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66071-3

No. 66071-3-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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SHARON HANKS, an individual,

*Respondent,*

v.

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

*Appellants.*

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**REPLY BRIEF OF APPELLANTS**

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## ARGUMENT

1. **There is no substantial evidence to support the jury's verdict that Appellants' negligence was a proximate cause of Respondent's damages.**

Respondent's theory of the case is that Appellant's "negligence caused a lengthy delay in the eventual sale of her home for a greatly reduced price." Brief of Respondent at 13. Respondent's theory is pure speculation and not supported by substantial evidence. "Proximate cause" requires that "(1) the cause produced the event in a direct sequence unbroken by any superseding cause, and (2) the event would not have happened in the absence of the cause." WPI 15.01.01. Respondent properly characterizes the issue in part as whether, "but for [Appellants'] negligence, [Respondent] would have sold her home sooner and for a much higher price." Brief of Respondent at 13. However, this same argument was made and rejected in *Boguch v. Landover Corporation*, 153 Wn.App. 595, 224 P.3d 795, 803-05 (2009).

Here, as in *Boguch*, Respondent's claim is based entirely on speculation. "In the absence of evidence that some person would have likely purchased the property on terms more favorable to [the seller] than those of the eventual sale, [the seller's] assertion, based on circumstantial evidence, that his realtors' [sic] alleged negligence was the proximate

cause of his purported financial loss does not rise above speculation.” 224 P.3d at 805.

“A judgment [as a matter of law] is proper when, viewing the evidence and reasonable inferences therefrom most favorable to the nonmoving party, the court can say as a matter of law that there is no substantial evidence supporting the verdict. . . . Evidence is substantial if it would convince an unprejudiced, thinking mind of the truth of the declared premise.” *Cowsert v. Crowley Maritime Corp.*, 101 Wn.2d 402, 405, 680 P.2d 46 (1984).

Here, as in *Boguch*, there is no evidence in the record that any other buyers “would have likely purchased the property on terms more favorable to [the seller] than those of the eventual sale.” 224 P.3d at 805. The only prospective buyers for Respondent’s house were (1) Robert Alia, who at best expressed interest in Respondent’s house, but who never made a written offer on Respondent’s house and who actually bought another house *before* Appellants’ negligent conduct, (2) Grimes, who could not get financing, and (3) Graces, who also could not get financing. The jury found that Appellants were not negligent with respect to Alia. And, Respondent testified that she would not have accepted Grimes’ offer had she known they had to sell their house before buying hers. In other words, with or without Appellants’ negligence, Respondent would have found

herself in the same position. There is no evidence that Respondent would have sold her house sooner or at a higher price, but for Appellants' negligence. It is pure speculation and the jury is not permitted to speculate. The verdict was based on sympathy for Respondent – not evidence.

Contrary to Respondent's contention, Respondent's home was *not taken off the market* while the Grimes' transaction was pending. The listing was published continuously in the NWMLS between March 10, 2008 and May 26, 2008, first as "pending inspection" and then as "pending." Ex. 50. The listing was still published in NWMLS and other members of NWMLS were free to present backup offers during that period. The listing was only taken off the market when Respondent cancelled the listing on June 26, 2008. Ex. 15 and 50.

**2. Respondent released Appellants from any liability arising out of the failed Grimes transaction.**

First, waiver does not require consideration. "As a waiver in Washington is unilateral (*Bowman v. Webster*, 44 Wn.2d 667, 269 P.2d 960 (1954), *Kessinger v. Anderson*, 31 Wn.2d 157, 196 P.2d 289 (1948)), there can be a waiver without consideration as well." *Gorge Lumber Co. v. Brazier Lumber Co.*, 6 Wn.App. 327, 335-36, 493 P.2d 782 (1972).

Second, even if consideration were required, there was consideration for the release: (1) Appellants continued to represent

Respondent in the sale of her house, and (2) Graces offered to buy the house personally. Contrary to Respondent's contention, Appellants were not obligated to continue to represent Respondent after the Grimes transaction failed. The Law of Real Estate Agency provides that either party to an agency relationship may terminate the relationship at any time simply by notifying the other party of the termination.

