

Case No. 29322-0

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

WASHINGTON PROFESSIONAL REAL ESTATE, LLC,
d/b/a Prudential Almon Realty,

Appellant,

vs.

DR. KIPP YOUNG, et ux.,

Respondents.

BRIEF OF RESPONDENTS

D. R. (ROB) CASE (WSBA #34313)
Larson Berg & Perkins PLLC
Attorneys for Respondents

105 North 3rd Street
Yakima, WA 98901
Phone: (509) 457-1515
Fax: (509) 457-1027

Case No. 29322-0

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

WASHINGTON PROFESSIONAL REAL ESTATE, LLC,
d/b/a Prudential Almon Realty,

Appellant,

vs.

DR. KIPP YOUNG, et ux.,

Respondents.

BRIEF OF RESPONDENTS

D. R. (ROB) CASE (WSBA #34313)
Larson Berg & Perkins PLLC
Attorneys for Respondents

105 North 3rd Street
Yakima, WA 98901
Phone: (509) 457-1515
Fax: (509) 457-1027

TABLE OF CONTENTS

Page

Table of Authorities..... iii

A. INTRODUCTION 1

B. STATEMENT OF THE CASE2

 B.1. Real Estate; Decision to Sell;
 & Listing with Original Broker2

 B.2. Listing with Plaintiff; Listing Contract
 & Extension of Term3

 B.3. “Tail” Provision of the Listing Contract 4

 B.4. The Plaintiffs’ Other, Failed Efforts are Irrelevant 5

 B.5. “For Sale” Sign; Advertising Flyer;
 & Actions of Third Party 5

 B.6. The Eastmans Travel to Yakima to Look at Houses;
 The Subject Property is *Not* on their Itinerary;
 & Circumstance by Which the Eastmans Drive
 By the Property 7

 B.7. Dr. Tom Eastman Arrives in Yakima; Chance Encounter
 With Linda Rockwell; & Mrs. Rockwell Puts
 the Eastmans in Touch with the Defendants ...9

 B.8. The Eastmans Tour the Property; Offers are Exchanged
 & Closing Occurs, All *Without Any*
 Involvement by the Plaintiff 10

 B.9. Knowledge by Dr. Place and Mrs. Rockwell that the
 Subject Property Might be For Sale 11

 B.10. The Sign and/or Flyer Played *No Role* in
 Mrs. Rockwell’s Decision to Call the Youngs 12

C. <u>ARGUMENT AND ANALYSIS</u>	13
C.1. Standard of Review	13
C.2. Procuring Cause Doctrine	14
C.3. The Plaintiff Was <i>Not</i> the Procuring Cause of this Sale ..	15
C.4. <i>Lloyd Hammerstad</i> and <i>Roger Crane</i> Are Dispositive on the Issue of “Procuring Cause”..	17
C.5. The Plaintiff is <i>Not</i> Entitled to a Commission Under the “Tail” Provision of the Contract	20
C.6. <i>Professionals 100</i> is Distinguishable and Does <i>Not</i> Dictate a Different Outcome	23
C.7. The Defense Should be Awarded Costs and Fees	25
D. <u>CONCLUSION</u>	26

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases

Bonanza Real Estate, Inc. v. Crouch,
10 Wn. App. 380, 517 P.2d 1371 (1974) 14

Conner v. City of Seattle,
153 Wn. App. 673, 223 P.3d 1201 (2009)20

Lloyd Hammerstad, Inc. v. Saunders,
6 Wn. App. 633, 495 P.2d 349 (1972) throughout

Professionals 100 v. Prestige Realty, Inc.,
80 Wn. App. 833, 911 P.2d 1358 (1996)22-25

Roger Crane & Associates, Inc. v. Felice,
74 Wn. App. 769, 875 P.2d 704 (1994) throughout

