IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

JAMES R. DAVEY and DANA DAVEY, Husband and wife, Appellants, v. WINDERMERE SERVICES, CO., a Washington corporation; WINDERMERE MANITO, LLC, a Washington limited liability corporation; JOSEPH NICHOLS, SR. and JANE DOE NICHOLS, husband and wife; YVONNE DEBILL and JOHN DOE DEBILL, husband and wife; KATHI PATE and JOHN DOE PATE, husband and wife, Respondents and Cross-Appellants, CHARLES V. CARROLL and JANE DOE CARROLL, husband and wife; and LAW OFFICES OF CHARLES V. CARROLL, a Washington professional limited liability corporation, Defendants.	No. 30014-5-III UNPUBLISHED OPINION

Kulik, J. — James and Dana Davey sued Windermere Services, Co. and its agents for violation of the Consumer Protection Act (CPA), chapter 19.86 RCW; breach of fiduciary duty; fraud; and intentional infliction of emotional distress. The Daveys alleged that Windermere acted dishonestly by falsely representing that the buyers of the Daveys' home had signed and delivered the purchase agreement by the acceptance date. The trial court granted summary judgment in favor of Windermere on the basis of collateral estoppel. The court ruled that the Daveys were precluded from bringing this action because prior litigation determined that the buyers' acceptance of the purchase agreement was timely. We agree and affirm, but we reverse the denial of attorney fees to Windermere and award fees.

FACTS

The main issue in this case is whether collateral estoppel precludes the Daveys' lawsuit. The facts from a 2007 action entitled *Pratt v. Davey*, No. 07-2-04300-9 (Spokane County Super. Ct., Wash.) (2007 litigation) are crucial to the present lawsuit.

In July 2007, James Davey and Dana Davey entered into an Exclusive Right to Sell Listing Agreement (listing agreement) with Yvonne Debill, a real estate agent for Windermere Services, Co. Pursuant the listing agreement, Windermere became the

Daveys' agent to sell and receive offers on the Daveys' home located at 3720 W. Rosamond, Spokane. The Daveys agreed to list their home for $266,000.

Robert L. and Sharon Pratt made an offer to buy the Daveys' home. The Daveys rejected the Pratts' first offer of $260,000, and on July 28, counter offered with the list sales price of $266,000. The terms of the counter offer stated that the offer expired on July 29.

The Pratts accepted the counter offer on July 28 by initialing the changes the Daveys made to the original purchase agreement. The Pratts' agent, Kathi Pate, dated the contract "7-28-07." Clerk's Papers (CP) at 81. Upon receiving the counter offer, Ms. Debill telephoned the Daveys and congratulated them on selling their home.

On August 3, the Pratts met with the Daveys at the Rosamond address. The Daveys presented the Pratts with a letter identifying the defects in the home that the Daveys planned to fix prior to showing it. The letter was an attempt to modify the terms of the parties' agreement.

On August 20, the Daveys contacted Ms. Debill to tell her that their house was not sold because they did not have a contract and that they were never told they had a contract. Over the next few weeks, the Daveys also communicated with the Pratts that they would not sell the house. The Daveys refused to sign the closing documents.

2007 Litigation. The Pratts sued the Daveys for specific performance. The Pratts requested that the court order the Daveys to honor the terms of the Real Estate Purchase and Sale Agreement (purchase agreement).

At trial, one of the Daveys' arguments was that they did not have a binding agreement to sell their home because the Pratts did not deliver their acceptance to the Daveys' broker on time. The Daveys contend that there was no evidence to prove that Ms. Pate delivered the counter offer to the broker's office on July 28. Contrary to Ms. Pate's testimony, the Daveys argued that the circumstances surrounding the acceptance lead to a conclusion that Ms. Pate could not have accepted the counter offer on that day. "She can't say where she was. Or where [the Pratts] were. So how could the document been [sic] initialed and be given to her on the date, the alleged date of mutual acceptance, the 28th? [W]e don't know that." CP at 493.

In response to the Daveys' argument, the trial court said, "I have never heard anyone make an argument, well, I don't know if the date on [the counter offer] saying it's [sic] mutual assent of 7-28 is really, really correct. Because, I really think everybody is lying to me." CP at 497.

