

No. 71156-3-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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COURT OF APPEALS  
DIVISION ONE

OCT 10 2014

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HMC Capital Investments, Inc, d/b/a John L. Scott Snohomish, Barbara A. Shelton, Christopher Gough, John or Jane Doe, Designated Broker of John L. Scott Snohomish,  
Appellants,

v.

Paul N. and Deborah R Hagman, husband and wife, and Ryan P. Hagman,  
as his separate estate,  
Respondents.

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ON APPEAL/REVIEW FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SKAGIT COUNTY  
No. 12-2-00807-1

BRIEF OF RESPONDENTS

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## **I. INTRODUCTION**

Defendants HMC Capital Investments, Inc. d/b/a John L. Scott Snohomish, Barbara Shelton, Christopher Gough, and the Designated Broker of John L. Scott Snohomish (Shelton) have appealed the trial court order granting plaintiffs Paul, Deborah, and Ryan Hagman's (Hagman) motion for voluntary non-suit but declining to award attorney's fees to Shelton.

On July 30, 2014 Hagman filed a voluntary motion to dismiss under CR 41(a)(1)(B). (CP 127-171). The status of the parties was fixed on that day. The trial court, after delays in availability of the court and motions for reconsideration for various reasons, ultimately entered an order dismissing the matter without prejudice, denied the reconsideration motions, did not grant any attorney's fees, and ordered that attorney fees and costs would be addressed" if Hagman "reinstate[d] any claim." (CP 396).

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

Shelton assigns error to the trial court's order which did not grant them attorney's fees. (CP 396). Shelton basis this error on the purported contract clause between the some of the parties, and on CR 11. Shelton does not assign error to the denial of their summary judgment motion, that is, Shelton does not seek review or appeal of the December 3, 2012 ruling

that found genuine issues of material fact preclude summary judgment dismissal. (CP 397-404).

Hagman reformulates the issues in this appellate matter as follows:

- A. Whether the trial court erred where the negligent misrepresentation and fraud claims are not disputes “concerning the Agreement” and thus not governed by the contract fee provision?**
- B. Even if the claims “concern the Agreement,” which they don’t, whether the trial court abused its discretion to deny attorney’s fees and costs in this particular nonsuit?**
- C. Whether the trial court erred in denying CR 11 sanctions?**
- D. Whether attorney’s fees on appeal should be awarded for a frivolous appeal of the CR 11 dismissal?**
- E. Whether the order on the voluntary motion to dismiss refusing to award attorney’s fees is appealable as a matter of right?**

### **III. FACTUAL BACKGROUND**

The Hagmans purchased a single parcel (Lot 2) of a short plat of property in Skagit County from Warren Williams. (CP 97). Christopher Gough represented the Hagmans. His wife at the time, Barbara Shelton, represented the Williams, and was apparently the managing or designated broker of the entity HMC Capital Investments, Inc. (now defunct) that held itself out as John L. Scott Snohomish.

During the sale, the seller and agent represented to Hagman that his property had existing factual and legal access and rights in an adjacent parcels' well to support the development of the parcel Hagman purchased. (CP 437-439); (CP 585). The agents put on the MLS listing that the property had "Water Rights." (CP 483); (CP 554). The agents also told the bank appraiser that water was not a problem and "approved for connection and service [to] the subject Lot 2." (CP 440);(CP 506). But the "agent only remarks" in the MLS in one of Shelton's listings on the adjacent parcel where the supposed shared well was, told a different story (CP440-441). The agent only remarks on the adjacent lot where the well share was represented to exist, indicated the well situation was not settled. (CP 442);(CP 525). This was important, because an in stream flow rule apparently prevented the Haggmans from easily obtaining a different well and a building permit for the property at the time of purchase from any new well, even though Ecology closed the property to any new unmitigated wells a year after the purchase, pursuant to an unlawful amendment to the rule. *See* (CP 528); *Cf. Swinomish v. Ecology*, 178 Wn.2d 571 (2013) detailing history of water issues). In other words, the statements regarding the water rights were false at the time of the sale, and in other circumstances such false statements could result in damages that would be less severe (i.e. the

cost of drilling a new well), but where the factual and legal availability of water is then removed where a person no longer can just go out and drill a new well– the damages are exacerbated (cost of drilling a new well, cost of mitigation plan, delay in approvals, rental damages during extra delays, uncertainty, etc.). (CP 444). In short, the difference is illustrated by the home built during the pendency of this suit and now existing on Lot 3. (CP 444); (CP 531). But, meritorious as the claims are, Hagman’s through discovery learned that the seller and defendants were unable to effectuate the preferred equitable remedy rescission for lack of financial wherewithal. (CP 317-320). Shelton was unilaterally driving up the costs of litigation (not answering discovery, failing to provide discovery after CR 26(i) conferences, needlessly setting the trial date over objection of counsel, etc. etc.). (CP 317-320).

Because of the misrepresentations regarding the water, the Hagsmans brought claims against several defendants, but only tort claims for negligent and fraudulent misrepresentation against real estate agents and broker (Appellant here) who represented the buyer and seller as a dual agent for breaches of statutory and common law duties in tort<sup>1</sup>. (CP 91-92).

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<sup>1</sup> Plaintiff also alleged the violation of statute and common law constituted per se violations of the Consumer Protection Act as well. (CP 95).

It was only these tort claim defendants (Appellant here) who brought a CR 56 summary judgment motion on only the tort claims claims seeking summary dismissal, but the Plaintiffs prevailed on the motion demonstrating their *prima facie* case. (CP 123-125). Plaintiff presented argument of duty (CP419-427), breach (427-429), causation (429), and damages (429). While Plaintiff moved in part for a CR 56(f) continuance, the court denied the continuance request but instead on December 3, 2012 found “Based upon the argument of counsel, the pleadings and evidence presented, the Court finds genuine issues of material fact preclude summary judgment in this matter.” (CP 124). The court then ruled: “1. Defendants’ motion is denied. 2. Def’s motions for attorney fees + CR 11 sanctions are denied.” (CP 124-125).

Later, because of the economic reality of Defendants who did not have the wherewithal to settle or even if a judgment entered have the ability to effectuate the preferred remedy of rescission, the Hagman’s sought a voluntary non-suit conditioned upon no award of attorney’s fees and costs. (CP 129-130). Other reasons included that Shelton was not responsive to discovery demands, the entity responsible was dissolved, and Shelton (or Shelton’s counsel) was deliberately increasing the cost and expense of

litigation, and unilaterally set the trial date multiple times over objection of Plaintiff and other Defendants. (CP 131-135)

In the motion, the Haggmans reasoned that their suit was not “on the contract” but as claimed in the Complaint, arose from duties independent of any purported listing agreement, and moreover, even if an attorney fee provision in a purported agency listing agreement applied, the Court would have discretion to deny attorney’s fees in the CR 41 non-suit context if the justice of the case required it. (CP 129-130).

The trial court granted the motion which was opposed only by the Shelton defendants, due to a request for an award of attorney’s fees, but opposing counsel did not appear at the hearing. (CP 322-325). The opposing non-moving parties, including Shelton, sought reconsideration. (322-326). The trial court stayed the dismissal order and made provision for oral argument. (CP 372).

On Haggmans’ motion,<sup>2</sup> the trial court heard oral argument and denied the motion for reconsideration on CR 11 and attorney’s fees, lifted the stay, and ruled:

“Based on the file in this case, including the declarations, if any, the court finds there is

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<sup>2</sup> CP 373-383

good reason to dismiss this case, pursuant to the voluntary request of plaintiffs and Rule 41 CR. WHEREFORE: The court orders that this case be dismissed without prejudice. **Should the Plaintiffs reinstate any claims, attorney fees and costs would be addressed at that time.** Stay is vacated. Motions for reconsideration are denied.” (CP 396).

