73737-6

73737-6

NO. 73737-6-I

COURT OF APPEALS STATE OF WASHINGTON
DIVISION ONE

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

Plaintiffs/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; FIRST AMERICAN TITLE COMPANY,

Defendants/Appellants.

BRIEF OF RESPONDENTS

Jeffrey P. Downer, WSBA No. 12625
Jonathan J. Loch, WSBA No. 43107
Of Attorneys for Respondents

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I. INTRODUCTION

For more than a year, plaintiffs-respondents Mr. 99 & Associates, Inc. and Martin Rood (collectively Mr. Rood) worked to procure JRJ LLC, dba Mazda of Everett (Mazda), as the buyer of 11409 Highway 99 in Everett (the Property), at the invitation, encouragement, and approval of defendants-appellants 8011 LLC, Walter Moss II, and Kari Graves (collectively 8011). Mr. Rood introduced the Property to Mazda; drafted numerous purchase and sale agreements; communicated numerous offers and counteroffers; and helped 8011 increase its sales price. 8011 agreed to pay Mr. Rood a 5% commission if he procured a buyer for the Property. Yet when Mazda bought the Property for $2.14 million, 8011 refused to pay Mr. Rood his 5% commission, worth $107,000.00.

The superior court rightly awarded Mr. Rood that commission because he procured Mazda, and awarded him attorney fees and other amounts because the Listing so provides. The superior court entered judgment not only in contract but also based on tort claims of unjust enrichment, trover, conversion, misappropriation, and tortious interference. 8011 does not challenge entry of judgment on those tort claims, so this court must affirm the judgment for Mr. Rood.

8011 **agreed** the superior court could decide the case as a matter of law on 8011's own motion for reconsideration. Therefore, even if this court reaches the merits, it reviews all of the superior court's rulings for abuse of discretion only. The trial court acted within its sound discretion.

8011 seeks disgorgement of Mr. Rood's duly earned commission

by repeatedly maligning him. This court should ignore that pejorative argument, because it depends on (1) obsolete common law that RCW 18.86 *et seq.* abrogated, (2) a declaration that was not before this judge on these motions, and (3) a factual account that is plainly false.

8011 does not challenge the amount of attorney fees awarded to Mr. Rood or that the judgment is against all defendants, not just 8011.

II. ASSIGNMENTS OF ERROR

Assignments of Error

Mr. Rood assigns no error to the superior court's decisions.

Issues Pertaining to Assignments of Error

1. Whether this court must affirm the superior court's judgment awarding Mr. Rood his $107,000.00 commission, where:

(a) the superior court entered judgment based on both contract and tort claims by Mr. Rood;

(b) 8011 does not challenge the judgment as to the tort claims;

(c) the superior court entered judgment on 8011's motion for reconsideration, so this court reviews it for abuse of discretion only;

(d) 8011 entered into a written Listing with Mr. Rood that gave Mr. Rood a 5% commission if he procured a buyer or lessee;

(e) the Listing conditions commission on whether Mr. Rood procures a buyer, which 8011 concedes he did, not on whether the Property sold within a set time;

(f) 8011 encouraged and approved Mr. Rood's efforts to sell the

Property to Mazda;

(g) despite 8011's freezing Mr. Rood out of the final negotiations, Mazda ultimately bought the Property; and

(h) the final sale used Mr. Rood's contract documents and work product.

2. Whether the superior court acted within its discretion in awarding reasonable attorney fees, costs, and interest to Mr. Rood, where:

(a) the $107,000.00 commission was a liquidated sum supporting the prejudgment interest award, and 8011 did not oppose that award;

(b) the Listing contains a prevailing-party fee provision that 8011 now admits does apply; and

(c) 8011 concedes the fees are reasonable.

III. STATEMENT OF THE CASE

Mr. Rood is a commercial real estate broker and owns the Mr. 99 & Associates, Inc. real estate brokerage. CP 2415. Mr. Moss and the estate of Donna Moss own 8011. CP 2377, 2416. Ms. Graves is an authorized agent for 8011, attorney-in-fact for Mr. Moss, CP 131-37, and personal representative of the estate. CP 1880-81. Ms. Graves's brother, Walter Moss III, operated a business on the Property for no rent; she asked him to vacate, CP 1881, 4049, and later sued to evict him. *Id.* 8011 intended to lease or sell the Property. CP 1881, 2328. Ms. Graves wanted to sell to avoid sharing lease proceeds with her brother. CP 939.

A. Prior to the Listing, Mr. Rood worked to procure a buyer for 8011 and was hired by the Property's ultimate buyer, Mazda.

Mazda was already a potential buyer by the time 8011 contacted Mr. Rood to procure a buyer for the Property. CP 643, 668, 908-09, 2325, 2328. Mazda was referred to Mr. Rood in late 2010 to early 2011. CP 643, 668. Richard Matthews, attorney for 8011, contacted Mr. Rood by February 16, 2011. CP 908-09, 2325, 28. 8011 wanted to list the property by March 1, 2011. CP 910-11, 2328. Mr. Matthews had worked with Mr. Rood before and felt he was the best person for the job. CP 910. Ms. Graves spoke with Mr. Rood. CP 2325-30. On February 17, 2011, Mr. Matthews asked Mr. Rood to prepare a listing agreement for the Property and to make recommendations for both lease and sale pricing. CP 909-11, 2330. Mr. Rood began to research values and potential customers at Ms. Graves's direction, *id.*, obtained title information for the Property, and researched how to market it most effectively. CP 913-14, 919.

On April 1, 2011, Mr. Rood met with Jerry McCann of Mazda and introduced the Property to him. CP 643, 650. Mazda preferred to buy the building they were then renting from their landlord, Mr. Pignataro, CP 643, but Mr. Rood reviewed the Property's appraisal and discussed it with 8011's appraiser, Jud Clendantel, on April 14, 2011. CP 1900, 1910.

On May 5, 2011, Mr. Rood emailed Ms. Graves lease prices, to show what rent she might charge for the Property. CP 1910. Meanwhile, Mazda hired Mr. Rood to renegotiate its lease; he began to provide real estate services for Mazda. CP 662-65, 672-77. Mr. Rood worked on the

Mazda negotiations between May 2011 and March 2012. CP 658-59, 679, 682, 685-96, 721-35. Mr. Pignataro decided not to sell. CP 643. Between February and July 2011, 8011 and Mr. Rood focused on the Property's boundaries, whether 8011 could terminate Walter Moss III's lease, and what the Property was worth. CP 914.

B. The parties entered into the written Listing.

While Mr. Rood worked with Mazda, Mr. Rood drafted a Listing for the Property in July 2011. CP 646-48, 658-59, 2326. Mr. Moss signed it. CP 648. 8011 agreed to pay Mr. Rood a commission of 5% of the sales price if Mr. Rood procured a buyer or lessee, CP 647-48, unless 8011 leased the premises to Mr. Moss, III or to the "Pierre family." CP 648, 917. Paragraph 6 of the Listing states:

> **COMMISSION.** Firm shall be entitled to a commission if: (a) Firm leases or procures a lessee on the terms of this Agreement, or on other terms acceptable to Owner ... [or]
>
> (c) Owner leases the Property within six months after the expiration or sooner termination of this Agreement 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 Firm pursuant to this Agreement ... the commission shall be calculated as follows: **5% of gross lease amount for entire term.**

CP 647. "Lease" is defined in ¶ 3(b) to mean "lease, sublease, sell, or enter into a contract to lease, sublease, or sell the Property," CP 646, including sublessees. CP 2332. "Terms of this Agreement" is defined in paragraph 2. *Id.* Paragraph 2 states:

> **PRICE AND TERMS.** Owner agrees to list the Property at a lease price of $9500 per month and shall consider offers that include the following terms: [blank].

Id. Thus, "terms of this Agreement" differs from "during the term of the Agreement." "Term" refers to the duration of the Listing, CP 2333, ¶6(b)-(c), whereas "terms" refers to the "price and terms" 8011 would accept. CP 2332, ¶ 2. The Listing did not specify the latter. *Id.* The duration of the Listing was from July 21, 2011 to January 21, 2012. CP 648, 1163.

C. During the Listing, Mr. Rood worked with Mazda and worked to procure a buyer for the Property.

Mr. Rood posted the Listing on the real estate databases he belonged to, installed a "for lease" sign on the Property, and by August 22, 2011 had emailed approximately 400 brokers about the Property. CP 1173, 1080, 2326, 2337. Meanwhile, Mazda asked Mr. Rood to find a property that was eight miles away from its location, according to state law. CP 643, 708. The Property was about 7.5 miles away, so Mazda was compelled to focus first on other properties. CP 643, 672-707. Mr. Rood also worked on negotiations with Mazda's landlord between May 2011 and March 2012, CP 658-59, 679, 682, 685-96, 721-35, until Mr. Pignataro decided against selling. CP 643. It was a difficult time to sell or lease properties. CP 918-21. Mr. Rood was "beating the bushes" looking for buyers between the time the Listing was signed and April 1, 2012. *Id.* He contacted nearby property owners to gauge their interest in the Property, a family that owns a lot of property on Highway 99, and other purchasers and lessees along Highway 99. *Id.*

D. After the Listing, Mr. Rood continued to procure Mazda at the encouragement of 8011.

It is customary in the commercial real estate industry for listings to last six months, then be renewed as long as the broker is performing and continues to represent the party. CP 916, 936-37. The parties did not renew the Listing because they did not feel it was necessary. CP 920. Instead, Mr. Rood and 8011 operated as if the Listing and an implied obligation were still in place. CP 920, 936-37. Between January 21 and April 11, 2012, Mr. Rood discussed the Property with other prospects, CP 920, and continued to work with Mazda. CP 721-35.

