No. 97373-3

SUPREME COURT OF THE STATE OF WASHINGTON

No. 775693-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

JUANITA COUNTRY CLUB CONDOMINIUM OWNERS ASSOCIATION
Respondent - Plaintiff

v.

PHILLIPS REAL ESTATE SERVICES, LLC
Petitioner - Defendant

PHILLIPS REAL ESTATE SERVICES, LLC'S PETITION FOR REVIEW

Matt Adamson, WSBA #31731
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I. IDENTITY OF PETITIONER

Petitioner is Phillips Real Estate Services, LLC. Petitioner was the defendant in the trial court and the respondent in the Court of Appeals.

II. THE COURT OF APPEALS OPINION

Phillips seeks review of the opinion issued in *Juanita Country Club Condo. Owners Ass'n v. Phillips Real Estate Servs., L.L.C.*, No. 77569-3-I, 2019 WL 1013972 (Mar. 4, 2019) (the "Opinion"). The Opinion reversed the trial court's grant of summary judgment, and *sua sponte* ruled on the meaning of the contract as a matter of law in favor of Juanita County Club Condominium Association ("JCC"). *See* Appendix A. On May 30, 2019, the Court of Appeals denied Phillips' timely motion for reconsideration. *See* Appendix B.

III. ISSUES PRESENTED

1. Does the Opinion conflict with published precedent by *sua sponte* granting summary judgment to JCC as the non-moving party?

2. Should this Court resolve the conflicting standards for when contract interpretation is a question of law?

3. Does the Opinion conflict with published precedent as to interpretation of potentially conflicting contract provisions?

4. Should the issue of contract interpretation be remanded for trial, or decided in favor of Phillips as a matter of law?

5. Did the Court err in not awarding fees to Phillips?

IV. STATEMENT OF THE CASE

1. JCC is a condominium association with 112 unit owners. JCC hired Phillips to manage the condominium. The parties negotiated, revised, and signed a Management Agreement. (CP 73-74; 79-84)

2. Section 8 of the first draft of the Agreement initially recited a fact: "Association acknowledges the receipt from Agent of a pamphlet on the law of real estate agency as required by RCW 18.86.030(1)." (*Id*.)

3. During negotiations, JCC changed Section 8 by adding "(Honesty, Good Faith, Reasonable Care, Material Facts)" under the recital. (CP 81) Frank Sloan, JCC's president, testified why he added that parenthetical:

> I wrote … *"(Honesty, Good Faith, Reasonable Care, Material Facts)"* … because that is the duty of care that the referenced Revised Code of Washington's statute required. (CP 268)

4. The Opinion incorrectly states that both parties drafted the parenthetical added to Section 8. (Compare Opinion p. 10 with CP 268)

5. The parties initialed Sloan's addition to Section 8. In fact, the parties initialed the page containing Sections 8 and 10 in five places. Further, when they wanted to delete language, they crossed it out and initialed it. They did not cross out Section 10. (CP 81)

6. Mr. Sloan, for JCC, signed the Management Agreement on June 6, 2012. Phillips signed on June 15, 2012. (79-84) In its final form, Sections 8 and 10, each on page 3 of the Agreement, read:

> **8.0 REAL ESTATE AGENCY LAW**. Association acknowledges the receipt from Agent of a pamphlet on the law of real estate agency as required by RCW 18.86.030. (*Honesty, Good Faith, Reasonable Care, Material Facts).*
>
> …
>
> **10.0 RESPONSIBILITY**. Agent [Phillips] shall be responsible for willful misconduct or gross negligence but shall not be held responsible for any matters relating to error of judgment, or for any mistakes of fact or law, or for anything, which it may do or refrain from doing which does not include any willful misconduct or gross negligence. (CP 81) (Attached hereto as Appendix C)

7. After Phillips resigned in 2015, JCC filed suit for breach of contract, seeking damages, mostly for "accounting" errors. The trial court dismissed JCC's claims on summary judgment, ruling that Section 10 required JCC to prove gross negligence.

8. The Court of Appeals reversed, *sua sponte* holding as a matter of law that the parenthetical added to Section 8 imposed a duty of reasonable care and that Section 10 is meaningless.

V. ARGUMENT

A. Standard of Review

Under RAP 13.4, this Court will accept review if (1) the decision of the Court of Appeals is in conflict with a decision of this Court or with

a published decision of the Court of Appeals; or (2) the petition involves an issue of substantial public interest. Both apply here.

B. *Sua Sponte* Ruling Without Proper Opportunity to Present Evidence of Disputed Material Facts Conflicts With Precedent

JCC's summary judgment motion did not ask the trial court to rule that Section 8 imposes a duty of reasonable care that conflicts with and deletes Section 10. (CP 13-24) JCC raised that argument for the first time in a "motion for reconsideration" (CP 417) and Phillips objected to JCC seeking new relief in such a motion. (CP 841-42)

On Appeal, JCC barely addressed the argument that Section 8 trumps Section 10. (Open. Br. at p. 31) JCC argued that interpretation of Sections 8 and 10 presented "a question of fact" and asked that the issue be remanded for trial. (Reply p. 4) Nonetheless, the Court of Appeals effectively granted JCC summary judgment, *sua sponte* ruling on the meaning of Sections 8 and 10 in JCC's favor as a matter of law.

A court "could properly grant summary judgment to the [non-moving party] only after allowing [the moving party] to present evidence that material facts were in dispute." *Nishikawa v. U.S. Eagle High,* 138 Wn. App. 841, 852, 158 P.3d 1265 (2007); 14A Wash. Prac., Civil Procedure § 25:13 (3d ed.); *Wright and Miller*, 10A Fed. Prac. & Proc. Civ. § 2720.1 (4th ed.) *citing Fountain v. Filson*, 336 U.S. 681, 682,

(1949)); *Cool Fuel v. Connett*, 685 F.2d 309, 311-312 (9th Cir. 1982) (non-moving party must have "had a full and fair opportunity").

For example, had JCC filed a motion under CR 56, Phillips' may have included evidence of the context of negotiations, potentially deposition testimony from Mr. Sloan, other instances where potential clients actually asked Phillips to delete Section 10, or testimony from the former employee who negotiated the contract, or other extrinsic evidence that may be relevant. But JCC never filed a CR 56 motion on this issue.

This Court should accept review and hold that appellate courts cannot grant summary judgment against a party who had no opportunity under CR 56 to present conflicting evidence in the trial court. Thus, at a minimum, the parties' intent as to the meanings of Sections 8 and 10 should have been remanded.

C. Review is Appropriate to Resolve Conflicting Standards for When Contract Interpretation is a Question of Law

Our appellate courts have adopted conflicting standards for when contract interpretation is ripe for summary judgment. The standards of contract interpretation, and when contract interpretation is a question of law, are also issues of "substantial public interest" because they arise in almost every contract dispute. *See e.g. Kelley v. Tonda*, 198 Wn. App. 303, 307, 393 P.3d 824 (2017) (noting that lawyers these days think all

cases should be decided on summary judgment). It is time to provide one consistent standard for when contract interpretation is a question of law.