Shelton appeals or seeks review of only the dismissal orders because the trial court did not award attorney’s fees, on the grounds that the trial court erred in not awarding CR 11 sanctions attorney’s fees, and not awarding attorney’s fees pursuant to a purported contract. (CP 397-404);(Br. of Appellant).

The trial court did not err in entering the order in this matter dismissing the suit on Plaintiffs voluntary non-suit motion, without an award of attorney’s fees to Shelton.

Several statements made in Appellants Opening Brief should be pointed out as erroneous. Appellants state “No contingency of any kind was exercised between the time of signing of the PSA and the closing date” and cited to CP 114. But CP 114 is an unsigned declaration. It is not known what is meant by this statement in Appellant’s Opening Brief (i.e. the sale did occur), but the Declaration of Ryan Hagman (CP 434-541) details the buyer’s actions and the reasons therefore. Appellants state that the

Hagmans all signed a document called the “Buyer’s Agency Agreement”, however, there is no such agreement signed by Ryan Hagman (CP 99).

#### IV. ARGUMENT

CR 41(a) provides:

- “(a) Voluntary Dismissal.
  - (1) *Mandatory*. Subject to the provisions of rules 23(e) and 23.1, any action shall be dismissed by the court:
    - (A) By Stipulation. When all parties who have appeared so stipulate in writing; or
    - (B) By Plaintiff Before Resting. Upon motion of the plaintiff at any time before plaintiff rests at the conclusion of his opening case.”

Generally speaking, the effect of a voluntary non-suit of a complaint is to render the proceedings a nullity and leave the parties as if the action had never been brought. *Wachovia SBA Lending v. Kraft*, 165 Wn.2d 481, 492 (2009) (attorney’s fees not recoverable in voluntary non-suit).

A party bringing a voluntary non-suit is entitled to such an order on the first day the motion is brought. A party may freely non-suit without prejudice so long as it is the first time bringing the non-suit—a second non-suit results in a dismissal with prejudice. CR 41(a)(4).

Attorney's fees, but only when available otherwise under a contract or statute, however, have been awarded in limited cases *in the discretion of the court* when they arise out of contract or statute and justice so requires in a particular case during voluntary non-suit situations. *Walji v. Candy Co, Inc.*, 57 Wn. App. 284, 288 (1990).

Voluntary nonsuits may come shortly after service before discovery even starts, or may come after days of trial before a jury. The decision as to whether a particular voluntary nonsuit should trigger attorney fees *should be left to the discretion of the trial judge* in light of the circumstances of the particular case, *whether interpreting a contract clause or a statute*.

*Walji v. Candyco, Inc.*, 57 Wash. App. 284, 290, 787 P.2d 946, 949 (1990)(emphasis added).

Accordingly, the primary issues are whether (1) the action triggered attorney's fees under a contract or statute and (2) if it did, whether the trial court here erred in not awarding attorney's fees in light of the circumstances of the particular case.

Hagman has several other sections of this brief regarding CR 11, and lastly, what the result should be if this court is inclined to reverse the trial court.

Because the action is not "on the contract" according to *Boguch v. Landover Corp.*, 153 Wn. App. 595, 615-618 (2009), the appeal should be denied and the learned trial judge affirmed. Moreover, even if the action

were “on the contract” the trial court did not abuse its discretion because the circumstances of this case shown in the record and the declarations of counsel support the order dismissing without prejudice and reserving the issue of attorney’s fees until and if Plaintiff reinstated its claims.

**A. Because The Negligent Misrepresentation And Fraud Claims Are Not Disputes “Concerning The Agreement” And Thus Do Not Trigger The Contract Fee Provision, But Are Statutory And Common Law Duties Independent Of The Purported Listing Agreement, The Trial Court Did Not Err.**

The American rule provides that a party is responsible for their own attorney’s fees, unless there is a contract term, statute, or recognized ground in equity. *McGreevy v. Oregon Mut. Ins. Co.*, 128 Wn.2d 26, 34, 904 P.2d 731, 736 (1995).

Defendant Shelton argues the trial court erred because, they argue, there is “exclusive” Buyer’s agency agreement and a term provides a prevailing party attorney’s fees. (Opening Brief).

However, the trial court did not error because Plaintiffs claims against Shelton are not “on the contract.” The trial court did not error in the order dismissing the matter without an award of attorney’s fees because the Complaint alleges breaches of duties arising independent of the agency agreement as a matter of law. The complaint alleges negligent and intentional

misrepresentation by the Hagman's real estate agent, for which the Defendants are liable.

Negligent and fraudulent misrepresentation claims against real estate professionals rely on common law duties and statutory duties of the real estate agents, irrespective of the listing or agency agreements. *Jackowski v. Borchelt*, 174 Wn.2d 720, 278 P.3d 1100 (2012); *Boguch v. Landover Corp.*, 153 Wn. App. 595, 615-618 (2009). Accordingly, claims against a realtor for violations of RCW 18.86/.85 and the common law duties are independent tort claims, and the prevailing party is not entitled to attorney's fees thereon based upon a contractual agency agreement. *Boguch v. Landover Corp.*, 153 Wn. App. 595, 615-618 (2009).

*Boguch* is controlling. In *Boguch*, on similar facts and claims, the trial court awarded attorney's fees to a prevailing realtor against its client based upon a listing agreement, but after the client's claims of violations of RCW 18.86 were dismissed on summary judgment. The Court of Appeals reversed the trial court on the award of attorney's fees because the claims arose from duties independent of the listing agreement. The Court of Appeals held:

“Although [the realtor's] duty to [client] arose because the parties entered into a contractual relationship, the listing agreement itself does not specify the duty of care that the realtor must provide. To the contrary, the common law and chapter 18.86 RCW imposed a duty to exercise

reasonable care on the realtors. Although the statute may be read as being incorporated into the listing agreement by reference, it does not follow that any act taken in fulfillment or derogation of that duty constitutes specific contractual performance or breach thereof.” *Id.* at 617.

Accordingly, this court ruled the trial court erred in award attorney’s fees under a contract for tort claims based upon the common law and RCW 18.86 et seq. There is no compelling reason to depart from *Boguch*.

In contrast, in *Edmonds v. John L. Scott Real Estate, Inc.*, 87 Wn. App. 834, 855 (1997), which was also distinguished in *Boguch*, the plaintiff buyer alleged and the trial court found that a real estate agent breached fiduciary duties related to improper disbursement of earnest money deposits, and tortious negligence related to the drafting of the earnest money agreement itself. *Id.* at 855-856. On appeal, the agent argued the fiduciary duty claim and negligence claim were tort claims, and therefore attorney’s fees could not be awardable under the buyer/broker agreement clause providing for fee-shifting. *Id.* at 855. However, the Court of Appeals affirmed rejecting the agent’s attempted distinction under the facts of that case, because the allegations related to matters regarding disbursement of funds and preparing the earnest money agreement, the award of attorney’s fees pursuant to the buyer/agent agreement was proper as they were “on the

contract.” The court reasoned the particular duties did not arise independent of the buyer/agent agreement, and the plaintiff relied upon the buyer/broker agreement as creating the obligations and the court found that the buyer/broker agreement at issue *created* the duties that were breached. *Id.*

Here, unlike in *Edmonds*, but like in *Boguch*, the Complaint claims only statutory and common law duties being breached, and does not allege a breach of contract action against Shelton or otherwise refer to the purported listing agreement as a basis for the duties. (CP 91-92). The contract is not needed to determine the duties and scope of the duties breached, but is important to show only that the statutory and common law duties arose in this matter between the Haggans and the defendants as entities. *Boguch*, at 617. Here, as the Complaint states, the Plaintiffs claims were based upon breaches of statutory and common law duties, not duties in any purported agency agreement. (Compl. ¶¶46-63, 68-70);(CP 91-92). Likewise, Defendants represented by Jamie Jensen did not defend against breach of contract claims seeking to enforce provisions of the Buyer’s agency agreement. (Compl. ¶¶46-63, 68-70). They did not defend or move for summary judgment against the CPA claims or otherwise segregate their time. (CP 11-20); (CP 207-211)(time and task itemization)

The listing agreement merely identifies who is responsible for the breaches of common law and statutory duties. It is not central to the dispute. The duties are not prescribed by the agreement only but those duties breached arise independently. The claims are not “on the contract” for the above reasons, and moreover Defendant did not incur fees to “enforce the provisions of such contract.” *Cf.* RCW 4.84.330. Accordingly, *Boguch* controls, it would be error to award attorney’s fees.