On April 11, 2012, a year after Mr. Rood first told Mazda of the Property, Mr. Rood again presented the Property to Mazda. CP 1069, 1197, 2326. He gave Mazda the Property's appraisal, the property profile, and a quitclaim deed he had obtained on February 22, 2011. CP 708-20, 2330. Although the Listing had expired, Mr. Rood's representation of 8011 had not. CP 923. Ms. Graves directed Mr. Rood to focus on the sale to Mazda. CP 939. Mr. Rood therefore emailed Mazda about the Property, which was interested and made offers. CP 740-43, 2326, 2339. Mr. Rood began to work as a dual agent for Mazda and 8011. CP 2326.

1. Mr. Rood prepared several Purchase and Sale Agreements and negotiated the sale.

On May 18, 2012, Mazda told Mr. Rood that it would offer to buy the Property for $17 per square foot. CP 1900-01. He drafted the first of several Purchase and Sale Agreements (PSAs). CP 1918-30. This PSA provided for a 5% commission to Mr. Rood, whether or not the Listing

was in place, CP 1927, and disclosed that Mr. Rood was a dual agent. CP 1928. Mr. Rood sent the offer to Mr. Matthews to discuss with 8011, CP 924, and arranged to meet with Ms. Graves to review the offer. CP 1932.

E. None of the other real estate brokers 8011 contacted negotiated with Mazda or entered into a listing.

While Mr. Rood continued his work, Ms. Graves corresponded with other real estate brokers without telling Mr. Rood. CP 1902. One of them, Norm Beck, prepared a PSA dated May 29, 2012 that increased the price to $19.66 per square foot. CP 1902, 1260-73, 2034-08. 8011 did not retain Mr. Beck or offer him a commission. CP 1883, 1902. Instead, Mr. Beck's PSA listed Mr. Rood as the selling broker for Mazda, and Mr. Beck as the listing broker for 8011. CP 1260-73. It listed a 5% commission, to be split between Mr. Rood and Mr. Beck whether or not the Listing was in place. CP 1269. On about June 1, 2012, while Mr. Rood continued his work, Ms. Graves contacted real estate broker Lisa Bride, CP 1903, 2117, who told Ms. Graves the property would sell for between $19.50 and $20.88 per square foot. CP 2117. 8011 did not offer her a commission. CP 1883.

While Mr. Rood continued his work, Ms. Graves also contacted real estate broker Matt Henn. CP 2009. Ms. Graves showed Mr. Henn one of Mazda's offers. *Id.* He drafted PSAs identifying Mr. Rood as the buyer's agent and himself as seller's agent. CP 1902-03, 2056, 2060. Mr. Henn's draft PSAs increased the commission 8011 would pay from 5% to 6%, CP 1902-03, 2050-65, 2066-2115, even "if there is no written listing

or commission agreement." Of that 6% commission, 4% would go to Mr. Rood and 2% to Mr. Henn. CP 2115. 8011 did not sign Mr. Henn's PSA. *Id.* Mr. Henn ultimately did not represent 8011 in negotiations with Mazda or enter into a listing agreement. CP 2010. Mr. Rood continued to pursue the sale of the Property at 8011's assent and told Ms. Graves that a 6% commission was not in 8011's best interests. CP 2010.

F. As Mr. Rood continued to work with Mazda and 8011 to get the best sale price possible for 8011, they signed a PSA he had drafted, entitling him to commission.

Ms. Graves knew Mr. Rood was working to close a sale between Mazda and 8011. CP 2009, 1497-1520. In fact, she instructed Mr. Matthews to consider no other buyer but Mazda. CP 938-39. 8011 specifically wanted a sale, not a lease. CP 938-39. Mr. Rood therefore kept other proposals alive to leverage Mazda. CP 938-39. On July 13, 2012, 8011 countered an offer Mazda had signed on June 27, 2012. CP 1137, 1217-33, 1938-54. That counteroffer included a commission of 5% to Mr. Rood, whether or not there was a written Listing, stating, "Seller … agrees to pay a commission in a total amount computed in accordance with the listing or commission agreement. If there is no written listing or commission agreement, [8011] agrees to pay a commission of 5%." CP 1947. By this time, Mazda was no longer considering other properties and was in the process of obtaining a waiver of the eight-mile rule. CP 643.

On about July 19, 2012, Mr. Rood notified Ms. Graves of another inquiry he had received on the Property. CP 1482. She supported Mr. Rood's efforts to maximize Mazda's purchase price. *Id.* On July 21,

2012, Mazda made another offer, this time for $18 per square foot. CP 1901, 1936. Mr. Rood told Mazda the offer was inadequate but that he would take a higher offer to 8011, and that he was showing the property to another car dealer that day. CP 1936. On July 23, 2012, Mr. Rood also solicited a purchase offer from another entity. CP 1245.

1. Mr. Rood duly told Ms. Graves of Shawn Rahimzadeh's inquiry about the Property.

8011 argues at length that Mr. Rood engaged in supposed misconduct, citing a self-serving declaration of Ms. Graves, App. Br. at 12, 38-39, CP 1528-1742, that was not before Judge Wilson on either summary judgment or reconsideration.[1] CP 436-38, 553-43. This court may consider only those materials brought to Judge Wilson's attention on summary judgment (and by extension, on reconsideration of summary judgment). *See* §V.B., *infra*. 8011 filed that declaration regarding different motions, heard a different year, before a different judge.

Mr. Rood acted properly. On July 22, 2012, Shawn Rahimzadeh emailed him proposed terms to lease the Property, including rent of $8500 per month. CP 1247-48. Mr. Rood replied that he was presenting Mazda with a final offer to sell but would draft an offer for Mr. Rahimzadeh if the Mazda sale fell through. *Id.* On July 30, 2012, Mr. Rood contacted Mr. Rahimzadeh again and said he would be in touch if the Mazda deal failed. *Id.* Ms. Graves admits that Mr. Rood told her in July 2012 that he had

[1] A stray page of this 200-plus-page declaration and an exhibit page were inadvertently attached to Mr. Rood's cross-motion for summary judgment. CP 1131-32.

received inquiries about the Property and that someone was interested in leasing it. CP 1025, 1483. She admits that she told Mr. Rood that she preferred selling to Mazda and focusing solely on that sale, not a lease. *Id.* In August 2012, Mr. Rood exchanged emails with Mr. Rahimzadeh and said he would be in touch if Mazda did not sign. CP 1250-55. On August 27, 2012, Mr. Rood asked Mr. Rahimzadeh if he was still interested and said, "I have an alternative for my client [Mazda] that would make the Moss property available to you ... if you still want it, please send me a proposal of you[r] willingness to rent for $8,500 a month." CP 1251.

Mr. Rahimzadeh forwarded to Ms. Graves his July 22, 2012 emailed proposal, CP 125, but despite this, 8011 chose not to pursue it. CP 1884-85. Mr. Rahimzadeh never made any written lease offer. CP 1024, 2254-74. Ms. Graves recognized that Mr. Rahimzedeh's proposal might not qualify as a "real proposal" or offer when she shared it with her new attorney Ted Watts. CP 1257.

2. Mr. Rood continued to work with Mazda.

Around July 26, 2012, Mazda made a counteroffer of $18.75 per square foot. CP 1901. Upon review of the July 26, 2012 PSA, Mr. Rood determined that $19.50 per square foot would be more appropriate based upon comparable properties. CP 1901. Mr. Rood emailed Ms. Graves on July 26, 2011 with the offer of $18.75 and stated, "I think if I get $19.50 to $19.75 from you, I think I can get them to move up. Please get back to me asap." CP 1956. That day, Ms. Graves texted Mr. Rood and asked that he email her the Mazda offer. CP 1030. Ms. Graves and Mr. Rood

exchanged text messages; Ms. Graves asked Mr. Rood to keep her posted regarding the Property. CP 1035. Mr. Rood also asked Ms. Graves to extend the Listing, but she did not respond. *Id.* Mr. Rood reiterated that he represented both 8011 and Mazda and said he would need an extended listing signed to secure a lease offer from Mr. Rahimzadeh. *Id.*

On July 27, 2012, Ms. Graves told Mr. Matthews, "we are getting fairly close to coming to an agreed upon price with a potential buyer but I need to know what the capital gains implications will be. … I am sending you a copy of the latest counteroffer from Mazda." CP 1983-84. Ms. Graves instructed Mr. Rood, "you suggested 19.50-19.75 sf so I will counter in that range at … $19.66/sf." CP 1985-86. He replied: "I want to get everything I can for you and hope they bite at this. We are very close. I will call Jerry McCann tomorrow and speak with him." *Id.* Mr. Rood drafted a counteroffer of $19.66 per square foot to Mazda, notifying Mazda that it would be 8011's final offer. CP 1902. That offer included a 5% commission to him, "in accordance with the listing," and "if there is no written listing agreement, Seller agrees to pay a commission of 5% of the sales price." CP 1902, 1997, 1988-2004. Mr. Rood continually asked 8011 for a listing agreement from February 2012 to July 2012. CP 1191.

