No. 73737-6-I

SUPREME COURT
OF THE STATE OF WASHINGTON

MR. 99 & ASSOCIATES, INC.; MARTIN S. ROOD,

Respondents,

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,

Appellants,

FIRST AMERICAN TITLE COMPANY,

Defendant.

ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

Petitioner Martin Rood admits that his written Agreement with Respondent 8011 includes a tail provision detailing how Rood would be awarded a commission if he failed to perform within the Agreement's term. Rood also admits that he failed to satisfy the tail provision. He does not claim a commission under the Agreement.

Rather, Rood asks this Court to "modify" the law on the procuring cause doctrine, a narrow exception to the statute of frauds. Under numerous cases from this Court and the appellate courts, this equitable doctrine does not apply where, as here, there is a complete written agreement that expressly provides how a commission will be awarded if the agreement is terminated or expires before performance is complete. Rood does not assert a conflict with any of these cases, or otherwise attempt to meet the criteria for discretionary review. Instead, he asks this Court to create equitable relief for commercial real estate brokers who fail to satisfy the clear and unambiguous terms of the agreements they enter.

Rood's argument on the standard of review is equally unpersuasive. The trial court ruled as a matter of law, finding no real questions of fact. Thus, appellate review is plainly *de novo*.

This Court should deny review.

RESTATEMENT OF ISSUES

1. Where the trial court ruled as a matter of law, plainly stating that there are no questions of material fact, did the appellate court correctly apply the *de novo* standard of review?

2. Did the appellate court correctly hold that the procuring cause doctrine does not entitle Rood to a commission, where Rood did not procure a buyer within the six-month term of the parties' written listing Agreement, and where Rood failed to satisfy the listing Agreement's tail provision, expressly providing how a commission would be awarded after the Agreement was terminated or expired?

STATEMENT OF THE CASE

Rood begins by stating that it is "critical" to understand the relationships between the parties. Pet. at 2. He then states that before entering a listing Agreement with 8011, he "had a pre-existing relationship with Mazda," who ultimately purchased 8011's commercial property ("the Property"). *Id*. Rood claims that Mazda "sought to purchase" the Property, but "determined not to proceed with any purchase at the time." *Id*.

That is inaccurate. 8011 does not dispute that Rood represented Mazda before entering the listing Agreement with 8011.

But Mazda was not even interested in the Property until months after the parties' listing Agreement had expired. CP 643, 708-11, 1082.

Rood first "made Mazda aware of the potential availability of [the Property]" in April 2011. CP 643; *see also* BR 4. He admits that Mazda "wasn't interested" in purchasing the Property, instead hoping to purchase the building it was leasing. *Id*. Rood represented Mazda in negotiations with its landlord from May 2011 to March 2012. BR 4-5 (citing CP 643). During that timeframe, Rood also entered a listing Agreement with 8011 covering the six-month period from July 21, 2011 to January 21, 2012. CP 1123.

For the first time in March 2012, Mazda learned that its landlord was not interested in selling. BR 4-5 (citing CP 643). It was then – two months after Rood's listing Agreement with 8011 had expired – that Mazda asked Rood to locate a property for purchase. BR 6; CP 643. The property had to be eight miles from Lynwood Mazda under state law requiring an eight-mile separation between car dealers. *Id*. Rood admits that for months after the Agreement expired, Mazda "did not consider" the Property, as it was only 7.5 miles from Lynwood Mazda. *Id*.

Rood and Mazda then set about pursuing properties satisfying the eight-mile rule. BR 7 (citing CP 1069, 1197, 2326); CP 708-11,

1082. After eliminating those properties, Rood "again presented the Property to Mazda" in April 2012, three months after the parties' Agreement had expired. *Id*. Rood reminded Mazda to make sure it could "get by the 8 mile rule" before pursuing the Property. CP 708, 1082. Mazda first made 8011 an offer on May 2012, four months after the parties' Agreement had expired. BR 7; CP 925, 1567, 1900.

In short, Rood falsely claims that he was "exert[ing] his best efforts to work out a sale between Mazda and 8011 during his six-month exclusive period." Pet. at 3. Rood admits that Mazda was not even interested in the Property until months after Rood's listing Agreement with 8011 had expired. *Id*. Rood instead was helping Mazda try to purchase the building it was leasing. BR 4-5.

Rood next cites the listing Agreement's tail provision, which entitles him to a commission if 8011 leased the property within six months after the agreement expired, "to a person or entity that submitted an offer to purchase or lease the Property during the term of this Agreement, or that appears on any registration list provided by [Rood]." Pet. at 2-3 (quoting CP 647). This begs two questions: (1) did Mazda submit an offer "during the term of the Agreement?"; and (2) did Rood put Mazda on a registration list and provide it to 8011? The answer to both questions is "no."