The trial court ruled that the Pratts accepted the Daveys' counter offer on July 28 and that a valid purchase and sale contract was formed. The court stated in its oral ruling:

[The counter offer] was signed and initialed on 7-28. As is shown on the

> contract. That's when the sellers made the counteroffer. And that's when—not only the buyers, Mr. and Mrs. Pratt, said they signed it, but that is also when their agent said they signed it.
>
> Now, you asked at 6:10 p.m. if—Ms. Pate could tell you where she was. She said no. . . . The point is this—they have no reason to lie to you.

CP at 499. The court ordered the Daveys to sign all documents necessary to complete the closing and awarded damages and attorney fees to the Pratts.

The Daveys appealed. A commissioner of this court determined that the trial court did not err in ordering specific performance. Commissioner's Ruling, *Pratt v. Davey*, No. 26620-6-III (Wash. Ct. App. Nov. 21, 2008). This court determined that the Daveys' conduct on August 3 waived strict compliance with the provisions in the agreement regarding delivery and earnest money. While this court used alternative grounds for reaching its decision, this court did not determine that the trial court's reasoning was in error. As stated in the opinion, "[E]ven if the Pratts' delivery of their acceptance to the Daveys' realtor did not comply with the provision requiring delivery to the broker, the Daveys' conduct waived strict compliance with that provision, as well." CP at 98. In another section related to the statute of frauds, this court acknowledged that Ms. Debill had the agreement accepting the Daveys' counter offer in her possession the same day that the Pratts delivered it.

The Daveys sought discretionary review from the Washington Supreme Court.

The Daveys' request was denied. *Pratt v. Davey*, 166 Wn.2d 1023, 217 P.3d 782 (2009).

Current Litigation. On July 27, 2010, the Daveys, acting pro se, brought the present lawsuit against Windermere, Windermere Manito, LLC, Joseph Nichols, Sr. and Jane Doe Nichols, Yvonne Debill and John Doe Debill, Kathi Pate and John Doe Pate, Charles Carroll and Jane Doe Carroll, and the Law Offices of Charles Carroll (hereinafter "Windermere"). Charles Carroll, Jane Doe Carroll, and the Law Offices of Charles Carroll were voluntarily dismissed from the action.

The Daveys brought four separate claims against Windermere: (1) violation of the CPA, (2) breach of fiduciary duty, (3) fraud, and (4) intentional infliction of emotional distress. In their complaint, the Daveys restated their belief that the Pratts did not validly accept the counter offer. "[The Daveys] did not receive a copy of the signed [purchase agreement] when the Pratts allegedly accepted the counteroffer on July 28, 2007 because, on information and belief, they did not sign the counteroffer that day. The counteroffer lapsed. Defendants YVONNE DEBILL and KATHI PATE, however, represented that the Pratts did sign." CP at 6.

The Daveys challenged the validity of the contract and Windermere's actions throughout their complaint. For instance, in their breach, fraud, and emotional distress claims, the Daveys contended that Windermere breached its fiduciary duties by "falsely

claiming the buyers timely accepted plaintiffs' counteroffer for sale of their home." CP at 8. Also, the Daveys claimed that Ms. Debill had specific knowledge "that the plaintiffs [sic] offer was not accepted on time," "that the original contract document was replaced with a fraudulent contract document indicating that it was faxed on July 28th," and "that [Ms. Pate] and [Mr. Pratt] were not truthful in Superior Court, yet [Ms. Debill] did not disclose this information to her clients." CP at 10.

Windermere moved for summary judgment. The trial court dismissed the Daveys' claims on the basis of collateral estoppel and failure to present sufficient evidence to substantiate every element of their claim. The trial court denied Windermere's request for attorney fees. The Daveys appeal the dismissal. Windermere cross-appeals the denial of its request for attorney fees.

ANALYSIS

An appellate court reviews summary judgment orders de novo, performing the same inquiry as the trial court. *Sheikh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006) (quoting *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002)).

