

68608-9

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No. 68608-9-1

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

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SERGEY SAVCHUK,

Appellant,

v.

CHRISTINE SAMS and METRO REALTY, INC.,

Respondents.

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APPELLANT'S REPLY BRIEF

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ORIGINAL

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**TABLE OF CONTENTS**

**I. INTRODUCTION ..... 1**

**II. SAMS’ “STATEMENT OF THE CASE” IGNORED  
SUBSTANTIALLY ALL OF THE RECORD.....2**

**III. SAMS’ NO DUTY ARGUMENTS LACK MERIT.....3-5**

**Statutes and Authorities Cited:**

*Cogan v. Kidder, Matthews & Segner, Inc.*,  
97 Wn.2d 658, 663-664, 648 P.2d 875 (1982).....3

*Ward v. Coldwell Banker/San Juan Properties, Inc.*,  
74 Wn. App. 157, 161-163, 872 P.2d 69 (1994) .....3

*Harstad v. Frol*, 41 Wn. App. 294, 704 P.2d 638 (1985) .....3

*Pilling v. Eastern & Pac. Enterprises Trust*,  
41 Wn. App. 158, 702 P.2d 1232 (1985) .....3

*Langston v. Huffacker*, 36 Wn. App. 779, 678 P.2d 1265 (1984) ....3

*Burien Motors v. Balch*, 9 Wn. App. 573, 513 P.2d 582 (1974).....3

RCW 18.86.070.....3-4

**IV. SAVCHUK’S CLAIMS OF NEGLIGENCE AND  
BREACH OF THE DUTY TO EXERCISE REASONABLE  
SKILL AND CARE REMAIN VIABLE.....5-19**

**Statutes and Authorities Cited:**

RCW 18.86.030(1)(a).....5

**A. Common Law Duties and Claims Survived After  
the Enactment of Chapter 18.86, RCW.....6-7**

**Statutes and Authorities Cited:**

Chapter 18.86, RCW.....6

*Jackowski v. Borcholt*, 174 Wn. 2d 720, 278 P.3d 1100 (2012).....6

RCW 18.86.030.....7

RCW 18.86.050.....7

RCW 18.86.030(1)(a).....7

**B. Sams Improperly Attempted to Limit Her Obligations Arise Out of the Attorney’s Standard of Care.....7-9**

**Statutes and Authorities Cited:**

*Cultum v. Heritage House Realtors, Inc.*,  
103 Wn. 2d 623, 694 P.2d 630 (1985).....7-8

RCW 18.18.050(1)(c).....9

**C. Sams Did Not Undermine Savchuk’s Claims Relating to the Refundability of Installment Deposits.....9-11**

**Statutes and Authorities Cited:**

RCW 64.04.005.....11

*Skagit State Bank v. Rasmussen*,  
109 Wn. 2d 377, 745 P.2d 37 (1987).....11

**D. The Trier of Fact Is Entitled to Consider the Arrangement under which Sams Receive Nonrefundable Installment Commission Payments as a Factor Bearing on Sams’ Negligence and Breach of Other Duties.....12-14**

**Statutes and Authorities Cited:**

*Langston v. Huffacker*, 36 Wn. App. 779, 781  
678 P.2d 1265 (1984) .....13

**E. Sams’ Conduct With Respect to the August  
Extension Remains a Viable Basis for  
Negligence Liability.....14-16**

**Statutes and Authorities Cited:**

RCW 18.86.030(1)(d).....14

RCW 18.86.030(1)(b).....14

RCW 18.86.050(1)(b).....14

*Skagit State Bank v. Rasmussen*, 109 Wn. 2d 377,  
745 P.2d 37 (1987).....16

**F. Savchuk Can Maintain a Viable Negligence Claim  
Based on Sams’ Failure to Take Timely Action to  
Facilitate Closing Through a Note and Deed of  
Trust. ....17-18**

**Statutes and Authorities Cited:**

RCW 18.86.030(1)(a).....17

RCW 18.86.050(1)(c).....17

**G. Savchuk’s Negligence Claims, Arising Out of  
Improper Interest Payments, Remain Viable..18-19**

**V. SAVCHUK IS ENTITLED TO REVERSAL WITH  
RESPECT TO SEVERAL CLAIMS NOT ADDRESSED  
BY SAMS AND METRO REALTY.....19-20**