“(1) The agency relationships set forth in this chapter commence at the time that the licensee undertakes to provide real estate brokerage services to a principal and continue until the earliest of the following:

...

(d) Termination of the relationship by notice from either party to the other.”

RCW 18.86.070.

Had Respondent refused to release Appellants from potential claims arising out of the Grimes transaction, Appellants would have terminated their relationship with Respondent, as an agency relationship requires trust and confidence between the parties.

Respondent cannot possibly argue that Graces were obligated to buy her house. Certainly, Graces would not have agreed to buy Respondent's, if Respondent had attempted to reserve a potential claim against Appellants.

**3. The only actual damages proximately caused by Appellants' negligence was one-half of the earnest money on the Grimes transaction.**

As discussed above, Respondent did not show that she lost any other prospective buyers as a result of the Grimes transaction. At most, if the Grimes transaction was not contingent of the sale of their house, then Grimes should have forfeited their earnest money of \$5,000, of which Respondent would have been entitled to one-half, or \$2,500.

Although not directly on point, *Merkley v. MacPherson's, Inc.*, 69 Wn.2d 776, 420 P.2d 205 (1966) is analogous. In *Merkley*, the broker procured a buyer for the seller's apartment building and represented to the seller that the buyer had signed a promissory note for \$2,700 as earnest money. The buyer refused to close the transaction, claiming that the broker had misrepresented the income from the apartments. When the seller attempted to collect the note from the buyer, the broker was unable to produce the note, because the broker had neglected to procure a note from the buyer. As here, the purchase and sale agreement provided that in the event of a forfeiture of the earnest money by the buyer, the seller and broker each would be entitled to one half of the earnest money. The seller sued the broker seeking to recover the entire earnest money deposit of \$2,700. The Supreme Court affirmed the trial court's judgment limiting

the seller's recovery to the half of the earnest money that should have been forfeited to the seller, but for the broker's negligence.

Here, Respondent assumed the risk that Grimes might not be able to get financing, as the purchase and sale agreement was expressly conditioned upon their ability to obtain a purchase loan. Ex. 5. Grimes could not obtain financing without first selling their present home. Respondent signed a rescission agreement releasing Grimes from any further obligations under the purchase and sale agreement and instructing the closing agent to refund the earnest money to Grimes in full. Ex. 13.

However, if the Hanks-Grimes purchase and sale agreement was not conditioned upon the sale of Grimes' present home, then Grimes' inability to sell their present home did not excuse their performance, such that Grimes' earnest money should have been forfeited to Respondent and Appellants, equally. Since Respondent offered no evidence that any other prospective buyers were lost between March 10, 2008 (the date of the sale) and May 26, 2008 (the date of the rescission), Respondent's actual damages should be limited to one-half of the earnest money, as that was her only loss caused by Appellants' negligence.

**4. This court may set aside the jury verdict, if not supported by substantial evidence, regardless of whether Appellants timely moved for judgment as a matter of law.**

There is nothing in the court rules that requires a party to move for a directed verdict or judgment as a matter of law as a condition to challenging a jury verdict on appeal as not being supported by substantial evidence.

But, even if applicable, CR 50 is ambiguous, in that it does not clearly state that a party *must* make a motion for judgment as a matter of law at the close of the plaintiff's case as a condition to making such a motion after the jury returns a verdict. At best, it is implied by stating that a party "*may renew* its request for judgment as a matter of law by filing motion no later 10 days after entry of judgment." (Emphasis added.)

The judicial council comments are not part of the court rules in Washington. *State v. O'Connor*, 155 Wn.2d 335, 119 P.3d 806 (2005). *Miller v. Arctic Alaska Fisheries Corp.*, 133 Wn.2d 250, 944 P.2d 1005 (1997), cited by Respondent, is not on point, because rule at issue in *Miller* (ER 904) had no federal counterpart.