On July 30, 2012, Ms. Graves contacted Mr. Rood and stated she was "willing to submit one final offer" to Mazda. CP 1028, 2119. She said, "I therefore would like you to include the following in my counteroffer to Mazda" at $19.25 per square foot and included a broker commission of 2.5%; and "it is understood that we do not have

representation in this negotiation," even though she asked Mr. Rood to convey the counteroffer to Mazda. *Id.* Mr. Rood replied that those terms were not fair to him, CP 2121, and that he would instead take the offer of $19.66 per square foot to Mazda. CP 2123. Ms. Graves replied that Mr. Rood could submit his offer of $19.66 but also that "this offer is final and if there is any gap it will be up to you and Mazda to figure out how to fill it." CP 2125. By this point, the deal that Mr. Rood had worked on was fairly close to closing, and Mr. Rood continued to make efforts on 8011's behalf. CP 928-29. Mr. Matthews testified that Mr. Rood did a lot of legwork between May and July 2012 to get to an agreement, not only on price, "but on the other terms, closing, feasibility, extension, [and boundary issues]." CP 927. Mr. Rood continued to make efforts on the seller's behalf "to button up the last details." CP 928. Ms. Graves admits that Mr. Rood procured the buyer, CP 2010-11; that only Mr. 99 had listed the Property for lease or sale, CP 2011; and that Mr. Rood continued to work for 8011 to sell the Property Mazda. *Id.*

On July 31, 2012 Mr. Rood presented Ms. Graves with a new, signed offer from Mazda, CP 1904, 2127-43, that provided for a 5% commission to Mr. Rood with or without a listing agreement. CP 2136.

About this time, Mr. Matthews told Mr. Rood that 8011 needed a higher price from Mazda. CP 927. Mr. Matthews began to negotiate directly with Mazda at 8011's direction and added new terms. *Id.*

On August 8, 2012, Mr. Rood contacted Mazda and stated that 8011 "will not come down from her $19.66/sf." CP 2145. Mr. Rood even

offered to reduce his commission by $16,400.25 as incentive for Mazda to close. CP 1904, 2147-63. On August 20, 2012, Mr. Rood prepared a PSA, CP 1275-92, and again offered to reduce his "commission on the transaction" by $16,400. CP 1284, 1287. On August 21, 2012, Mr. Rood prepared yet another PSA dated August 21, 2012; it identified Mr. Rood as dual agent and provided for a 5% commission. CP 1294-1312.

G. 8011 froze Mr. Rood out of the final stage of the sale.

On August 21, 2012, Ms. Graves retained attorney Watts to review Mr. Rood's latest PSA. CP 1904-05. The next day, Ms. Graves told Mr. Rood that said she would not sign the August 21, 2012 PSA and was having it reviewed and would contact him or Mr. Matthews thereafter. CP 1399. Mr. Rood notified Mazda about the development. CP 2165.

On August 24, 2012, Ms. Bride prepared a counteroffer that provided a 2.5% commission to Mr. Rood and identified Mr. Rood as selling firm and no one as listing firm. CP 1314-31, 1905, CP 2167-84.

On August 28, 2012, Ms. Graves notified Mr. Rood that 8011 was reviewing the last offer from Mazda and would prepare a counteroffer shortly. CP 4209. Mr. Rood relayed this to Mazda. *Id.*

On August 31, 2012, Ms. Bride drafted another PSA that was presented to Mazda as Ms. Graves's "final offer." CP 1333-50, 1905, 2186-2204. It identified Mr. Rood as the "selling firm," listed no one as the listing firm, and provided for a 2.5% commission to Mr. Rood. *Id.* Ms. Graves believes that Ms. Bride's efforts, which were far less extensive than Mr. Rood's, warrant a commission but paid her none. CP 1883.

On September 4, 2012, Mr. Watts emailed Mr. Matthews that 8011 had retained him to assist with the Property. CP 4212. Mr. Watts knew of Mr. Rood but stated, "It was my advice to Kari and remains so now that any offers must come from [Mazda] and can be signed by [Mazda] ... I was unable to see any document that provided for a listing or the payment of any commission by the seller. If you or Mr. Rood can provide it to me I will consult with the seller about it." *Id.* Mr. Matthews forwarded the email to Mazda's attorney Mark Leen to Mr. Rood. *Id.*

On September 7, 2012, Mr. Matthews asked Mr. Leen to prepare an offer, or to have Mr. Rood do so. CP 1180. Mr. Matthews suggested that Mr. Leen "leave the issue of the commission out and let Mr. Rood deal with that post closing." *Id.* Meanwhile, Mr. Rood obtained the appraised value of the property next door to the Property to show 8011 that his efforts had persuaded Mazda to offer a higher price. CP 1180.

On September 11, 2012, Mazda drafted and signed a PSA for $19.50 per square foot and providing a 2.5% commission to Mr. Rood. CP 1352-71, 1905, 2206-25. It identified Mr. Rood as the "selling firm" and no one as the listing firm. *Id.*

On September 13, 2012, Mr. Henn reviewed the September 11, 2012 document and told Ms. Graves, "I feel and recommend that I be paid a real estate fee for this ... you are now receiving the price I recommended that you would and paying a 2.5% fee. This can be behind the scenes and I will consult until the transaction is closed or jump in." CP 2227.

On September 22, 2012, Mazda drafted and signed another PSA,

providing a 2.5% commission and identifying Mr. Rood as the "selling firm" and no one as the listing firm. CP 1373-92, 1905, 2229-48.

On September 28, 2012 3:19pm Mr. Watts notified Mazda that further negotiations were fruitless, and 8011 would not sell to Mazda. CP 1905, 2250. Minutes later, Mr. Watts contacted Mr. Rood, notified him that the negotiations were off and 8011 was no longer interested in working with Mazda on negotiating a sale, CP 1403, and directed him to remove the listing on the property and to take down his signs. *Id.* Both Mr. Matthews and Mr. Watts represented 8011. CP 4164-65. Mazda's attorney, Mr. Leen, informed Mr. Watts that Mazda was still willing to proceed. CP 4168-69. On October 1, 2012, Mr. Rood sent Ms. Graves a text stating, "the Mazda guys said they have everything you wanted. If you want to just pay ½ commission I am ok with that. Let me know soon though. Only ones winning are the attorneys." CP 1906, 2252. Mazda then contacted Ms. Graves directly to ask why she walked away from the negotiations and asked to meet her in person. CP 4168-70. The parties met, Mazda stated it still wanted to buy the property, and Ms. Graves explained she did not want any "loose ends" on the terms. CP 4170.

H. 8011 and Mazda closed the transaction based on Mr. Rood's work product.

On October 8, 2012, Mazda made a revised offer to Ms. Graves. CP 1906, 2254-73. It still identified Mr. Rood as the "selling firm," CP 2261, 2264, but stated in handwriting, "seller will pay no real estate commission at closing. Buyer does not warrant as to seller's liability for

commission." CP 2270. This document was based on an earlier version by Mr. Rood. CP 930-31. 8011 and Mazda signed this PSA on October 12, 2012 and closed the sale on January 17, 2013. CP 153, 419-21, 2270.[2]

1. 8011's attorney testified that 8011 had a legal and moral obligation to compensate Mr. Rood.

Mr. Matthews told Ms. Graves that legally and morally, 8011 owed Mr. Rood a commission, because they used, unchanged, the PSA template that he drafted. CP 940-41. On January 10, 2013, Mr. Matthews emailed Mr. Rood, stating, "I think you earned your fee by bringing the parties together; ultimately that issue will be up to a court looking at your listing; your actions and the actions after Kari took the deal to Watts." CP 2276. The final deal was the same on virtually everything except the commission. CP 933. In his deposition, Mr. Matthews said, "it's wrong for somebody to take what another person brought to them, agree to the number, and then get to the altar and scrap them. I think morally it's wrong." CP 942. He testified that it is customary for such listings to last six months, then be renewed as long as the broker is performing and continues to represent the party. CP 916, 936-37. The parties did not renew this Listing, however, they did not feel it was necessary. CP 920. Instead, Mr. Rood and 8011 operated as if the Listing and an implied obligation was still in place. *Id.*; CP 936-37.

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[2] Also in January 2013, Mr. Watts told Ms. Graves that Mr. Rood could sue her for the commission, win, and recover attorney fees. CP 4206.