**Statutes and Authorities Cited:**

RCW 18.86.030(1)(d).....20

RCW 18.86.030(1)(b).....	20
RCW 18.86.050(1)(a).....	20
RCW 18.86.050(1)(b).....	20
RCW 18.86.050(1)(c).....	20
<b>VI. AMPLE EVIDENCE SUPPORTS THE CONCLUSION THAT SAMS' BREACHES OF DUTY PROXIMATELY CAUSED SAVCHUK'S DAMAGES.....</b>	<b>19-25</b>
<b>Statutes and Authorities Cited:</b>	
<i>Hertog v. City of Seattle</i> , 138 Wn. 2d 265, 275, 979 P.2d 400 (1999).....	23
<i>Smith v. Preston Gates Ellis LLP</i> , 135 Wn. App. 859, 864, 147 P.3d 600 (2006).....	23-24
<i>Ward v. Coldwell Banker/San Juan Properties, Inc.</i> , 74 Wn. App. 157, 872 P.2d 69 (1994).....	25
<i>Boguch v. Landover Corp.</i> 153 Wn. App. 595, 224 P.3d 795 (2009).....	25
<b>VII. CONCLUSION .....</b>	<b>25</b>

## TABLE OF AUTHORITIES

### I. CASES:

<i>Boguch v. Landover Corp</i> , 153 Wn. App 595, 224 P.3d 995 (2009).....	25
<i>Burien Motors, Inc. v. Balch</i> , 9 Wn. App. 573, 513 P.2d 582 (1974).....	3
<i>Cogan v. Kidder, Matthews &amp; Segner, Inc.</i> , 97 Wn. 2d 658, 648 P.2d 875 (1982).....	3
<i>Cultum v. Heritage House Realtors, Inc.</i> , 103 Wn.2d 623, 694 P.2d 630 (1985).....	7-8
<i>Harstad v. Frol</i> , 41 Wn. App. 294, 704 P.2d 638 (1985).....	3
<i>Hertog v. City of Seattle</i> , 138 Wn. 2d 265, 979 P.2d 400 (1999).....	23
<i>Jackowski v. Borchelt</i> , 174 Wn. 2d 720, 278 P.3d 1100 (2009).....	6
<i>Langston v. Huffacker</i> , 36 Wn. App. 779, 678 P.2d 1265 (1984).....	3, 13
<i>Pilling v. Eastern &amp; Pac. Enterprises Trust</i> , 41 Wn. App. 158, 702 P.2d 1232 (1985).....	3
<i>Skagit State Bank v. Rasmussen</i> , 109 Wn. 2d 377, 745 P.2d 37 (1987).....	11, 16
<i>Smith v. Preston Gates Ellis LLP</i> , 135 Wn. App. 859, 864, 147 P.3d 600 (2006).....	23-24
<i>Ward v. Coldwell Banker/San Juan Properties, Inc.</i> , 74 Wn. App. 157, 872 P.2d 69 (1994).....	3, 25

### II. STATUTES

Chapter 18.86, RCW.....	6
-------------------------	---

RCW 18.86.030.....	7
RCW 18.86.030(1)(a).....	5, 17
RCW 18.86.030(1)(b).....	14, 20
RCW 18.86.030(1)(d).....	14, 20
RCW 18.86.050.....	7
RCW 18.86.050(1)(a).....	20
RCW 18.86.050(1)(b).....	14, 20
RCW 18.86.050(1)(c).....	17, 20
RCW 18.86.070.....	3-4
RCW 64.04.005.....	11

## I. INTRODUCTION

Petitioner Sergey Savchuk's ("Savchuk") Opening Brief asserted 12 assignments of error and presented 12 issues for decision by this Court. Rather than forthrightly addressing these issues, Respondents Christine Sams and Metro Realty, Inc.<sup>1</sup> "doubled down" on their strategy employed below, of oversimplifying and correspondingly ignoring the depth and breadth of Savchuk's claims. Indeed, on page 4 of Sams' brief, she tellingly identified only four issues to be addressed.

Given Sams' substantial burden as the moving party to establish that there were no disputed issues of material fact pertinent to any of Savchuk's claims and that she was entitled to prevail with respect to each and every such claim as a matter of law, Sams' failure to even address most of Savchuk's claims was fatal. As demonstrated in Savchuk's Opening Brief and highlighted through this Reply, Savchuk is entitled to reversal and remand with respect to all of his claims.

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<sup>1</sup> Respondents Christine Sams and Metro Realty, Inc. shall be referred to, collectively and individually, as "Sams."

**II. SAMS' "STATEMENT OF THE CASE" IGNORED SUBSTANTIALLY ALL OF THE RECORD.**

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Citing liberally from the 475-page Record of Proceedings in this appeal, the Statement of the Case set forth in Savchuk's Brief carefully detailed the factual background leading to the Purchase and Sale Agreement (the "PSA"); the pertinent provisions of the PSA; the negotiations and interactions leading to the critical August 2007 PSA Extension (the "August Extension"); and other events giving rise to this lawsuit. Among other evidence, Savchuk cited three declarations of expert witnesses, declarations of fact witnesses, pertinent portions of depositions and relevant documents.

In furtherance of Sams' approach, of largely ignoring Savchuk's actual claims and the facts that support them, her "Statement of the Case" cited a grand total of two pages from the her own declaration as the purported entirety of the pertinent record. The resulting skewed statement demonstrated that Sams had no intention of forthrightly dealing with the actual facts in the record supporting Savchuk's claims. As a consequence, this Court should rely on the Statement of the Case set forth by Savchuk as embracing the entirety of the pertinent record.