While the attorney fee clause suggests it relates to Consumer Protection Act claims attorney’s fees, this is really an attempt at a one-sided attorney fee provision which is also void as violative of public policy because the Consumer Protection Act statute already provides only the plaintiff can recovery attorney’s fees. RCW 19.86.090; *See also, Sato v. Century 21 Ocean Shores Real Estate*, 101 Wn.2d 599, 603, 681 P.2d 242, 245 (1984)(“The statute is clear-only the claimant is authorized to recover attorney’s fees”). It is impermissible for a consumer to waive the protections of the Consumer Protection Act, and the one-sided statutory attorney’s fees is an important and deliberate feature thereof. RCW 19.86.090. Accordingly, there has been no prevailing party for purposes of the consumer protection act claims on this voluntary dismissal to the extent and if Shelton incurred any fees defending against Consumer Protection Act

claims. *Wachovia SBA Lending v. Kraft*, 165 Wn.2d 481, 492 (2009)(attorney's fees not recoverable in voluntary non-suit with a one-sided attorney's fees clause). Moreover, an examination of the attorney's billings indicates no time related to the consumer protection act defenses. Defendants never incurred any attorney's fees defending those claims or bringing a summary judgment motion on those claims. (CP 207-211). The trial court did not error. As argued below, it is also Hagman's position that any contract provision that tries to rebalance the attorney's fees provisions of the Consumer Protection Act is void as violative of public policy. RCW 19.86.090. *Sato v. Century 21 Ocean Shores Real Estate*, 101 Wn.2d 599, 603, 681 P.2d 242, 245 (1984).

Shelton's reliance on other cases where there is no professional relationship between the parties, but only a contract where the contract itself was central to the duties between a buyer and a seller, are not helpful to Shelton on the question of attorney's fees.<sup>3</sup>

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<sup>3</sup> Shelton cites to *Singleton v. Frost*, 108 Wn.2d 723 (1987)(interpreting RCW 4.84.330); *Harting v. Barton*, 101 Wn. App. 954 (2000)(landlord-tenant contract dispute citing RCW 4.84.330); *Douglas v. Visser*, 295 P.3d 800(2013)(vendor and purchaser where purchaser was provided knowledge of problems and declined to investigate *further*, rather than being told there were no problems).

Assuming the claims against Shelton are “concerning the Agreement,” which they are not, whether the trial court abused its discretion to deny attorney’s fees and costs in this particular nonsuit in interpreting a contract clause or statute?

The question of whether to award attorney’s fees under a prevailing party attorney’s fees provision, during a CR41(a)(1)(B) motion to dismiss, *is a matter of judicial discretion*, even if a statute or attorney’s fees are awardable to a prevailing party. *Walji v. Candy Co, Inc.*, 57 Wn. App. 284, 288 (1990). *See also, Andersen v. Gold Seal Vineyards, Inc.*, 81 Wn.2d 863, 868 (1973)(construing long arm statute, a defendant could be a prevailing party for purposes of attorney’s fees in the discretion of the court “if the court finds that justice of the case requires it.”). This Court in *Walji* made it clear that there is discretion in the trial court on the attorney’s fees question whether there is a contract term or statute providing attorney’s fees:

Voluntary nonsuits may come shortly after service before discovery even starts, or may come after days of trial before a jury. The decision as to whether a particular voluntary nonsuit should *trigger* attorney fees *should be left to the discretion of the trial judge* in light of the circumstances of the particular case,

whether interpreting a contract clause  
or a statute.

*Walji v. Candyco, Inc.*, 57 Wn. App. 284, 290, 787 P.2d 946, 949 (1990)(emphasis added). *Walji* makes it plain that in a CR 41(a)(1)(B) motion, whether attorney's fees are "triggered" despite statute, contract, or other grounds, is within the sound discretion of the trial judge. *Walji*, 57 Wn. App. at 290.

In *In re Archer's Estate*, justice did not require the award of attorney's fees even after extensive preparation by both sides of a will contest matter, and plaintiff took a voluntary non-suit and there was no question the statute of limitations had run, where there had been no trial on the matter. *In re Archer's Estate*, 36 Wn.2d 505, 219 P.3d 112 (1950).

In *Anderson* it was recognized that the awarding of costs in an action in equity was in the sound discretion of the court, which in turn, the awarding of costs determined whether a defendant was a "prevailing party" or not.

"The prevailing party in a lawsuit is that party in whose favor judgment is entered. As a general rule where a plaintiff voluntarily dismisses his action, the defendant is entitled to costs. 20 C.J.S. Costs s 68 (1940); 20 Am.Jur.2d Costs s 18 (1965). See also 21 A.L.R.2d 627 Voluntary Dismissal-Conditions (1952). This court has said, by dictum, that the awarding of costs to the

defendant, where there is a voluntary nonsuit, is within the discretion of the trial court. In re Estate of Frye, 198 Wash. 406, 88 P.2d 576 (1939). It would seem to follow that, if the defendant is awarded costs, he is the prevailing party.

While we find no case in which this court has been asked to decide whether the defendant 'prevails' when an action against him is dismissed on motion of the plaintiff, we have recognized that, where no judgment is entered against a defendant in an action at law, he is entitled to his costs. Sibbald v. Chehalis Sav. & Loan Ass'n, 6 Wash.2d 203, 107 P.2d 333 (1940). It also was said in that case that if the action is one of equitable cognizance, the disposition of the costs is within the discretion of the trial court and will not be disturbed in the absence of abuse."

*Andersen v. Gold Seal Vineyards, Inc.*, 81 Wash. 2d 863, 865-66, 505 P.2d 790, 792 (1973). Accordingly, it follows if the award of costs is the touchstone of whether a defendant is a prevailing party, where costs are not awarded and or the disposition of costs is discretionary in equitable matters, there is no prevailing party in a particular matter on a voluntary non-suit.  
*Id.*

Finally, most recently in *Wachovia SBA Lending v. Kraft*, 165 Wn.2d 481, 492 (2009) the Supreme Court revisited the issue of attorney's fees when there is a voluntary dismissal without prejudice, and the court

ruled that when the parties intend to reference the “prevailing party” language in RCW 4.84.330 or that the statute is otherwise invoked, a voluntary non-suit does not give rise to an award of attorney’s fees to the defendant because there is no final judgment.

The Supreme Court in *Wachovia* signaled a retreat from and criticized some of the court of appeals decisions, and made it clear that it is merely a general rule that a defendant in a plaintiff’s voluntary non-suit matter is a prevailing party, but that a non-suit without prejudice leaves the parties as if the suit had never been brought. *Id.* The trial court’s discretion was not at issue in *Wachovia*, but the interpretation of RCW 4.84.330 was.