Cases from Other Jurisdictions

Briggs v. Rector, 88 A.D.2d 778, 451 N.Y.S.2d 520 (1982) 15

Gilmer v. Fauteux, 168 V.t 636, 723 A.2d 1150 (1998) 15

Korstad v. Hoffman,
221 Cal. App.2d Supp. 805, 35 Cal. Rprt. 61 (1963)....23

Shalimar Development, Inc. v. FDIC,
257 Va. 565, 515 S.E.2d 120 (1999) 15

Staubus v. Ried, 652 S.W.2d 293 (1983) 14

Rules and Regulations

RAP 10.320

RAP 12.120

A. INTRODUCTION

This is a simple appeal arising in the context of a real estate commission dispute. The facts are undisputed and basic. The applicable law is established, clear and on-point. Two decisions - each by Division Three - are dispositive, specifically *Lloyd Hamerstad, Inc. v. Saunders*, 6 Wn. App. 633, 495 P.2d 349 (1972) and *Roger Crane & Associates, Inc. v. Felice*, 74 Wn. App. 769, 875 P.2d 704 (1994). Full copies of these decisions are set forth at CP 71-87.

Without overtly saying so, the plaintiff-appellant (Prudential Almon Realty) is asking this court to disregard these precedents and to create new law in the plaintiff's favor.

The plaintiff demands roughly \$55,500 because a third party (who did not purchase the property, and was never interested in purchasing it) saw a "for sale" sign at the property and later mentioned the property to the actual buyers. However, the buyers did not see the sign, the third party didn't mention the property to the buyers until after the listing contract had expired and after the sign had been removed, and the plaintiff did nothing whatsoever to facilitate and/or close the transaction. Those facts are undisputed.

Nevertheless, the plaintiff argues that its sign "set in motion a series of events that culminated in the sale." *See Appellant's Brief*, p.1.

As a secondary argument, the plaintiff contends that the subject transaction should be covered by the “tail” provision of the listing contract, even though the buyers had no awareness of the property during the original term of the contract. *See Appellant’s Brief*, pp.19-20.

Lloyd Hammerstad and *Roger Crane* considered facts similar to (and, from the broker’s perspective, more compelling than) those of the instant case. Yet, no commissions were owed in those cases -- not under a procuring cause analysis, nor under a contractual analysis. The same conclusions apply in the instant case.

Accordingly, the defense submits that this court should (a) affirm the trial court’s entry of summary judgment in the defendant’s favor, and (b) award costs and fees to the defense incurred on this appeal.

B. STATEMENT OF THE CASE

B.1. Real Estate; Decision to Sell; & Listing with Original Broker

The subject real estate is situated in Yakima County, and it bares the common street address of 610 Noble Hill Road, Yakima. CP 89 (Ins.3-4); CP 225 (ln.13). Sometime during 2007, the defendants, as the owners of the property, decided they wanted to sell it. CP 89 (Ins.19-22; CP 21-22. They listed the property with Lakemont Realty. CP 21-22. The details of that listing are not fully established, but, according to the

defendants, the Lakemont listing lasted “for a number of months or a year or something.” CP 89 (Ins.19-22); CP 21-22. In any event, Lakemont did not finalize a sale and its listing expired.

B.2. Listing with Plaintiff; Listing Contract; & Extension of Term

In March or April of 2008, the defendants decided to again list the property for sale. CP 89 (Ins.24-25); CP 22-23. This time, they listed the property with Prudential Almon Realty, which is the plaintiff-appellant herein. CP 89 (Ins.25-26).¹

The parties signed a contract entitled “Exclusive Listing Agreement Contract”. CP 89 (Ins.29-30). As originally executed, the term of the contract was May 7, 2008, through November 7, 2008. CP 89-90. However, by agreement of the parties, the term was subsequently extended to December 31, 2008. CP 90 (Ins.1-3); CP 28 (Ins.12-23). At the time, the plaintiff was actively negotiating with one or two prospective buyers, and the defendants agreed to a brief extension to let those negotiations proceed. CP 28 (Ins.12-23) Ultimately, however, the plaintiff did not finalize a sale with either of those prospective buyers. *See*

¹ Technically, the appellant is Washington Professional Real Estate, LLC, and “Prudential Almon Realty” is just an assumed business name of that entity. *See* Caption. For ease of reference, the name Prudential Almon Realty will be used, because that is the name recited on the parties’ contract. *See* “Appendix A” to *Appellant’s Brief*.

e.g., Appellant's Brief, pp.3-4.