I. Mr. Rood sued for his commission.

On February 28, 2013, Mr. Rood sued 8011, LLC, Walter Moss, Kari Graves, and First American Title Company. CP 2407-23. Mr. Rood alleged causes of action for breach of contract, trover, conversion, misappropriation, unjust enrichment, violation of the Escrow Agent Registration Act, violation of the Consumer Protection Act (CPA), and tortious interference. CP 2415-23. After a long delay that forced Mr. Rood to move for default, CP 4242-47, 8011 answered and counterclaimed for violation of the CPA. CP 4231-32, 2392-2406. An Amended Answer was filed July 13, 2012. CP 2377-91. All parties later agreed to dismissal of the claims against First American and for 8011 to interplead $134,000.00 into the court registry, until the court ordered or the parties stipulated that it be disbursed. CP 4226-30. The superior court ultimately ordered the $134,000 disbursed to Mr. Rood. CP 2427-28, 2473-74.

J. On summary judgment motions in 2014, Judge George Appel dismissed 8011's CPA counterclaim but found fact disputes as to Mr. Rood' commission claim.

On May 23, 2014, Superior Court Judge George Appel decided two summary judgment motions by Mr. Rood: (1) for dismissal of 8011's CPA counterclaim, CP 2360-69, which Judge Appel granted, CP 1468-70; and (2) seeking a ruling as a matter of law because Mr. Rood was the procuring cause of the sale, CP 2278-95, which Judge Appel denied, CP 1466-67. 8011 argued that fact disputes precluded the latter. CP 1772. Judge Appel ruled that the obligation to pay a commission turned not on

whether the parties met the statute of frauds, but on the existence and terms of an implied contract to pay the commission. CP 764.

K. In 2015, Judge Joseph Wilson denied 8011's motion for summary judgment and Mr. Rood's cross-motion.

Despite having earlier argued that fact disputes precluded summary judgment, CP 1772, on April 29, 2015 8011 moved for summary judgment. CP 1440-63. Mr. Rood cross-moved for summary judgment. CP 1103-30. Judge Joseph Wilson denied both parties' motions for summary judgment, finding fact disputes. CP 553-56.

L. 8011 moved for reconsideration; Judge Wilson and the parties agreed that it would decide the action as a matter of law; Judge Wilson decided in Mr. Rood's favor on several legal grounds.

8011 moved for reconsideration of the denial of its summary judgment motion. CP 2951-57. After receiving that motion, Judge Wilson's clerk informed both sides that the court "decided that the case is ripe for a decision on your summary judgment motions" and would resolve the case as a matter of law if the imminent trial was stricken. CP 5, 10, 18, 22. The parties negotiated and ultimately agreed that Judge Wilson could decide the action as a matter of law, after considering both sides' pleadings on reconsideration. CP 4. The clerk confirmed this agreement: "you can safely strike your trial! Just for extra assurance, [the court] is fully aware that you will be doing this now that he has heard from both parties." CP 12, 23-24. Mr. Rood struck the trial. CP 3.

On June 18, 2015, Judge Wilson denied 8011's motion for reconsideration, granted Mr. Rood's cross-motion, and awarded Mr. Rood

his full $107,000 commission. CP 436-38. Mr. Rood then moved that the $134,000 in the court registry be disbursed to him, CP 2518-30, which 8011 did not oppose, CP 2486-87, and for fees, costs, and prejudgment interest. CP 142-425. 8011 opposed the motion for fees but not their reasonableness or the prejudgment-interest award. CP 56-58, 74-141.

Washington law requires a party seeking an attorney-fee award to propose Findings of Fact and Conclusions of Law to permit appellate review. *See* § V.D., *infra.* Mr. Rood did so. CP 30-40. 8011's response to these facts was perfunctory and incomplete, CP 56-70, and did not challenge any specific Finding of Fact. *Id.* Thus 8011 admitted that: (1) Ms. Graves had filed a baseless complaint against Mr. Rood to the Department of Licensing; (2) that complaint was to cause personal and professional difficulty and legal expense to Mr. Rood; (3) his high legal expense "resulted directly from defendants' and their attorneys' strategic and tactical decisions, all of which ultimately failed"; (4) defendants' lawyers "repeatedly engaged in obstructionist litigation tactics that needlessly drove up legal expenses"; (5) 8011's counsel repeatedly asserted privileges that had been waived previously; (6) the court had sanctioned defense counsel $3,500 for discovery violations; and (7) defense counsel's many gratuitous disputes over discovery and tactical delays in disclosing an expert forced plaintiffs to further legal expense. CP 30-40. These Findings are verities on appeal. § V.D., *infra.* Rather than address the reasonableness of the fees, 8011 rehashed Mr. Rood's right to a commission, which it already had lost, CP 56-68, and argued that

even if Mr. Rood won his commission, the Listing's fee provision did not apply. CP 64-65. As to the fees' reasonableness, 8011 offered only a page of unsupported assertions that some fees were not adequately documented, that others were unrelated, and that others had been denied in discovery-motion practice. CP 66-67. 8011 presented no proof or argument to support these conclusory assertions. CP 71-128.

M. The superior court's rulings were an exercise of its discretion, or are unchallenged on appeal, or both.

The clerk's minute entry for the July 1, 2015 hearing states, "[T]he general facts of this case are straightforward and generally agreed. The court has reviewed cases cited in counsel's briefs and finds Ms. Graves engaged Plaintiff Rood in this process, and that they had a relationship and **recovery is based on tort** and equity." CP 26 (emphasis added). Judge Wilson orally ruled that "the main basis in my rationale for thinking of recovery is the contract that exists" but also that the "**recovery is not only based on contract, it's also based on tort** and it's based on equity." RP 7/1/15 at 12, 34 (emphasis added). He also held, "I think they win on all their causes of action because I don't think there's any real question of fact here," *id.*, and "it's reasonable and right to award Mr. Rood his attorneys' fees in defense of that action." *Id.* at 36. 8011 admitted that Mr. Rood "prevail[ed] in tort" and that summary judgment was granted in his favor "pursuant to tort." CP 64, 67.

Judge Wilson condemned the sharp practice and vexatious litigation tactics of 8011's counsel:

This has been an exercise, in my view, of the classic Alice in Wonderland going down a rabbit hole. What I determine to be a fairly straightforward case has been made into an abyss of legal filings …

I have reviewed case after case after case cited by the defense where they cite a proposition. And while that proposition is found in the case, what I have found consistently is the defense fails to look at the next following sentence in that case where it puts it into context of the facts of that case.

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. ... 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.

But the problem is that the defense didn't apply those cases to the facts, the unique facts of this case. One of the earlier cases that are cited, I think it's the *Koller* [*Koller v. Flerchinger*, 73 Wn.2d 857, 859, 441 P.2d 126 (1968)] case, … where the defense cites a case that absent a valid listing agreement, absent a valid agreement, that a broker cannot recover a fee. End of discussion. That should be the end of the case.

But if you look at the facts of that case, the very next sentence is, "without any prompting from the sellers." That in my mind is just a disservice to the Court where technically speaking the cite to that case is accurate, it's misleading in the implication of its legal result. Because those words in the case, "absent any prompting from the seller to engage in this discussion" is applicable here, because we have Ms. Graves asking the broker, the agent, to engage in that conversation with Mazda. And so while it's nice to have bullet points of law to help guide the Court, when those bullet points are completely taken out of context and not applied to the facts in front of the Court, it's a disservice.

And it continues, even in the citing of cases to your opposition to fees. ... And so I take that information that I've gotten and I looked at all the files that I have and all the work that's been generated, and there is some support

> for the plaintiff's position in this case of the type of vexatious litigation that has gone on.

RP 7/1/15 at 31-35. The superior court awarded Mr. Rood $107,000 in commission, $192,870.00 in fees, $3,429.47 in costs, and $31,458.00 in prejudgment interest, totaling $334,757.47, CP 30-40, and entered Mr. Rood's judgment. CP 28-29. The court adopted Mr. Rood's Findings of Fact and Conclusions of Law with few modifications. CP 27, 30-40.

8011 appealed the May 27, 2015 order denying both cross-motions for summary judgment to 8011; the July 1, 2015 orders denying 8011's motion for reconsideration and granting summary judgment to Mr. Rood on reconsideration; the July 18, 2015 order granting fees, costs, and expenses to Mr. Rood, CP 2427-28; and the judgment. CP 2428.

IV. SUMMARY OF ARGUMENT

Mr. Rood worked tirelessly for almost two years to effect this purchase of this Property by this buyer from this seller. The procuring-cause rule entitles him to his $107,000 commission. Even if it did not, he won on tort claims as well, and 8011 fails to challenge judgment on those tort claims, so that this court must affirm. Even if this court were to reach the merits of the procuring-cause rule, it reviews the superior court's decisions for abuse of discretion only, and the superior court acted well within that discretion. 8011's attempts to avoid paying the commission based on violations of RCW 18.86 fail because they are factually groundless and rely on statutorily abrogated case law and on a declaration not properly before the superior court. 8011 now admits that the

prevailing party is entitled to fees. In no event may 8011 recover fees, because it asserts that, and several other issues, for the first time on appeal. 8011 concedes that the fee award to Mr. Rood was reasonable in amount.