Shelton relies on *Singleton v. Frost* for the reason why the trial court erred and that case was interpreting RCW 4.84.330. Where a contract has an attorney’s fees provision and RCW 4.84.330 is implicated, when a party prevails on the merits and a final judgment is entered, the trial court must award attorney’s fees *Singleton v. Frost*, 108 Wn.2d 723 (1987)(interpreting RCW 4.84.330). Shelton provides no rationale as to why RCW 4.84.330 is not applicable to the contract term Shelton relies on, and Shelton even relies principally upon *Singleton v. Frost* which is an RCW 4.84.330 case. While RCW 4.84.330 can be thought of as the “one-sided attorney’s fees statute”

– by its terms, it applies to almost any contract term that relates to attorney’s fees whether it is unilateral or bilateral. RCW 4.84.330.

But in a motion to dismiss where there is an attorney’s fees clause that falls within the ambit of RCW 4.84.330, there is no prevailing party for purposes of awarding attorney’s fees under that statute. *Wachovia SBA Lending v. Kraft*, 165 Wn.2d 481 (2009). Accordingly, in this matter there is no prevailing party under *Wachovia*, and it was not error to not award attorney’s fees on the voluntary dismissal.

Here, the evidence to support of the motion to dismiss without an award of attorney’s fees to Shelton, and supporting the trial court’s order dismissing without fees and without prejudice and denying the reconsideration, is in the record, even presuming the Plaintiffs’ claims against Shelton were “on the contract,” which they were not. The justice of this case simply does not require the award of attorney’s fees to Shelton in the proceeding, even presuming the tort claims for violations of common law and statutory duties were “on the contract.”

First, justice in this case supports no award of attorney’s fees on dismissal because Plaintiffs prevailed on the only request for affirmative

relief, Defendants' summary judgment motion<sup>4</sup>, and the court dismissed CR 11 claims and found that genuine issues of material fact precluded Defendants summary judgment motion. Defendants do not appeal this denial of summary judgment. (CP 397-404).

Second, the justice of the case at the time the first motion to dismiss was filed also supports that there is no prevailing party for purposes of awarding attorney's fees. Plaintiffs reasoned that while they had meritorious claims, they sought a voluntary non-suit because Defendants had no economic wherewithal to realistically provide the preferred remedy of rescission, and were not providing discovery when due on the one hand, while unilaterally setting the trial date on the other, preventing Plaintiffs from being able to economically prepare the case. (CP 128, 132, 134). In addition, Shelton orally admitted during an examination of documents requested to be produced that Shelton had no funds or ability to pay a judgment (CP 318), but moreover Defendants revealed that HMC Capital Investments, Inc. was dissolved. (CP 133). Shelton never disputed this statement that Shelton nor HMC Capital had the wherewithal to provide a remedy. (CP 340-350). A key witness that had information regarding

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<sup>4</sup> See *Greenlaw v. Renn*, 64 Wn. App. 499 (1992); *Paulson v. Wahl*, 10 Wn. App. 53, 57 (1973).

Defendants' actual knowledge of falsity of statements (in addition to the documentary evidence of this) became unwilling to testify, raising the specter of additional expense. (CP 135). Moreover, the defendant Williams, the seller, in deposition and through documentary discovery revealed he had no wherewithal to pay or effectuate the preferred remedy of rescission. (CP 133). Even with the order dismissing the matter, Defendant Williams, the seller, admitted in writing that he had no money to settle. (CP 325).

Clearly then, for the above three broad categories of reasons, the dismissal decision by Hagmans was not based upon the merits, and resulted from a practical decision that further litigation was too expensive to pursue at this time, with a judgment having dubious value due to inability of Defendants to provide the preferred remedy of rescission.

Shelton argues that Hagman never contested the reasonableness of the fees, without citation to the record. A review of the record amply demonstrates Hagman's challenge to the reasonableness of the fees, the unilateral unnecessary actions of the Defendants, and the failures to segregate fees. (CP 318-320); (CP 302-313). Fees are properly not awarded pursuant to contract where they result in a course of conduct largely of the parties' own choosing. *Persing, Dyckman & Toybee, Inc. v. George Scofield Co., Inc.*, 25 Wn. App. 580, 583, 612 P.2d 2 (1980). A court's decision to

award attorney fees requires the court to exclude from the requested hours “any wasteful or duplicative hours and any hours pertaining to unsuccessful theories or claims.” *Mahler v. Szucs*, 135 Wash.2d 398, 434, 957 P.2d 632, 966 P.2d 305 (1998). Here, the declarations in the record plainly show that Hagman’s first sought relief from the seller Williams, before turning their attention to the real estate agents, and this litigation strategy was both practical and economical for all sides. While a defendant must do what a defendant must do to defend itself, there is a practical reality to the need for certain litigation moves that a trial court properly considers

Shelton certainly is not a prevailing party on the multiple and repeatedly unsuccessful CR 11 motions. The second CR 11 motion had no new basis than the first. Likewise, Shelton was not a prevailing party on their summary judgment motion, and a summary judgment motion is a request for affirmative relief. *Paulson v. Wahl*, 10 Wn. App. 53, 57 (1973). In fact, at the time the motion for voluntary dismissal was filed, Shelton had not prevailed on a single point of law or aspect of the case, and an examination of the fee affidavit shows that the Attorney spent more time arguing about fees than defending the merits of the action, and was unable to demonstrate that there was no genuine issue of material fact, or that Shelton was entitled to judgment as a matter of law. Shelton does not appeal

the denial of the motion for summary judgment which found that genuine issues of material fact preclude summary judgment. It should also be pointed out that the invoices indicate all of the time was “unbilled.” (CP 294-298).

While the case law of Washington firmly places the question of attorney’s fees during or following a voluntary non-suit within the discretion of the trial judge<sup>5</sup>, public policy also favors a party’s choice to remove a matter from the court system rather than plodding on through continued expensive litigation and a trial for fear of otherwise having to pay attorney’s fees when a plaintiff determines a defendant is essentially judgment proof from an economic standpoint and the costs of litigation begin to invoke the law of diminishing returns. *Cf. Oprian v. Goldrich*, 220 Cal. App. 3d 337, 269 Cal. Rptr. 429 (1990). (“It would be a sad day indeed if a litigant or his or her attorney could not dismiss an action to avoid further fees and costs, simply because they were fearful such a dismissal would result in [a finding of a favorable determination for the defendant subjecting them to] a malicious prosecution claim. It is common knowledge that costs

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<sup>5</sup> *Walji v. Candy Co, Inc.*, 57 Wn. App. 284, 288 (1990).

of litigation, such as attorney's fees, costs of expert witnesses, and other expenses have become staggering.”)

This is especially true where under the facts of the situation the moving party has already successfully prevailed against a defendant's summary judgment motion and against CR 11 claims, and the trial court finds “genuine issues of material fact exist” on the claims. (CP 123-126). This means Plaintiff has proved a *prima facie case*. Shelton claims that defendant was faced with answering requests for admission and a looming trial date as the reason for dismissal. (Opening Br. at 18). But Shelton's own attorney's fees list indicates they reviewed the Hagemans' answers to requests for admission (CP 211). Moreover, requests for admission are irrelevant to the rights of a plaintiff to take voluntary non-suit. *Dellit v. Perry*, 60 Wn.2d 287 (1962) (requests for admission is not a request for affirmative relief).