Rood acknowledges that the Agreement expired without any "serious" offers and that the parties did not enter a new Agreement. CP 1184, 1190-91; BR 7. He acknowledges also that Mazda submitted its first written offer four months after the Agreement had expired. BR 7. There is no registration list, and Rood does not contend otherwise. If Rood had any inkling that he could work a deal between 8011 and Mazda, then he should have put Mazda on a registration list and given it to 8011. But again, Rood admits that Mazda had no interest in the Property until after the Agreement expired. BR 6; CP 643.

Rood claims that he "believed that the agreement remained in effect with respect to ongoing negotiations with Mazda." Pet. at 3 (citing CP 920). That assertion is flawed in two regards. First, as addressed above, there were no "ongoing negotiations" with Mazda – Mazda did not begin negotiating with 8011 until four months after Rood's listing Agreement with 8011 had expired. Second, Rood acknowledges that he repeatedly asked 8011 to sign a new listing agreement and that 8011 refused. CP 1184, 1190-91.

The remainder of Rood's Statement of the Case is an argument that 8011 consented to Rood being its agent and that an exchange of offers and counters established a new contract for a

commission, independent from the listing Agreement. Pet. at 4-6. 8011 addresses these arguments below. *Infra*, Argument § B.

REASONS THIS COURT SHOULD DENY REVIEW

A. The appellate court correctly held that the trial court did not find facts, so in turn correctly applied the *de novo* standard of review.

Rood argues that the appellate court erroneously applied a *de novo* standard of review. Pet. at 7-13. Rood's argument incorrectly assumes that the trial court "necessarily" made factual determinations. *Id*. at 11. That is false, as the court's orders and oral ruling plainly demonstrate. Thus, the appellate court applied the correct standard of review. This Court should deny review.

The appellate court correctly set forth the unusual procedural posture below that gives rise to Rood's novel argument. Op. at 6-7. In brief sum, "(1) both plaintiffs and defendants moved for summary judgment on the merits, (2) each motion was denied, and (3) defendants (8011) moved for reconsideration." *Id*. at 7. The trial court then informed the parties that it considered the matter "ripe for a decision on [the parties'] summary judgment motions," stating that he would "provide a decision to resolve the case" if the parties agreed to strike the trial date. *Id*. 8011 informed the court that it agreed that the judge could decide the action "as a matter of law." *Id*. The parties

then mutually agreed that the trial court could "decide this action in its entirety based on the summary judgment pleadings, defendants' motion for reconsideration, plaintiffs' pleadings in opposition to defendants' motion for reconsideration, and defendants' reply pleadings in support of reconsideration." *Id*. The court subsequently entered an order denying 8011's motion for reconsideration and granting Rood's cross-motion for summary judgment. *Id*. at 8.

Since the trial court had denied both parties' motions for summary judgment, and since only 8011 sought reconsideration, the appellate court held that the trial court's ruling was not a straightforward CR 56 ruling, or a straightforward CR 59 ruling. *Id*. at 8. Instead, the trial court "decided the case by means of a trial by affidavits without fact-finding," permitted by RCW 2.28.150. *Id*.

Rood admits that the parties agreed that the trial court could decide the action as a matter of law. Pet. at 8-9. He also admits that the trial court's supposed "factual determinations" are "not enshrined in traditional findings of fact."[1] *Id*. at 11. He does not identify any "factual determinations" supposedly made. *Id*. at 7-13.

[1] The court entered findings on attorney fees only, not the merits. Op. at 7.

Rather, Rood claims, without explanation, that the trial court's decision "necessarily resolved the factual and credibility issues articulated [a month earlier] in its May 27, 2015 colloquy with counsel," when the court initially denied the cross-motions for summary judgment before later telling the parties he was prepared to rule as a matter of law. *Id*. at 11. Rood ignores subsequent proceedings that contradict his current argument. When addressing attorney fees on July 1, 2015, the trial court stated that "the general facts of this case are straight forward and generally agreed." CP 26. The court's oral ruling on attorney fees makes plain that the court changed positions, ultimately concluding that the facts are agreed. 7/1/15 RP 32. Indeed, the court explained how he had been led into thinking that there were fact disputes:

> … And I think that's what gave me so much trouble in my initial ruling where I declined to rule in either party's favor on their cross-motions, and where I commented that I believe that the factual disputes, that the facts are agreed. And ultimately I do find that the facts are agreed. The interpretation of those facts is a different matter, but the facts, the general facts of this case are straightforward and they're agreed. And I guess what gave me so much difficulty was the adamant position of the defense that these legal principles that they're citing must in and of themselves support their case.

