

Case No. 45743-1-II
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II
Ca

Case No. 45743-1-II

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

PHILIP A. NELSON,
Appellant,

v.

ROBERT V. TRENT and JANE DOE TRENT, husband and wife,
individually and their marital community composed thereof; and
SDC HOMES, LLC, a Washington limited liability company,
Respondents.

APPELLANT'S REPLY BRIEF

Counsel for Appellant:
Paul E. Brain, WSBA #13438
BRAIN LAW FIRM PLLC
1119 Pacific Avenue, Suite 1200
Tacoma, WA 98402
Tel: 253-327-1019
Email: pbrain@paulbrainlaw.com

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY1

II. APPLICABLE AUTHORITY AND DISCUSSION.....4

 A. Is the Employment Agreement Ambiguous?4

 B. If the Phrase “\$1000 Per Home Sold” Is Not a Condition,
 Would SDC’s Decision to Sell Lots Rather Than Homes
 Excuse Payment of Stipend?.....12

III. CONCLUSION.....17

TABLE OF AUTHORITIES

Cases

<i>Berg v Hudesman</i> , 115 Wn.2d 657, 801 P. 2d 222 (1990)	5
<i>Bloom v Christensen</i> , 18 Wn.2d at 142, 138 P. 2d 655 (1943).....	10, 14
<i>Burt v. Heikkala</i> , 44 Wn.2d 52, 265 P.2d 280 (1954).....	9
<i>Dunne v Combe</i> , 192 Cal. 740, 221 P. 2d 912 (1923)	14
<i>Landscape Design & Constr., Inc v Harold Thomas Excavating, Inc.</i> , 604 S.W. 2d 374 (Tex. 1980).....	7
<i>Newport Yacht Basin Ass'n of Condominium Owners v. Supreme Northwest, Inc.</i> , 168 Wn. App. 86 at 100, 285 P.3d 70 (Div. 1 2012)....	5
<i>State Farm Gen. Ins. Co., v. Emerson</i> , 102 Wn.2d 477, 687 P.2d 1139 (1984).....	5
<i>Tacoma Northpark LLC v. NW LLC</i> , 123 Wn. App. 73 at 80, 96 P.3d 454 (2004).....	15
<i>Tacoma Northpark LLC v. NW LLC</i> , 123 Wn. App. 73, 96 P.3d 454 (2004).....	7, 11
<i>Taylor v. Shigaki</i> , 84 Wn.App. 723, 730, 930 P.2d 340 (1997).....	11
<i>Todiss v Garuto</i> , 34 N.J. Super 333, 112 A. 2d 285 (App. Div. 1955)	14
<i>Wash. State Hop Producers Liq. Trust v Goschie Farms</i> , 112 694 at 700, 773 P.2d 70 (1989).....	16
<i>Washington Professional Real Estate LLC v. Young</i> , 163 Wn. App. 800, 260 P.3d 991 (2011).....	9
<i>Wm. Dickson Co. v. Pierce County</i> , 128 Wn. App. 488, 116 P.3d 409 (2005).....	4

I. INTRODUCTION AND SUMMARY

The Respondents in this matter are SDC Homes LLC (“SDC”) and Robert Trent (“Trent”), its principal. Appellant is Phil Nelson who was employed by SDC as its Land Acquisition Manager. The dispute concerns compensation to Appellant for services rendered in that capacity under a written employment agreement. This appeal is taken from a Summary Judgment Order construing the Employment Agreement between the parties as a matter of law.

The Employment Agreement states:

SDC HOMES LLC shall pay Employee for services rendered, pursuant to this Agreement, \$5,000 monthly plus a stipend of \$1,000 per home sold if the land was purchased through Phil Nelson as Land Acquisition Manager.

(*CP 18 at § 12.1*). The dispute between the parties concerns only the stipend portion. Appellant claimed that SDC is obligated to pay stipend on 256 building lots in residential subdivisions which Appellant contends were “purchased through Phil Nelson as Land Acquisition Manager.” SDC elected to sell these lots in bulk to another homebuilder rather than construct homes. Appellant contends SDC earned an \$8.2 million dollar profit on these bulk sales based on the public records pertaining to purchase and resale prices. (*See CP 131 -138*).

The Trial Court concluded that the Employment Agreement could be construed as a matter of law and that the phrase “\$1000 per home sold” was a condition precedent to the obligation to pay stipend. Because SDC sold the 256 lots without constructing homes, the Trial Court dismissed

Appellant's claims based on the 256 lots on the basis that the condition to payment had not been met.

