return of their deposits in the event of Sellers' breach and allowed them to seek any remedies except compensatory or punitive damages. Miller and Torgerson, as real estate agents for the project, were made aware of the sales contract changes by email and asked for their comments.

On August 27, 2003, One Lincoln Tower, LLC, and Bellevue Master, LLC, assigned their interests in the sales contracts to Respondent LS Holdings, LLC. On December 17, 2003, all buyers received a letter from the condominium complex, signed by Appellant Vicki Ringer, stating that, despite the change in ownership and the need to "redocument" the purchases, buyers still had the right to purchase their units for the

¹ For convenience, we refer to Respondents One Lincoln Tower, LLC, and Bellevue Master, LLC, who were both involved in selling the units, as Sellers and refer to Appellants collectively as Buyers.

same price and any changes in the new contracts would be minimal. On May 3, 2004, LS Holdings, LLC, unilaterally terminated the contracts with Buyers and authorized the release of their respective \$5,000 deposits.

On November 1, 2004, Buyers filed complaints against Sellers for breach of contract. They sought compensatory damages or, in the alternative, specific performance, and attorney fees and costs. Sellers answered, admitting breach but asserting that Buyers remedies were limited by contract to the return of their \$5,000 deposits, and filed a counterclaim for rescission based on breach of Buyers' fiduciary duties as real estate agents for the project. On March 11, 2005, Sellers moved for summary judgment, asking the court to enforce the contract provision limiting Buyers' remedies and dismiss the action upon repayment of the \$5,000 deposit plus any interest accrued. On April 26, 2005, Buyers responded and filed a cross motion for summary judgment. They argued that the provision limiting remedies was unconscionable and unenforceable, and asked for leave to amend their complaints to include claims for promissory estoppel. On May 6, 2005, the trial court heard the summary judgment arguments on the provision limiting remedies in both cases together. The court granted Sellers' summary judgment motions, denied Buyers' cross motions, ordered Sellers to return Buyers' deposits within five days, did not award either side attorney fees, and stated it would dismiss the case upon proof that Sellers had returned Buyers' deposits.² On May 20, 2005, Sellers moved for attorney fees and confirmation of dismissal. On May 23, 2005, Buyers again moved to amend their complaints to add claims for

² There is no proof in the record, other than Sellers' assertions, that Sellers tendered and Buyers refused the deposit money, both before Buyers filed suit and in response to the trial court's order granting Sellers summary judgment on the damages issue.

promissory estoppel. That same day, Buyers also moved to revise the order granting summary judgment in favor of Sellers on the issue of damages. On June 7, 2005, the trial court denied Buyers' motions to amend their complaints and denied their motions for revision. Buyers and Sellers also filed cross motions for summary judgment on Sellers' counterclaims for rescission. The court denied both motions and dismissed the counterclaims as moot because the earlier summary judgment motions granted Sellers the same relief. On June 16, 2005, the trial court denied Sellers' requests for attorney fees. Buyers appeal and Sellers cross appeal.

I. Motion to Supplement the Record

As a threshold matter, we must decide whether to consider supplemental documents from a federal case involving some of the same parties. Buyers ask us to take judicial notice of these documents under ER 201 or, alternatively, to supplement the record with these documents under RAP 9.6. Buyers seek to include the documents from this federal case to show that they did not violate any fiduciary duty they owed to Sellers. This information would be relevant only if the trial court granted Sellers' motions for rescission based on the claimed breach of fiduciary duty, which it did not.

We cannot take judicial notice of records from separate judicial proceedings, even if those proceedings involve the same parties.³ RAP 9.11 allows this court to consider additional evidence if it is necessary to fairly resolve the issues on review. But because the additional evidence offered is not relevant to the resolution of this case, we deny the motion and have not considered the documents.

³ Spokane Research & Defense Fund v. City of Spokane, 155 Wn.2d 89, 98, 117 P.3d 1117 (2005) (citing In re Adoption of B.T., 150 Wn.2d 409, 415, 78 P.3d 634 (2003)).

II. Applicability of UCC

Buyers argue the trial court erred in granting summary judgment in favor of Sellers because the contract provision limiting remedies was unconscionable and fails its essential purpose under the UCC.⁴ Buyers contend we should apply these UCC provisions to this contract for the sale of real estate.

When reviewing a summary judgment decision, we engage in the same inquiry as the trial court.⁵ Although the Washington Supreme Court has held that the unconscionability doctrine may be applied by analogy beyond the UCC context,⁶ no Washington court has applied UCC principles in the real estate context. And, in Southcenter View Condominium Owners' Ass'n v. Condominium Builders, Inc. we explicitly stated that the UCC does not apply to contracts for the sale of real estate and declined to apply its provisions by analogy.⁷ Because Buyers present nothing to persuade us that we need to revisit that holding, we decline to consider their UCC-based unconscionability and failure of essential purpose arguments.