Even if CR 50 requires a motion for judgment as a matter of law at the close of the plaintiff's case, this court may and should excuse non-compliance by Appellants to serve the ends of justice where no prejudice to Respondent has been shown. The comment to the 2005 amendment to CR 50 cites as the sole reason for the change "the administration of justice because the parties and/or the court can correct possible errors before the

verdict.” 4 WASHINGTON PRACTICE, RULES PRACTICE CR 50, Note 15 (5<sup>th</sup> ed.). This reason is illogical. A motion for judgment as a matter of law at the close of the plaintiff’s case, by definition, is made *after* the plaintiff has rested. There is no opportunity for the plaintiff to cure a deficiency in the proof after the plaintiff has rested. To the contrary, the administration of justice is better served by permitting a party to bring a motion for judgment as a matter of law after the jury has returned a verdict, where the verdict obviously was arrived at as a result of sympathy and passion for Respondent’s circumstance in having lost her husband.

In *Scannell v. State*, 128 Wn.2d 829, 833-34, 912 P.2d 489 (1996), the Supreme Court held that leniency was warranted and granted an extension of time for filing a notice of appeal, where the petitioner was confused over a change in the appellate rules, used reasonable diligence in carefully following the prior rules, and made a good faith attempt to timely file his notice of appeal. 128 Wn.2d at 834-35.

CR 1 provides that the civil rules “shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.”

RAP 1.2 provides in part as follows:

**(a) Interpretation.** These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis

of compliance or noncompliance with these rules except in compelling circumstances where justice demands. . .

. . .

**(c) Waiver.** The appellate court may waive or alter the provisions of any of these rules in order to serve the ends of justice. . . .

So, regardless of whether CR 50 requires a motion for judgment as a matter of law at the close of the plaintiff's case, this court has authority to set aside the jury verdict, if not supported by substantial evidence.

**5. Noneconomic damages for emotional distress cannot be awarded for simple negligence.**

Noneconomic damages for emotional distress may be awarded only upon proof of an *intentional* tort. As explained by the Supreme Court:

“The distinction in treatment between negligence and intentional torts is related to the difference in fault. Society through its courts has a ‘definite tendency to impose greater responsibility upon a defendant whose conduct was intended to do harm, or was morally wrong.’ PROSSER AND KEETON ON THE LAW OF TORTS § 8, at 37 (W. Page Keeton et al. eds., 5th ed. 1984). Courts generally establish rules which make liability more likely to attach to intentional wrongdoers than to those who are merely negligent. *Id.* Washington is no exception to this rule. In *Smith v. Rodene*, 69 Wn.2d 482, 418 P.2d 741, 423 P.2d 934 (1966), this court stated:

‘We think that a fair summary of the holdings in such cases is as follows: (1) Where plaintiff suffers mental or emotional distress which is caused by some *negligent* act of the defendant, there is no

right of action, even although the mental condition in turn causes some physical injury; unless the act causing the mental fright or emotional distress also threatens an immediate physical invasion of plaintiff's personal security, that is, threatens immediate bodily harm. (2) But where mental suffering or emotional distress is caused by a *wilful* act, recovery is permitted.'

*Id.* at 488-89, 418 P.2d 741 (citations omitted) (quoting *United States v. Hambleton*, 185 F.2d 564, 565 (9th Cir.1950)). Again in *Schurk v. Christensen*, 80 Wn.2d 652, 497 P.2d 937 (1972), the rule was stated: 'By a long line of decisions in this state, we have, as a general rule, denied recovery for mental anguish and distress in cases not involving malice or wrongful intent, unless there has been an actual invasion of a plaintiff's person or security, or a direct possibility thereof.' *Schurk*, 80 Wn.2d at 655, 497 P.2d 937.