Many cases hold that contract interpretation "is a question of law when (1) the interpretation does not depend on the use of extrinsic evidence or (2) only one reasonable inference can be drawn from the extrinsic evidence." *Kelley*, 198 Wn. App. 303, 313; *Tanner Elec. v. Puget Sound Power,* 128 Wn.2d 656, 674, 911 P.2d 1301 (1996); *Berg v. Hudesman*, 115 Wn.2d 657, 668, 801 P.2d 222 (1990).

However, JCC argued for, and our appellate courts have also applied in other opinions, a conflicting standard, holding that there is a question of fact if the language, alone, has two or more reasonable meanings. *See Wm. Dickson Co. v. Pierce Cty.*, 128 Wn. App. 488, 495, 116 P.3d 409 (2005) (holding that each party suggested a reasonable meaning of "third parties" and "[b]ecause more than one reasonable interpretation is possible here, the trial court erred when it granted" summary judgment); *Marshall v. Thurston Cty.*, 165 Wn. App. 346, 351, 267 P.3d 491 (2011) ("Summary judgment is not appropriate on an ambiguous contract"); *GMAC v. Everett Chevrolet,* 179 Wn. App. 126, 135, 142, 317 P.3d 1074 (2014) ("if two or more meanings are reasonable, a question of fact is presented").

Many of the "two or more reasonable meaning" cases include the words "when viewed in context," *GMAC*, 179 Wn. App. at 135, or when "viewed in light of the parties' other objective manifestations." *Go2Net v. C I Host*, 115 Wn. App. 73, 85, 60 P.3d 1245 (2003). However, this is still inconsistent with the standard in *Berg and Tanner Electric* because it would require a trial if there is more than "one reasonable meaning" of the language even if the "objective manifestations" are undisputed. *See e.g Wm. Dickson*, 128 Wn. App. at 494-95 (remanding because, although the facts were undisputed, "third parties" had two reasonable meanings).

A potentially related issue is the scope of "extrinsic evidence," specifically the frequent recitation that "extrinsic evidence may include … (4) the reasonableness of respective interpretations urged by the parties." *Hearst Commc'ns v. Seattle Times*, 154 Wn.2d 493, 502, 115 P.3d 262 (2005). If a reasonable interpretation urged by the parties is extrinsic evidence, then "more than one reasonable interpretation" means there is disputed extrinsic evidence and thus a question of fact. If that is so, then the two standards are consistent. But interpretations proffered by counsel are advocacy, not evidence, and interpretations proffered by parties after a dispute arises are inadmissible subjective intent. *See Hollis v. Garwall*, 137 Wn.2d 683, 696, 974 P.2d 836 (1999).

This Court should accept review and ask for supplemental briefing on the proper standard for when contract interpretation is a question of law, and whether "reasonableness of the interpretations urged by the parties" is extrinsic evidence. The Court should overrule the standard in cases such as *Wm. Dickson*, 128 Wn. App. 488, and hold that when there is no extrinsic evidence, or the extrinsic evidence is undisputed, interpretation of language is a question of law - even if that language has two or more reasonable meanings. It should also hold that "interpretations urged by the parties" are not extrinsic evidence unless the urging came from a witness before the disputes arose, or is a party admission.

D. Review by this Court is Appropriate Because the Opinion Conflicts with Precedent and Misstates the Facts

It is a substantial public interest that courts interpret contracts applying consistent rules because it affects how contracts are negotiated, and confidence in judicial enforcement of contracts is vital to a democracy and to a free market economy.

Contract language, like elections, has consequences. This Court has consistently enforced that maxim, to forbid parties from escaping the agreed-upon terms. As this Court has held for at least 76 years:

> It is elementary law, universally accepted, that the courts do not have the power, under the guise of interpretation, to rewrite contracts which the parties have deliberately made for themselves. …

> Interpretation of an agreement does not include its modification or the creation of a new or different one. A court is not at liberty to revise an agreement while professing to construe it.
>
> *Chaffee v. Chaffee*, 19 Wn.2d 607, 625, 145 P.2d 244, 252 (1943); *See also Panorama Vill. Condo. Owners Ass'n Bd. of Directors v. Allstate*, 144 Wn.2d 130, 137, 26 P.3d 910, 914 (2001) (same).

In this case, the Opinion does not enforce the agreement as written. Instead, it construes an ambiguous handwritten addition in favor of its drafter in order to delete an unambiguous Section 10.

Consistent with, and necessary to, the maxim that courts may not rewrite contracts for the parties, courts "will not adopt a contract interpretation that renders part of the contract … meaningless." *Kelley*, 198 Wn. App. at 316; *Cambridge Townhomes v. Pac. Star Roofing*, 166 Wn.2d 475, 487, 209 P.3d 863 (2009). In this case, the Court of Appeals rendered an entire unambiguous Section 10 meaningless.

Similarly, Washington law requires that when two clauses potentially conflict, the Court must attempt to harmonize them such that both are given reasonable effect. *See Nishikawa*, 138 Wn. App. at 849. In this case, the Opinion makes no effort to harmonize Sections 8 and 10. The Court of Appeals did not address the (at least) three alternative

reasonable interpretations that harmonize Sections 8 and 10. (*See* Phillips Resp. Br. at pp. 23-25; Motion for Reconsideration).

Both this Court and the Court of Appeals also hold that ambiguous language is construed against the drafter. Ambiguous language is certainly not construed in favor of the drafter – especially when doing so renders a second unambiguous provision meaningless. *See Guy Stickney v. Underwood*, 67 Wn.2d 824, 827, 410 P.2d 7 (1966) (construing addition to form contract against the drafter and harmonizing with seemingly conflicting form provisions); *McDonald v. State Farm*, 119 Wn.2d 724, 734, 837 P.2d 1000 (1992) (rejecting interpretation of exclusion 3 that would render Section 4 meaningless); *GMAC*, 179 Wn. App. at 140 (rejecting proposed interpretations because they would render the "on demand provision … meaningless"). In this case, the Court of Appeals construed the ambiguous addition to Section 8 in favor of the drafter - and did so in order to render the unambiguous Section 10 meaningless.

The principle to enforce the agreed-upon language and thus harmonize seemingly conflicting terms, and construe ambiguous additions against the drafter, is required even when the ambiguous, seemingly conflicting provision, is a negotiated revision to a printed form contract. *See Guy Stickney*, 67 Wn.2d at 827; *see also Jones Assocs. v. Eastside Properties*, 41 Wn. App. 462, 468, 704 P.2d 681 (1985) (construing

addition to form contract against the party adding the ambiguity). In this case, the Court of Appeals construed the ambiguous addition in favor of its drafter, and made no attempt to harmonize.