III. Public Policy

We can invalidate a contract provision on public policy grounds.⁸ A contract provision contravenes public policy if, regardless of the intent of the parties, the

⁴ See RCW 62A.2-719(3) (dealing with unconscionability); see also RCW 62A.2-719(2) (dealing with failure of essential purpose).

⁵ M.A. Mortenson Co., Inc. v. Timberline Software Corp., 140 Wn.2d 568, 577, 998 P.2d 305 (2000) (citing Hertog v. City of Seattle, 138 Wn.2d 265, 275, 979 P.2d 400 (1999)).

⁶ Yakima County (W. Valley) Fire Protection Dist. No. 12 v. City of Yakima, 122 Wn.2d 371, 391, 858 P.2d 245 (1993) (citing Jeffery v. Weintraub, 32 Wn. App. 536, 542, 648 P.2d 914 (1982)).

⁷ 47 Wn. App. 767, 771, 736 P.2d 1075 (1986), review denied, 107 Wn.2d 1028 (1987) (citing RCW 62A.2-102).

⁸ Marshall v. Higginson, 62 Wn. App. 212, 216-18, 813 P.2d 1275 (1991), review dismissed, 119 Wn.2d 1013 (1992).

provision as written "has a 'tendency to evil,' to be against the public good, or to be injurious to the public."⁹

We are not convinced that a contract provision limiting remedies for breach of a real estate contract has a tendency to promote evil. Buyers rely on our holding in Marshall v. Higginson that it is against public policy to allow an attorney to make a contract conditioning her willingness to testify at a former client's trial on his promise not to sue her for malpractice.¹⁰ Allowing contracts like the one in Marshall clearly promotes injury to the public by allowing attorneys to limit their liability by misleading their former clients and undermines respect for the legal profession.¹¹ In contrast, here, the provision limiting remedies is not clearly injurious to the public. While allowing condominium sellers to limit buyers' damages in the event of a breach to the return of their deposits would tend to promote breach by sellers whenever the fair market value of the condominium increases between presale and completion, allowing buyers to limit their damages to the loss of a deposit tends to promote breach by buyers if the housing market takes a downturn. We hold that this agreed upon allocation of risk, which limits liability for both parties, does not violate public policy.¹²

⁹ Id. at 216 (quoting Golberg v. Sanglier, 27 Wn. App. 179, 191, 616 P.2d 1239 (1980), rev'd on other grounds, 96 Wn.2d 874, 639 P.2d 1347, 647 P.2d 489 (1982)).

¹⁰ 62 Wn. App. 212, 218, 813 P.2d 1275 (1991).

¹¹ Id.

¹² In their reply brief, Buyers also argue the limitation on remedies provision is not enforceable because it violates the Interstate Land Sales Act (ILSA). Buyers did not raise this argument below, and we decline to consider it under RAP 2.5(a).

IV. Denial of Leave to Amend Complaint

We review a trial court's denial of a motion to amend for abuse of discretion.¹³ A trial court abuses its discretion when its decisions are manifestly unreasonable or based on untenable grounds or reasons.¹⁴ Civil Rule 15(a), which governs amendments to pleadings, states that leave to amend "shall be freely given when justice so requires." But a court "may consider whether the new claim is futile or untimely."¹⁵

Here, Sellers contend that Buyers' motions to amend were both untimely and futile. We agree. Buyers filed their motions to amend after the court denied their cross motions for summary judgment. Buyers argue that they first asked to amend in their motions for summary judgment. Although Buyers included a request to amend their complaint to add a promissory estoppel claim in their initial cross motions for summary judgment, they failed to attach a proposed amended pleading as required by CR 15(a), which explains why the trial court did not rule on this request in its order denying Buyers' cross motions for summary judgment.

Further, justice did not require the court to allow Buyers to add a promissory estoppel claim because such a claim would not have succeeded on the merits. Buyers' promissory estoppel claim is based on their supposed reliance on the December 17, 2003 letter to One Lincoln Tower buyers, designed to assure them that, despite the change in ownership and the need to "redocument" their purchases, the contract price of their units would not go up and any changes to the contracts would be minimal. Nothing in the letter modifies the earlier contract provision limiting Buyers' remedies in

¹³ Travis v. Tacoma Pub. Sch. Dist., 120 Wn. App. 542, 554, 85 P.3d 959 (2004) (citing Ino Ino, Inc. v. City of Bellevue, 132 Wn.2d 103, 142, 937 P.2d 154, 943 P.2d 1358 (1997), cert. denied, 522 U.S. 1077).

¹⁴ Id. (citing Boeing Co. v. Heidy, 147 Wn.2d 78, 90, 51 P.3d 793 (2002)).