Id. If that were not clear enough, the trial court later stated "I don't think there's any real question of fact here." *Id*. at 34.

The court's oral ruling on attorney fees also makes abundantly clear that the court granted Rood's motion for summary judgment, something it could not have done if it had been resolving disputes of material fact. 7/1/15 RP 36-37. This is consistent with the court's order on reconsideration, plainly stating that the court is granting Rood's cross-motion for summary judgment. CP 438.

Moreover, Rood never argued on appeal that the trial court found facts. His argument on appeal was that the court should review for an abuse of discretion, where the trial court granted him summary judgment through the vehicle of 8011's motion for reconsideration. BR 26-28. That is, Rood's only argument on the standard of review was that even though the trial court plainly ruled "as a matter of law," the appellate court should have nonetheless reviewed for an abuse of discretion. *Id*. Fact finding was never alleged. *Id*.

Indeed, it would have, and does, completely undermine Rood's defense of the trial court's ruling on appeal to argue that the trial court found facts. On appeal, Rood was defending the trial court's order granting him summary judgment. CP 438. Of course, the order was defensible only if the court did not find facts. Rood's argument that fact finding occurred is not just new, but is also entirely inconsistent with his position on appeal.

Rood's remaining arguments are equally meritless. He claims that the parties agreed to a trial by affidavit, not a summary judgment. Pet. at 11. The parties' actions contradict this new claim, where both parties moved for summary judgment, necessarily taking the position that there were no issues of material fact. But in any event, what the parties' thought they were agreeing to does not answer whether the trial court found facts. The trial court plainly stated that there were no factual disputes. 7/1/15 RP 32.

Rood incorrectly suggests that in "contrast" to summary judgments, "trials by affidavit contemplate the submission of competing sets of affidavits...." Pet. at 11. So too does a court presiding over motions for summary judgment, where it must consider competing "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits...." CR 56(c). Rood proves nothing.

Finally, the cases Rood relies on are inapposite. Rood claims that "Division I actually overlooked the fact that where trials by affidavit have occurred, decisions in such cases are not reviewed *de novo*, but rather their factual determinations are reviewed for substantial evidence." Pet. at 12 (citing ***In re Marriage of Shellenberger***, 80 Wn. App. 71, 906 P.2d 968 (1995); ***In re***

Marriage of Stern, 68 Wn. App. 922, 846 P.2d1387 (1993)). These cases only support the rather obvious proposition that "factual determinations are reviewed for substantial evidence." Pet. at 12. Neither of these cases address the issue here – a trial by affidavit decided on the law, not on the facts.

B. The appellate court correctly held that the procuring cause rule does not apply where the listing Agreement has an express tail provision Rood failed to satisfy.

Rood does not challenge the appellate court's correct decision that he is not entitled to a commission under the listing Agreement. Op. at 10-13. In sum, "Rood did not satisfy the conditions specified in the agreement's tail provision, failing to provide 8011 an offer to purchase from Mazda during the duration of the agreement and failing to provide a registration list to 8011 during or shortly after the expiration of the agreement's durational period." *Id*. at 12-13. Rood's only argument on the merits is that the appellate court failed to correctly apply the procuring cause doctrine, an equitable exception to the statute of frauds. Pet. at 13-19.

The appellate court followed well established law that the procuring cause doctrine does not apply where, as here, a written contract expressly provides how a commission will be awarded if an agency is terminated or expires before a commission is earned. Op.

at 14. Instead, the procuring cause doctrine is just a gap filler, creating an equitable remedy only when a contract is silent (*id*.):

> Importantly, however, the procuring cause rule does not apply when "a written contract expressly provides 'how commissions will be awarded when an employee or agent is terminated.'" ***Syputa v. Druck, Inc.,*** 90 Wn. App. 638, 645, 954 P.2d 279 (1998) (quoting ***Willis*** [***v. Champlain Cable Corp.,*** 109 Wn.2d [747,] 755 [748 P.2d 621 (1988)]). "In the absence of a contractual provision specifying otherwise, the procuring cause doctrine acts as a gap filler." ***Syputa***, 90 Wn. App. at 645-46 (citing ***Indus. Representatives, Inc. v. CP Clare Corp.,*** 74 F.3d 128 (7th Cir. 1996)). Washington courts are "reluctant" to apply "the procuring cause rule to cases involving a clearly written employment contract." ***Willis***. 109 Wn.2d at 756.

