

No. 94264-1

SUPREME COURT
OF THE STATE OF WASHINGTON

Mr. 99 & ASSOCIATES, INC., and
MARTIN S. ROOD,

Petitioners,

v.

8011, LLC, a Washington limited liability company;
WALTER MOSS and JANE DOE MOSS, husband
and wife, and their marital community;
KARI GRAVES and JOHN DOE GRAVES,
husband and wife, and their marital community;
FIRST AMERICAN TITLE COMPANY,

Respondents.

MEMORANDUM OF REAL ESTATE PROFESSIONAL
AMICI IN SUPPORT OF REVIEW

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities.....	ii
I. INTRODUCTION & INTERESTS OF AMICI.....	1
II. ISSUES TO BE ADDRESSED BY AMICI.....	1
III. ARGUMENT.....	1
IV. CONCLUSION.....	5

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Table of Cases</u>	
<u>Washington Cases</u>	
<i>Dalke v. Sivyer</i> , 56 Wash. 462, 105 P. 1031 (1909).....	2, 3
<i>Feeley v. Mullikin</i> , 44 Wn.2d 680, 269 P.2d 828 (1954).....	3, 4
<i>Miller v. Paul M. Wolff Co.</i> , 178 Wn. App. 957, 316 P.3d 1113 (2014)	5
<i>Willis v. Champlain Cable Corp.</i> , 109 Wn.2d 747, 748 P.2d 621 (1998)	1, 3
<u>Statutes</u>	
RCW 19.36.010	2
<u>Washington Rules of Appellate Procedure</u>	
RAP 13.4(b).....	5
<u>Other Authorities</u>	
William B. Stoebuck, John W. Weaver, 18 <i>Wash. Practice</i> (2d ed.) § 15.8.....	1, 4

I. INTRODUCTION & INTERESTS OF AMICI

The petition for review here presents the question of whether, and how, real estate professionals whose listing agreements for residential and commercial properties have expired, but their services have resulted in a successful sale, should be compensated. The specific backgrounds of amici are set forth in the motion for leave to submit this memorandum.

Amici offer this memorandum to the Court based on their experience with clients who exploit their professional services to their benefit – a sale of residential or commercial real property – but who refuse to properly compensate them for their services that benefitted the clients.

II. ISSUE TO BE ADDRESSED BY AMICI

Amici believe this Court should grant review and eliminate the exception to the procuring cause principle adopted in *Willis v. Champlain Cable Corp.*, 109 Wn.2d 747, 748 P.2d 621 (1998). Alternatively, this Court should allow real estate professionals to recover in *quantum meruit* where their services resulted in a successful sale, even though a tail provision was present in the listing agreement.

III. ARGUMENT

The law relating to the duration of listing agreements and their enforcement in Washington was ably summarized in William B. Stoebuck, John W. Weaver, 18 *Wash. Practice* (2d ed.) § 15.8 at 204-05:

As a general rule, to earn a commission, the broker must actually negotiate the sale—obtain a binding offer on the listed terms or effect a binding purchase and sale agreement—during the listing period. There are situations, however, in which a broker may be entitled to a commission when a sale to a purchaser he has produced during the listing period is not consummated until afterward. If the court concludes that the seller acted fraudulently or in bad faith to hold off a sale to such a purchaser until after the listing period, the broker will be awarded his commission. Or, even if no bad-faith scheme is proven, a broker earns a commission if he locates the buyer during the listing period, negotiations are continuing at the end of that period, and a sale agreement is thereafter made as a result of those negotiations. Also, the seller may waive the end of the listing period, and in effect extend it, by, for instance, urging the broker to continue sales efforts beyond the original period. Because it may be practically difficult to make out any of these theories, it has become common and is wise for a broker to include a clause in the listing agreement, extending his right to commission beyond the formal listing period. Such a clause will say that, for some period such as 90 days or six months beyond the end of the period, the broker is entitled to a commission if the seller makes an agreement of sale with a buyer who was produced by the broker within the period. Clauses of this kind are enforceable in Washington.