On appeal, Appellant contends that, with respect to stipend, §12.1 is in effect a real estate commission agreement.¹ Appellant earned stipend based on the number of lots "purchased through Phil Nelson as Land Acquisition Manager." The language "per home sold" simply specifies when and in what amount stipend will be paid, not whether compensation was earned because, Appellant's performance of services was complete with the closing of a land acquisition. Respondents actually agreed with this interpretation stating:

In the context of an agreement for the sale of real estate by an agent, the law is that if the condition to payment of a commission - the procurement of a purchaser capable of closing on terms acceptable to the seller, has been met the commission is earned. The obligation to pay a commission is not dependent on whether the transaction procured by the agent actually closes or, closes on terms different than that procured by the agent. If the seller can change his mind after a buyer has been procured,

¹ Incidentally, it was also originally Respondents' position that the Employment Agreement was analogous to a real estate commission agreement. The Argument on this issue in Respondents' Summary Judgment Motion is captioned "Nelson has no right to a commission where he was not the procuring cause." CP 41. Procuring cause of course being the standard for payment of a real estate commission where the agreement between the parties does not specify a different standard. Now, Respondents contend: "[T]his is not a case involving real estate commissions;" Respondents' Brief at 15, even though Respondents' arguments are based on real estate commission cases from California and New Jersey.

and avoid the obligation to pay a commission the seller's obligation becomes discretionary and the contract illusory.

Appellant's interpretation is based on certain specific evidence. First, it is undisputed that, as Land Acquisition Manager, Appellant provided no services in relation to the construction of or sale of single family homes to retail buyers. Appellant's services were all related to bulk acquisitions of single family building lots, prior to the construction of houses. With respect to lots, Appellant's services were complete with the closing of the acquisition transaction. If the stipend was intended as incentive compensation, also Respondents' characterization (Respondents' Brief at 18), Respondent fails to explain how Appellant would be incentivized when Appellant was not being paid to make sales of houses.

Second, it is undisputed that during the course of negotiations for the Employment Agreement, Trent explained that the language regarding a home sale was only intended to allow SDC not to have to pay stipend until cash flow from the properties "purchased through Phil Nelson as Land Acquisition Manager" was received.

Respondent contends that the Employment Agreement is unambiguous on its face and can only be reasonably interpreted as requiring the sale of a home as a condition to the obligation to pay stipend. This is not consistent with either the language of §12.1 or the extrinsic evidence and, Respondent cites to no extrinsic evidence in making this argument.

Respondents further contend that SDC is excused from performing the obligation to pay stipend unless the failure of the condition

precedent was bad faith on the part of SDC. This analysis, based on dictum from other jurisdictions, is simply irrelevant if the phrase “\$1000 per home sold” is not a condition.

There is no evidence of any kind that the bulk sale of lots, as opposed to the construction and sales of homes, was in the contemplation of the parties during the negotiations for the Employment Agreement. That SDC would continue in the home building industry during the period of Appellant’s employment was an assumption fundamental to the Employment Agreement. That SDC would receive an offer to purchase lots in bulk is a supervening event not within the contemplation of the parties at the time of contracting. SDC’s obligation would be excused only if the elements of the doctrine of impossibility of performance are satisfied. They clearly are not here.

II. APPLICABLE AUTHORITY AND DISCUSSION

A. Is the Employment Agreement Ambiguous?

This is the threshold question here because, as a general proposition, summary judgment is not appropriate on an ambiguous contract. *Wm. Dickson Co. v. Pierce County*, 128 Wn. App. 488, 493–94, 116 P.3d 409 (2005). An ambiguity exists if, on the face of the contract, two reasonable and fair interpretations are possible. *State Farm Gen. Ins. Co., v. Emerson*, 102 Wn.2d 477, 687 P.2d 1139 (1984). Because the objective of contract interpretation is to implement the intent of the parties; *Newport Yacht Basin Ass’n of Condominium Owners v. Supreme Northwest, Inc.*, 168 Wn. App. 86 at 100, 285 P.3d 70 (Div. 1 2012), this

amounts to saying that a contract is ambiguous when the intent of the parties is unclear from the express language of the agreement in question.