While Hagman maintains that attorney's fees in this matter are not recoverable under the terms of the purported agency listing agreement because the claims are not on the contract and the duties breached arise independently of the listing agreement, even assuming the attorney's fees clause applies in this situation, the decision whether the clause triggers an award of attorney's fees in a motion to dismiss is within the sound discretion

of the court based upon the factors and circumstances of the case. The Court did not abuse its discretion in denying attorney's fees and reserving the question until and if Hagman files again.

**B. The Trial Court Did Not Abuse Its Discretion In Denying CR 11 Sanctions.**

Hagman filed a motion on the merits in this matter moving to dismiss the appeal and affirm the trial court. A panel of judges held that the above issues briefed here presented debatable issues, but declined to dismiss the CR 11 basis for the appeal- not because it also presented a debatable issue – but because “ RAP 18.14 does not contemplate partial motions on the merits.” (Order Granting Motion to Modify and Denying Motion on the Merits, Sept 10, 2014).

From the circuitous brief, it is difficult to identify precisely the basis of the error Shelton tries to identify with the trial court not awarding CR 11 sanctions against Hagman.

At one point Shelton states: “By bringing this lawsuit Hagman has violated the specific terms of the contract. Such an action is a violation of Rule 11.” (Opening Br. at 14). This flamboyant statement is not well grounded in fact or law, and appears to be an attempt to bootstrap the agency listing agreement into a dispute.

A denial of a motion for CR 11 sanctions is reviewed for abuse of discretion. *Parry v. Windermere Real Estate/East, Inc.*, 102 Wn. App. 920, 929 (2000); *Just Dirt, Inc. v. Knight Excavating, Inc.*, 138 Wn. App. 409, 157 P.3d 431 (2007).

The imposition of sanctions under CR 11 is a matter addressed to the discretion of the trial court, and will be reviewed only to determine if the court manifestly abused that discretion. *Protect the Peninsula's Future v. City of Port Angeles*, 175 Wn. App. 201, 304 P.3d 914 (2013).

"To impose sanctions for a baseless filing, the trial court must find not only that the claim was without a factual or legal basis, but also that the attorney who signed the filing did not conduct a reasonable inquiry into the factual and legal basis of the claim."

*West v. Wash. Ass'n of County Officials*, 162 Wn. App. 120, 135, 252 P.3d 406 (2011).

The first reason the CR 11 arguments by Shelton should be rejected is because the trial court found that genuine issues of material fact on Plaintiffs' claims preclude summary judgment, and Shelton does not appeal that December 2012 determination and order on the substantive legal arguments of the parties. Further, the CR 11 motion was also denied by that same December 2012 order, and Defendant fails to raise new grounds, but did not appeal the December 2012 order.

The second reason the CR 11 arguments by Shelton should be rejected, is because Shelton does not articulate any reasons how the trial court abused its discretion on the subject- even if there was sanctionable conduct in bringing the claims (which there isn't), the decision to award fees as sanctions is within the broad discretion of the trial court.

Rather, Shelton argues incredulously that their listing agreement removes all duties, and that it was a breach of contract to bring the statutory and common law claims against Shelton. This is itself specious. "By bringing this lawsuit Hagman has violated the specific terms of the contract. Such an action is a violation of Rule 11." (Opening Br. at 14). In short, Shelton appears to argue that the listing agreement is a license to make negligent and fraudulent misrepresentations. This is, to be repetitive, specious. The whole point of the torts of negligent and fraudulent misrepresentation are where one party is lulled into an agreement based upon misrepresentations that reasonably induce that party to contract and not inquire further, and this caused damages. *Lawyers Title Ins. Corp. v. Baik*, 147 Wash. 2d 536, 545, 55 P.3d 619, 624 (2002).

As demonstrated in the order on Shelton's failed CR 56 summary judgment, the Hagmans have shown genuine issues of material fact:

- (1) That the Realtors/Shelton supplied information for the guidance of others in their business transactions that was false; and
- (2) That Realtors/Shelton knew or should have known that the information was supplied to guide the Hagmans in business transactions;
- (3) That the Realtors/Shelton were negligent in obtaining or communicating false information;
- (4) That the Hagmans relied on the false information supplied by the Realtors/Shelton;
- (5) That the Hagmans' reliance on the false information supplied by Realtors/Shelton was justified (that is, that reliance was reasonable under the surrounding circumstances ); and
- (6) That the false information was the proximate cause of damages to the Hagmans.

*See, Lawyers Title Ins. Corp. v. Baik*, 147 Wash. 2d 536, 545, 55 P.3d 619, 624 (2002); *Bloor v. Fritz*, 143 Wash. App. 718, 734, 180 P.3d 805, 815 (2008)(holding that actual knowledge of omissions/misrepresentations does not entitle dual agent to the protections of RCW 18.86.030(2)).

Because torts arising independent of listing agreements related to breaches of the common law and statutory duties of real estate agents are well recognized in Washington, the appellant's claimed error under CR 11 should be dismissed on this motion.

Washington has adopted the Restatement (Second) of Torts §552(1) for the tort of negligent/fraudulent misrepresentation. *Lawyers Title Ins. Corp. v. Baik*, 147 Wash. 2d 536, 545, 55 P.3d 619, 623 (2002)(citing *Restatement (Second) of Torts* § 552(1) (1977) as quoted in *ESCA Corp. v.*

*KPMG Peat Marwick*, 135 Wash.2d 820, 826, 959 P.2d 651 (1998)); *See also, Jackowski v. Borchelt*, 174 Wn.2d 720 (2012).

The common law, in addition to statutory law, provides relief to purchasers against real estate agents whether they are buyer's agents, seller's agents, or dual agents notwithstanding RCW 18.86.030(2). *Jackowski v. Borchelt*, 174 Wn.2d 720 (2012); *Bloor v. Fritz*, 143 Wash. App. 718, 734, 180 P.3d 805, 815 (2008); *Janda v. Brier Realty*, 97 Wash. App. 45, 50, 984 P.2d 412, 415 (1999). A plaintiff need not be without negligence in relying on the representations, as the comparative fault statute applies and the question is one for the finder of fact. *Lawyers Title Ins. Corp. v. Baik*, 147 Wash. 2d at 551 ("we hereby reject the applicability of section 552A to negligent misrepresentation claims").

Shelton cites to *Douglass v. Visser*, 173 Wn. App. 823, 295 P.3d 800 (2013) in passing and without discussion, for the proposition that a realtor has no duty to independently verify the accuracy or completeness of any statement made by any party, raising this basis for the first time on appeal. (Opening Br. at 13). This court should reject the argument on that basis. Nonetheless, *Douglas v. Visser* is distinguishable, because there the seller (who happened to be a real estate agent by profession) put the purchaser on notice of the defect, purchaser inspected and assumed the risk of a limited

inspection. *Id.* The agreement was between a seller of a home, and a purchaser. *Id.* Here, in the Hagmans' case on the other hand, the allegation and facts showed that the professional realtors assisting with the transaction between a seller and purchaser had actual and imputed knowledge of the falsity of statements regarding the availability of water at the time of the sale from Lot 3 to supply Lot 2, affirmatively made representations to both the Hagmans and to the bank appraiser (CP 506) and deliberately or negligently did not share the true nature of the information with the Hagmans. (CP 441-442);(CP 525). The MLS listing "agent only" remarks on Lot 3 indicated trouble with the supply, and that it was unclear whether Lot 2 had a supply of water from Lot 3. (CP 442);(CP 525). This information in the MLS listing was not provided to the Hagmans to follow up on and investigate, and is also *prima facie* evidence of the realtor's actual knowledge of the falsity of statements made to the Hagmans. (CP 312)

Rather, Christopher Gough represented there was no problem with the availability to the water supply for the lot that it was essentially plug and play, especially if, he advised, the seller signed the Well Addendum he presented for the parties. (CP 441-442);(CP 525). These representations, which Shelton had actual knowledge of the falsity thereof because of the agent only remarks, violate the common law and statutory duties of a

professional realtor—irrespective of what an agreement between the parties might try to say.