In specific terms, Washington has long recognized the need for an exception to the policy of the Statute of Frauds, RCW 19.36.010, where a contract between a real estate professional and a client for the listing and sale of a property has expired, but the professional's services result in a successful sale. *Dalke v. Sivyler*, 56 Wash. 462, 105 P. 1031 (1909). That procuring cause principle is equitable in nature and designed to avoid the unjust benefit of the client from the professional's "time, expense, or

energy.” *Id.* at 465. *See also Feeley v. Mullikin*, 44 Wn.2d 680, 683, 269 P.2d 828 (1954) (“When a broker is employed to procure a purchaser on certain terms and he procures a purchaser to whom a sale is eventually made, he is entitled to a commission *irrespective of who makes the sale or the terms thereof, if he was the procuring cause of the sale.*”) (emphasis in original).

But this Court’s decision in *Willis*, 109 Wn.2d 747, and the Court of Appeals’ extension of *Willis* into a rule of law that appears to categorically prohibit a broker’s ability to recover commissions under the procuring cause doctrine when a written contractual tail provision is involved, ignores the procuring cause doctrine’s role as a gap filler and threatens to artificially limit the scope of the procuring cause equitable principle. As noted in Rood’s petition for review, *Willis*’ limitation predates the full development of the implied covenant of good faith that is a key part of all contracts in Washington.

More critically, insofar as the *Willis* court declined to apply good faith principles as to any contractual tail provision, *id.* at 759, the Court’s opinion could be read to call into question some of the other exceptional grounds for enforcing a professional’s right to a commission such as the fraudulent conduct of the client, referenced in *Washington Practice*. Taken to its logical extent, the Court of Appeals’ strict reliance on *Willis*

allows clients to avoid paying commissions, pursuant to the procuring cause doctrine, simply by delaying the finalization of sales until after the tail provision expires. That result is not only unjust, but it ignores the purpose of the procuring cause doctrine and the equitable principles on which it is based. See *Feeley*, 44 Wn.2d at 686 (quoting *Henning v. Holbrook-Blackwelder Real Estate Trust Co.*, 218 Mo. App. 433, 277 S.W. 62 (1925) ("If this were not so, it would become an easy matter for the principal to escape the payment of the agent's commission, while enjoying the fruits of his labors.")).

Simply put, if the real estate professional is the procuring cause of the successful sale, regardless of whether the listing agreement and any tail provisions in it have expired, the professional is entitled to compensation. As Professor Stoebuck recognized, "the seller may waive the end of the listing period, and in effect extend it, by, for instance, urging the broker to continue sales efforts beyond the original period." 18 *Wash. Practice* (2d ed.) § 15.8 at 204-05. Thus, if the circumstances warrant, and the real estate professional has in fact procured the sale, an "expired" tail provision should not unconditionally bar the application of the procuring cause doctrine.

The procuring cause doctrine is intended to act as a "gap filler" when a contract does not otherwise provide for how commissions are to be

awarded after the contract expires but the sales professional's continued work for the client results in a successful sale. *See Miller v. Paul M. Wolff Co.*, 178 Wn. App. 957, 964, 316 P.3d 1113 (2014) (citing *Indus. Representatives, Inc. v. CP Clare Corp.*, 74 F.3d 128 (7th Cir. 1996)). This Court should recognize and give effect to the doctrine's role as a gap filler for gaps which result from a waived tail provision and from a tail provision which has expired. The Court of Appeals' failure to address the doctrine's gap filler role deprives real estate professionals the contractual and equitable right to seek compensation for their work in situations like the one at present.

Whether this Court chooses to enforce the contractual commission, or to allow the real estate professional to recover on *quantum meruit* principles, it is simply inequitable to allow a client to unjustly benefit from the professional's services without appropriate compensation to the professional. This is particularly true where the overwhelming number of agreements to pay compensation to real estate professionals like the amici are commission agreements.

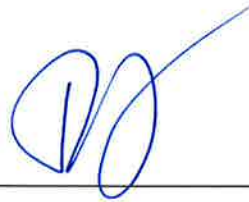
IV. CONCLUSION

This Court should grant review in this case. RAP 13.4(b). This Court should fully apply equitable principles and allow real estate professionals to recover for their services that lead to a successful sale of

residential or commercial properties.

DATED this 15th day of May, 2017.

HANSON BAKER LUDLOW
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By: _____

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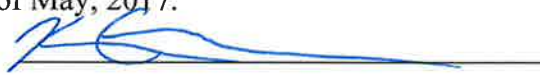
CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Hanson Baker Ludlow Drumheller P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorneys of record by the methods noted:

- Email and first-class United States mail, postage prepaid, to the following:

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DATED this 15th day of May, 2017.



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