Summary judgment is appropriate when there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). "A material fact is of such a nature that it affects the outcome of the

litigation." *Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995). Factual issues may be decided as a matter of law when reasonable minds could reach but one conclusion or when the factual dispute is so remote it is not material. *Ruffer v. St. Frances Cabrini Hosp. of Seattle*, 56 Wn. App. 625, 628, 784 P.2d 1288 (1990) (quoting *Trane Co. v. Brown-Johnston, Inc.*, 48 Wn. App. 511, 513, 739 P.2d 737 (1987)).

The reviewing court considers the facts and inferences from the facts in the light most favorable to the nonmoving party. *Jones*, 146 Wn.2d at 300. The facts set forth must be specific and detailed. *Sanders v. Woods*, 121 Wn. App. 593, 600, 89 P.3d 312 (2004). The nonmoving party may not rely on mere speculation or unsupported assertions, facts not contained in the record, or inadmissible hearsay. *Higgins v. Stafford*, 123 Wn.2d 160, 169, 866 P.2d 31 (1994) (quoting *Peterick v. State*, 22 Wn. App. 163, 181, 589 P.2d 250 (1977), *overruled on other grounds by Stenberg v. Pac. Power & Light Co.*, 104 Wn.2d 710, 709 P.2d 793 (1985)).

A defendant moving for summary judgment may meet the initial burden by pointing out the absence of evidence to support the nonmoving party's case. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). "In this situation, the moving party is not required to support the motion by affidavits or other

materials negating the opponent's claim." *White v. Kent Med. Ctr., Inc.*, 61 Wn. App. 163, 170, 810 P.2d 4 (1991). Still, the moving party must identify "'those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.'" *Id.* (quoting *Celotex*, 477 U.S. at 323).

If the moving defendant meets the initial showing, then the burden of proof shifts to the plaintiff. *Young*, 112 Wn.2d at 225. If, at this point, the plaintiff "'fails to make a showing sufficient to establish the existence of an element essential to [his or her] case, and on which [he or she] will bear the burden of proof at trial', then the trial court should grant the motion." *Id.* (quoting *Celotex*, 477 U.S. at 322).

Collateral Estoppel. "Collateral estoppel works to prevent relitigation of issues that were resolved in a prior proceeding." *City of Aberdeen v. Regan*, 170 Wn.2d 103, 108, 239 P.3d 1102 (2010). "Collateral estoppel requires '(1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied.'" *Id.* (quoting *City of Arlington v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 164 Wn.2d 768, 792, 193 P.3d 1077 (2008)). The issues to be precluded must have

actually been litigated and necessarily determined in the prior action. *Id.* (quoting *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 508, 745 P.2d 858 (1987)).

Collateral estoppel, referred to as issue preclusion, must be distinguished from res judicata, or claim preclusion. *Shoemaker*, 109 Wn.2d at 507. "'The doctrine of collateral estoppel differs from res judicata in that, instead of preventing a second assertion of the same claim or cause of action, it prevents a second litigation of issues between the parties, even though a different claim or cause of action is asserted.'" *Rains v. State*, 100 Wn.2d 660, 665, 674 P.2d 165 (1983) (quoting *Seattle-First Nat'l Bank v. Kawachi*, 91 Wn.2d 223, 225-26, 588 P.2d 725 (1978)).

Here, the Daveys contend that the trial court erred by dismissing their claims on the basis of collateral estoppel. They maintain that collateral estoppel does not apply because the issues decided in the 2007 litigation are not identical to the issues before the court in the current litigation. The Daveys also contend that the application of the doctrine results in an injustice to the Daveys.

As a preliminary matter, it is important that we not confuse the doctrines of collateral estoppel and res judicata. The question before this court is not whether the Daveys' claims of breach of fiduciary duty, fraud, CPA violations, and outrage were previously decided, but whether the issues underlying the Daveys' claims were

previously decided.

In the present claims, the Daveys admit that they do not contest the validity of the contract. The key issue, according to the Daveys' complaint, is whether Windermere committed dishonest acts to cover up that the counter offer was not accepted on time. The Daveys offered this same argument in the 2007 litigation.

The underlying issue is whether a signed contract was delivered to Windermere's office on July 28. This issue has previously been decided. In the 2007 litigation, the trial court determined that the contract was accepted in accordance with the terms and conditions specified in the counter offer. The terms and conditions of the counter offer required delivery to the broker's agent by July 29. The Pratts accepted the counter offer on July 28. The trial court rejected the Daveys' argument that Ms. Pate lied about the date of acceptance. The Court of Appeals did not find error with the findings or conclusions, but merely found additional grounds to affirm the decision.