The Opinion also includes material misstatements of the facts. The substance of the Opinion starts by relying on Section 9 of the Agreement, which addresses the requirement that changes to the agreement must be in writing, which has nothing to do with this case.[1] The Court then states: "A Phillips representative and an Association representative inserted the following handwritten language" to Section 8. The Opinion then says that both "parties initialed and acknowledged the handwritten change to the standard of care." Opinion pp. 10-11.

First, while the parties did initial the change to Section 8, Section 8 was not a "standard of care." Whatever one might think of the words added to Section 8, prior to that, it was just a recital of fact – delivery of a pamphlet. It is not accurate to say that the parties "initialed … the handwritten change to the standard of care." They initialed a change to a recital confirming delivery of a pamphlet.

Second, the addition to Section 8 was not inserted by "a Phillips representative and an Association representative." The addition was

[1] Section 9 has no relevance because the change to Section 8 was made during negotiations (CP 268), and not a post-agreement change.

added solely by Frank Sloan, JCC's president. (CP 268) Thus, the ambiguity – a string of words in a parenthetical added to a recital about delivery of a pamphlet – was from the sole hand of JCC.

Getting material facts wrong, and thus not applying precedent such as *Guy Stickney*, 67 Wn.2d 824, breeds cynicism and distrust. Correcting such errors, and applying precedent based on the facts, is of "substantial public interest" in a democracy. RAP 13.4(b)(4).

Rather than accurately state the facts, apply precedents, and attempt to harmonize Sections 8 and 10 - all necessary to determine the intent of the parties in agreeing to the actual language of the agreement - the Opinion instead applies a "preference" for handwritten changes over typed provisions. For its "preference" position, the Court of Appeals relied on *Green River Valley Found, Inc. v. Foster*, 78 Wn.2d 245, 249, 473 P.2d 844 (1970) which cites to *Creditors' Ass'n v. Fry*, 179 Wash. 339, 342, 37 P.2d 688 (1934).

The Opinion, however, conflicts with those cases. Each of those cases notes that the preference for additions over printed terms only applies if the two contract provisions are "irreconcilable." *Creditors'*, 179 Wash. 339, 342 ("irreconcilable"); *Green River*, 78 Wn.2d 245, 249 ("directly contrary to"). Applying the preference, therefore, is not the

first, or the only, step. One cannot say that two provisions are "irreconcilable" unless you first attempt to harmonize them and fail.

This is illustrated in the Restatement (Second) of Contracts § 203, Comment f, illustration 3:

> A charter party contains the printed provision "vessel to have turn in loading." There is written below this, "vessel to be loaded promptly." The printed and written provisions are given the consistent meaning that the vessel shall take its turn in loading, though this involves considerable delay, but when its turn arrives, the vessel shall be loaded promptly

See also id, § 202, cmt. d, (noting that "[w]here the whole can be read to give significance to each part, that reading is preferred; if such a reading would be unreasonable, a choice must be made" under the preferences in Section 203, one of which is handwriting over printed).

Similarly, *Guy Stickney* involved a revision to a form contract, but this Court did not jump to accepting the revision as controlling over potentially conflicting form provisions. Rather, it construed the revision against the drafter, and then harmonized the provisions. 67 Wn.2d at 827.

There is no principled difference between a negotiated revision added with a pen and one added with a keyboard. There may ultimately be a reason to prefer a negotiated revision that is clear and irreconcilable with the original form, but not if the two provisions can both be given reasonable effect. The goal is to determine the intent of the parties in the

words used; not to apply technical rules of construction as "merely justifications for decisions arrived at on other grounds, which may or may not be revealed in the opinion." *Berg v. Hudesman*, 115 Wn.2d at 665.

Thus, the first step is to interpret what was written and not crossed out, i.e. determine if Section 8 can be harmonized with Section 10, such that both provisions agreed upon can be given reasonable effect.

Section 8 as modified solely by Mr. Sloan reads as follows:

> 8.0 **REAL ESTATE AGENCY LAW**. Association acknowledges the receipt from Agent of a pamphlet on the law of real estate agency as required by RCW 18.86.030. (*Honesty, Good Faith, Reasonable Care, Material Facts).*

It may be helpful, but not necessary, to consider that putting words in parentheses typically means they are an "aside," or "nonessential," or supplemental."[2] As to why he added the parenthetical, Mr. Sloan testified that he was in fact adding nonessential or supplemental information, words quoted from the referenced statute. He said:

> I also wrote under Paragraph 8 entitled Real Estate Agency Law: *"(Honesty, Good Faith, Reasonable Care, Material Facts)"* It is my recollection that I wrote that in because that is the duty of care that the referenced Revised Code of Washington's statute required. (CP 268)

If Mr. Sloan's parenthetical is converted to a complete sentence – which itself is overly generous to JCC when deciding the issue in its favor as a matter of law - Section 8 has at least two reasonable interpretations:

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[2] https://www.grammarbook.com/punctuation/parens.asp; https://awc.ashford.edu/PDFHandouts/Punctuations-Parentheses.pdf

1. Association acknowledges receipt from Agent of a pamphlet on the law of real estate agency, as required by RCW 18.86.030(1). (For brokerage services, RCW 18.86.030(1) imposes a duties of honesty, good faith, reasonable care, and disclosure of material facts).
2. Association acknowledges receipt from Agent of a pamphlet on the law of real estate agency, as required by RCW 18.86.030(1). (Phillips will perform real estate brokerage services consistent with duties of honesty, good faith, reasonable care, and disclosure of material facts).

As to interpretation 1, Section 8 was originally just a recital of a fact – delivery of a pamphlet arguably required by the statute. Mr. Sloan quoted from the referenced statute. Thus, it would be reasonable to construe Section 8 as a recital of what the pamphlet and/or statute said. After all, the "preference for an interpretation which gives meaning to every part of an agreement does not mean that every part is assumed to have legal consequences." Restatement (Second) of Contracts § 203.

As to interpretation 2, Mr. Sloan admits that he quoted a statute that only covers the duties of brokers rendering "real estate brokerage services" because he thought the "statute required" that "duty of care." Taking Mr. Sloan's at his word leads to interpretation number 2 above, i.e. that it applies to the work - brokerage services - covered by the statute he quoted. A reasonable juror could take Sloan at his word.[3]

[3] JCC owned and was renting out a unit (CP 170), and it would be real estate brokerage services to assist them in leasing or selling that unit. RCW 18.85.151(12).

These two reasonable interpretations can be harmonized with Section 10. Section 8 recites the statute or applies to real estate brokerage services. Section 10 applies to claims arising out of all other services, including bookkeeping, hiring maintenance companies, etc.