"We continue to be more likely to allow recovery of emotional distress damages for intentional acts than for negligent ones. *See, e.g., White River Estates v. Hiltbruner*, 134 Wn.2d 761, 766, 953 P.2d 796 (1998) (holding that emotional distress damages may be a remedy for a statutory violation only if that violation sounds in intentional tort); *Birchler v. Castello Land Co.*, 133 Wn.2d 106, 942 P.2d 968 (1997) (allowing recovery of emotional distress damages where there was an intentional interference with property interests); *Nord v. Shoreline Sav. Ass'n*, 116 Wn.2d 477, 483, 805 P.2d 800 (1991) (emotional distress damages have been allowed as part of the recovery for intentional wrongdoing without reference to whether the emotional distress claimed was severe); *Cagle v. Burns & Roe, Inc.*, 106 Wn.2d 911, 916, 726 P.2d 434 (1986) (damages for emotional distress available upon proof of an intentional tort)."

*Kloepfel v. Bokor*, 149 Wn.2d 192, 66 P.3d 630 (2003). See also, *Bunch v.*

*King County Dept. of Youth Services*, 155 Wn.2d 165, 116 P.3d 381

(2005) (employment discrimination); *Berger v. Sonneland*, 144 Wn.2d 91, 26 P.3d 257 (2001) (unauthorized disclosure of confidential patient information); *Nord v. Shoreline Sav. Ass'n*, 116 Wn.2d 477, 805 P.2d 800 (1991) (fraud and breach of fiduciary duty); *White River Estates v. Hiltbruner*, 134 Wn.2d 761, 953 P.2d 796 (1998) (intentional violation of the Mobile Home Landlord-Tenant Act); *Birchler v. Castello Land Co., Inc.*, 133 Wn.2d 106, 942 P.2d 968 (1997) (timber trespass); *Herring v. Dep't of Soc. & Health Servs.*, 81 Wn.App. 1, 914 P.2d 67 (1996) (employment discrimination); *Miotke v. Spokane*, 101 Wn.2d 307, 678 P.2d 803 (1984) (public nuisance); *Cherberg v. Peoples Nat'l Bank*, 88 Wn.2d 595, 564 P.2d 1137 (1977) (intentional interference with business relationships); *Rasor v. Retail Credit Co.*, 87 Wn.2d 516, 554 P.2d 1041 (1976) (intentional violation of the fair credit reporting act); *Wilson v. Key Tronic Corp.*, 40 Wn.App. 802, 701 P.2d 518 (1985) (nuisance); *McRae v. Bolstad*, 32 Wn.App. 173, 646 P.2d 771 (1982), *affirmed on other grounds*, 101 Wn.2d 161, 676 P.2d 496 (1984) (fraudulent concealment); *Odom v. Williams*, 74 Wn.2d 714, 446 P.2d 335 (1968) (malicious prosecution); *Nordgren v. Lawrence*, 74 Wash. 305, 133 P. 436 (1913) (landlord's unlawful entry); *Wright v. Beardsley*, 46 Wash. 16, 89 P. 172 (1907) (desecration of deceased's body); *McClure v. Campbell*, 42 Wash. 252, 84 P. 825 (1906) (wrongful eviction); *Davis v. Tacoma Ry. & Power*

*Co.*, 35 Wash. 203, 77 P. 209 (1904) (defamation of character); and *Willson v. Northern Pac. R.R. Co.*, 5 Wash. 621, 32 P. 468, 34 P. 146 (1893) (wrongful expulsion by a railroad carrier).

To the extent that *Whaley v. State, Dept. of Social and Health Services*, 90 Wn.App. 658, 956 P.2d 1100 (1998) conflicts with the above authorities, it is not an accurate statement of the law.

Even if *Whaley* were good law, it is easily distinguishable from this case. *Whaley* involved a provider of specialized day care for school aged children with developmental disabilities.

“The scope of any duty is bounded by the foreseeable range of danger. A defendant who is under a duty of care is liable for emotional distress caused by a breach of that duty if emotional distress was a field of danger that the defendant should reasonably have anticipated and guarded against.