As far as we can tell, Respondents' argument that the Employment Agreement is unambiguous is based solely on the language of the Employment Agreement itself as the discussion of this issue is devoid of citation to a factual record. However, the analysis is not limited to the language of the Employment Agreement even if the Agreement is considered unambiguous and would include the context in which the Employment Agreement was entered into. *Berg v Hudesman*, 115 Wn.2d 657, 801 P. 2d 222 (1990).

In arguing that the Employment Agreement unambiguously requires the sale of a home in order for commission to be earned, Respondents ignore the entirety of the context in which the Employment Agreement arose as well as the undisputed extrinsic evidence relating to the formation of the Agreement.

First, it is literally beyond dispute that SDC's objective in hiring Appellant was to facilitate bulk purchases of single family building lots, not completed single family homes:

SDC Homes LLC hereby desires to employ an experienced and knowledgeable *Vacant Land* Real Estate Agent who can professionally and effectively perform the responsibilities and duties of the *Vacant Land* Real Estate Agent in general and specifically with respect to those [responsibilities and duties] defined in Section 4 below.

Employment Agreement Recital; CP 56 (emphasis added).² Not one of the duties and responsibilities of the Land Acquisition Manger enumerated in Section 4.1 of the Employment Agreement (CP 59-60) involves any responsibility for the construction or ultimate sale of individual residences.

Appellant's performance of his services as Land Acquisition Manager with respect to an acquisition is complete when a bulk purchase of building lots closes, not when the houses are ultimately sold. This is exactly why the Employment Agreement specifically and expressly ties the obligation to pay stipend to the acquisition of bulk lots "purchased through Phil Nelson as Land Acquisition Manager."

Appellant agrees that the Employment Agreement contains a condition to the payment of stipend but, it is not the sale of a home. The condition is that Appellant has fulfilled his duty in the acquisition of lots. The term "if" is classic conditional language as recognized in many jurisdictions. See, e.g., *Landscape Design & Constr., Inc v Harold Thomas Excavating, Inc.*, 604 S.W. 2d 374 (Tex. 1980):

Normally a term such as "if", "provided that", "on condition that", or some phrase of conditional language must be included that makes performance specifically conditional.

² The Agreement uses the terms "Vacant Land Real Estate Agent" and "Land Acquisition Manager" interchangeably. While Appellant was managing land acquisitions he also clearly was acting as a real estate agent for SDC. In this regard, § 2.4.5 requires SDC to fund the cost of maintaining Appellant's real estate license. CP 58. § 3 requires Appellant to comply with real estate licensing laws and guidelines from the national Association of realtors. CP 58. § 4.5 deals with real estate commissions from sellers. CP 61. Respondents assertion that the Employment Agreement is not governed by principles relating to real estate agency agreements is inexplicable.

On the other hand, the term “per” is not included in the lexicon of conditional language in the Washington Appellate Opinion commonly cited on what is conditional language:

Where it is doubtful whether words create a promise (contractual obligation) or an express condition, we will interpret them as creating a promise. But words such as “provided that,” “on condition,” “when,” “so that,” “while,” “as soon as,” and “after” suggest a conditional intent, not a promise.

Tacoma Northpark LLC v. NW LLC, 123 Wn. App. 73 at 80, 96 P.3d 454 (2004).

The Employment Agreement here does not say that a stipend will be paid “if a home is constructed on land purchased through Phil Nelson.” Rather, it uses a term, the term “per” which is typically defined “for each,” and which, in the common parlance and understanding, goes to the rate and timing of payment not the obligation to pay.

The language of the Agreement is fully consistent with the undisputed evidence relating to the negotiations for the Employment Agreement. Trent described SDC a start-up company short on cash. As Nelson testified: “He [Trent] said to me [Nelson], ‘*We need to preserve cash flow.*’ ” (CP 482:16, *emphasis added*):

A I believe the context of the document as it’s formed here and the agreement that we did was based on you get paid for your performance of buying lots or bringing lots in the door when we sell houses because that’s the best way for cash flow. When we sell a house, we make a profit. That way you’re not a labor -- or not a burden on our cash flow. ***Cash flow was always the issue.*** Compensation was always the issue. ***And saving and preserving cash flow was always an issue.***

(CP 369:9-18, *emphasis added*). In light of the “context evidence,” a finder of fact could conclude reasonably that § 12.1 of the Employment Agreement provides that the purchase of the lot “through Phil Nelson as SDC’s Land Acquisition Manager” is the condition to pay stipend and that the phrase “\$1000 per home sold” only goes to the timing of payment.