While Shelton appears to argue that RCW 18.86.030 *carte blanche* exculpates their conduct, affirmative representations made after a listing agreement is entered into and a course of conduct between the parties develops, could clearly fall within the “unless otherwise agreed” exception to the statutory limitations on liability in RCW 18.86.030—which would be a question of fact. Further, *Douglas v. Visser* did not discuss or address that a plaintiff need not be “negligent free” in order to recover under negligent misrepresentation claims. *Lawyers Title Ins. Corp. v. Baik*, 147 Wash. 2d at 551 (“we hereby reject the applicability of section 552A to negligent misrepresentation claims”).

Shelton does not articulate reasons why the trial court abused its discretion in denying CR 11 sanctions, especially when Shelton fails to seek review of or appeal the December 2012 order on summary judgment. Even if CR 11 were violated, attorney’s fees as sanctions are within the discretion of the court. Shelton provides no reasoned argument for error by the trial court under CR 11. Not only does the briefing, facts, declarations, and argument show there is a factual and legal basis for the claims against Shelton, the Declaration of Peter Ojala (CP 317-320) documents the inquiry

made into the law and to the opposing party prior to the filing and serving the lawsuit.

The trial court should be affirmed.

**C. Whether Attorney's Fees On Appeal Should Be Awarded For A Frivolous Appeal Of The CR 11 Dismissal?**

CR 11 sanctions are a matter within the broad discretion of the trial court. While CR 11 should be invoked when appropriate, CR 11 should not be knee jerk basis for requesting attorney's fees, *Bryant v. Joseph Tree, Inc.*, 119 Wash. 2d 210, 829 P.2d 1099 (1992), as has been done here by Shelton on multiple occasions at the trial court level (for the same alleged reasons). An appeal is frivolous, and thus entitled a party to attorney's fees, if it is so totally devoid of merit that there is no reasonable possibility of reversal. *In re Marriage of Tomsovic*, 118 Wn. App. 96, 74 P.3d 692 (2003).

Shelton's claims that the trial court somehow erred in denying CR 11 sanctions because "[b]y bringing this lawsuit Hagman has violated the specific terms of the contract [and] [s]uch action is a violation of Rule 11"<sup>6</sup>, are not well based in fact and law, are imposed for an improper purpose,

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<sup>6</sup> Opening Brief at 14.

and are needlessly increasing the costs of litigation in this matter and violate CR 11.

“Pursuant to RAP 18.7, CR 11's certification requirement ...applies to proceedings in the appellate courts, as well as in the superior courts.”

*Bryant v. Joseph Tree, Inc.*, 119 Wash. 2d 210, 223, 829 P.2d 1099, 1106 (1992)(citing *Rhinehart v. Seattle Times, Inc.*, 59 Wash.App. 332, 342, 798 P.2d 1155 (1990)).

Hagman requests attorney's fees for having to respond to the CR 11 claims on appeal. There is no basis in fact or law for a claim that CR 11 sanctions should apply to Hagman or Hagman's counsel.

Hagman respectfully requests, as a sanction, attorney's fees of an amount of at least \$2000.00 but in the sound discretion of this court, for having to respond to the CR 11 arguments over and over and over.

**D. Whether The Order On The Voluntary Motion To Dismiss Refusing To Award Attorney's Fees Is Appealable As A Matter Of Right And Whether The Trial Court Erred In Reserving The Attorney Fee Question?**

While a party may not appeal a decision to dismiss without prejudice, a party can seek review of an ancillary order regarding attorney's fees in a dismissal matter. *Wachovia SBA Lending v. Kraft*, 165 Wn.2d 481 fn.4 (2009). A dismissal with prejudice is appealable as a matter of right

under RAP 2.2(a)(3), which allows an appeal from “any written decision affecting a substantial right in a civil case which in effect determines the action and prevents a final judgment or discontinues the action.”

“With respect to dismissals without prejudice the law is, unfortunately, less than crystal clear, but the rule appears to be that the dismissal is not appealable as a matter of right if the statute of limitations allows sufficient time for refileing. See *Munden v. Hazelrigg*, 105 Wash. 2d 39, 711 P.2d 295 (1985) (no appeal allowed from dismissal without prejudice, where statute of limitations had not run and filing of new action was possible); *Barnier v. City of Kent*, 44 Wash. App. 868, 723 P.2d 1167 (Div. 1 1986) (appeal allowed from dismissal of declaratory judgment action without prejudice, where practical effect was to discontinue the action).”

4 Washington Practice CR 41 K. Teglund (6<sup>th</sup> Edition)(Note 27)

The order is a result of Hagmans’ motion, which was sought conditioned upon no award of attorney’s fees. (CP 314)

Accordingly, there is no reviewable decision on an appeal. *Wachovia SBA Lending v. Kraft*, 165 Wn.2d 481 fn.4 (2009. fn.4, fn.10; RAP 2.2(a)(4). The trial court declined to award fees on the dismissal without prejudice, and essentially ruled the question of attorney’s fees could be brought up again when and if Hagman reinstated the claims. (CP 396).

Such an order is arguably somewhere in between a dismissal with prejudice and a dismissal without prejudice. 4 Washington Practice CR 41 K. Teglund (6<sup>th</sup> Edition)(Note 6)(“The trial court may also reach a conclusion somewhere between with prejudice and without prejudice, ruling that the plaintiff can file a second action, but only after paying the defendant’s costs in the dismissed action.”)

Accordingly, this Court should decline to address the merits of this matter before it under any discretionary review authority. However, if review is granted and the trial court’s decision is found in error, to avoid prejudice to Hagman the matter should be remanded to the trial court so that the status of the parties is that as they were on July 30, 2013 so as not to prejudice Hagman who conditioned the motion to dismiss on no award of attorney’s fees. 4 Washington Practice CR 41 K. Teglund (6<sup>th</sup> Edition)(Note 27)(“If the trial court dismisses the plaintiff’s case but is reversed on appeal, the plaintiff need not refile. Ordinarily, at least, the case simply proceeds as if the case were never dismissed.”)

## **V. CONCLUSION**

The trial court’s order dismissing this matter without an award of attorney’s fees should be affirmed. If reversed, the matter should be remanded to the trial court.

Dated this <sup>10<sup>th</sup></sup>~~9<sup>th</sup>~~ day of October, 2014.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "P. C. Ojala". The signature is written in a cursive style with a horizontal line underneath it.

Peter C. Ojala, WSBA #42163  
Carson Law Group, P.S.  
Attorney for Respondent

DECLARATION OF MAILING

Dawn Misawic declares as follows:

I am an employee of Carson Law Group, P.S., a United States citizen, over the age of eighteen (18) years, and am competent to testify to the matters set forth herein.

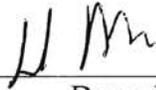
I certify that on October 10, 2014, I mailed by U.S. First-Class Mail, postage prepaid copies of the above RESPONSE BRIEF OF APPELLANTS

to the following:

Russell James Jensen, Jr.  
Mukilteo Law Office PLLC  
4605 116<sup>th</sup> St SW Ste 101  
Mukilteo WA 98275-0105  
Attorney for Barbara Shelton  
and related parties

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Dated at Everett, Washington on October 10, 2014.