The subject transaction, whereon the plaintiff seeks a commission, occurred after the extended listing expired -- manifestly so. CP 90 (Ins.4-7). Closing occurred on March 20, 2009. *See Appellant's Brief*, p.7. The listing, as extended, expired 79 days earlier on December 31, 2008. CP 90 (Ins.1-3). Moreover, the buyers on the subject transaction, Drs. Tom & Pat Eastman, did not negotiate with the plaintiff at any time -- neither during the original term of the listing, nor during the extension period. *See e.g., CP 92* (Ins.9-12). Because of these facts, the plaintiff seeks to invoke the "tail" provision of the contract.

B.3. "Tail" Provision of the Listing Contract

As the "tail" provision, paragraph 8.a. of the listing contract established three limited circumstances where, after expiration of the listing, the plaintiff (as "Broker") nevertheless might be entitled to a commission. In relevant part, this paragraph was as follows:

If the property . . . is . . . sold . . . within 365 days after the expiration of this Agreement [1] to any person with whom a Broker negotiated or [2] to whose attention the Property was brought through the signs, advertising, or any other action or efforts of a Broker, Broker's agents, employees or subagents, or [3] on information secured directly or indirectly from or through a Broker during the term of this Agreement, then the Seller shall pay Broker the above compensation

(Ellipses and bracketed material added.) See CP 90 (lns.12-18); see also “Appendix A” to *Appellant’s Brief*.

The subject transaction did occur “within 365 days after the expiration of th[e] Agreement”, which is the initial overarching requirement. CP 90 (lns.19-20). However, the defense disputes that any of the three circumstances is satisfied, which will be further explained below.

B.4. The Plaintiff’s Other, Failed Efforts are Irrelevant

At pages 3 and 4 of its *Appellant’s Brief*, the plaintiff discusses negotiations with parties other than Drs. Tom and Pat Eastman. However, under the applicable law, these other negotiations are irrelevant. The focus is on “the ultimate sale”. See e.g., *Llyod Hammerstad, Inc. v. Saunders*, 6 Wn. App. at 634 & 636 (CP 72 & 74); *Roger Crane & Associates, Inc. v. Felice*, 74 Wn. App. at 777 (CP 84). Accordingly, the defense asks the court to disregard these portions of the *Appellant’s Brief*.

B.5. “For Sale” Sign; Advertising Flyer; & Actions of Third Party

At some point during the listing, the plaintiff placed a customary “for sale” at the property. CP 91 (lns.4-5); see also *Appellant’s Brief*, p.4. In September or October of 2008, this sign was noticed by .Dr. John Place. CP 91 (lns.4-5). Dr. Place was riding his motorcycle in the area, saw the

sign, and stopped and retrieved an advertising flyer from the sign. CP 91 (Ins.4-6). There is no evidence to suggest that Dr. Place was interested in buying the property. Rather, his brother-in-law and sister (Drs. Tom & Pat Eastman) were considering moving to Yakima from Nebraska, so Dr. Place was trying to stay apprised of available residences in the greater Yakima area. CP 91 (Ins.2-3). However, there is no evidence to suggest that Dr. Place's motorcycle ride on this particular day was directly motivated by the Eastmans' potential relocation. In other words, Dr. Place was not specifically searching for available homes; he just noticed the sign by happenstance.