V. ARGUMENT

A. Because 8011 does not appeal the entry of judgment based on Mr. Rood's tort claims, this court must affirm.

The superior court based its judgment on Mr. Rood's tort as well as contract claims: "[T]here's a number of different theories which support the plaintiff's recovery." RP 7/1/15 at 12. The superior court "reviewed cases cited in counsel's briefs and finds Ms. Graves engaged Plaintiff Rood in this process, and that they had a relationship and recovery is based on tort and equity," CP 26; "recovery is not only based on contract, it's also based on tort and it's based on equity." RP 7/1/15 at 12, 34. 8011 devotes no argument to the superior court's entry of judgment on Mr. Rood's claims for (1) unjust enrichment, (2) trover, (3) conversion, (4) misappropriation, or (5) tortious interference. This court thus must affirm that judgment. Nor did 8011 come to grips with Mr. Rood's tort claims in superior court; it cited no factual material or authority, and spent just two sentences, in opposing those claims. CP 610. This court should affirm the judgment because 8011 failed to assign error to or otherwise challenge the trial court's ruling on these issues and devotes no argument or citation to legal authority to these issues. RAP 10.3(a)(4); *King County v. Seawest Inv. Associates, LLC*, 141 Wn. App. 304, 317, 170 P.3d 53 (2007). Nor may 8011 address these points for the

first time in its reply brief. *Sacco v. Sacco,* 114 Wn.2d 1, 5, 784 P.2d 1266 (1990); RAP 10.3(c). This court may review only a claimed error

> that is included in the assignment of error or clearly disclosed in the associated issue pertaining thereto and is supported by argument and citations to legal authority.

Vern Sims Ford, Inc. v. Hagel, 42 Wn. App. 675, 683, 713 P.2d 736 (1986); RAP 10.3(a)(4), (6). This court must ignore "issues on appeal that are not raised by an assignment of error or are not supported by argument and citation of authority." *McKee v. Am. Home Prods. Corp.*, 113 Wn.2d 701, 705, 782 P.2d 1045 (1989) (citation omitted). This court may affirm the trial court on any ground the record supports. *Wash. Fed. Sav. & Loan Ass'n v. Alsager*, 165 Wn. App. 10, 14, 266 P.3d 905 (2011).

Similarly, 8011 fails to assign error to the trial court's entry of judgment against Mr. Moss and Ms. Graves, not just against 8011, LLC.

B. This court should strike or disregard the portions of 8011's brief that violate the RAPs.

This court may consider only those materials brought to Judge Wilson's attention on summary judgment (and by extension, on reconsideration of summary judgment). RAP 9.12; CR 56(h). In asserting professional misconduct of Mr. Rood, 8011 relies heavily on Ms. Graves's declaration, App. Br. at 12, 38-39, CP 1528-1742, which was never before Judge Wilson. CP 30-40, 436-38, 553-55. This court must ignore it. It also is inadmissible because it contradicts her prior deposition testimony. *Marshall v. AC & S Inc.*, 56 Wn. App. 181, 782 P.2d 1107 (1989).

C. This court must disregard several issues that 8011 raises for the first time on appeal.

This court may dispose of issues solely because the appellant raises them for the first time on appeal (other than narrow exceptions not relevant here). RAP 2.5(a); *N. Pac. Bank v. Pierce Cty.*, 24 Wn.2d 843, 857-58, 167 P.2d 454 (1946). 8011 raises several issues for the first time on appeal: (1) that the Listing required Mr. 99 to provide a registration list to 8011; (2) that Mr. Rood never disclosed his dual agency; and (3) that 8011 is entitled to attorney fees. 8011 also fails to assign error to whether 8011 is owed attorney fees. 8011's brief must provide a "separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error." RAP 10.3(a)(4). Failure to do so precludes appellate review. *State v. Olson*, 126 Wn.2d 315, 321, 893 P.2d 629 (2000).

D. This court reviews the superior court's May 27 and June 18, 2015 rulings for an abuse of discretion.

After the superior court denied 8011's summary judgment motion, 8011 moved for reconsideration on grounds that the ruling was contrary to law, CR 59(a)(7), and that "substantial justice" was not done, CR 59(a)(9). CP 2953. The superior court decided this action on 8011's own motion for reconsideration, as 8011 admits. App. Br. at 15, 16. That one, undisputed fact is crucial to this appeal: Motions for reconsideration are not reviewed de novo, but for manifest abuse of discretion only. *Lilly v. Lynch*, 88 Wn. App. 306, 320-21, 945 P.2d 727 (1997). 8011 must make "a clear showing of … discretion manifestly unreasonable, or exercised on

untenable grounds, or for untenable reasons." *Miller v. Campbell*, 137 Wn. App. 762, 768-69, 155 P.3d 154 (2007) (citation omitted). "Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously." *Coggle v. Snow*, 56 Wn. App. 499, 506-07, 784 P.2d 554 (1990) (citation omitted). The denial of 8011's motion for reconsideration does not remotely meet this strict standard. Cases granting reconsideration under CR 59(a)(9), for example, typically involve egregious violations, such as when a party attested to perjured discovery responses. *Barth v. Rock*, 36 Wn. App. 400, 674 P.2d 1265 (1984). Nothing of that sort happened here. Nor was judgment for Mr. Rood was contrary to law; the record supported it. De novo review of these dispositive rulings here would contravene the settled standard of review on reconsideration, thwart the court's sound discretion to resolve the action on reconsideration, and violate the parties' express agreement to resolve the case in this manner. In these agreed circumstances, this court must review the May 27, 2015 Order for a manifest abuse of discretion only.

The superior court did not reconsider its summary judgment rulings sua sponte. Rather, after 8011 moved for reconsideration, the superior court determined it could decide the case as a matter of law. CP 5, 10. 8011 fully committed to decision of the action **on reconsideration specifically**. Trial was imminent. Counsel and the court communicated extensively on the subject. One goal it served was resolution of the action.

CP 18, 22. Both sides had urged the court to decide the action as a matter of law, so it exercised its discretion and proposed to do so. CP 1-25. 8011 is not entitled to reversal just because it lost when it expected to win.

Ordinarily, a superior court's determination on whether a statutory, contractual, or equitable basis for attorney fees exists is reviewed de novo. *Sanders v. State,* 169 Wn.2d 827, 866, 240 P.3d 120 (2010). Here, however, the superior court reached that issue only because 8011 moved for reconsideration, so the abuse-of-discretion standard applies to that decision as well. Even if this court were to review that decision de novo, it was correct. A contractual basis for attorney fees exists, and that contractual basis was central to each of Mr. Rood's causes of action. This court should affirm the award of attorney fees to him. Findings of Fact are required to support a fee award, *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998), and the superior court duly entered them. CP 30-40. This court must affirm a superior court's findings of fact, supported by substantial evidence. "Substantial evidence" is sufficient evidence to persuade a fair-minded, rational person of the finding's truth. *State v. Halstein*, 122 Wn.2d 109, 129, 857 P.2d 270 (1993). The record supported these Findings of Fact. CP 142-421. Indeed, 8011 challenges none of those Findings of Fact, which thus are verities on appeal. *Merriman v. Cokely*, 168 Wn.2d 627, 631, 230 P.2d 162 (2010).

The amount and reasonableness of an attorney-fee award is reviewed for abuse of discretion. *Gander v. Yeager*, 167 Wn. App. 638, 647, 282 P.3d 1100 (2012). Superior courts make a record of that exercise

by entering findings of fact and conclusions of law to support the award. *Mahler*, 135 Wn.2d at 435. The superior court did so here. CP 30-40.

E. The invited-error doctrine defeats 8011's appeal, or at least requires an abuse-of-discretion standard of review.

The invited-error doctrine applies when one "takes affirmative and voluntary action that induces the trial court to take an action that party later challenges on appeal," *Lavigne v. Chase, Haskell, Hayes & Kalamon, P.S.*, 112 Wn. App. 677, 681, 50 P.3d 306 (2002), and prohibits review of that issue. *In re Marriage of Morris,* 176 Wn. App. 893, 900, 309 P.3d 767 (2013). 8011 moved for reconsideration and then agreed with Mr. Rood that the court could decide the action as a matter of law in exchange for striking the trial. CP 1-25. That agreement induced the superior court to take the action 8011 now challenges on appeal. This court therefore must either affirm or apply an abuse-of-discretion standard of review.

F. 8011 is estopped from seeking de novo appellate review.

8011 is estopped from arguing that de novo review applies. Estoppel can defeat an appellant's very right to appeal. *Jones v. Jones*, 75 Wash. 50, 57-58, 134 P. 528 (1913). Here, 8011 **agreed** with Mr. Rood that the superior court could decide the case as a matter of law on reconsideration, in exchange for Mr. Rood's agreeing to strike the trial. Mr. Rood, as plaintiff, held the right to proceed to trial or to strike the trial date. Relying on 8011's agreement to allow the superior court to decide the entire action on reconsideration, he chose the latter. 8011 agreed to reconsideration, and thus that an abuse-of-discretion standard applied. It

plainly relinquished any argument that appellate review is de novo.