The trial court in 2007 needed to find that the delivery of the counter offer was timely in order to conclude that the Pratts' acceptance of the counter offer was valid. Thus, collateral estoppel precluded the Daveys from relitigating the issue of whether the counter offer was timely accepted and delivered on July 28. Applying the doctrine would not result in injustice to the Daveys because they were given the ability to bring this issue

before the trial court.

The trial court did not err in concluding that collateral estoppel applies to the core issue in the Daveys' claim. Because no question remained as to this material issue of fact, the trial court did not err by granting summary judgment in favor of Windermere.

Summary Judgment. In its memorandum in support of the motion for summary judgment, Windermere contended that the Daveys failed to present evidence to support every element essential to their claim. Windermere then addressed each of the Daveys' four claims individually, pointing out the applicable law and the elements that the Daveys could not support beyond the mere allegations in the Daveys' pleadings. The burden then shifted to the Daveys to present sufficient evidence to support each element of each of their claims.

CPA Claim. The five elements of a CPA claim are: (1) an unfair or deceptive act, (2) that is occurring in trade or commerce, (3) that has an impact on the public interest, (4) that has proximately caused, (5) damage to the plaintiff's property or business. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986).

The Daveys contend that the deceptive act relates to the timeliness of acceptance of the counter offer. As previously mentioned, the 2007 litigation determined that

acceptance was timely. The Daveys admit that the purchase agreement was valid and enforceable. Furthermore, the Daveys failed to support their assertion that Windermere falsified documents and lied to the Daveys.

The Daveys also have not met the injury, proximate cause, or the damage elements.[1] The Daveys agreed with Windermere to sell their home for $266,000. Windermere negotiated a contract for the listing price. The Daveys cannot show how Windermere caused injury or damage given that the Daveys received the full purchase price for their home. The trial court appropriately dismissed the Daveys' CPA claim.

Breach of Fiduciary Duty. To support a claim for breach of fiduciary duty, a plaintiff must show: (1) the existence of a duty owed to the complaining party, (2) a breach of that duty, (3) a resulting injury, and (4) that the claimed breach was the proximate cause of the injury. *Hansen v. Friend*, 118 Wn.2d 476, 479, 824 P.2d 483 (1992). A realtor has a common law and statutory duty to exercise reasonable skill and care in representing a seller's interests, to deal honestly and in good faith, to present written offers and communications in a timely fashion, and to disclose material

[1] In their memorandum in opposition of the motion for summary judgment, the Daveys contend that damages resulted from Windermere's low valuation of the home. The Daveys did not raise the issue of undervaluation in their complaint. At the summary judgment hearing, the trial court decided that the Daveys were estopped from asserting the issue.

matters known by the agent and not apparent or readily ascertainable to a party. RCW 18.86.030(1)(a)-(d); RCW 18.86.040.

The Daveys claim that Windermere owed a duty to deal honestly and in good faith and to disclose all material facts. The Daveys contend that Windermere breached this duty by falsely claiming that the Pratts' acceptance of the counter offer was timely. However, the Daveys do not offer proof that Windermere lied about timely acceptance. Also, the Daveys do not show how the alleged untruthfulness resulted in injury because Windermere sold the Daveys' home for the purchase price. The trial court appropriately dismissed the Daveys' claim of breach of a fiduciary duty.

Fraud. In order to survive summary judgment on their fraud claim, the Daveys needed to show: (1) a representation of an existing fact, (2) materiality of the representation, (3) falsity of the representation, (4) the defendant's knowledge of its falsity, (5) defendant's intent to induce reliance on the representation by the plaintiff, (6) plaintiff's ignorance of the falsity of the representation, (7) plaintiff's reliance on truth of the representation, (8) plaintiff's right to rely on the representation (justifiable reliance) and (9) damages. *Stiley v. Block*, 130 Wn.2d 486, 505, 925 P.2d 194 (1996). The elements of fraud must be established by "'clear, cogent and convincing evidence.'" *Id*. (quoting *Sigman v. Stevens-Norton, Inc.*, 70 Wn.2d 915, 920, 425 P.2d 891 (1967)).