Supporting these interpretations that give reasonable meaning to both Sections 8 and 10 is the fact that the parties initialed the page with Section 10 in five different places. (CP 81) Initialing a page indicates agreement with the terms on that page; not an intent to delete those terms. *See Michak v. Transnation Title,* 148 Wn.2d 788, 799, 64 P.3d 22 (2003).

Moreover, in other parts of the contract, when the parties agreed on revisions that conflicted with the printed words - including two places on the same page as Section 10 - each time they crossed out the language they intended to delete. (CP 79, 81) When the parties wanted to delete conflicting language, they knew how. They did not delete Section 10.

Finally, these two interpretations, enforcing both Section 8 and Section 10, are further supported by the fact that JCC drafted the ambiguous addition to Section 8, which is construed against JCC as its drafter. *See Guy Stickney*, 67 Wn.2d 824, 827 (construing *a revision to a form* against the drafter and harmonizing the provisions).

Applying the conflicting summary judgment standards, under the standard argued by JCC, there is at least one "reasonable interpretation"

that gives effect to both Sections 8 and 10. Therefore, it conflicts with published precedent to interpret the agreement as a matter of law to render Section 10 meaningless. *See Wm. Dickson*, 128 Wn. App. at 495 (two reasonable interpretations prevented summary judgment).

Under the alternative standard, considering the reasonable inferences from the extrinsic evidence in favor of Phillips, a reasonable juror could conclude that the parties intended for both Sections 8 and 10 to apply. The extrinsic evidence includes Sloan's admission that he added the language in Section 8 because he thought the statute regulating brokerage services applied, and *not* because he was attempting to delete Section 10. With extrinsic evidence supporting Phillips' interpretation, ruling on the meaning in favor of JCC as a matter of law conflicts with published precedent. *See Berg*, 115 Wn.2d at 668.

E. While Disputed Facts Prevent *Sua Sponte* Summary Judgment for JCC, the Same is Not True as to Affirming the Trial Court

To this point, deciding between the conflicting summary judgment standards is necessary to provide the proper explanation for reversal of the Court of Appeals' *sua sponte* conclusion that Section 10 is meaningless. Under either standard, the Opinion conflicts with a number of published precedents. But whether to affirm the trial court, or remand for trial, may depend on which standard is correct.

Three appellate judges deemed JCC's interpretation reasonable (albeit after misstating the facts). And as explained above, there are at least two alternate interpretations that give effect to both Section 8 and Section 10. Therefore, if the Court of Appeals' interpretation is still reasonable after correcting the facts - if a reasonable juror could reach that interpretation - then *Wm. Dickson* and *GMAC* require remanding for trial to decide between multiple reasonable interpretations.

However, the correct standard, as stated in *Berg*, requires reversing the Court of Appeals and affirming the trial court. Under *Berg*, contract interpretation "is a question of law when (1) the interpretation does not depend on the use of extrinsic evidence or (2) only one reasonable inference can be drawn from the extrinsic evidence." 115 Wn.2d at 668.

In this case, the extrinsic evidence is undisputed. The extrinsic evidence is Mr. Sloan's testimony as to why he edited the recital in Section 8. JCC's proposed inferences from his testimony are unreasonable,[4] and his testimony is also inadmissible subjective intent when offered to support JCC. *See Hollis*, 137 Wn.2d at 696.[5]

[4] JCC argued that "Mr. Sloan explained that he included that language because he believed PRE owed that duty of care in performance under its obligations pursuant to the Agreement." Op. Br. p. 30. Mr. Sloan, of course, testified to no such thing. (CP 268)

[5] His testimony, however, is a party admission and thus can be used by Phillips to show he was quoting a statute and not because he intended to delete Section 10.

As such, when the facts are correctly stated; when potentially conflicting terms are harmonized and each given reasonable effect; when the ambiguous addition to Section 8 is construed against JCC as the drafter; and when the ambiguous revision to one section is not construed in favor of the drafter so as to delete a separate unambiguous section - when those precedents are followed to determine the intent of the parties and the agreement is enforced as written - the trial court must be affirmed.

This Court should accept review, hold that *Berg* and *Tanner* state the proper standard for when contract interpretation is a question of law ripe for summary judgment, reverse the Court of Appeals, and affirm the trial court. There is no extrinsic evidence that supports JCC's proffered interpretation. Sections 8 and 10 can be harmonized and both given reasonable meaning. Section 10 requires proof of gross negligence for JCC's claims in this case. Section 8 does not apply because JCC's claims in this case do not arise out of brokerage services. Therefore, JCC was required to raise disputed material facts under the gross negligence requirement of Section 10, which it did not even try to do. (*See* CP 263; Phillips Resp. Br. pp. 28-31)

F. Fees on Appeal

The trial court should have been affirmed and Phillips awarded fees on appeal as it requested in its opening brief under RAP 18.1.

VI. CONCLUSION

This Court should accept review; rule that summary judgment cannot *sua sponte* be granted to the non-moving party if the moving party did not have an opportunity under CR 56 to present conflicting evidence; confirm that *Berg* and *Tanner Electric* state the appropriate standard for when contract interpretation is a question of law, and overrule the standard applied in *WM Dickson* and other cases; hold that interpretations are not extrinsic evidence unless offered by a witness before a dispute arose or as a party admission; correct the facts as to who drafted the ambiguous language; re-emphasize that contract language must be enforced as written, and therefore an interpretation that gives reasonable meaning to potentially conflicting sections must be enforced rather than one that deletes an entire unambiguous section under the guise of interpretation; reverse the Court of Appeals; and affirm the trial court.

DATED this 1st day of July, 2019.

JAMESON BABBITT STITES
& LOMBARD, P.L.L.C.

By _____
Matt Adamson, WSBA #31731
Attorneys for Respondent Phillips
Real Estate Services, LLC

CERTIFICATE OF SERVICE

Kelli Chapman states and declares:

1. I am a legal assistant with the law firm of Jameson Babbitt Stites & Lombard, PLLC, over the age of 18 years, a resident of the State of Washington, and not a party to this matter.

2. On July 1, 2019, I served the foregoing Petition for Review:

Attorneys for Appellant

David Betz
701 Fifth Avenue, Suite 2800
Seattle, WA 98104
dbetz@fifthavenue-law.com

via Hand Delivery

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington, this 1st day of July, 2019.

Kelli Chapman

Kelli Chapman, Assistant to Matt Adamson

APPENDIX A

FILED
3/4/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JUANITA COUNTRY CLUB CONDOMINIUM OWNERS ASSOCIATION, a Washington non-profit corporation, Appellant, v. PHILLIPS REAL ESTATE SERVICES, L.L.C., a Washington limited liability corporation, Respondent.	)	No. 77569-3-I DIVISION ONE UNPUBLISHED OPINION FILED: March 4, 2019

SCHINDLER, J. — In 2012, Juanita Country Club Condominium Owners Association (Association) entered into a management agreement with Phillips Real Estate Services LLC (Phillips). In 2016, the Association filed a lawsuit against Phillips alleging breach of contract. The court granted Phillips' motion for summary judgment and dismissed the claims against Phillips. Because the parties modified the standard of care in the management agreement in writing and there are material issues of fact whether Phillips breached the reasonable care standard, we reverse summary judgment dismissal of the claims against Phillips, vacate the award of attorney fees, and remand.