G. Mr. Rood was the procuring cause of the sale to Mazda.

1. Mr. Rood caused the events that caused 8011's sale of the Property to Mazda.

A real estate broker is entitled to his commission when he procures a purchaser who is accepted by the principal and with whom the principal enters into a binding, enforceable contract. *Bonanza Real Estate, Inc. v. Crouch*, 10 Wn. App. 380, 385, 517 P.2d 1371 (1974) (citing *White & Bollard, Inc. v. Goodenow*, 58 Wn.2d 180, 361 P.2d 571 (1961); *Dryden v. Vincent D. Miller Inc.*, 56 Wn.2d 657, 354 P.2d 900 (1960); *Wesco Realty, Inc. v. Drewry*, 9 Wn. App. 734, 515 P.2d 513 (1973)). To earn a commission, a broker must have either (1) produced (*i.e.*, procured) a purchaser ready, able, and willing to buy the property, or (2) sold the specific property, contemplated in the agreement to pay commission. *Bethel v. Preston*, 157 Wash. 652, 656, 290 P. 224 (1930); *Cushing v. Monarch Timber Co.*, 75 Wash. 678, 685, 135 600 (1913).

8011 repeatedly denies that the procuring-cause rule applies but fails to define what a "procuring cause" is. Mr. Rood was the procuring cause of this sale because he set in motion the events that culminated in the sale and thus accomplished what he undertook under the his agreement with 8011 to procure a buyer for the Property. *Bonanza*, 10 Wn. App. at 385 (citing *Hayden v. Ashley*, 86 Wash. 653, 150 P. 1147 (1915); *Bagley v. Foley*, 82 Wash. 222, 144 P. 25 (1914)). Mr. Rood earned his commission by producing a buyer who was ready, willing, and able to buy

the Property on the terms required. *Bloom v. Christensen*, 18 Wn.2d 137, 142, 138 P.2d 655 (1943) (citing *Ollinger Co. v. Benton*, 156 Wash. 308, 286 P. 849 (1930); *Arthur D. Jones & Co. v. Eilenfeldt*, 28 Wash. 687, 69 P. 368 (1902); *Carstens v. McReavy*, 1 Wash. 350, 25 P. 471 (1890)); *Bethel*, 157 Wash. at 656; *Cushing*, 75 Wash. at 685. The final terms of the sale are immaterial because Mr. Rood was the procuring cause of the sale itself. *Bonanza*, 10 Wn. App. at 385 (citing *Chamness v. Marquis*, 62 Wn.2d 509, 383 P.2d 886 (1963); *Quadrant Corp. v. Spake*, 8 Wn. App. 162, 504 P.2d 1162 (1973)). 8011 cannot deny Mr. Rood his commission simply by excluding him from the final stage of negotiations. Mazda was ready, able, and willing to buy the Property because of Mr. Rood's efforts.

2. Mr. Rood continued to work with and procure Mazda during and after the Listing.

During the Listing, Mr. Rood worked tirelessly to market the Property for lease or sale. § III.C., *supra.* After the Listing expired, continued to work tirelessly to that end, and particularly in an effort to sell the Property to Mazda. § III.D.-F., *supra.* 8011 argues Mr. Rood did not "procure" Mazda until after the Listing expired, because Mazda could not buy the Property when Mr. Rood first introduced it to Mazda due to the eight-mile rule, so that Mazda's first offer to 8011 came after the Listing expired. Mazda would not have obtained a waiver or made any offer to 8011 but for Mr. Rood. Mr. Rood worked to procure Mazda before, during, and after the Listing. Moreover, 8011 is precluded from raising any question as to the ability of Mazda to perform because 8011 accepted

Mazda as the purchaser and entered into a binding agreement with Mazda. *Largent v. Ritchey*, 38 Wn.2d 856, 233 P.2d 1019 (1951).

Thus, Mr. Rood **produced** a buyer who was ready, able, and willing to purchase the Property upon the terms required. *Cushing*, 75 Wash. at 685. No other broker produced Mazda; it was already at the table because of Mr. Rood. He introduced the Property to Mazda, drafted PSAs, and helped Mazda and 8011 negotiate. He helped 8011 increase its sales price, further showing that his commission was well earned.

3. The procuring-cause rule applies to Mr. Rood despite the Listing's expiration, it does not state how commission is awarded when it expires.

The procuring-cause rule applies to Mr. Rood even though the Listing expired. As 8011 admits, a real estate broker who procures a buyer while employed to do so is entitled to a commission even when his employment or contract expires, as long as the broker is the procuring cause of the sale and the contract is silent as to what should happen to the commission in the event that the employment is terminated. *See Syputa v. Druck, Inc.*, 90 Wn. App. 638, 645-46, 954 P.2d 279 (1998) (citing *Willis v. Champlain Cable Corp.*, 109 Wn.2d 747, 754-55, 748 P.2d 621 (1988)). The rule prevents a principal from enjoying the fruits of the broker's labors but then evading paying him and provides that when a broker is

> employed to procure a purchaser and does procure a purchaser to whom a sale is eventually made, he is entitled to a commission regardless of who makes the sale if he was the procuring cause of the sale. This rule is applied to allow agents commissions on sales completed after a principal has terminated their employment if the sales resulted from the agent's efforts. ... [I]f a principal

> attempts to revoke an agency or intervenes by taking the matter into his or her own hands, "such revocation or intervention, if made in bad faith, cannot defeat the right of the broker to a commission." If this were not so, the principal could easily escape paying the agent's commission while enjoying the fruits of the agent's labors.

Willis, 109 Wn.2d at 754-55 (citations omitted). Here, Mr. Rood began procuring Mazda before the Listing, continued procuring Mazda during the Listing, and procured Mazda after the Listing. Because this Listing does not specify what happens to the commission if Mr. Rood procures Mazda but his Listing expired, the procuring-cause rule applies.

8011 argues that awarding Mr. Rood a commission after the Listing expired is an "absurd result," citing *Brackett v. Schafer*, 41 Wn.2d 828, 831, 252 P.2d 294 (1953). There, the plaintiff argued that a written agreement to pay commission was effective, even though the exclusive agency feature of the contract had expired. *Id.* The Court held both the exclusive nature of the contract and the agreement to pay commission expired when the contract expired. *Id.* at 832. But there, the issue was whether plaintiff retained the authority to sell the property after the contract expired, not whether the agent's commission was tied to his procuring the eventual buyer. *Id.* at 831-33. Here, the Listing entitles Mr. Rood to a commission if he procures a buyer. *See* § V.H.5., *infra*.

4. Neither the Listing's "tail provision" nor the lack of a registration list defeats 8011's obligation to pay Mr. Rood's commission.

8011 argues that the Listing's so-called tail provision at ¶ 6(c) bars Mr. Rood from receiving his commission. The tail provision entitles Mr. Rood to a commission if 8011 sold the Property within six months of the

Listing to a person or entity that submitted an offer to purchase the Property during the term of the Listing. Because Mazda did not make an offer during the Listing, *see* ¶ V.E., *infra*, ¶ 6(c) of the Listing does not apply. 8011 wrongly focuses on whether 8011 actually sold the Property within six months after the Listing's duration, not on whether Mr. Rood procured Mazda. Paragraph 6(a) entitles Mr. Rood to a commission if he procures Mazda. Mr. Rood did procure Mazda, so ¶ 6(a) entitles him to his commission. Morever, ¶ 6(c) is not a true "tail provision." It does not provide the sole manner by which termination can be effected or how commissions will be awarded after termination. *See Willis*, 109 Wn.2d at 754-55. The Listing does not say what happens to the commission if Mr. Rood procures Mazda after the Listing expired. The procuring-cause rule acts to fill the gap absent a contract provision specifying what happens to commission when the agent is terminated. *Syputa*, 90 Wn. App. at 645-46.

8011 implies it can avoid paying Mr. Rood's commission because he did not identify Mazda on any registration list. This court should ignore this argument because 8011 improperly raises it for the first time on appeal, § V.C., *supra*, and fails to support it by citation to the record. *Mills v. Park*, 67 Wn.2d 717, 721, 409 P.2d 646 (1966). The Listing does not make a registration list a prerequisite to 8011's obligation to pay the commission or even hint that any failure to provide one is a breach of the Listing. 8011 cannot evade paying a commission on this specious basis.

5. Mr. Rood satisfied the statute of frauds.

8011 concedes Mr. Rood produced this buyer, yet attempts to use the statute of frauds to avoid liability for its calculated decision to cut Mr. Rood out of the final sale. Mr. Rood has satisfied RCW 19.36.010(5).

An agreement authorizing or employing a broker to sell or purchase real estate for compensation or a commission must be in writing. RCW 19.36.010(5). The writing must identify (1) the parties; (2) the employment; (3) the real estate; and (4) the agreement to pay the commission, *Bishop v. Hansen*, 105 Wn. App. 116, 120, 19 P.3d 448 (2001), and must be signed. *Smith v. Twohy*, 70 Wn.2d 721, 725, 425 P.2d 12 (1967). The following elements are **not** necessary to satisfy RCW 19.36.010(5): (1) the sales price; (2) a complete legal description of the listed property; or even (3) the date when the parties entered into the agreement. *Bishop*, 105 Wn. App. at 120. *See also Bethel*, 157 Wash. at 655-56. Here, both the Listing and the July 13, 2012 PSA that Ms. Graves signed satisfy RCW 19.36.010(5): They describe the parties, Mr. Rood's employment, the real estate, and the agreement to pay commission. CP 646-48, 1217-33. The Listing and July 23, 2012 PSA are signed by the party to be charged, defendants. CP 648,CP 1217-33.