...

“It is therefore not unforeseeable as a matter of law that creating false statements and attributing them to [the child] would cause him emotional distress. Nor was it unforeseeable that a normally constituted mother of such a child would also experience mental suffering as the result of this conduct. A jury could thus find that the plaintiffs’ emotional damage was within a general field of danger that the staff at Northwest’s Child, as part of their professional duty of care in the use of [facilitated communication], should have anticipated and guarded against.”

90 Wn.App. at 674-75.

This case involves real estate brokerage services – not a provider of specialized day care for school aged children with developmental

disabilities. No reported Washington case has ever held a real estate broker liable for noneconomic damages for emotional distress or mental suffering without objective symptoms.

In *McRae v. Bolstad*, 32 Wn.App. 173, 646 P.2d 771 (1982), *affirmed*, 101 Wn.2d 161, 676 P.2d 496 (1984), the court affirmed a judgment against a real estate broker who fraudulently concealed from the buyers chronic sewage and drainage problems.

“Mental suffering, to be compensable, must be manifested by objective symptoms though actual physical impact need not be shown. *Corrigal v. Ball and Dodd Funeral Home, Inc.*, 89 Wn.2d 959, 577 P.2d 580 (1978).

“The trial court noted objective symptoms:

‘This is a case in which the plaintiffs are entitled to recover for (mental suffering) because of the sewage involved, the septic tank problem in the house. That’s a direct threat to the health of the family, and water under the house is enough to call mental distress.’”

32 Wn.App. 178-79.

In *Wilson v. Key Tronic Corp.*, 40 Wn.App. 802, 701 P.2d 518 (1985) (also involving an intentional tort), the court imposed a stricter standard.

“When the mental distress results from less than intentional or malicious conduct, under the former ‘zone of danger’ test, a showing of actual or possible direct physical invasion was generally necessary. *Murphy v. Tacoma*, 60 Wn.2d 603, 620-21, 374 P.2d 976 (1962). Under that test, pollution of a household water supply was regarded as a

physical invasion of the occupant's person. *Murphy*, at 621, 374 P.2d 976, citing *Drake v. Smith*, 54 Wn.2d 57, 337 P.2d 1059 (1959). Applying that standard, the landowners here would recover.

“The modern test set forth in *Hunsley v. Giard*, 87 Wn.2d 424, 553 P.2d 1096 (1976), provides a broader basis for recovery. Under the *Hunsley* test, where actual invasion of a plaintiff's person or security or a direct possibility thereof could not be made out, recovery was nevertheless warranted if the plaintiff's mental distress was the reaction of a reasonable person and manifested by objective symptoms.

“*McRae v. Bolstad*, 32 Wn.App. 173, 178, 646 P.2d 771 (1982), *aff'd on other grounds*, 101 Wn.2d 161, 676 P.2d 496 (1984), found sewage and septic tank problems under the family home sufficient to support a finding of ‘mental distress,’ and quoted the trial court's observations regarding objective symptoms:

‘This is a case in which the plaintiffs are entitled to recover for [mental suffering] because of the sewage involved, the septic tank problem in the house. That's a direct threat to the health of the family, and water under the house is enough to call mental distress.’

“*McRae*, at 178-79, 646 P.2d 771.

“The ‘direct threat’ in *McRae* is similar to the one in this case; however, we decline to adopt the court's reasoning that the threat to the health of the family constituted ‘objective symptoms.’ Rather, we find such a threat of contact, or as in our case actual ingestion, satisfies the stricter invasion standard of *Murphy*. Fears of present and future health problems stemming from actual ingestion of the chemical by family members are not remote and fanciful, but rather are reasonable and therefore compensable.”

40 Wn.App. at 809-10.

Here, Appellants did not engage in any intentional or malicious conduct nor was there any threat to Respondent's health or safety. The jury found simply that Appellants were negligent in handling a real estate transaction. Emotional distress in a real estate transaction is not "a field of danger that [Appellants] should reasonably have anticipated and guarded against."