Since the parties' listing Agreement has a tail provision detailing how Rood could obtain a commission after the Agreement expired, there is no gap to fill. Op. at 14. Thus, the procuring cause doctrine does not apply. *Id*.

Ignoring the appellate court's correct holding on this point, Rood relies heavily on ***Ctr. Invest. v. Penhallurick***, 22 Wn. App. 846, 592 P.2d 685(1979). *Compare* Pet. at 14-15 *with* Op. at 14-15 n. 9. There, the broker had an oral agreement, "presumptively" without a tail provision, but the final written agreement provided for a commission. Op. at 14-15 n. 9. Here, however, the parties "specifically contracted for a tail provision in their brokerage

agreement," and the final Purchase and Sale Agreement (PSA) does not provide for a commission. *Id*. Thus, "***Penhallurick*** is inapplicable." *Id*. Rood fails to address this correct holding.

Rood next argues that this Court should take review because it could conclude that the parties extended their Agreement, and thus that the procuring cause rule applies. Pet. at 17-18. Rood fails to mention that he repeatedly asked 8011 for a new agreement, but it refused. CP 1184, 1190-91. Thus, it is impossible to reasonably conclude that the parties extended the Agreement.

Moreover, Rood's argument relies largely on the negotiations between 8011 and Mazda, including some draft PSAs providing for a commission. Pet. at 17-18. But Rood ignores the appellate court's correct holding that these negotiations merge into the final written PSA, and cannot be used to contradict it. Op. at 16-17 (citing ***Fleetham v. Schneekloth***, 52 Wn.2d 176, 178-79, 324 P.2d 429 (1958)). He also ignores the court's correct holding that an exchange of offers that were not accepted "did not and could not create a binding legal agreement between Mazda and 8011." Op. at 18-19 (citing ***Cent. Puget Sound Reg'l Transit Auth. v. Heirs & Devisees of Eastey***, 135 Wn. App. 446, 454, 144 P.3d 322 (2006)).

Rood alternatively argues that there arose a new oral agreement enforceable under ***Penhallurick***. *Id*. Again, ***Penhallurick*** is easily distinguished, where the oral agreement was express, and where the final writing provided for a commission. 22 Wn. App. at 848. Here too, Rood asks this Court to create an oral agreement from the parties' actions that would contradict the terms of the final writing it merged into. That is not the law. Op. at 16-17.

Finally, Rood claims that the "exception" that the procuring cause doctrine does not apply where, as here, the brokerage agreement is a complete writing with a tail provision, could "swallow" the procuring cause "rule." Pet. at 15-16 (citing ***Willis***, 109 Wn.2d at 755-59). Thus, Rood asks this Court to "modify" its holding in ***Willis*** and hold that a written tail provision is "just evidence of whether the procuring cause principle should be applied." Pet. at 18.

Preliminarily, while Rood asks this Court to "modify" ***Willis***, there are a number of cases providing that the procuring cause doctrine does not apply where, as here, the agreement provides how a commission will be awarded after the agreement terminates or expires. *See e.g.*, ***Willis***, 109 Wn.2d at 754; ***Miller v. Paul M. Wolff Co.***, 178 Wn. App. 957, 964, 316 P.3d 1113 (2014); ***Syputa***, 90 Wn. App. at 645-46; ***Roger Crane & Assocs. v. Felice***, 74 Wn. App. 769,

774-75, 875 P.2d 705 (1994); ***Thayer v. Damiano***, 9 Wn. App. 207, 210, 511 P.2d 84 (1973). Rood does not address these cases.

Rood's argument incorrectly elevates the procuring cause doctrine to the "rule." Pet. at 15-16, 18-19. The "rule" is the statute of frauds, which requires brokers to reduce to writing any agreement to receive a commission. RCWs 19.36.010 and 18.86.080(7); ***Penhallurick***, 22 Wn. App. at 849 (citing ***Engleson v. Port Crescent Shingle Co.,*** 74 Wash. 424, 133 P. 1030 (1913) "and cases cited therein"). "[T]he statute [of frauds] would not have the effect intended" if a broker could recover a commission absent a written agreement. 22 Wn. App. at 849-50 (quoting RESTATEMENT (SECOND) OF AGENCY §468, at 399 (1958), Comment on Subsection 2 (1958)). Brokers are expected to know the law, and can reasonably be deprived compensation if they fail to follow it. *Id*.