FACTS

In June 2012, Juanita Country Club Condominium Owners Association (Association) entered into a "Management Agreement" with Phillips Real Estate Services LLC (Phillips). The agreement gives Phillips the authority and duty to "supervise the management and maintenance" of the Association.

The Management Agreement defines Phillips as the "Agent." Section 2 of the agreement describes the "DUTIES OF AGENT." Section 2.1, "Management Duties," states Phillips will "[m]aintain businesslike relations with members and respond in systematic fashion to requests for services from the" Association board of directors (Board); "[o]versee modernization, rehabilitation, and major construction projects"; and "[p]repare special reports in accordance with requests by the Board." Section 2.2 states Phillips is responsible for "Fiscal and Accounting," specifically:

a. Preparation of an annual budget at least 60 days prior to the end of the fiscal accounting year, subject to final approval by the Board.
b. Receipt and posting of individual Association member dues to individual account records.
c. Collection of assessments as provided in the Declaration and follow upon all delinquencies to effectuate collection of all amounts owed.
d. Preparation and mailing of delinquency notice(s) as directed by the Board.
e. Timely preparation of payroll checks and accurate record keeping of payroll time sheets for Association personnel.
f. Make payment on invoices, utility bills and other common expenses as approved by the Board and consistent with section 2.1.
g. Monthly preparation and distribution of Statement of Cash Receipts and Disbursements as directed by the Board.
h. Preparation and distribution of annual financial reports as directed by the Board.
i. Preparation of correspondence and reports regarding finances as requested by the Board.
j. Assist in performance of audits in cooperation with auditors appointed by the Association.

Section 2.5 states Phillips shall "[m]aintain all financial records of the Association and its members" and "[m]aintain complete files for all major repairs and expenditures made to common areas."

In early 2013, the Association obtained a construction loan to repair the roof of the condominiums. The Association planned to repay the loan with a "special assessment" against each condominium owner. The Board resolution for the special assessment states, "In the event of a surplus in special assessment payments collected, whether due to Project cost savings, high collection rates, or any other reason, those funds shall be committed to the Association's reserve accounts."

The Board agreed condominium owners could pay the assessment with monthly payments for 15 years and had the option to pay the assessment early. The monthly payments included principal and interest. The interest rate on the installment payments was the same as the interest rate on the construction loan. Because the loan required interest-only payments for the first year, those payments were not applied toward principal in the first year. Some condominium owners exercised the option to pay the special assessment early. As a result, the Association initially collected more than it was required to pay on the loan.

On September 23, 2013, Association Board president Frank Sloan sent an e-mail to Phillips president Timothy Pfohl and manager Terry Hughes about a "number of issues." The e-mail states that "it appears that items are being forgotten and or not being followed through on" and identifies "Monthly Financials not being posted for

HOA,"[1] "Loan monthly accounting," and "Penalties, Rental accounting and letters to offenders." Hughes responded to the e-mail the next day on September 24:

> You have not received your August financials yet as they were incorrect. I have our financial lead correcting them now and will have them to you as soon as I can.
>
> The warning letters all went out when directed and there has been some response from them. I have not received any updates on them. I am working on the rental list (I sent you my most recent copies) and getting all the leases, etc. That is taking some time, but I am getting some response from those investor owners.

On October 31, Phillips finance director William Holguin sent an e-mail to Sloan about the need to correct the accounts for dues and the special assessment:

> I wanted to provide you an update on status of the adjustments and review. We have been working diligently on the Juanita Country Club financial information and making a tremendous amount of progress. Tomorrow, I will be able to forward you a report outlining up to date history on the special assessment accounts and regular dues accounts. We do have one owner's ledger that may need to be adjusted, but everything else has been carefully reviewed. All items that sho[we]d up in the regular ledger that should have been in the Special Assessment ledger have been moved to their correct spot. You should be receiving an email from [Hughes] or me sometime tomorrow containing an update of all the tenant ledgers balances.

On November 5, Sloan sent an e-mail to Hughes, Pfohl, and Holguin pointing out accounting errors:

> [Y]our numbers are not correct...I don't about [sic] anyone else but our unit I-102 accounting states we have paid no monies toward the roof?....I want a letter to each owner regarding their unit and the current accounting you have and allow them to audit their account both the DUES and SPECIAL ASSESSMENT.
>
> If my accounting via the email from [Holguin] is supposed to be update[d] and correct.....then there are issues. I have spen[t] the weekend retrieving all payments to the HOA is B[ank] of A[merica]....and both my dues which should be reduced is at ($176) monthly....wrong.....but I will check with the

[1] Homeowner association.

> others and see what their reduction is currently at.....Special Assessment ($76) monthly?.....we will pay [$]4k this month...and reduce that amount....
>
> This is just my account [I] am afraid to hear from others.[2]

On November 19, Sloan sent an e-mail to Pfohl concerning Hughes' "lack of accounting knowledge" and problems with "co-mingling the Dues and Assessment." Pfohl responded:

> On the accounting dep[artmen]t — I saw the shortcomings and made a key hire about 6 months ago — Mary Jo Bennett. Knows condo[3] bookkeeping in and out. . . . She is oversight of all our condo bookkeepers now so will see vast improvement there. That's a promise.
>
> Very disappointed on the accounting items. Accounting has to be one of the foundations upon which we build our relationships and reputation. No ifs, ands, or buts about it. There has been and will continue to be vast improvement. I guarantee it.

On November 28, 2014, Sloan sent a letter to Pfohl about the "continuous accounting issues regarding our Monthly Dues/Assessment Loan" and the intent to terminate the Management Agreement with Phillips. But after assurances from Pfohl, Sloan agreed to "try to work it out." After the Board meeting on July 27, 2015, Phillips decided to terminate the Management Agreement with the Association effective September 1, 2015.

The Association retained accountant Andrew McAlister and Emerald City Management & Consulting LLC to reconcile the "many discrepancies" in the accounting.

In 2016, the bank rejected the Association's application for a loan "because of the state of the accounting." The Association hired consultant and loan broker Rebekah Baze to manage the accounting and help obtain the loan.

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[2] Ellipses in original.

[3] Condominium.

On May 12, 2016, the Association filed a lawsuit against Phillips. The complaint alleged (1) breach of contract, (2) breach of fiduciary duty, and (3) breach of implied duty of good faith and fair dealing. The Association alleged Phillips breached the Management Agreement by failing to properly manage the special assessments, conduct audits, manage rental restrictions, record an amended declaration, and charging the Association for services it did not perform.