In *Bishop v. State*, 77 Wn.App. 228, 889 P.2d 959 (1995), the court noted that "emotional distress is 'a fact of life' and there are limitations on one's liability. These limitations arise from the 'very concept of negligence' and the established notions of duty, breach of duty, proximate cause, and injury. *Hunsley v. Giard*, 87 Wn.2d 424, 435, 553 P.2d 1096 (1976), stated: 'With adequate limitations, the courts can administer the adjudication of this tort just as it does the complex intricacies of products liability and medical malpractice.'" 77 Wn.App. at 233.

Likewise, in *Spurrell v. Bloch*, 40 Wn.App. 854, 701 P.2d 529 (1985), the court held:

"To recover on a theory of wrongful infliction of emotional distress, plaintiffs must first demonstrate mental or emotional distress. They have failed to do so. Nor have they surpassed a further restriction on liability, which is proof of objective symptomatology. *Hunsley v. Giard*, 87 Wn.2d 424, 553 P.2d 1096 (1976). Plaintiffs have claimed one sleepless night, tears, loss of appetite, and anxiety. While in some cases such transitory signs could be 'symptoms,' we do not see signs of distress above that level

which is a fact of life.”

40 Wn.App. at 863.

Respondent’s attempt to distinguish negligent infliction of emotional distress with professional negligence is a distinction without a difference. In *Snyder v. Medical Service Corp. of Eastern Wash.*, 98 Wn.App. 315, 988 P.2d 1023 (1999) (citing *Whaley*), the court held that the same analysis applies to both.

“Like all negligence claims, a negligent infliction of emotional distress claim requires duty, breach, proximate cause, and injury. *Hunsley v. Giard*, 87 Wn.2d 424, 434-35, 553 P.2d 1096 (1976). Emotional distress is ‘a fact of life’ and so the elements of duty, breach, causation, and injury place limits on an employer’s liability for emotional distress. *Hunsley*, 87 Wn.2d at 435, 553 P.2d 1096; *Bishop v. State*, 77 Wn.App. 228, 233, 889 P.2d 959 (1995). In other words, a defendant’s liability is measured ‘by the strictures imposed by negligence theory, *i.e.*, foreseeable risk, threatened danger, and unreasonable conduct measured in light of the danger.’ *Corrigal v. Ball & Dodd Funeral Home, Inc.*, 89 Wn.2d 959, 962, 577 P.2d 580 (1978). Ms. Snyder must also show objective symptoms of emotional distress. *Id.*; *Whaley v. State*, 90 Wn.App. 658, 673, 956 P.2d 1100 (1998).

“Ms. Snyder argues that she does not have to show objective symptoms prior to when she began her medical leave. She contends her emotional distress must only be susceptible to medical diagnosis and proved through medical evidence. She relies on *Hegel v. McMahon*, 136 Wn.2d 122, 132-35, 960 P.2d 424 (1998). *Hegel* is distinguishable. The *Hegel* court’s holding was in the context of a negligent infliction of emotional distress claim where the plaintiffs, relatives of an injured motorist, arrived shortly after the injury-causing accident. We recently reaffirmed the necessity of objective symptoms. *Whaley*, 90

Wn.App. at 673, 956 P.2d 1100.

“The mental distress must also ‘be the reaction of a normally constituted person,’ absent knowledge by the defendant that the plaintiff has a peculiar characteristic or condition. *Hunsley*, 87 Wn.2d at 436, 553 P.2d 1096.”

98 Wn.App. at 323-24.

There are sound policy reasons why noneconomic damages for emotional distress should not be awarded in a negligence case against a real estate broker. Most real estate transactions involve emotional distress. Until a transaction actually has closed, there always is a risk that the transaction will not close. A failed transaction is disruptive to the parties’ plans and can cause stress. In addition, the damages awarded by a jury could be hugely disproportionate to the compensation to be earned by the broker. Here, the noneconomic damages awarded by the jury were \$170,500, and the commission Appellants would have received had the Grimes transaction closed was only \$15,900. Ex. 6. Such runaway jury verdicts will put real estate brokers out of business or at least increase the cost of doing business, and therefore, the affordability of housing.