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Dawn Misawic, Legal Assistant

**VI. APPENDIX E**

*Oprian v. Goldrich*, 220 Cal App 3d 337 (1990)

**220 Cal.App.3d 337 (1990)**

**269 Cal. Rptr. 429**

**NICK OPRIAN et al., Plaintiffs and Appellants,**

**v.**

**GOLDRICH, KEST AND ASSOCIATES et al., Defendants and Respondents.**

Docket No. G006252.

Court of Appeals of California, Fourth District Division Three.

May 15, 1990.

339 \*339 COUNSEL

Nick **Oprian** and Winifred L. **Oprian**, in pro. per., Paoli & Paoli, Sylvia L. Paoli, John L. Dodd and Douglas S. Honig for Plaintiffs and Appellants.

Greenberg, Glusker, Fields, Claman & Machtinger, Michael K. Collins, Baker & McKenzie, Joel Mark and Myron Roschko for Defendants and Respondents.

OPINION

MOORE, J.

Nick and Winifred **Oprian** (collectively **Oprian**) filed an action for malicious prosecution and civil conspiracy against a real estate development partnership and its attorneys. The lower court granted defendants' motions for summary judgment and dismissed the action. On appeal, **Oprian** contends the court erred by granting the summary judgment motions because there was a favorable termination in the prior action and triable issues of fact existed as to probable cause and malice. We affirm.

I

## FACTS AND PROCEDURAL HISTORY

As stated by **Oprian**, this action for malicious prosecution and civil conspiracy arose out of a real estate deal gone awry. **Oprian** owned a parcel of land in Orange County. In 1975, the county advised it was interested in developing a senior citizen housing project on that property, under a housing program administered by the Department of Housing and Urban \*340 Development (HUD), and referred **Oprian** to **Goldrich, Kest and Associates (GKA)**, a real estate development partnership with extensive experience in developing such projects. **Oprian** met with Robert I. Stern, a general partner of GKA, who said GKA would be interested in developing the property as a HUD project.<sup>[1]</sup>

An option contract was entered into between **Oprian** and Stern on August 27, 1975, giving Stern the right to name a nominee if escrow was opened. The option was for two years, but the parties agreed Stern could elect a one year extension. Thereafter, Stern pursued development of the property as a senior citizen project, making the appropriate applications and submittals to HUD, and filing a proposal for the project. Stern also exercised his right to extend the option for an additional year, until August 27, 1978.

On July 1, 1977, Stern wrote **Oprian** that it appeared HUD would approve the project. However, in August he learned HUD selected a competing proposal. Since the value of the property had appreciated well above the 1976 option price, **Oprian** was pleased to learn HUD turned down Stern's proposal. On September 23, he wrote Stern asking about

GKA's intentions. Stern wrote back on October 3, informed **Oprian** he planned to resubmit the application, and predicted HUD would eventually choose the project.

In his October 3 letter, Stern also analyzed the feasibility of using the property for some other purpose, and indicated a willingness to buy the property immediately in order to pursue either a "conventional project and/or a HUD development..." Stern intended the letter to be an exercise of his option, but was advised it might not be effective. Accordingly, he sent **Oprian** another letter, dated October 13, expressly seeking to exercise the option. Because of **Oprian's** apparent unwillingness to honor the option, Stern retained Attorney Myron Roschko to advise him of his rights. After being advised of the facts by Stern, and reviewing written documentation, Roschko advised Stern he had a valid option to purchase the property.

**Oprian** did not immediately respond to Stern's October 3 letter. Since approximately September 15, he had been looking for another buyer, and in late September or early October he began negotiating with a condominium builder. On October 13 **Oprian** wrote Stern indicating he did not wish to sell the property unless it was to be developed for a HUD project. He asked \*341 Stern to agree to cancel the option. Four days later, **Oprian** and the condominium builder opened escrow for the sale of the property to the condominium builder for \$315,000, plus \$1,000 per unit if the property was resold as raw land.<sup>[2]</sup> Upon learning **Oprian** intended to sell the property to the condominium developer, Stern again met with Roschko. Roschko advised Stern he was entitled to purchase the property and, on November 9, Roschko wrote **Oprian** demanding he agree to exercise of the option, and stating that if he did not Roschko would advise Stern to file a lawsuit and record a lis pendens "which will create a lien on the property and make it unmarketable..." When **Oprian** refused, Roschko filed a complaint for specific performance and recorded a lis pendens. Stern declared he filed the suit based on Roschko's advice, and believed he had a valid option which **Oprian** had breached by refusing to sell. He believed the case was meritorious, and that belief was confirmed by his attorney who had fully reviewed the matter.

After the complaint was filed, **Oprian** sent Stern a letter purporting to rescind the option. He also answered the complaint and filed a cross-complaint for declaratory relief, seeking a determination that HUD approval was a condition precedent to the exercise of the option. Despite the pendency of the litigation and the recorded lis pendens, **Oprian** sold the property to the condominium developer on October 11, 1978. The developer later conveyed the property to Country Hollow, Ltd., which built condominiums on the property.

Stern later substituted the law firm of Greenberg & Glusker (now Greenberg, Glusker, Fields, Claman and Machtinger [Greenberg]) as his attorneys in place of Roschko, who had no further involvement in the case. The declarations of Stern and the Greenberg attorneys filed in the trial court indicated Stern fully disclosed all of the underlying facts to the attorneys and provided them with documentation and pleadings. Greenberg concluded Stern's specific performance action was meritorious, with an excellent chance of success, and so advised him.

In December 1980, Stern and GKA entered into a settlement with Country Hollow and related entities, agreeing to dismiss the specific performance action and withdraw the lis pendens in return for payment of \$357,500. **Oprian** was not a party to the settlement, and the agreement specifically provided that it did not include any breach of contract claims Stern might have against **Oprian**.

In the meantime, **Oprian** amended his cross-complaint to include a cause of action for fraud against GKA and each of its partners, including Stern. \*342 Trial on Stern's complaint and **Oprian's** cross-complaint began on December 28, 1982, and the jury returned a verdict for **Oprian** on both the complaint and the cross-complaint, awarding \$214,460 compensatory damages and \$400,000 punitive damages.

However, in an unpublished opinion filed October 15, 1985, the Fourth Appellate District, Division One, reversed, directing the court to enter judgment on the cross-complaint in favor of all cross-defendants. The Court of Appeal concluded there was no substantial evidence to support the jury's finding of fraud.

At the conclusion of its opinion, the Court of Appeal also directed that Stern's complaint be dismissed, "based on representations of counsel at oral argument." At oral argument, one of the justices asked counsel for Stern and GKA

whether he would retry the complaint if the court reversed the judgment on the cross-complaint. Counsel responded he had not discussed the matter with his clients, but that if the judgment on the cross-complaint were reversed Stern and GKA would probably be willing to forego further prosecution of the complaint rather than incur additional attorney's fees and the inconvenience of pursuing a second trial.

On August 25, 1986, **Oprian** filed the complaint for malicious prosecution and civil conspiracy out of which this appeal arises. A first amended complaint was filed in 1987, naming GKA and its partners, including Stern, and Attorneys Roschko and Greenberg. All defendants filed motions for summary judgment contending, inter alia, the prior action did not result in a favorable determination to **Oprian**, and there was probable cause to bring the prior action.

The lower court granted the motions, and entered judgments for the defendants on November 6, 1987.

## II

### STANDARD OF REVIEW

(1) The granting of summary judgment will only be affirmed if the undisputed material facts "conclusively negate a necessary element of the plaintiff's case or establish a complete defense ..." to the action. (Walsh v. Bronson (1988) 200 Cal. App.3d 259, 264 [245 Cal. Rptr. 888]; Code Civ. Proc., § 437c, subd. (c).) Stated otherwise, a defendant seeking summary judgment must affirmatively negate at least one essential element of every cause of action. (343 Frazier, Dame, Doherty, Parrish & Hanawalt v. Boccardo, \*343 Blum, Lull, Niland, Teerlink & Bell (1977) 70 Cal. App.3d 331, 338 [138 Cal. Rptr. 670].)