Phillips propounded interrogatories, asking the Association to "[i]temize the damages claimed by you against defendant in this litigation, and describe how you calculated each category of damages." In answer to the interrogatory, the Association identified (1) the failure of Hughes "to pass along increase in loan adjustable rate to owners" and "to transfer approximately $150,000[.00] in funds from Mutual of Omaha Bank to Alliance Bank," (2) the failure of Phillips "to conduct audits for 2013 and 2014 and to timely forward to accountant 2010-12 audits," (3) the failure of Hughes and property manager Vickie Tolson to "manage rental restrictions" and identify delinquent renters, and (4) the failure of Tolson to record the amended declaration for approximately two to three months. The Association claimed $32,092.50 in damages plus attorney fees.

The case was transferred to mandatory arbitration on February 7, 2017. The arbitrator filed an award on June 16, 2017. On June 22, the Association filed a request for a trial de novo, a jury demand, and a request to seal the award. The superior court sealed the award and issued the case schedule order on June 26.

The Association filed supplemental interrogatory responses claiming additional damages of $34,897.50 for a total of $66,990.00 plus attorney fees.

The Association filed a motion for partial summary judgment on the standard of care under the terms of the Management Agreement. The Association argued section 10 of the Management Agreement that limits the responsibility of Phillips to willful misconduct and gross negligence violated the law that regulates the actions of real estate agents and brokers, chapter 18.86 RCW.

Phillips filed a motion for summary judgment dismissal of the lawsuit. Phillips argued the provision of the agreement that limits its responsibility to willful misconduct and gross negligence did not violate chapter 18.86 RCW and the evidence did not support the breach of that duty.

The court denied the Association's motion for partial summary judgment. The court ruled the willful misconduct and gross negligence standard in the Management Agreement did not violate chapter 18.86 RCW. The court dismissed the claims for failure to record the amended declaration and "failure to manage rentals" but did not dismiss the accounting claims. The order states:

> (1) Section 10 of the Management Agreement is enforceable and plaintiff will be required to prove gross negligence or willful misconduct at trial;
> (2) Plaintiff[']s claims for failure to record, and failure to manage rentals are dismissed;
> (3) Only plaintiff[']s accounting failure claims remain.

On reconsideration, the court concluded the Association did not present evidence to show willful misconduct or gross negligence to support the accounting claims. The court entered an order dismissing the lawsuit. The court awarded Phillips attorney fees and costs in the amount of $79,837 plus interest.

ANALYSIS

Chapter 18.86 RCW

The Association contends the court erred by concluding section 10 of the Management Agreement did not violate chapter 18.86 RCW. Section 10 limits Phillips' duty under the Management Agreement to "willful misconduct or gross negligence."

The Association asserts section 10 violates RCW 18.86.030(1). RCW 18.86.030(1)(a) states an agent who "renders real estate brokerage services" cannot waive the duty to exercise reasonable care. Phillips contends the statutory duty of reasonable care under RCW 18.86.030(1)(a) does not apply to "common interest community managers" that provide only management and financial services under chapter 18.85 RCW.

"Statutory interpretation is a question of law reviewed de novo." Williams v. Tilaye, 174 Wn.2d 57, 61, 272 P.3d 235 (2012). We look first to the text of a statute to determine its meaning. Griffin v. Thurston County Bd. of Health, 165 Wn.2d 50, 55, 196 P.3d 141 (2008). If a statute is plain and unambiguous, the meaning of the statute must be determined from the wording of the statute itself. W. Telepage, Inc. v. City of Tacoma Dep't of Fin., 140 Wn.2d 599, 608-09, 998 P.2d 884 (2000). Statutes are read together to achieve a harmonious statutory scheme that maintains the integrity of the respective statutes. Employco Pers. Servs., Inc. v. City of Seattle, 117 Wn.2d 606, 614, 817 P.2d 1373 (1991).

Chapter 18.85 RCW and chapter 18.86 RCW regulate and govern the activities of real estate agents and brokers. Under RCW 18.86.030(1)(a), the duty to use "reasonable skill and care" applies only to a broker or agent who renders "real estate

brokerage services under chapter 18.85 RCW." RCW 18.86.010(11) defines "real estate brokerage services" as "the rendering of services for which a real estate license is required." RCW 18.85.151(12) exempts "[c]ommon interest community managers who . . . provide management or financial services" from obtaining a broker's license "if they do not promote the purchase, listing, sale, exchange, optioning, leasing, or renting of a specific real property interest."

Because the Management Agreement and the record establishes Phillips was acting as a common interest community manager for the Association, not as a provider of real estate brokerage services, section 10 of the Management Agreement does not violate RCW 18.86.030(1).

Written Modification of the Management Agreement

In the alternative, the Association contends the parties modified the terms of the Management Agreement in writing to adopt reasonable care and not willful misconduct or gross negligence.

Contract interpretation is a question of law we review de novo. Dave Johnson Ins., Inc. v. Wright, 167 Wn. App. 758, 769, 275 P.3d 339 (2012). Washington courts follow the objective manifestation theory of contracts. Berg v. Hudesman, 115 Wn.2d 657, 663, 801 P.2d 222 (1990); Hearst Commc'ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 503, 115 P.3d 262 (2005). "[W]e attempt to determine the parties' intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties." Hearst, 154 Wn.2d at 503. We "impute an intention corresponding to the reasonable meaning of the words used." Hearst, 154 Wn.2d at 503. We give words in a contract their ordinary and usual meaning "unless

the entirety of the agreement clearly demonstrates a contrary intent." Hearst, 154 Wn.2d at 504. "Interpretations giving lawful effect to all the provisions in a contract are favored over those that render some of the language meaningless or ineffective." Grey v. Leach, 158 Wn. App. 837, 850, 244 P.3d 970 (2010).

The plain and unambiguous language of section 9 of the Management Agreement, "AGREEMENT TO BE CHANGED IN WRITING ONLY," states, "This Agreement shall constitute the entire Agreement between the contracting parties, and no variance or modification thereof shall be valid and enforceable, except by an agreement in writing."[4]

Section 8, "REAL ESTATE AGENCY LAW," states, "Association acknowledges the receipt from Agent of a pamphlet on the law of real estate agency as required by RCW 18.86.030(1)." A Phillips representative and an Association representative inserted the following handwritten language, "Honesty, Good Faith, Reasonable Care, Material Facts."

Section 10, "RESPONSIBILITY," states:

> Agent shall be responsible for willful misconduct or gross negligence but shall not be held responsible for any matters relating to error of judgment, or for any mistakes of fact or law, or for anything, which it may do or refrain from doing which does not include any willful misconduct or gross negligence. Agent shall not be responsible for acts or omissions of independent contractors engaged by Agent on behalf of the Association.