The Listing entitles Mr. Rood to a commission because he procured a buyer, who bought the Property at a price and on conditions acceptable to 8011. Paragraph 6(a) of the Listing states:

> **COMMISSION.** Firm shall be entitled to a commission if: (a) Firm leases or procures a lessee on the terms of this Agreement, or on other terms acceptable to Owner ... the

> commission shall be calculated as follows: **5% of gross lease amount for entire term.**

CP 647. "Lease" means "lease, sublease, sell, or enter into a contract to lease, sublease, or sell the Property" CP 646, ¶ 3(b), including sublessees. *Id.* "Terms of this Agreement" is defined as:

> **PRICE AND TERMS.** Owner agrees to list the Property at a lease price of $9500 per month and shall consider offers that include the following terms:
>
> Term of Lease: [blank]
>
> Terms: [blank]

CP 2332, ¶ 2. Read in context of the Listing as a whole, ¶ 6(a) of the Listing reads:

> **COMMISSION.** Firm shall be entitled to a commission if: (a) Firm leases [or sells] or procures a lessee [or buyer] on the terms of this Agreement [as defined in Paragraph 2].

CP 2332-33. In other words, the Listing entitled Mr. Rood to a commission if he procured a buyer who bought the Property at a price and upon terms 8011 would ultimately agree to. That happened. The Listing satisfies 19.36.010(5) even though it did not include the sales price. *Bethel*, 157 Wash. at 655-56; *Bishop*, 105 Wn. App. at 120.

8011 argues that the Listing is "legally defunct" because it expired. 8011 is wrong for two reasons. First, the Listing states that Mr. Rood is entitled to a commission if he procures a buyer, not whether he procures a buyer before the Listing is expired or the Property is sold within a certain time. Second, 8011 conflates "terms of this Agreement" in ¶ 6(a) of the

Listing with the duration of the Listing. "Terms of this Agreement" is defined in ¶ 2 of the Listing and refers to the prices and terms 8011 would accept for the Property. CP 1163. The word "terms" in ¶ 6(a) cannot refer to the duration of the Listing, because "terms" is plural and would imply more than one period of time. The duration of the Listing was July 21, 2011 to January 21, 2012. *Id.* To illustrate, the word "term," as used in ¶¶ 6(b) and 6(c) of the Listing, refers to the Listing's duration. CP 1164. But ¶¶ 6(b) and 6(c) do not obligate 8011 to pay the commission. Paragraph 6(a) does. 8011's obligation to pay Mr. Rood's commission depends on whether Mr. Rood procured Mazda, not when the Listing expires.

The cases 8011 cites to support is "legally defunct" argument are distinguishable, particularly because they involve different contracts with different contractual language. For example, in *Ctr. Invs., Inc. v. Penhallurick*, 22 Wn. App. 846, 848-49, 592 P.2d 685 (1979), the contract did not promise the broker a commission if the broker "procured" a buyer, but only if a sale was completed during the contract's period. Here, Mr. Rood was not employed just to effect a sale, but also to procure a buyer. Thus, the parties contemplated that Mr. Rood might procure a buyer before the Listing expired, which would entitle Mr. Rood to his commission whenever the sale was made. *Penhallurick* supports Mr. Rood's position, noting that RCW 19.36.010(5)

> is not ironclad. There is a line of cases permitting a broker or real estate agent to recover if his services have already been performed. Generally, those cases have involved an oral agreement between broker and seller with a subsequent writing between seller and buyer. The courts have held that

> if the broker was the procuring cause of an eventual sale for which there had been a subsequent writing, the broker was entitled to payment for past services.

Id. at 849-50. Mazda was already a potential buyer by the time 8011 contacted Mr. Rood to procure a buyer for the Property, and Mr. Rood performed services before the Listing was signed. He performed more services before 8011 signed the July 13, 2012 PSA. Mr. Rood had performed all of his services by the time 8011 and Mazda entered into a writing. Mr. Rood satisfied the statute of frauds because his past services were valid consideration to support later agreements to pay a commission. *Assoc. Realty v. Lewis*, 49 Wn.2d 514, 304 P.2d 693 (1956); *Johnston v. Smith*, 43 Wn.2d 603, 262 P.2d 530 (1953); *Feeley v. Mulliken*, 44 Wn.2d 680, 683, 269 P.2d 828 (1954); *Muir v. Kane*, 55 Wash. 131, 104 P. 153 (1909) (holding that "the better rule is with the cases holding the moral obligation alone [is] sufficient to sustain the promise").

Pavey v. Collins, 131 Wn.2d 864, 870, 199 P.2d 571 (1948), cited by 8011, is also distinguishable from the facts here. In *Pavey*, the writing expired before the broker had secured a prospective purchaser. *Id.* Here, Mr. Rood was procuring Mazda before, during, and after the Listing, and before, during, and after the July 13, 2012 PSA. Therefore, these writings satisfy the statute of frauds. Likewise, in *Thayer v. Damiano*, 9 Wn. App. 207, 210-11, 511 P.2d 84 (1973), the contract expressly limited when commission would be paid even though the broker procured the buyer. This Listing contains no such limitation. It merely states that if Mr. Rood procures a buyer, then he is owed a commission on the sales price. Even

if Mr. Rood's commission was tied to when Mr. Rood procured Mazda, a broker need not negotiate the sale within a fixed time if the delay is due to the fraud or fault of the owner. *Koller v. Flerchinger*, 73 Wn.2d 857, 441 P.2d 126 (1968). Here, 8011 refused to extend Mr. Rood's Listing, even though it was standard practice to do so, and 8011 knew Mr. Rood was working to procure Mazda and indeed encouraged his efforts. 8011 continued to benefit from Mr. Rood's efforts. 8011 cites *Koller* to support its position, but it merely confirms Mr. Rood's point. In *Koller*, the plaintiff broker sought a buyer without the seller's knowledge or authorization, whereas here, 8011 repeatedly agreed to, ratified, and even encouraged Mr. Rood's efforts on its behalf. The Court denied commission to the broker in *Koller* because the broker's efforts were neither requested nor acknowledged: it was "commission by ambush." Here, 8011 took away Mr. Rood's commission by ambush.

The July 13, 2012 PSA that Ms. Graves signed satisfies RCW 19.36.010(5). It describes the parties, Mr. Rood's employment, the real estate, and the agreement to pay commission. CP 1217-33. The party to be charged, Ms. Graves, signed it. *Id.* It does not specify the final sales price, but that is not required by RCW 19.36.010(5). It states:

> Seller agrees to sell the Property on the terms and conditions herein**, and further agrees** to pay a commission in a total amount computed in accordance with the listing or commission agreement. If there is no written listing or commission agreement, [8011] agrees to pay a commission of 5%.

CP 1137, 1217-33, 1938-54. Notably, because the agreement to pay a commission is separate from the agreement to sell the Property, it is irrelevant that the July 13, 2012 PSA is not the final agreement to buy and sell the Property. To condition Mr. Rood's commission on whether he is named in the final PSA with Mazda would reward 8011 and any other seller who decides to cut out a broker from the commission he earned, simply by excluding him from the final PSA. The July 13, 2012 PSA contained an agreement to pay Mr. Rood a commission that was separate from its agreement to sell the Property, contingent only on Mazda's financing. CP 1226, 1229. As of July 13, 2012, Mazda and 8011 agreed Mr. Rood would receive a commission on the sale, even if the sale itself was still under negotiation. *See Koller*, 73 Wn.2d at 859 (requiring meeting of the minds to enforce an agreement to pay commission).

The statute of frauds does not bar recovery for the breach of an implied-in-fact contract, particularly when several writings establish the contract. *Cushing*, 75 Wash. at 685; *Family Med. Bldg., Inc. v. DSHS*, 37 Wn. App. 662, 666, 684 P.2d 77 (1984). This Listing, multiple PSAs, and emails and text messages between 8011 and Mr. Rood constitute several writings and evidence an expectation that 8011 would pay Mr. Rood a commission for his services. This court may affirm the trial court on any ground supported by the record. *Alsager*, 165 Wn. App. at 14.

H. This court must affirm because 8011 devotes no argument to judgment based on tort causes of action.

Mr. Rood alleged not just (1) breach of contract, but also (2) unjust

enrichment, (3) trover, (4) conversion, (5) misappropriation, and (6) tortious interference. 8011 failed to devote argument to or otherwise challenge entry of judgment on the five tort claims. This court may affirm the superior court on any ground the record supports. § V.A., *supra*. The record supports judgment on the elements of each of these tort claims:

8011 is liable for unjust enrichment. The elements of unjust enrichment are: (1) the defendant receives a benefit, (2) the received benefit is at the plaintiff's expense, and (3) the circumstances make it unjust for the defendant to retain the benefit without payment. *Young v. Young*, 164 Wn.2d 477, 191 P.3d 1258 (2008); WPI 301A.02 (6th ed. 2012). The record establishes all three elements: (1) 8011 received a $2,140,000.00 benefit paying the $107,000.00 for commission; (2) the benefit was at Mr. Rood's expense because he expended great effort to effect the sale but was deprived of his $107,000 commission; and (3) depriving him of that commission is plainly unjust. This claim is better viewed as a legal, not equitable, remedy in the form of restitution. *Bort v. Parker*, 110 Wn. App. 561, 580, 42 P.3d 980 (2002) (citation omitted).