The analogy to a real estate commission agreement is entirely apt. In that context, a typical commission agreement could be summarized as: “seller will pay a commission of X% at closing [when and how much] if agent procures a buyer acceptable and accepted by seller [the condition satisfied through agent’s performance.]”³ Under *Washington Professional Real Estate LLC v. Young*, 163 Wn. App. 800 at 810-811, 260 P.3d 991 (2011)(*citations omitted*), a commission is earned when the sale is procured:

Under the procuring cause of sale doctrine, when a party is employed to procure a purchaser and does procure a purchaser to whom a sale is eventually made, that party is entitled to a commission regardless of who makes the sale.

It is the procurement of a person ready, willing and able to buy on terms acceptable to the seller that entitles a broker to a commission – ***not the final closing of a deal.*** *Burt v. Heikkala*, 44 Wn.2d 52, 265 P.2d 280 (1954). The reason is simple. Once the agent has procured a buyer on terms acceptable to seller, the agent’s performance of the agent’s

³ Respondents offer no explanation as to why this is different from “\$1000 per home sold [when and how much] if the land was purchased through Phil Nelson [the condition satisfied through Nelson’s performance].”

contractual duty is complete. The seller has received the full benefit of the contractual bargain.

Washington law is real clear on this point. Once a buyer is procured, or in this case, the land purchased, the obligation to pay commission matures. The seller cannot change his mind because the agent's performance is complete. "The rule applies even though the sale is not consummated by the owner or is consummated by him upon terms different from those stipulated in the brokerage agreement." *Bloom v Christensen*, 18 Wn.2d at 142, 138 P. 2d 655 (1943).

It is undisputed that what happened here is that, after Trent/SDC hired Appellant on the expectation that he would receive stipend compensation if he were successful in making bulk acquisitions of lots, and plats were purchased through Phil Nelson as Land Acquisition Manager, Trent concluded SDC could get a better deal by selling the lots in bulk.

Again, Appellant was not hired to sell homes. He was hired to make bulk purchases of building lots. Appellant's performance was complete when the lot acquisition was complete, not when homes were built and sold. The situation is no different than a seller who, after the agent procures a purchaser, decides not to sell or to take a subsequent higher offer from a third party. Respondents do not contest that under these circumstances, a commission would still be payable under Washington law.

SDC contends that even though Appellant's performance of his obligations under the Employment Agreement is complete with respect to

any acquired plat, SDC can elect to sell the lots in bulk and avoid paying stipend. In other words, SDC's performance is discretionary with SDC. SDC gets the benefit of its bargain but, at its election, Appellant is deprived of his bargained for benefit. This interpretation would render the Employment Agreement as to stipend illusory. Courts do not give effect to interpretations of contracts that render contract obligations illusory. Taylor v. Shigaki, 84 Wn.App. 723, 730, 930 P.2d 340 (1997).

As the Court stated in Tacoma Northpark LLC v. NW LLC, 123 Wn. App. 73 at 80, 96 P.3d 454 (2004):

Where it is doubtful whether words create a promise (contractual obligation) or an express condition, we will interpret them as creating a promise.

If the phrase "per home sold" is a promise, rather than a condition, the only way to render this Employment Agreement not illusory is to conclude that SDC had an obligation to pay stipend even if it decided to sell lots acquired through Appellant in bulk without building homes.

Again, in order to find that the agreement is ambiguous, this Court has to conclude that there is more than one reasonable and fair interpretation of the Employment Agreement. First off, where it is undisputed that Appellant was told that the phrase "\$1000 per home sold" simply was intended to allow SDC to manage cash flow, what exactly is fair about adopting an interpretation which allows SDC to avoid paying stipend on the sale of plats purchased "through Phil Nelson as SDC's Land Acquisition Manager" on which SDC made an \$8.2 million profit.

Respondents assert that Appellant's interpretation is unreasonable using an analogy to a professional athlete with an incentive clause.

Respondents' Brief at 18-18. Respondents' argue that it makes no sense to provide an incentive to an athlete who doesn't start the requisite number of games.