The Management Agreement establishes the parties modified the terms of the agreement in writing. Both parties initialed and acknowledged the handwritten change

[4] Emphasis added.

to the standard of care.

8.0 REAL ESTATE AGENCY LAW
Association acknowledges the receipt from Agent of a pamphlet on the law of real estate agency as required by RCW 18.86.030(1).

9.0 AGREEMENT TO BE CHANGED IN WRITING ONLY (Honesty, Good Faith, Reasonable Care, Material Fact)
This Agreement shall constitute the entire Agreement between the contracting parties, and no variance or modification thereof shall be valid and enforceable, except by an agreement in writing.

10.0 RESPONSIBILITY
Agent shall be responsible for willful misconduct or gross negligence but shall not be held responsible for any matters relating to error of judgment, or for any mistakes of fact or law, or for anything, which it may do or refrain from doing which does not include any willful misconduct or gross negligence. Agent shall not be responsible for the acts or omissions of independent contractors engaged by Agent on behalf of the Association.

Because the handwritten modification prevails over the conflicting printed willful misconduct or gross negligence provision in section 10, the handwritten reasonable care standard controls. Green River Valley Found., Inc. v. Foster, 78 Wn.2d 245, 249, 473 P.2d 844 (1970).

Summary Judgment Dismissal of Claims

The Association contends the court erred by dismissing its breach of contract claims for failure to present evidence of gross negligence or willful misconduct. Philips contends that even if a reasonable care standard applies, the Association did not present evidence to establish breach or damages to support its claims.

We review summary judgment de novo, engaging in the same inquiry as the trial court. Kruse v. Hemp, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993). Summary judgment is appropriate if the pleadings, depositions, and affidavits show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); Degel v. Majestic Mobile Manor, Inc., 129 Wn.2d 43, 48, 914 P.2d 728 (1996).

The defendant on summary judgment has the burden of showing the absence of evidence to support the plaintiff's case. Young v. Key Pharm., Inc., 112 Wn.2d 216,

225, 770 P.2d 182 (1989). If the moving party shows an absence of a genuine issue of material fact, the burden shifts to the nonmoving party. Young, 112 Wn.2d at 225.

Only when reasonable minds could reach but one conclusion on the evidence should the court grant summary judgment. Smith v. Safeco Ins. Co., 150 Wn.2d 478, 485, 78 P.3d 1274 (2003). In conducting this inquiry, the court must view all facts and reasonable inferences in the light most favorable to the nonmoving party. Keck v. Collins, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). Where different competing inferences may be drawn from the evidence, the issue must be resolved by the trier of fact. Hudesman v. Foley, 73 Wn.2d 880, 889, 441 P.2d 532 (1968); Kuyper v. Dep't of Wildlife, 79 Wn. App. 732, 739, 904 P.2d 793 (1995).

The Association contends material issues of fact preclude summary judgment dismissal of its claim that Phillips breached a reasonable care standard in providing fiscal and accounting services.

Section 2.2 of the Management Agreement addresses the "[f]iscal and accounting services" Phillips is responsible for providing. The fiscal and accounting services include "[r]eceipt and posting of individual Association member dues to individual account records" and "[c]ollection of assessments."

Viewing the evidence in the light most favorable to the Association, there are material issues of fact as to whether Phillips breached the standard of reasonable care in performing fiscal and accounting duties. In September 2013, Phillips reported to the Association, "You have not received your August financials yet as they were incorrect." On October 31, Phillips assured the Association, "All items that sho[we]d up in the regular ledger that should have been in the Special Assessment ledger have been

moved to their correct spot." On November 5, the Association informed Phillips, "[Y]our numbers are not correct. . . . I want a letter to each owner regarding their unit and the current accounting you have and allow them to audit their account both the DUES and SPECIAL ASSESSMENT." On November 19, Phillips admitted there were continuing "shortcomings" in its accounting, stating, "Very disappointed on the accounting items. Accounting has to be one of the foundations upon which we build our relationships and reputation. No ifs, ands, or buts about it. There has been and will continue to be vast improvement." The Association also presented evidence that it was unable to obtain a loan from its lender "because of the state of the accounting" and could obtain the loan only after hiring consultant and loan broker Rebekah Baze.

The Association contends there are genuine issues of material fact as to whether Phillips breached the Management Agreement by failing to collect delinquent fees and manage rental restrictions. Phillips argues it had no duty to collect delinquent fees or manage rental restrictions. The Management Agreement does not support Phillips' argument. The Management Agreement defines Phillips' duties broadly. The agreement states Phillips has the duty to "follow up on all delinquencies to effectuate collection of all amounts owed."

Viewing the evidence in the light most favorable to the Association, the record shows manager Hughes assured the Association she was addressing past-due amounts owed. In a September 24, 2013 e-mail, Hughes states the "warning letters all went out when directed" and she was "working on the rental list." On November 5, Sloan sent an e-mail asking Hughes, "Did you send out [t]he letter regarding renting this unit?....I have not seen it and as I stated many times...please contact the owner of I 105

and let him know he owes [$]500 move in fee."[5] We conclude there are material issues of fact as to whether Phillips breached the standard of reasonable care in failing to facilitate and manage delinquent fees.

The Association contends there are material issues of fact as to whether Phillips breached the standard of reasonable care by delaying the approval and filing of the amended declaration. Phillips argues the Association did not present any evidence of delay or damages.

Viewing the evidence in the light most favorable to the Association, there are material issues of fact related to the delay between December 2014 and May 2015 and whether the delay was the proximate cause of the Association's damages. In December 2014, the Association decided to amend the declaration to make an owner responsible for water damage to the condominium unit. The Association attorney drafted and e-mailed the final documents for the amended declaration to property manager Tolson with instructions to begin the owner approval process by early December. The e-mail provides directions on providing notice to each condominium owner and states the documents "are designed to allow owners to consent by mail, without a meeting." Tolson did not record the amended declaration until late May. The undisputed record shows Phillips did not record the amended declaration until May 29, 2015. In the interim, there was water damage to a condominium unit in April. An April 15 e-mail states that because the amended declaration "is not recorded yet," the Association is liable for the repairs.

[5] Ellipses in original.

We reverse summary judgment dismissal of the lawsuit against Phillips, vacate the award of attorney fees, and remand.

WE CONCUR:

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JUANITA COUNTRY CLUB CONDOMINIUM OWNERS ASSOCIATION, a Washington non-profit corporation, Appellant, v. PHILLIPS REAL ESTATE SERVICES, L.L.C., a Washington limited liability corporation, Respondent.	No. 77569-3-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

Respondent Phillips Real Estate Services LLC filed a motion for reconsideration of the opinion filed on March 4, 2019. Appellant Juanita Country Club Condominium Owners Association filed an answer to the motion. A majority of the panel has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Judge

APPENDIX C

5.0 TERMS

The terms of this Agreement shall be for minimum term of one (1) year beginning the 1st day of July 2012 and ending the last day of July 2013. Upon expiration of the original term and each subsequent term, this Agreement shall be automatically extended for an additional year unless re-negotiated or terminated in writing a minimum of sixty (60) 30 DAYS AKS days prior to the expiration of each term.