8011 is liable to Mr. Rood for trover. Trover is a party's taking a chattel for its own enjoyment, the destruction of a chattel, or exercising dominion over a chattel to the exclusion of the rights of the owner, or withholding a chattel from the owner under a claim of title inconsistent with that of the owner. *Davenport v. Wash. Educ. Ass'n*, 147 Wn. App. 704, 721-22, 197 P.3d 686 (2008). Money is a "chattel" when defendant wrongly received it or had an obligation to return it to plaintiff. *Id.*

8011 is liable to Mr. Rood for conversion. Conversion is the intentional, willful and unjustified interference with personal property belonging to another, either by taking or unlawfully retaining it, thereby depriving the rightful owner of possession. *Alhadeff v. Meridian on Bainbridge Island LLC*, 167 Wn.2d 601, 619, 220 P.3d 1214 (2009). Even absent willful misconduct, the measure of damages for conversion is the fair market value of the property at the time and place of conversion. *Potter v. Wash. State Patrol*, 165 Wn.2d 67, 79, 196 P.3d 691 (2008).

8011 is liable to Mr. Rood for misappropriation. All defendants are liable to Mr. Rood for misappropriation, because (1) he made a substantial investment of time, effort, and money into creating the thing misappropriated such that the court can characterize that "thing" as a kind of property right; (2) defendants appropriated the thing at little or no cost, such that defendant's actions can be described as "reaping where it has not sown"; and (3) defendants injured Mr. Rood. *See Petters v. Williamson & Associates, Inc.*, 151 Wn. App. 154, 163-164, 210 P.3d 1048 (2009).

8011 is liable to Mr. Rood for tortious interference. All defendants are liable to Mr. Rood for tortious interference: (1) Mr. Rood had a business expectancy future economic benefit; (2) 8011 knew of that expectancy; (3) 8011 intentionally induced or caused the termination of the expectancy; (4) 8011's interference was for an improper purpose or by improper means; and (5) 8011's conduct caused damage to Mr. Rood. WPI 352.02 (6th ed. 2012). Interference is an improper purpose if done with an intent to harm Mr. Rood. WPI 352.03.

I. RCW 18.86 *et seq.* does not bar Mr. Rood's claims.

8011 argues that misconduct of Mr. Rood entitles it to keep his commission. This argument depends entirely on Ms. Graves's declaration, which this court must strike and ignore. *See* §V.B., *supra.*

This argument is substantively a counterclaim for disgorgement. 8011 never pleaded such a counterclaim and cannot argue it now. CP 2377, 2392. RCW 18.86 creates no cause of action. *Jackowski v. Borchelt*, 174 Wn.2d 720, 735, 278 P.3d 1100 (2012). Common-law tort causes of action remain the vehicle through which a party may recover for any breach of statutory duties set forth in RCW 18.86. *Id.* 8011 pleaded a failed counterclaim under the CPA but not for disgorgement. CP 1468. All of the cases 8011 cites on this issue involved claims or counterclaims against the broker for, or jury instructions regarding, recovery of commission. *Cogan v. Kidder, Mathews & Segner, Inc.*, 97 Wn.2d 658, 648 P.2d 875 (1982); *Meerdink v. Krieger*, 15 Wn. App. 540, 550 P.2d 42 (1976); *Koller v. Belote,* 12 Wn. App. 194, 528 P.2d 1000 (1974).

RCW 18.86 became effective January 1, 1997. It rewrote the duties of real estate brokers. *Jackowski*, 174 Wn.2d at 720. All of the cases 8011 cites predate RCW 18.86 and involve fiduciary duties. Real estate brokers no longer owe true fiduciary duties; RCW 18.86 supersedes them. RCW 18.86.110. The only authority 8011 has ever cited for commission "forfeiture" is obsolete, inapplicable, pre-1997 case law that depends on the existence of a true fiduciary relationship. Mr. Rood argued this to the superior court in exhaustive detail. CP 1125-29. 8011 failed to

cite any case law, then or now, that showed otherwise or that even postdated 1997. CP 613-15. No such case law exists.

8011 also is estopped from arguing Mr. Rood waived his right to a commission. 8011 sold the Property to the buyer Mr. Rood procured, and accepted the benefit of the sale. 8011 cannot claim Mr. Rood's commission should be disgorged when 8011 accepted the benefit of his labors, breach or no breach. *De Boe v. Prentice Packing & Storage Co.*, 172 Wn. 514, 521, 20 P.2d 1107 (1933) ("equitable estoppel is frequently applied to transactions [where] it would be unconscionable to permit a person to maintain a position inconsistent with one in which he has acquiesced or of which he has accepted benefit"); *Chemical Bank v. Wash. Pub. Power Supply System*, 102 Wn.2d 874, 900, 691 P.2d 524 (1984).

To construct its disgorgement argument, 8011 grossly mischaracterizes the parties' conduct. *See* § III.F.1, *supra*. 8011 alleges that Mr. Rood failed to inform it of Mr. Rahimzadeh's inquiries about a possible lease of the property. That allegation is false. Ms. Graves admitted at deposition that Mr. Rood did communicate this interest in a potential lease. CP 1019-20. She admitted that 8011 was not interested in such a lease and would rather sell the property than lease it. CP 1026. 8011 mischaracterizes Mr. Rahimzadeh's emails with Mr. Rood as an offer that Mr. Rood failed to share with 8011; they were mere inquiries that never became a signed offer. Regardless, 8011 learned long before closing all details of that so-called "offer," rejected that "offer," and closed on the sale to Mazda that Mr. Rood had put together for 8011 and

thus cannot claim any conceivable harm. CP 1257, 2254-74. Ironically, 8011's allegation that Mr. Rood breached a duty of seller's agent under RCW 18.86.040 shows that it did view Mr. Rood as its agent, entitling him to commission. And Mr. Rood did repeatedly disclose to 8011 that he was acting as a dual agent in PSAs. 8011 raises the issue of nondisclosure of dual agency for the first time on appeal; this court must ignore it. § V.C., *supra.*

J. The superior court correctly awarded Mr. Rood attorney fees and expenses.

The amount and reasonableness of any attorney fee award is reviewed for an abuse of discretion. *Gander*, 167 Wn. App. at 647. 8011 does not challenge the amount and reasonableness of the award; thus, if this court agrees Mr. Rood is entitled to attorney fees and costs, it must affirm the fee award in its entirety. An award of attorney fees must be based on contract, statute, or a recognized ground in equity. *Id.* at 645. The prevailing party in an action to enforce or defend a contract is entitled to attorney fees and costs where the contract so provides. RCW 4.84.330. This Listing so provides at §8. CP 647. Thus, Mr. Rood is entitled to an award of attorney fees.

8011 now argues that it is entitled to a fee award. 8011 raises this argument for the first time on appeal, so this court must ignore it. § V.C., *supra.* 8011 abandons its prior argument that the Listing does not permit a fee award, CP 64-66, now takes the opposite position, plagiarizes Mr. Rood's argument, and even cites the same case law. CP 48, 142, 422. By

now arguing that the Listing entitles it to fees, 8011 concedes that if this court affirms, then the superior court was correct to award Mr. Rood fees.

K. Mr. Rood moves for an award of fees and expenses on this appeal.

Pursuant to RAP 18.1(b), Mr. Rood moves for fees and expenses on review before the Court of Appeals. RCW 4.84.330 provides the statutory basis for such an award, and case law supports it. Mr. Rood, as the prevailing party in this action, is entitled to attorney fees and costs on appeal also. RAP 18.1(a); *Pederson's Fryer Farms, Inc. v. Transamerica Ins. Co.*, 83 Wn. App. 432, 455, 922 P.2d 126 (1996).

VI. CONCLUSION

Mr. Rood earned his commission by procuring the buyer, Mazda, and caused 8011's sale of the Property. 8011 fails to challenge the entry of judgment based on Mr. Rood's tort claims, which this court thus must affirm. 8011's disgorgement counterclaim was never pleaded; depends on a declaration that is inadmissible and was never properly before either the superior court or this court; and depends on case law that was abrogated by statute in 1997. Now that 8011 admits that the prevailing party should recover attorney fees, this court should affirm the award of fees, costs, and interest to Mr. Rood and award further fees on appeal. 8011 never challenged the reasonableness of those fees, so this court should affirm the amount of fees as well.

Respectfully submitted this 25th day of April, 2016.

LEE SMART, P.S., INC.

By: _____

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Of Attorneys for Respondents

CERTIFICATE OF SERVICE

I, the undersigned, certify under penalty of perjury and the laws of the State of Washington that on April 26, 2016, I caused service of the foregoing on each and every attorney of record herein:

VIA US MAIL AND ELECTRONIC SERVICE
Mr. Kenneth W. Masters
Masters Law Group PLLC
241 Madison Avenue N.
Bainbridge Island, WA 98110

DATED this 26 day of April, 2016 at Seattle, Washington.

Christie A. Williams, Legal Assistant