### III. SAMS NO DUTY ARGUMENTS LACK MERIT.

Quoting from *dicta* in one Court of Appeals case, Sams' Brief erroneously reiterated her assertion that Washington has adopted a categorical rule under which real estate agent's duty always terminates with the execution of a purchase and sale agreement. Yet, as established through Savchuk's Brief, a careful analysis of the cases cited by Sams demonstrates that, at most, an agent's scope of duty to a seller turns on the terms of the pertinent agency contract relating to the earning and payment of commissions.<sup>2</sup> If anything, Sams' discussion of *Cogan*, *Ward*, *Harstad* and *Burien Motors* as so-called "exceptions" to the non-existent categorical rule for which she advocated, demonstrated Savchuk's point that an agent's scope of duty is determined by the terms of the agency contract.

Similarly, Sams reference to language contained in RCW 18.86.070 that a real estate licensee's agency relationships "commence at the time that the licensee undertakes to provide real

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<sup>2</sup> Savchuk Brief at 23-26. See, e.g., *Cogan v. Kidder, Matthews & Segner, Inc.*, 97 Wn.2d 658, 663-664, 648 P.2d 875 (1982); *Ward v. Coldwell Banker/San Juan Properties, Inc.*, 74 Wn. App. 157, 161-163, 872 P.2d 69 (1994); *Harstad v. Frol*, 41 Wn. App. 294, 704 P.2d 638 (1985); *Pilling v. Eastern & Pac. Enterprises Trust*, 41 Wn. App. 158, 702 P.2d 1232 (1985); *Langston v. Huffacker*, 36 Wn. App. 779, 678 P.2d 1265 (1984); *Burien Motors v. Balch*, 9 Wn. App. 573, 513 P.2d 582 (1974).

estate brokerage services to a principal and continue until...(a) completion of performance by the licensee....” did not advance her position. Rather, it simply begged the question: When have those brokerage services been completed? Straightforwardly, this should be determined by the scope of the agency relationship set forth in the applicable contract. This is entirely consistent with remaining criteria for determining the scope of a licensee’s agency set forth in RCW 18.86.070, that Sams conveniently neglected to mention in her Brief.<sup>3</sup>

Significantly, Sams conceded that none of the pertinent cases holds that a buyer’s agent’s duty categorically terminates with the execution of a purchase and sale agreement. This is hardly, as Sams suggested, a distinction without a difference. In all probability, no buyer’s agent cases have imposed the limitation for which Sams advocates because, as a practical matter, buyers rarely enter into written agency agreements that might contain language limiting the agent’s duties to inducing a seller to execute a purchase and sale agreement with the agent’s buyer client.

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<sup>3</sup>. These are: “(b) Expiration of the term agreed upon by the parties; (c) Termination of the relationship by mutual agreement of the parties; (d) Termination of the relationship by notice from either party to the other. However, such a termination does not affect the contractual rights of either party.”

Certainly, no such writing, with a corresponding limitation, governed Savchuk's agency relationship with Sams. Accordingly, Sams' duty to Savchuk did not terminate with the January execution of the PSA.

Moreover, Sams did not even address Savchuk's alternative argument that Sams breached duties to Savchuk with respect to numerous claims arising out of the PSA itself. See Savchuk brief at 26-27. Thus, Sams clearly owed Savchuk a duty with respect to most, if not all, of his claims asserted in this matter, and the trial court, accordingly, erred in dismissing all of Savchuk's claims based on a purported lack of duty.

**IV. SAVCHUK'S CLAIMS OF NEGLIGENCE AND BREACH OF THE DUTY TO EXERCISE REASONABLE SKILL AND CARE REMAIN VIABLE.**

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Savchuk's Brief demonstrated the existence of a genuine issue for trial with respect to his claims based on common law negligence and breach of the duty of reasonable skill and care under RCW 18.86.030(1)(a). In addition to other evidence, the expert opinions of real estate broker/agent, James Bjerke, and attorney, Larry Daugert, provided adequate support from which a trier of fact could conclude that Sams was both negligent and breached her statutory duty to exercise reasonable skill and care.

Specifically, Mr. Bjerke's and Mr. Daugert's declaration collectively articulated 11 distinct means through which Sams breached her duty of reasonable skill and care owed to Savchuk. See Savchuk Brief at 29-33.

Sams, nevertheless, has persisted in her futile attempts to support summary judgment on these issues. As demonstrated in more detail below, these efforts fundamentally consisted of misstatements of law, mischaracterizations and/or oversimplifications of Savchuk's claims and blatant *ipse dixits*.