If Association should fail to keep, observe or perform any term of provision of this Agreement, and such failure shall continue for a period of ten (10) days after notice thereof by Agent, Agent shall be entitled to terminate this Agreement and upon any such termination, Agent shall have the right to pursue any remedy it may have at law or in equity, provided that the fee payable under paragraph 6.0 shall continue to be paid until the current term of this Agreement expires.

6.0 AGENT'S FEE

Agent shall be entitled to receive for services performed under this Agreement a fee of Two thousand three hundred and no/100ths Dollars ($2,300.00) per month, payable on or before the 20th of the current month. AKS

Agent reserves the right to increase said fee annually without notice based upon the percentage determined as the current year's Consumer Price Index for the City of Seattle. If to be increased by such other amount, if deemed appropriate by Agent at any time after the end of the first term of this Agreement, Agent will give no less than thirty (30) days written notice of such increase to the Association's Board of Directors

In the event that subject property is extensively repaired, restored, reconstructed or upgraded, including but not limited to re-roofing, painting, siding or insurance loss restoration, where Agent's assistance is required, in addition to services provided by a professional project manager or insurance adjuster, or in the event Agent is required to perform services for said property which are not included in this Agreement, Agent shall receive additional compensation per addendum A or compensation based upon such other terms as agreed between Agent and a majority of the Board of Directors, or by direct agreement with the insurance adjuster in writing prior to performing or arranging such services. For the purpose of this paragraph, projects exceeding a total cost of $10,000 and all insurance losses shall be considered "extensive" due to Agent's additional allocation of time to coordinate bids, board communications, resident notices, scheduling and process of contracted progress payments.

Compensation as herein above provided is to be net to the Agent over and above operating expenses, of the Association and exclusive of all other amounts payable by Association hereunder.

7.0 EMPLOYMENT OF STAFF MEMBERS

Recognizing that all staff members of Agent are contractually restricted from working for clients of Agent for a period of ~~two~~ Two DAE years after leaving Agent's employ, Association agrees not to employ or engage the services, directly or indirectly, of any person now or hereafter employed by Agent, for a period of two years from date of such person's termination of employment by Agent. AKS

8.0 REAL ESTATE AGENCY LAW

Association acknowledges the receipt from Agent of a pamphlet on the law of real estate agency as required by RCW 18.86.030(1).

9.0 AGREEMENT TO BE CHANGED IN WRITING ONLY (Honesty, Good Faith, Reasonable Care, Mutual Fact)

This Agreement shall constitute the entire Agreement between the contracting parties, and no variance or modification thereof shall be valid and enforceable, except by an agreement in writing. AKS

10.0 RESPONSIBILITY

Agent shall be responsible for willful misconduct or gross negligence but shall not be held responsible for any matters relating to error of judgment, or for any mistakes of fact or law, or for anything, which it may do or refrain from doing which does not include any willful misconduct or gross negligence. Agent shall not be responsible for the acts or omissions of independent contractors engaged by Agent on behalf of the Association.

11.0 ATTORNEY'S FEES

Should either party employ an attorney or attorneys to enforce any of the provisions hereof or to protect its interest in any manner arising under this Agreement, or to recover damages for the breach of this Agreement, the non-prevailing party in any action (the finality of which is not legally contested) agrees to pay the prevailing party all reasonable costs, damages and expenses, including attorneys' fees, expended or incurred in connection therewith.

12.0 NOTICE

Any notice of either party to the other shall be in writing and shall be given, and shall be deemed to have been duly given, if either delivered personally to a party, or mailed in a registered or certified postpaid envelope addressed to the party to whom notice is to be given.

13.0 SUCCESSORS AND ASSIGNS

This Agreement shall inure to the benefit of and constitute a binding obligation upon the Association and the Agent and their respective heirs, administrators, successors or assigns.

14.0 HOLD HARMLESS AND PUBLIC LIABILITY INSURANCE

Association will indemnify, defend and hold Agent harmless from all claims, proceedings and liability, relating to the property, including, without limitation, claims relating to or arising out of: construction defects, environmental liability, mold or moisture related claims, claims of non-compliance of the property with any law, regulation, ordinance or code provision, claims of property tenants, invitees or vendors, or claims of employees of Association hired by Agent pursuant to this Agreement. This indemnification includes, without limitation, such claims for personal injury or wrongful death and property damage, as well as reasonable attorneys fees and costs. However, this indemnity requirement will not apply to the extent a claim arises from the gross negligence or willful misconduct of Agent. Further, Agent's liability will, in any event, be limited to the amount of one year's management fees earned by Agent pursuant to this Agreement. Defense of Agent will be through counsel retained by Association that is reasonably acceptable to Agent.

Association agrees to carry bodily injury, property damage and personal injury public liability insurance in limits of not less than $2,000,000, combined single limit coverage of $2,000,000; and $2,000,000 bodily injury and personal injury, and property damage insurance equal to or greater than the current replacement cost of the property.

Association agrees that at all times during the continuance of this Agreement all bodily injury, property damage and personal injury, property insurance and any other coverage carried by Association on the property shall by the appropriate endorsement of all policies evidencing such insurance and without cost to Agent be extended to insure and indemnify Agent, as well as Association, as follows: PHILLIPS REAL ESTATE SERVICES, LLC is hereby named as an additional insured and insurance company agrees this policy shall be primary in respect to any coverage carried by PHILLIPS REAL ESTATE SERVICES, LLC.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement.

JUANITA COUNTRY CLUB
CONDOMINIUM OWNERS' ASSOCIATION

6/6/2012
Board President Date

6/19/2012
Board Secretary Date

PHILLIPS REAL ESTATE SERVICES, LLC

6/15/12
Diane Castanes, COO Date
As Designated Broker

JAMESON BABBITT STITES & LOMBARD PLLC

July 01, 2019 - 12:48 PM

Filing Petition for Review

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	Juanita Country Club Condo Owners Assoc., App v. Phillips Real Estate Services, L.L.C., Resp (775693)

The following documents have been uploaded:

- PRV_Petition_for_Review_20190701124747SC042218_1209.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Phillips Real Estate Services LLC Petition for Review.PDF

A copy of the uploaded files will be sent to:

- dbetz@fifthavenue-law.com
- scarpenter@fifthavenue-law.com

Comments:

Sender Name: Kelli Chapman - Email: kchapman@jbsl.com
Filing on Behalf of: Matthew Thomas Adamson - Email: madamson@jbsl.com (Alternate Email: twaggoner@jbsl.com)

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