As the Supreme Court recently held in barring a tort claim where a contractual relationship exists between the parties and the damages are purely economic losses, “[i]f tort liability is expanded to include economic damages, parties would be exposed to ‘liability in an indeterminate amount for an indeterminate time to an indeterminate class.’ (quoting

Justice Cardozo in *Ultramares Corp. v. Touche, Niven & Co.*, 255 N.Y. 170, 179, 174 N.E. 441, 74 A.L.R. 1139 (1931)).” *Alejandro v. Bull*, 159 Wn.2d 674, 683, 153 P.3d 864 (2007).

Here, the first and only time Respondent had any objective symptoms of emotional distress was in February of 2010 – nearly two years after Appellants’ negligent conduct! And, even then, she was diagnosed with a “panic attack.” RP 98:19-99:3. A jury cannot be permitted to award \$170,500 in noneconomic damages for a panic attack that occurred two years after-the-fact.

**6. This court should excuse Appellants’ failure to take exception to the trial court permitting the jury to consider noneconomic damages.**

The law of the case doctrine does not prevent this court from reviewing the jury’s improper award of noneconomic damages for emotional distress in a negligence case. “[A]pplication of the [law of the case] doctrine may be avoided where the prior decision is clearly erroneous, and the erroneous decision would work a manifest injustice to one party. . . . This common sense formulation of the doctrine assures that an appellate court is not obliged to perpetuate its own error.” *Roberson v. Perez*, 156 Wn.2d 33, 42, 123 P.3d 844 (2005).

“The purpose of CR 51(f) is to assure that the trial court is

sufficiently apprised of any alleged error in the instructions so that the court is afforded an opportunity to correct any mistakes *before* they are made and thus avoid the inefficiencies of a new trial. See *Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha*, 126 Wn.2d 50, 63, 882 P.2d 703 (1994); *Van Hout v. Celotex Corp.*, 121 Wn.2d 697, 703, 853 P.2d 908 (1993). . . . '[U]nder some circumstances compliance with the purpose of the rule will excuse technical noncompliance.' *Queen City Farms*, 126 Wash.2d at 63, 882 P.2d 703."

*Goehle v. Fred Hutchinson Cancer Research Center*, 100 Wn.App. 609, 615, 1 P.3d 579, review denied, 142 Wn.2d 1010, 16 P.3d 1263 (2000).

Where "it would be inequitable to penalize [a party] for a harmless technical error; the . . . instruction did not become the law of the case." *Mutual of Enumclaw Ins. Co. v. Cox*, 110 Wn.2d 643, 651-52, 757 P.2d 499 (1988).

Here, since the jury was asked in the Special Verdict Form to segregate Respondent's economic and noneconomic damages, the court could set aside the improper award of noneconomic damages for emotional distress without remanding for a new trial, even if this court were to affirm the economic damages.

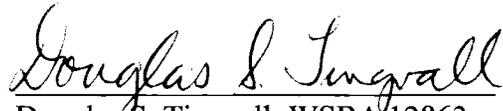
### CONCLUSION

The jury verdict improperly and unfairly places responsibility for the general decline in the real estate market entirely on Appellants. There is no substantial evidence in the record to support the jury's finding of proximate cause. Therefore, the verdict should be set aside and the case

should be remanded to the trial with instructions to dismiss.

Alternatively, this court should set aside the jury's award of noneconomic damages.

Respectfully submitted on April 13, 2011.

  
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**DECLARATION OF SERVICE**

I certify that I successfully emailed and mailed a copy of this Reply Brief of Appellants to Craig Blackmon, respondent's attorney, at 2033 6th Ave Ste 990, Seattle WA 98121, postage prepaid, on April 13, 2011 at Newcastle, Washington.