**A. Common Law Duties and Claims Survived After the Enactment of Chapter 18.86, RCW.**

Sams flatly misstated the law relating to the continued viability of common claims in light of the statutory duties imposed on real estate agents through Chapter 18.86, RCW. See Sams Brief at 24-26. In fact, contrary to Sams assertion, *Jackowski v. Borcholt*, 174 Wn. 2d 720, 278 P.3d 1100 (2012), clearly held that common law duties co-exist with those statutory duties:

[C]ommon law duties continue only to the extent they have not been limited by or are not otherwise inconsistent with the statute.<sup>4</sup>

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<sup>4</sup> 74 Wn. 2d at 733.

Certainly, nothing in RCW 18.86.030 or 18.86.050 is inconsistent with or contradicts continuation of the common law licensee agent duty not to engage in negligent conduct. Rather, it is entirely consistent with the duty of reasonable skill and care set forth in RCW 18.86.030(1)(a).<sup>5</sup>

**B. Sams Improperly Attempted to Limit Her Obligations Arise Out of the Attorney's Standard of Care.**

Similarly flawed was Sams' assertion that, as a matter of law, she was not negligent based on a violation of the reasonable standard of care among attorneys. Sams properly acknowledged that, by virtue of her role in drafting the PSA, she was subject to the reasonable standard of care among attorneys. However, her crabbed interpretation of *Cultum v. Heritage House Realtors, Inc.*, 103 Wn. 2d 623, 694 P.2d 630 (1985), unduly restricted the scope of that duty. *Cultum* held that a licensed real estate agent may prepare standard form agreements:

[P]rovided, that in doing so they comply with the standard of care demanded of an attorney.<sup>6</sup>

[\*\*\*]

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<sup>5</sup> Similarly, nothing in Chapter 18.86, RCW contradicts nor negates application of a common law fiduciary duty for real estate licensees/agents.

<sup>6</sup> 103 Wn. 2d at 628.

Therefore, we hold that licensed real estate brokers and salespersons, when completing form earnest money agreements, must comply with the standard of care of a practicing attorney.<sup>7</sup>

*Cultum*, accordingly, leaves the application of the attorney standard of care largely to attorney expert testimony. See Savchuk Brief at 30, n. 13. As a consequence, the expert opinion of attorney Larry Daugert should be facially sufficient to establish a viable negligence claim against Sams, since her conduct fell short of the reasonable standard of care among attorneys.

The distinction advanced by Sams, between “drafting”, which apparently is subject to the attorney standard of care, and “advice”, that purportedly is not, is illusory and unsupported by any authority. No legal document can be drafted without implicitly providing advice to a client that the language selected complies with applicable legal principles and is reasonably designed to fulfill the client’s goals and intentions. As illustrated through the Daugert Declaration, that process often involves the selection and implementation of alternative contract language provisions that will pose varying risks on, and advantages to, the attorney’s client. Those alternatives simply cannot be sifted through and applied

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<sup>7</sup> 103 Wn. 2d at 631.

without consulting with, and implicitly and explicitly, advising the client. The straightforward adoption of the attorney standard of care in *Cultum* necessarily embraces this conclusion.

It also advances sound policy. To the extent a real estate agent/licensee engages in legal practice, she will be held fully to the standard of care applicable to attorneys, not some dumbed-down version of it. In the alternative, the agent can avoid those obligations and duties by recognizing that drafting certain provisions in a purchase and sale agreement lay beyond the agent's expertise and advising her client to obtain the services of an attorney, consistent with RCW 18.18.050(1)(c).

**C. Sams Did Not Undermine Savchuk's Claims Relating to the Refundability of Installment Deposits.**

Once again, Sams mischaracterized and oversimplified Savchuk's claims to construct a "straw man" argument. Relying on the Bjerke and Daugert Declarations, Savchuk has asserted claims that Sams was negligent and breached her statutory duty to exercise reasonable skill and care by: 1) failing to draft a PSA with traditional seller financing provisions, under which title would transfer to the buyer in exchange for a security interest in the real

estate,<sup>8</sup> or at the very least, advising Savchuk of the substantial disadvantages associated with not taking title;<sup>9</sup> 2) failing to clarify the conflict between the Safe Harbor provision, limiting Savchuk's liability to his \$20,000 Earnest Money deposit and the other provisions of the PSA, including Forms 22C and 34, setting forth conflicting schedules of installment payments that might be viewed as nonrefundable; 3) failing to advise Savchuk that his liability would be limited to the \$20,000 in the Earnest Money in the PSA under the Safe Harbor provision of the PSA, even though Sams understood that the Safe Harbor provision generally limited a Seller's remedy to the Earnest Money deposits and 4) failing to advise Savchuk that the Sellers' retention of \$575,000 on a \$750,000 purchase was inappropriate and probably unenforceable. Savchuk Brief at 30-33.