(2) To establish a cause of action for malicious prosecution, **Oprian** was required to demonstrate the existence of a triable issue of fact with respect to each of the necessary elements: that the prior action: (1) terminated in his favor, (2) was filed without probable cause and, (3) was initiated by the defendants with malice. (3) (See fn. 3.) (Walsh v. Bronson, *supra*, 200 Cal. App.3d at pp. 263, 264; Bertero v. National General Corp. (1974) 13 Cal.3d 43, 50 [118 Cal. Rptr. 184, 529 P.2d 608, 65 A.L.R.3d 878].)<sup>[3]</sup>

(4a) **Oprian** contends a favorable termination of the prior action was established, and that there were triable issues as to the elements of probable cause and malice. We conclude that, as a matter of law, there was no favorable termination of the prior action.

## III

### FAVORABLE TERMINATION

An essential element of a cause of action for malicious prosecution is favorable termination of the prior action. (Bertero v. National General Corp., *supra*, 13 Cal.3d at p. 50.) (5) **Oprian** agrees, as he must, a dismissal on technical grounds for procedural reasons does not constitute a favorable termination. Moreover, where the proceeding terminates by agreement, without regard to its merits, there is no favorable termination. (Webb v. Youmans (1967) 248 Cal. App.2d 851, 853 [57 Cal. Rptr. 11]. See also Jaffe v. Stone (1941) 18 Cal.2d 146, 150 [114 P.2d 335, 135 A.L.R. 775] [to be favorable, the termination must indicate the innocence of the accused].) "Where a proceeding is terminated other than on its merits, the reasons underlying the termination must be examined to see if it reflects the opinion of either the court or the prosecuting party that the action would not succeed. [Citations]." (Haight v. Handweiler (1988) 199 Cal. App.3d 85, 88 [244 Cal. Rptr. 488].)

(4b) Here, the specific performance action brought by Stern terminated in a \$357,500 settlement with Country Hollow, 344 **Oprian's** successor-in-interest \*344 in the property. As part of the settlement, Stern withdrew the lis pendens and dismissed the specific performance claim. Thus, that action did not terminate in **Oprian's** favor. The same is true of

the breach of contract action. The court of appeal directed the complaint be dismissed, "based on representations of counsel at oral argument." The nature of the representation is explained in the declaration of Stern's counsel, which **Oprian** does not contradict. During oral argument, one of the justices asked counsel if the judgment on the cross-complaint for fraud were reversed with directions to enter judgment in favor of Stern, would he retry the complaint? Counsel responded that under those circumstances he believed his clients would forego further prosecution of the complaint in order to avoid further attorney's fees and the inconvenience of a second trial, although he believed the action was meritorious.

Chauncey v. Niems (1986) 182 Cal. App.3d 967 [227 Cal. Rptr. 718] is instructive: "If [the dismissal] is of such a nature as to indicate the innocence of the accused, it is a favorable termination sufficient to satisfy the requirement. If, however, the dismissal is on technical grounds, for procedural reasons, or for any other reason not inconsistent with his guilt, it does not constitute a favorable termination." (*Id.* at p. 976.)

The dismissal of Stern's complaint following oral argument was not on the merits. At the time, the specific performance claim had been settled and Stern's complaint had been amended to state a claim for damages for breach of contract. **Oprian** concedes the dismissal was voluntary and that "said dismissal was entered not on the merits of the underlying action." Nor did the dismissal reflect the opinion of the court that Stern's complaint would not succeed on retrial. Had the court found that the complaint was based on reversible error or was without substance, it would most certainly have reversed the judgment on the complaint. (See, e.g., John B. Gunn Law Corp. v. Maynard (1987) 189 Cal. App.3d 1565, 1573 [235 Cal. Rptr. 180].) Here, however, having determined to reverse the jury's verdict in favor of **Oprian** on the cross-complaint, the court of appeal merely inquired as to whether counsel would be willing to dismiss the complaint if the judgment on the cross-complaint were reversed.

It would be a sad day indeed if a litigant and his or her attorney could not dismiss an action to avoid further fees and costs, simply because they were fearful such a dismissal would result in a malicious prosecution action. It is common knowledge that costs of litigation, such as attorney's fees, costs of expert witnesses, and other expenses, have become staggering. The law favors the resolution of disputes. "This policy would be ill-served by a rule which would virtually compel the plaintiff to continue his litigation in order to place himself in the best posture for defense of a malicious prosecution \*345 action." (Leonardini v. Shell Oil Co. (1989) 216 Cal. App.3d 547 at p. 571 [264 Cal. Rptr. 883].)

Stern, GKA and their counsel agreed to dismiss the complaint against **Oprian** if they received a favorable determination on the cross-complaint. The motivation was to avoid the payment of further attorney's fees and court costs and the inconvenience of a second trial. Clearly the dismissal was not on the merits and resulted from a practical decision that further litigation was too expensive to pursue.

(6) (See fn. 4.) Accordingly, **Oprian** did not establish that the underlying cause of action terminated in his favor, and the motions of all defendants for summary judgment were properly granted on that basis alone.<sup>[4]</sup>

The judgments of the lower court are affirmed. Respondents shall recover their costs on appeal.<sup>[5]</sup>

Sonenshine, Acting P.J., and Wallin, J., concurred.

A petition for a rehearing was denied May 31, 1990.

[1] **Oprian's** malicious prosecution action was against Stern, his partners Jona **Goldrich**, Sol Kest and Robert Hirsch, their partnership, GKA, and Jona **Goldrich**, Trustee of **Goldrich** Trust No. 1, and Sol Kest, Trustee of Kest Trust No. 1. For convenience, these respondents are sometimes referred to collectively as GKA.

[2] **Oprian** testified the development of the property as a HUD project was important to him because it was the only way he could sell the property for \$120,000.

[3] **Oprian** sometimes refers to this action as one for "abuse of process." We assume this is inadvertent error. An action for abuse of process is established only where the process is abused or misused for a purpose other than that for which it is designed. (Friedman v. Stadum (1985) 171 Cal. App.3d 775, 779 [217 Cal. Rptr. 585].) The mere filing of an action and the recordation of a lis pendens

would not support an action for abuse of process. (*Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.* (1986) 42 Cal.3d 1157, 1169 [232 Cal. Rptr. 567, 728 P.2d 1202].)

[4] Because respondents' initiation of the underlying lawsuit did not constitute malicious prosecution, **Oprian's** conspiracy cause of action must also fail: "There is no cause of action for conspiracy per se, and a civil conspiracy does not give rise to a cause of action 'unless a civil wrong has been committed....' [Citations.]" (*Walsh v. Bronson, supra*, 200 Cal. App.3d at p. 271.)

The issues of probable cause and malice need not be reached. However, recent case law limits the determination of probable cause to an objective standard. In this case, we would not hesitate to find respondents had probable cause to initiate the underlying suit. (See *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863 [254 Cal. Rptr. 336, 765 P.2d 498]; *Klein v. Oakland Raiders, Ltd.* (1989) 211 Cal. App.3d 67 [259 Cal. Rptr. 149]; *Leonardini v. Shell Oil Co., supra*, 216 Cal. App.3d 547.)

[5] Because we do not find the appeal to be indisputably without merit, respondents' request for sanctions is denied. (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650 [183 Cal. Rptr. 508, 646 P.2d 179].)

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