The procuring cause doctrine is not the rule, but a narrow equitable exception that permits a broker to recover a commission in two circumstances. First, a broker may be entitled to a commission where he has an oral agreement allowing a commission and procures a sale, and the seller memorializes the oral agreement in a subsequent writing between seller and purchaser. ***Willis***, 109 Wn.2d at 755 (citing ***Penhallurick***, 22 Wn. App. at 850). Second, a broker

may be entitled to a commission where the written agreement allowing a commission does not have a fixed term and the seller terminates the agency in bad faith to deprive the broker of a commission. ***Zelensky v. Viking Equip. Co.***, 70 Wn.2d 78, 82-83, 422 P.2d 293 (1966) (citing ***Knox v. Parker***, 2 Wash. 34, 25 P. 909 (1891); ***Norris v. Byrne***, 38 Wash. 592, 80 P. 808 (1905); ***Lawson v. Black Diamond Coal Mining Co.***, 53 Wash. 614, 102 P. 759 (1909); ***Merritt v. American Catering Co.***, 71 Wash. 425, 128 P. 1074 (1912); ***Duncan v. Parker***, 81 Wash. 340, 142 P. 657 (1914)). Neither circumstance exists here. The parties' written Agreement expired on its own terms before Mazda became interested in the Property, and the final PSA did not allow a commission. Rood ignores this point and these cases.

Rood takes issue with this Court's (and the appellate court's) refusal to apply the procuring cause doctrine where the parties have expressly contracted for the broker's commission, including how the commission will be awarded after the agreement terminates or expires. Pet. at 18-19; ***Willis***, 109 Wn.2d at 754-55; ***Syputa***, 90 Wn. App. at 645-46. That is, Rood asks this Court to accept review and "modify" ***Willis*** to extend the procuring cause doctrine to create

remedies other than those the parties agreed to. Pet. at 18-19. The Court should decline to do so.

Rood contracted for ways to receive a commission if he did not complete performance during the term of the parties' Agreement. Op. 12-13. He admits that he failed to satisfy that provision, where he produced no offer within the term of the Agreement and failed to put Mazda on a registration list. *Id*. Rood is not entitled to additional remedies because he failed to satisfy the remedies he bargained for. Thus, Rood's argument does not so much ask this Court to apply the procuring cause doctrine, as it asks for an equitable exception to the contract Rood bargained for. It is well established that the courts will not add terms to a contract that the parties did not bargain for. ***McCormick v. Dunn & Black, P.S.***, 140 Wn. App. 873, 891-92, 167 P.3d 610 (2007); ***Dice v. City of Montesano***, 131 Wn. App. 675, 686-87, 128 P.3d 1253 (2006); ***Universal/Land Constr. Co. v. Spokane***, 49 Wn. App. 634, 637, 745 P.2d 53 (1987); ***In re Marriage of Mudgett***, 41 Wn. App. 337, 341, 704 P.2d 169 (1985).

And Rood's equitable arguments fail to acknowledge that there are no equitable defenses to the statute of frauds, even if it operates to defeat a "just claim." *See, e.g.*, BA 20-22; ***Forland v. Boyum***, 53 Wash. 421, 424, 102 P. 34 (1909); ***Farrell v. Mentzer***,

102 Wash. 629, 632, 174 P. 482 (1918). Rood ignores this point and these controlling cases.

Further, the appellate court rejected Rood's equitable arguments. Op. at 19-20. Rood mentions unjust enrichment and quantum meruit in passing, but does not challenge the appellate court's correct holding. Pet. at 18.

In sum, the procuring cause doctrine plainly does not apply, where the parties contracted for the remedies available if Rood did not complete performance during the Agreement's term. Creating additional remedies in equity would undermine the parties' bargain, and contradict decades of controlling precedent in the process.

CONCLUSION

The appellate court's decision is correct, and is consistent with cases from the Court of Appeals and from this Court. This Court should not take review to modify a line of cases holding only that the courts will not create equitable relief from the contracts parties bargain for. This Court should deny review.

RESPECTFULLY SUBMITTED this 17th day of May, 2017.

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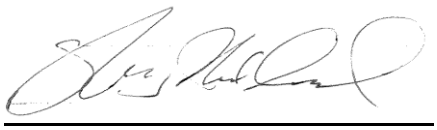

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CERTIFICATE OF SERVICE

I certify that I caused to be mailed via U.S. mail, postage prepaid, and/or emailed, a copy of the foregoing **ANSWER TO PETITION FOR REVIEW** on the 17th day of May, 2017 to the following counsel of record at the following addresses:

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