Rather than deal with the material structural deficiencies, ambiguities and conflicts contained in the PSA Sams drafted or the legal consequences of its Safe Harbor provisions, of which Sams was well aware, instead Sams pretended that Savchuk was seeking recovery based on the mere existence of any

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<sup>8</sup> Such as a deed of trust, mortgage or real estate contract

<sup>9</sup> CP 153, 158, 304-306.

nonrefundable provisions in the PSA. Obviously, this is not an accurate characterization of Savchuk's claims. Indeed, to the extent that the PSA is deemed valid under the Statute of Frauds, Savchuk has always acknowledged that his \$20,000 Earnest Money deposit was nonrefundable under RCW 64.04.005, in the event of his default. In essence, Savchuk has claimed that he was damaged because the PSA, as executed in January 2007, was improperly structured to adequately protect his interest, and hopelessly contradictory and ambiguous with respect to the refundable status of installment deposits made in addition to the Safe Harbor Earnest Money Deposits. Ample evidence supported the conclusion that Savchuk neither knew nor understood that these additional deposits would be nonrefundable and that Sams violated the reasonable standard of care among real estate agents and attorneys through her deficient draftsmanship and advice relating to these terms.<sup>10</sup>

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<sup>10</sup> *Skagit State Bank v. Rasmussen*, 109 Wn. 2d 377, 745 P.2d 37 (1987), cited by Sams is inapplicable. At most, *Rasmussen* might be pertinent with respect to claims arising under the PSA between the sellers, the Jerdes, and Savchuk, as buyer. Indeed, *Rasmussen* rested, in part, on the finding that none of the pertinent parties owed any special or fiduciary duty to the borrower/defendant in that case. By contrast, Savchuk is seeking recovery against a real estate agent who clearly owed substantial common law and statutory duties arising out of her professional relationship with Savchuk, including fiduciary duties. Moreover, at least with respect to the PSA, as executed in January 2007, one cannot conclude, as a matter of law, either that the PSA was unambiguous or that

**D. The Trier of Fact Is Entitled to Consider the Arrangement under which Sams Received Nonrefundable Installment Commission Payments as a Factor Bearing on Sams' Negligence and Breach of Other Duties.**

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Savchuk has rested a portion of his negligence claim on the impact of the arrangement under which Sams received nonrefundable installment commission payments prior to closing despite the fact that the transaction never closed, without disclosing that arrangement to Savchuk.<sup>11</sup> Mr. Bjerke's opined that this conduct supported his conclusion that Sams' conduct was negligent and breached her statutory duty to exercise reasonable skill and care, as well as other statutory duties. See Savchuk Brief at 30-31, 37-38. As with other bases for Savchuk's negligence claim, this

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Savchuk knew that the installment deposits, in addition to the Earnest Money, might be deemed nonrefundable. The implications of the August Extension will be addressed in Section I.E, below, and Sams' arguments relating to proximate in Section VI, below.

<sup>11</sup> Sams' assertion, on page 11 of her Brief, without any citation to the record, that this unusual commission arrangement was disclosed in the PSA, is flatly false. The PSA, as signed by the Jerdes and Savchuk, which is attached to Savchuk's Deposition as Exhibit B and was also Deposition Exhibit 22, contains no such disclosure. This is confirmed by both the Savchuk's Declaration and the confirming deposition testimony of Darlyce Jerde. CP 39-42, 77-90, 162, 177-190. Another version of the PSA, that was not the one as signed by the Jerdes and Savchuk, produced from Whatcom Land Title files and marked as Deposition Exhibit 5, did contain the addendum to the Listing Agreement between the Jerdes and their agent, Inman, calling for this commission payment arrangement. CP 39-42, 54-70. This addendum probably was included in the Whatcom Land Title version of the PSA for the convenience of the closing officer.

expert opinion should have been adequate to present the issue to the trier of fact.

Sams' response that, as a matter of law, she was entitled to prevail on this claim rested, among other deficiencies, on the initial false premise that Sams' commission was earned when the PSA was executed. Sams Brief at 11. This bald assertion, however, is unsupported by any citation to the record. It rests, instead, on a citation to an inapplicable case, *Langston v. Huffacker*, 36 Wn. App. 779, 678 P.2d 1265 (1984). Indeed, the conclusion in *Langston* that the agent in that case earned commission upon execution of the applicable purchase and sale agreement derived from such a provision in the pertinent listing agreement. 36 Wn. App. at 781. Here, no listing agreement existed between Savchuk and Sams governing when commission might be earned and or the scope of the agency.<sup>12</sup> As a consequence, it is far from clear that Sams would have been entitled to continue to receive, or as practical matter would have received, additional installment commission payments if Savchuk had ceased making his installment payments to the Jerdes.

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<sup>12</sup> In fact, no listing agreement has been cited or made a part of the record. Not even the addendum to some listing agreement attached to Deposition Exhibit 5 states that commission was earned when the PSA was signed.