In fact Respondents' analogy makes no sense (and is therefore unreasonable) because Appellant wasn't playing in the home sale game. It is like saying Felix Hernandez of the Mariners should not receive a bonus because Russell Wilson of the Seahawks did not complete enough touchdown passes. How does that incent Hernandez to throw more strikes? If, as Respondent admits, the stipend is incentive compensation, it only makes sense if the incentive is tied to the job performance – bulk acquisitions of lots. Appellant had absolutely no role in home sales and was being incentivized to buy more lots, not sell more homes.

Respondents also analogize to a “profit sharing provision” where the company does not make a profit, to assert that Appellant's interpretation is unreasonable. In actuality, § 12.1 of the Employment Agreement does not require that SDC make a profit from a house sale before stipend is paid. As explained by Trent, the provision was intended to tie the timing of payment to the generation of revenue from the lots “purchased through Phil Nelson as Land Acquisition Manager.” (*CP 482:16, CP 369:9-18*) So, the analogy doesn't fit in the first instance because stipend is not tied to profits. It is equally inapposite since public records suggest SDC made an \$8.2 million gross profit on the sale of the lots in bulk to MDC. (*CP 132-138*).

In the final analysis then, Appellant would submit that the only condition to payment in the Employment Agreement was that the land

involved was “purchased through Phil Nelson as Land Acquisition Manager.” Indeed, Appellant would submit that this Court can find that the only reasonable interpretation of § 12.1 of the Employment Agreement is that the phrase “\$1000 per home sold” defines when and how much, but not whether stipend would be paid.

B. If the Phrase “\$1000 Per Home Sold” Is Not a Condition, Would SDC’s Decision to Sell Lots Rather Than Homes Excuse Payment of Stipend?

At page 17 of Respondents’ Brief, Respondents’ assert that Nelson’s excuse of performance argument must fail.” Let’s be clear here. It is Respondents who argue that SDC’s decision to change its business plan is an excuse of performance. Appellants assert that there is no basis for finding an excuse of performance.

Respondents argue that SDC’s election not to sell homes is an excuse for non-payment of stipend only if the decision was taken in bad faith, citing principally to real estate commission cases from other jurisdictions. This is at the same time that Respondents assert: “Nelson’s analogy to brokerage cases is misplaced.” Brief at 21.

That is certainly not the rule in Washington and Respondents actually cite no case law from Washington in support. In Washington, seller cannot change his mind after the agent’s performance is complete. “The rule applies even though the sale is not consummated by the owner or is consummated by him upon terms different from those stipulated in the brokerage agreement.” *Bloom v Christensen*, 18 Wn.2d at 142, 138 P. 2d 655 (1943). It doesn’t matter why the seller failed to close.

In addition, the cases from foreign jurisdictions cited by Respondents really don't stand for the proposition for which they are cited. As Respondents state, *Dunne v Combe*, 192 Cal. 740, 221 P. 2d 912 (1923): "concerned a broker's contingent commission agreement, which specified the commission would not be owed until the buyer had paid for the property at issue." Respondents' Brief at 19. The buyer defaulted and the transaction did not close. The Court states at 74:

The default of the vendee, with the consequent destruction of the right of the broker to his commission, was a contingency inherent in the contract, *the risk of occurrence of which was assumed by the broker.*

(Emphasis added.) The agent assumed the risk because, the commission was not earned until closing rather than when the buyer was procured and the transaction could fail during that period between the agreement to close and actual closing. Applying the same rule here you would say Appellant assumed the risk that stipend would not be paid if Appellant didn't close any lot purchases, not home sales.

Todiss v Garuto, 34 N.J. Super 333, 112 A. 2d 285 (App. Div. 1955) is exactly the same:

The brokerage contract with which we are here concerned clearly manifests the definite intention of the parties that the commission was to be "contingent upon the transaction being consummated and in the event that said transaction was not consummated then and in that event no commission shall be paid to said brokers.

112 A. 2d 289-90. The result in *Todiss* and *Dunne* has nothing to do with whether the seller acted in bad faith. In fact, the *Todiss* Court described

the general rule governing commissions in exactly the same terms as Washington Courts:

It is the settled rule that in the absence of some qualifying or oppugnant expression, a broker who is duly engaged ordinarily earns his commission when he procures for the owner a purchaser ready, able, and willing to comply with the terms specified in the authority thus conferred, or with other or different terms which, however, are satisfactory to the owner.

112 A. 2d 287. The result in *Todiss* was a product of the fact that, as in *Dunne*, the commission was earned at closing such that the agent assumed the risk that the transaction would fail prior to closing.