The Daveys reiterated their complaint that Windermere was not truthful regarding the acceptance of the counter offer. The Daveys identified acts they considered fraudulent. However, the Daveys do not present evidence that would show that these fraudulent acts occurred or that Windermere's representations were false. Again, the Daveys offer no evidence to substantiate their claim. The trial court appropriately dismissed the Daveys' claim for fraud.

Intentional Infliction of Emotional Distress (Tort of Outrage). A prima facie case of intentional infliction of emotional distress requires a showing of: (1) an act of the defendant amounting to extreme and outrageous conduct, (2) intent on the part of the defendant to cause the plaintiff to suffer severe emotional distress, or recklessness as to such consequences, and (3) actual result of severe emotional distress. *Kloepfel v. Bokor*, 149 Wn.2d 192, 195, 66 P.3d 630 (2003). The conduct at issue must be "'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" *Dicomes v. State*, 113 Wn.2d 612, 630, 782 P.2d 1002 (1989) (emphasis omitted) (quoting *Grimsby v. Samson*, 85 Wn.2d 52, 59, 530 P.2d 291 (1975)).

Again, the Daveys did not identify any evidence to support or substantiate their claim. The trial court appropriately dismissed the Daveys' claim for intentional infliction

of emotional distress.

The trial court did not err by dismissing all of the Daveys' claims.

Windermere's Request for Attorney Fees. "Whether a party is entitled to attorney fees is an issue of law which is reviewed de novo." *Taliesen Corp. v. Razore Land Co.*, 135 Wn. App. 106, 141, 144 P.3d 1185 (2006).

Washington law generally provides for an award of attorney fees when authorized by a contract, statute, or recognized ground of equity. *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 839, 100 P.3d 791 (2004).

Even when a party elects to bring an action in tort, rather than an enforcement of a contract claim, the prevailing party is still entitled to its fees if the tort action is based on a contract. *Brown v. Johnson*, 109 Wn. App. 56, 58, 34 P.3d 1233 (2001). An action is based on a contract where (1) the action arose out of the contract, and (2) if the contract is central to the dispute. *Edmonds v. John L. Scott Real Estate, Inc.*, 87 Wn. App. 834, 855, 942 P.2d 1072 (1997) (quoting *Tradewell Group, Inc. v. Mavis*, 71 Wn. App. 120, 130, 857 P.2d 1053 (1993)).

The purchase agreement executed by the Daveys and prepared by Windermere allows the prevailing party to recover reasonable attorney fees if any of the parties are involved in a dispute related to any aspect of the transaction or the agreement.

The listing agreement between the Daveys and Windermere also has an attorney fee provision which requires the defaulting party to pay the prevailing party attorney fees, court costs, and other expenses, if it becomes necessary for either party to obtain an attorney to enforce the provisions of the contract.

The trial court denied Windermere's request for attorney fees and costs because the court believed that the claims were not linked to the contract.

The Daveys' tort actions arise out of the purchase agreement and/or the listing agreement. Without these agreements, the Daveys would not have a basis to assert claims against Windermere. Specifically, the purchase agreement allows for attorney fees in disputes related to any aspect of the transaction or agreement. The Daveys' claim of dishonesty and misrepresentation of the date of acceptance of the purchase agreement qualifies as a dispute related to an aspect of the transaction. The trial court abused its discretion by denying Windermere's request for attorney fees.

On appeal, reasonable attorney fees are recoverable if allowed by statute, rule, or contract and the request is made pursuant to RAP 18.1(a). *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 535, 79 P.3d 1154 (2003). As previously stated, the purchase agreement and listing agreement provide for attorney fees and costs to the prevailing party. Accordingly, attorney fees and costs are granted to Windermere.

Summary. We affirm the trial court's decision granting summary judgment in favor of Windermere. We reverse the trial court's denial of Windermere's request for attorney fees. We award to Windermere attorney fees and costs incurred at trial and on appeal.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Kulik, J.

WE CONCUR:

_____ _____
Brown, J. Korsmo, C.J.