In addition to improperly relying on an invalid initial premise, Sams' Brief opined at length about why Mr. Bjerke's declarations drew the "wrong" implications from the Sams' receipt of secretive nonrefundable installment commission payments. Sams Brief at 11-13. While this might be a perfectly legitimate closing argument at trial, it did nothing to establish the Savchuk has failed to establish the absence of a genuine issue of fact for trial determination. If anything, this effort emphasized the presence of a disputed material fact sufficient to defeat summary judgment on this issue.<sup>13</sup>

**E. Sams' Conduct With Respect to the August Extension Remains a Viable Basis for Negligence Liability.**

Sams' Brief inappropriately treats the August Extension as though it were a stand-alone agreement, with no pertinent relationship to the PSA. Yet, obviously the August Extension became a part of the PSA, for which Sams bore drafting responsibility, as an addendum to it. Fundamentally, Sams has

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<sup>13</sup> Significantly, as developed in Section V, below, nothing in the Sams' Brief even addressed Savchuk's claim that this commission arrangement gave rise to a claim for breach of Sams' fiduciary duties; and duty to disclose material facts, under RCW 18.86.030(1)(d), duty to deal honestly and in good faith, under RCW 18.86.030(1)(b) and a duty to timely disclose conflicts of interest, under RCW 18.86.050(1)(b). See Savchuk Brief at 33-38. The remaining arguments advanced in Section 3 of Sams Brief relating to proximate cause will be addressed in Section, VI, below.

sought to absolve herself from responsibility from the detrimental impact of the August Extension upon Savchuk by essentially and cynically maintaining that her European vacation was more important than providing adequate representation to her client. Having abandoned Savchuk during this critical juncture in the transaction, Sams made matters worse by recommending that Savchuk rely upon the adversary's agent, Anne Inman, to represent his interest with respect to the August extension. See CP 162-163. At the same time as Sams has attempted to distance herself from the August Extension for liability purposes, she readily accepted thousands of dollars in installment commission payments directly attributable to the August Extension. CP 138-152.

Notwithstanding Sams' efforts to oversimplify Savchuk's negligence claims relating to the August extension, ample evidence has been presented to support this claim, through the Bjerke and Daugert declarations, among other things. CP 163-164, 305.<sup>14</sup>

Among other deficiencies, Sams' Brief failed to address the breadth of Sams' deficiencies in representing Savchuk. Completely

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<sup>14</sup> Additionally, Savchuk has established viable claims arising out of Sams' conduct with respect to the August extension for breach of fiduciary duty, duty to disclose material facts, duty of loyalty, duty to disclose conflicts of interest and duty to advise Savchuk to seek expert advice. Savchuk Brief at 33-36, 37-40.

missing, for example, was any discussion of the complete incompetence brought to bear in the drafting of the PSA. Although the totality of these drafting deficiencies have been developed elsewhere,<sup>15</sup> as an example, if Sams had provided proper representation to Savchuk, in all probability, the transaction would have closed in January 2007 with the transfer of real estate title to Savchuk in exchange for a note and deed of trust. No lingering ambiguities would have remained with respect to the application to the note and deed of trust provisions in the PSA or the refundable nature of interim deposits. No extension would have been necessary.

Sams simply could not absolve herself from the mess created by these deficiencies by conveniently leaving the country during the critical August 2007 period, turning Savchuk's representation over to seller's agent and then accepting the benefit of resulting commission payments. At the very least, issues relating to the August Extension must be reserved for trial.<sup>16</sup>

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<sup>15</sup> See Savchuk Brief at 12-16, 29-33; CP 153-155, 157-158, 304-306.

<sup>16</sup> For reasons comparable to those set forth in n. 10, above, *Rasmussen* is inapplicable since that case does not address Sams' professional duties owed to Savchuk, including fiduciary duties.

**F. Savchuk Can Maintain a Viable Negligence Claim Based on Sams' Failure to Take Timely Action to Facilitate Closing through a Note and Deed of Trust.**

As demonstrated above and in Savchuk's Brief, Sams was negligent in failing to take adequate measures, either in drafting the PSA or advising Savchuk, to facilitate a timely closing under which Savchuk would have obtained title to the property in exchange for a note and deed of trust. With reasonably acceptable drafting, such a closing would have occurred shortly after the PSA was signed in January 2007. Failing that, consistent with her duty to exercise reasonable skill and care, Sams should have advised Savchuk to insist upon a tender of the note and deed and trust provided for in the PSA. As a farther fallback, this should have been insisted upon in August 2007, as an alternative to extending payments of deposits by Savchuk for which he was receiving little, if any, corresponding consideration. Finally, consistent with common law duties and those set forth in RCW 18.86.030(1)(a) and 18.86.050(1)(c), Sams should have advised Savchuk to seek expert advice at some point in this process prior to the August Extension, at any rate.