The analysis is very similar to the analysis in *Tacoma Northpark LLC v. NW LLC*, 123 Wn. App. 73 at 80, 96 P.3d 454 (2004), a frequently cited case on the issue of excuse of performance, also cited with approval by Respondents. In effect, Respondents are asserting that their performance was of the obligation to pay stipend was rendered impossible, and should be excused, because SDC elected to sell the lots in bulk.

Tacoma Northpark states the rule of law that:

The doctrine of impossibility and impracticability discharges a party from contractual obligations when a basic assumption of the contract is destroyed and such destruction makes performance impossible or impractical, *provided the party seeking relief does not bear the risk of the unexpected occurrence.*

Id at 81 (emphasis added). SDC's decision to sell its inventory and cease operations certainly rendered earning more stipend impossible even under SDC's interpretation of the Employment Agreement.

For something to be a basic assumption: "The object must be so completely the basis of the contract that, as *both parties* understand, without it the transaction would make little sense." *Wash. State Hop Producers Liq. Trust v Goschie Farms*, 112 694 at 700, 773 P.2d 70 (1989). What is the evidence that SDC's continuing construction of homes was an assumption basic to the Employment Agreement? The whole basis of the Employment Agreement was to acquire building lots on which SDC could construct houses. Nothing else was contemplated by the parties at the time of contracting. Mr. Nelson testified:

Q. Did Mr. Trent ever disclose to you that he had any intention with respect to the business activities of SDC, before you signed the employment agreement, that SDC would ever sell lots acquired in bulk or not build houses on them?

A. No, never. To even think about -- to even think about having market value to what was going on, trying to flip was not our -- was not the business plan.

(CP 525).

Q. You said when you executed your employment agreement Mr. Trent never said he might sell lots in bulk or might sell the company; is that correct?

A. No, didn't talk about selling the company.

Q. Okay. But certainly that was something that you could reasonably contemplate might happen in the future; correct?

A. Again, this is a start-up company. So --

Q. Okay.

A -- you're trying to get me to speculate when I executed this agreement whether or not he was going to sell the company or not. At that point, what were they building? Sixty -- 55, 60 homes a year. Is that an acquisition target? No, not even close. Is it a market at that time in point where even contemplating selling a building company made sense? No.

(CP 567-568). At the time the Employment Agreement was entered into, SDC was in no condition to be an acquisition target and, in fact, became so because Appellant was successful in his job.

Is there a basis for concluding that Appellant assumed the risk that SDC would cease selling houses? There is no provision in the Employment Agreement, no circumstance relating to the condition or business plan of SDC or other evidence that would suggest that Appellant could be deprived of stipend already earned by SDC's decision to cease building houses.

Otherwise:

Performance of a contract is excused under this impossibility doctrine only on a showing of "extreme and unreasonable difficulty, expense or injury." Performance is not excused merely because it became "more difficult or expensive than originally anticipated" to keep contractual obligations.

Tacoma Northpark at 81. SDC did not sell its inventory of lots in bulk because of any operational difficulty. Respondents readily and repeatedly admit it was a business decision which allowed SDC to make more money. So, while there is nothing which would stop SDC from making that election, SDC had every right to do so, it is not an excuse for avoiding SDC's contractual obligations to Appellant.

III. CONCLUSION

Going back to the context in which these issues came before this Court, there are at least issues of fact as to the interpretation of §12.1 of the Employment Agreement. Respondents assert that in light of the fact that review is de novo, that the decision of the Trial Court can be sustained on the grounds that SDC's performance of the obligation to pay stipend was excused because it made a business decision not to continue to build and sell houses. On the record before this Court, the claim is legally insufficient.

Accordingly, Appellant respectfully submits that the decision of the Trial Court should be reversed and this matter remanded for trial.

DATED this 19th day of May, 2014.

BRAIN LAW FIRM PLLC

By: _____
Paul E. Brain, WSBA #13438
Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I have this 19th day of May, 2014, served a true and correct copy of the foregoing document upon counsel of record, via the methods noted below, properly addressed as follows:

cm

Counsel for Respondents:

Michael Goldfarb _____ Hand Delivery
Kelley, Goldfarb, Huck & Roth PLLC _____ U.S. Mail (first-class, postage prepaid)
700 Fifth Avenue, Suite 6100 _____ Facsimile
Seattle, WA 98104 **X** Email

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

DATED this 19th day of May, 2014, at Tacoma, Washington.