¹⁵ Id. (quoting Ino Ino, Inc., 132 Wn. 2d at 142).

the event of Sellers' breach. Additionally, the letter was signed by Vicki Ringer, one of the Buyer-Appellants. Clearly, Buyers were aware of the letter when they filed their initial complaints. If Buyers wanted to claim that one of them induced the others to rely to their detriment on this letter, they could have raised a promissory estoppel claim in their original complaints. Thus, it was not manifestly unreasonable for the trial court to deny Buyers' motions to amend.

V. Denial of Motions to Revise

Buyers claim that the trial court erred by denying their motions to revise the orders granting Sellers' summary judgment motions on the limitation of remedies issue and ordering that the complaint would be dismissed upon proof that Sellers returned Buyers' deposits within five days of the order. Buyers argue the court should not have dismissed their complaints because Sellers admitted to breaching the contract. Instead, they contend the trial court should have entered judgment in their favor but limited damages to the return of their deposits. Buyers cite no case law, statute, or court rule to suggest that the court's decision to dismiss these cases, where the only issue was decided against Buyers on summary judgment, rather than entering a formal judgment constitutes reversible error. Under RAP 10.3(a)(6), this court will not address arguments that are unsupported by authority.¹⁶

Further, Buyers fail to explain why it matters that the trial court chose to dismiss the cases upon proof of return of the deposits instead of entering judgment in their favor. Presumably, Buyers sought a judgment to claim prevailing party status under the attorney fees provision of the contract. But allowing such a result would thwart the

¹⁶ Hines v. Todd Pac. Shipyards Corp., 127 Wn. App. 356, 368, 112 P.3d 522 (2005).

purpose of the attorney fees provision by allowing the losing party to claim attorney fees based on an uncontested issue.

Buyers also claim the court entered the order in violation of CR 54(f)(2) because they were given only four days' notice rather than five. Buyers did not raise this argument in their original motion for revision, and we decline to consider it under RAP 2.5(a). Finally, Buyers contend that under the contract they were entitled not only to the return of their earnest money deposits but also to an amount equal to their assigned commissions. But since their assigned commissions were not due until closing or immediately before closing, this value never passed to Sellers. We hold that the trial court did not err in denying Buyers' motions for revision.

VI. Sellers' Rescission Claims

The trial court denied both Buyers' and Sellers' motions for summary judgment and dismissed Sellers' claims for rescission as moot because the court had already granted Sellers the same relief by granting their summary judgment motions on the damages issue. When an issue becomes moot before trial, we generally decline to review it in order to "avoid the danger of an erroneous decision caused by the failure of parties, who no longer have an existing interest in the outcome of a case, to zealously advocate their position."¹⁷ Because the trial court had already granted relief, it correctly determined the rescission issue was moot.

¹⁷ Orwick v. City of Seattle, 103 Wn.2d 249, 253, 692 P.2d 793 (1984).

VII. Attorney Fees

“The general rule in Washington is that parties may not recover attorney fees except under a statute, contractual obligation, or some well-recognized principle of equity.”¹⁸ Here, the contract provides for attorney fees and costs at trial and on appeal:

The prevailing party in any litigation concerning this Agreement shall be entitled to be paid its court costs and reasonable attorneys' fees by the party against whom judgment is rendered, including such costs and fees as may be incurred on appeal.

The trial court ruled that Sellers were not entitled to attorney fees below under the contract because “judgment” was not rendered against Buyers.

The court erred in interpreting “judgment” so narrowly. A more flexible reading of the attorney fees provision is supported by our holding in Piepkorn v. Adams that the term “prevailing party” in a bilateral contract should be interpreted to mean the substantially prevailing party.¹⁹ Summary judgment is a kind of “judgment.” Here, the court entered summary judgment in favor of Sellers and against Buyers and dismissed the case. Thus, Sellers are the prevailing party under the contract and the court should have ordered Buyers, as the parties against whom summary judgment was rendered, to pay Sellers' reasonable attorney fees and costs. For the same reason, Sellers are entitled to attorney fees and costs on appeal under RAP 18.1.

¹⁸ Quality Food Centers v. Mary Jewell T, LLC, 134 Wn. App. 814, 817, 142 P.3d 206 (2006) (citing N. Pac. Plywood, Inc. v. Access Rd. Builders, Inc., 29 Wn. App. 228, 236, 628 P.2d 482, review denied, 96 Wn.2d 1002 (1981)).

¹⁹ 102 Wn. App. 673, 686, 10 P.3d 428 (2000) (citing Marassi v. Lau, 71 Wn. App. 912, 916, 859 P.2d 605 (1993)).

We affirm the trial court's entry of summary judgment in favor of Sellers and reverse its decision not to award attorney fees and costs. We remand with instructions to award Sellers reasonable attorney fees and costs incurred below and on appeal.

Azid, J.

WE CONCUR:

Cox, J.

Baker, J.