If any of these actions had been taken, even as late as August 2007, Savchuk's losses probably would have been limited to his \$20,000 earnest money deposit, pursuant to the Safe Harbor provision in the PSA. Sams' failure to provide proper representation of Savchuk by employing any of the above alternatives is sufficient to defeat summary judgment with respect to these bases for imposing liability on Sams resting on negligence and/or her statutory duty to exercise reasonable skill and care.

**G. Savchuk's Negligence Claims, Arising Out of Improper Interest Payments, Remain Viable.**

Both the PSA, as executed in January 2007 and the August Extension include provisions purported requiring Savchuk to pay the Jerdes interest on his installment payments. See CP 79, 89-90. Thus, despite the fact that the Jerdes loaned Savchuk no funds, the agreements, nevertheless, called for his payment of substantial interest. As confirmed through the expert opinion of Mr. Bjerke, Sams' failure to take effective action, either through action or advice, to avoid this untoward result, constituted a violation of her duty of reasonable skill and care to Savchuk.

Undaunted, Sams has audaciously argued that Savchuk may not present this basis for negligence to the trier of fact, based

on some theory of “forbearance”, unrelated to the facts or any applicable law. Essentially, she has speculated that Savchuk’s payment of interest on installments throughout this transaction, both before and after the August Extension, was somehow justified as an “extension fee.”

This is, of course, nonsense. In fact, Savchuk began paying interest on installments long before the August Extension, beginning with his first installment in 2007 and continuing after the August Extension, through his last installment payment in 2008. Moreover, the August Extension separately called for the payment by Savchuk of a \$10,000 “fee to extend,” distinct from an additional obligation to pay interest on installments at 7.5% per annum.

Not only was the position she has taken unsupported by the actual facts in the record, Sams’ brief failed to cite any legitimate legal authority that might plausibly support her position. Her obtuse reference to a Washington usury statute is a *non-sequitur*, at best.

**V. SAVCHUK IS ENTITLED TO REVERSAL WITH RESPECT TO SEVERAL CLAIMS NOT ADDRESSED BY SAMS.**

Savchuk’s Brief emphasized that Sams’ summary judgment motion failed to even address several of Savchuk’s claims. See Savchuk Brief at 28-29. She continued that practice in connection

with Sams' Brief. Indeed, the following claims asserted by Savchuk were not addressed by Sams' Brief: 1) breach of fiduciary duty; 2) breach of a duty to disclose material facts, pursuant to RCW 8.86.030(1)(d); 3) breach of a duty to deal honestly and in good faith, pursuant to RCW 18.86.030(1)(b); 4) breach of a duty of loyalty, under RCW 18.86.050(1)(a); 5) breach of a duty to timely disclose conflicts of interest, under RCW 18.86.050(1)(b); and 6) breach of a duty to advise Savchuk to seek expert advice, pursuant to RCW 18.86.050(1)(c). See Savchuk Brief at 33-40.

In addition, rather than addressing Savchuk's actual CPA claim, Sams' Brief devoted approximately six pages to analyzing a claim that she might prefer that Savchuk was making, but which Savchuk, in fact, did not make. Indeed, as demonstrated in Savchuk's Brief, his CPA claim is much broader than a myopic focus upon merely the commission structure presented in Sams' Brief. By ignoring Savchuk's actual CPA claim, Sams has essentially conceded the merits of that claim for the purposes of summary judgment.

With respect to all of the claims set forth in this Section of the Reply, Sams has presented no viable counterargument. Reversal with respect to these claims is, accordingly, appropriate.

**VI. AMPLE EVIDENCE SUPPORTS THE CONCLUSION THAT SAMS' BREACHES OF DUTY PROXIMATELY CAUSED SAVCHUK'S DAMAGES.**

With respect to some of Savchuk's claims, Sams has argued that Savchuk has failed to establish proximate cause as a matter of law. Among other deficiencies, Sams' causation arguments have not addressed the totality of Savchuk's claims. Savchuk has maintained throughout that Sams has committed a cascade of errors which, individually and collectively have imposed substantial losses upon him. These began with the disastrous drafting of the PSA which, among other things, failed to properly structure the seller financing transaction such that Savchuk obtained title to the Property in exchange for a note and deed of trust.<sup>17</sup>

Obviously, Savchuk would have been in a substantially more favorable position had he obtained title sometime in early 2007. He would not have been at risk that the Jerdes would simply keep all of his deposits as well as title to the real estate leaving Savchuk with nothing, as occurred in this case. Moreover, he could have made productive use of the real estate, including receiving rents from the residence located on it and perhaps selling it. Finally, in the event

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<sup>17</sup> This deficiency could have been remedied had Sams advised Savchuk to insist upon a closing based on payment by note and deed of trust prior to the August extension, or alternatively to advise Savchuk to obtain legal advice on the issue.

of default on the note and deed of trust, Savchuk would have been entitled to all of the safeguards associated with deed of trust foreclosure proceedings.

In addition, Savchuk should have been informed that, consistent with the "Safe Harbor" provision in the PSA and applicable law relating to liquidated damages, as opposed to improper penalty, only his \$20,000 earnest money should have been considered nonrefundable. With proper representation in regard to these issues, in all probability, Savchuk's losses would have been limited to his \$20,000 deposit rather than the loss in excess of \$500,000 he sustained. See CP 163-164.

Similarly, if Sams had properly fulfilled her duties to Savchuk with respect to negotiations resulting in the August Extension, in all probability, he would have been represented by his own advocate and would not have signed the August Extension. See CP 13-14, 163-164. In that event, Savchuk's losses would have been limited to his earnest money deposit.

Finally, if Savchuk had been informed, prior to the execution of the January 2007 PSA, that Sams would be receiving nonrefundable commission payments out of his installment payments, as stated by Savchuk:

I would have become suspicious of my agent, Christine Sams, and would not have signed the PSA without obtaining advice from a more trustworthy realtor or an attorney.<sup>18</sup>

Consistent with the opinions expressed by James Bjerke and Larry Daugert, in all probability, had Savchuk obtained such advice, either from a competent, reputable realtor or a real estate attorney, he would not have signed the present PSA as drafted and incurred resulting losses.

When viewed in a light most favorable to Savchuk, as it must be for these proceedings, the evidence is more than sufficient to establish at least a disputed issue of material related to proximate cause. Among other things, this is supported by the general principal that: "breach and proximate cause are generally fact questions for the trier of fact."<sup>19</sup>

The cases cited by Sams do not contradict this conclusion. For example, *Smith* is distinguishable. The plaintiff in *Smith* alleged that he had suffered substantial damages as a result of construction work and practices of a builder he had hired to construct his "dream home." He was seeking partial compensation

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<sup>18</sup> CP 163.

<sup>19</sup> *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). See *Smith v. Preston Gates Ellis LLP*, 135 Wn. App. 859, 864, 147 P.3d 600 (2006) ["Proximate cause is usually the province of the jury"]

for those alleged losses by asserting a malpractice case against the attorney who drafted his construction contracts with his builder. In finding that Smith had failed to establish proximate cause, as a matter of law, the Court observed that:

Smith could not specifically identify an alternative that would have led to a better outcome. 'I can't tell you what I would have done, but I would not have entered into this contract.' He could only speculate that he might have looked for another builder but that he was committed to building his 'dream home.'<sup>20</sup>

In other words, since Smith was going to engage in the construction project at any rate, it was mere speculation that Smith would have obtained a better result with a different, as yet unidentified, hypothetical contractor.

By contrast to Smith's equivocation, Savchuk's testimony clearly states alternative courses of conduct he would have taken that would have diminished or eliminated his losses. Significantly, evidence in the record supports the conclusion that, in contrast to Smith, Savchuk was not unequivocally committed to enter into this transaction. CP 161. To the contrary, Savchuk was hesitant to enter to make the purchase from the beginning and ultimately executed the PSA largely due to pressure from Sams. CP 13-14,

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<sup>20</sup> 135 Wn. App. at 865.

162-165. Thus, the alternatives that Savchuk would have pursued with proper actions or representations by Sams were sufficient to create at least a triable issue with respect to proximate cause.<sup>21</sup>

## VI. CONCLUSION

For the foregoing reasons, and those set forth in Savchuk's Brief, this Court should reverse summary judgment below. Not only has Sams failed to meet her burden of establishing that there no genuine issues of fact with respect to issues she raised below and on appeal, Sams failed to even address several of Savchuk's claims. While Savchuk maintains that he is entitled to reversal with respect to all of his claims, a straightforward application of CR 56 mandates reversal with respect to claims not addressed by Sams, at any rate.

RESPECTFULLY SUBMITTED this 12<sup>th</sup> day of September, 2012

BRITAIN & VIS PLLC

BY:   
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Attorney for Petitioner Sergey Savchuk

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<sup>21</sup> The remaining two cases cited by Sams also are distinguishable. *Ward* [failure of realtor to disclose financial assistance to buyer did not proximately cause seller's damage because seller had no contractual right to interfere with buyer's financing arrangements]; *Boguch v. Landover Corp.* 153 Wn. App. 595, 224 P.3d 795 (2009) [alleged real estate agent's error in representing boundaries of listed property did not proximately cause seller's alleged loss in purchase price, as a matter of law because the existence of an alternative perspective buyer that would have paid a higher purchase price was purely speculative].

## CERTIFICATE OF SERVICE

I hereby certify that a copy of this Reply Brief has been served by regular U.S. mail, upon Douglas S. Dingvall, Attorney for Respondents, 8310 154<sup>th</sup> Avenue, SE, Newcastle, Washington 98059-9222, this 12<sup>th</sup> day of September 2012.

  
JAMES E. BRITAIN, WSBA #6456