Upon returning home, Dr. Place briefly showed the flyer to his wife, but he didn't do anything else with it. CP 91 (Ins.8-9); CP 206 (Ins.17-23). In this regard, Dr. Place testified, "I didn't send the flyer to Pat [his sister]." (Bracketed material added.) CP 91 (Ins.10-11); CP (Ins.22-23). This is confirmed by Dr. Pat Eastman's own testimony. CP 91 (Ins.11-15). Moreover, the Eastmans never saw any "for sale" sign - whether from the plaintiff's office or from any other realty company - at the subject property. CP 92 (Ins.1-8). The sign was only seen by Dr. Place, and the flyer was only seen by Dr. Place and his wife.

Later, on or about January 15 or 16, 2009, Dr. Place sent an email to his sister wherein he mentioned the subject property. CP 91 (Ins.16-

21). The actual email (or a printout of it) is not part of the factual record. What is known, however, is that the email was sent approximately two weeks after the listing contract had expired (*i.e.*, January 15-16 vs. December 31). Notably, there is no evidence to suggest that the Eastmans had any awareness of the subject property prior to this email. Thus, the Eastmans didn't learn about the subject property until after the listing had expired.

Also, this was not the only email that Dr. Place sent to the Eastmans. Rather, Dr. Pat Eastman testified that her brother "was firing off e-mails" about "this house" and "that house". CP 225 (Ins.13-17). Thus, the subject property held no special importance.

B.6. The Eastmans Travel to Yakima to Look at Houses; The Subject Property is *Not* on their Itinerary; & Circumstance by Which the Eastmans Drive By the Subject Property

On January 22, 2009, Dr. Pat Eastman flew to Yakima to begin looking at houses. CP 92 (Ins.23-24). By this point, the Eastmans had retained their own local realty company, Creekside Realty, to assist them in locating a house. CP 92 (Ins.15-18). The Eastmans exchanged "numerous" emails with Creekside Realty in an effort to "narrow down" the type of home they wanted to look at. CP 223-224; CP 92 (Ins.18-20).

Dr. Pat Eastman recalls mentioning the subject property in one email to Creekside, but the realtor (Sue Gifford) “said she couldn’t find it.” CP 92 (Ins.26-30); CP (ln.13-20). To be explained below, the defendants had taken the property off the market by this point, because the listing with the plaintiff had expired. As before, this email (or a printout of it) is not part of the factual record.

Accompanied by her brother (Dr. Place) and two realtors (Sue Gifford and Patti Bemis, from Creekside Realty), Dr. Pat Eastman began looking at houses on January 23, 2009. CP 92 (Ins.24-26); CP 224 (Ins.11-25). Notably, when asked during her deposition whether the subject property was on their itinerary, Dr. Pat Eastman’s answer was an unqualified “No.” CP 92 (Ins.20-22); CP 224 (Ins.2-10).²

After the group looked at “a whole list of homes” of houses, Dr. Place suggested that they should drive by the subject property, which was only five or six blocks away. CP 93 (Ins.13-16); CP 208 (Ins.10-21). Dr. Place testifies that “the two realtors didn’t know anything about the house at that time.” CP 93 (Ins.17-18); CP 208 (Ins.22-24). They group drove to the subject property and noticed that the sign was gone. CP 93 (Ins.20-21); CP 209 (Ins.2-8). Dr. Place said, “Well, it’s off the market” CP

² Dr. Tom Eastman was not deposed, and the plaintiff did not submit a “Declaration” or any other evidence from him.

209 (lns.2-8). In fact, the listing had expired, so the sign had been removed.

The group looked at the exterior of the house from a neighboring driveway, then departed and ended their day. CP 93 (lns.4-11); CP 225-226.. As explained by Dr. Pat Eastman, “We didn’t do anything at that point.” CP 226-227. More specifically, they didn’t go inside the house or even step foot on the grounds. CP 93 (lns.23-26). Also, they didn’t have the flyer with them, nor any email that mentioned the property. *Id.* By all indications, this property was a fleeting idea.

B.7. Dr. Tom Eastman Arrives in Yakima; Chance Encounter with Linda Rockwell; & Mrs. Rockwell Puts the Eastmans in Touch with the Defendants

Dr. Tom Eastman arrived in Yakima during the evening of Friday, January 23, 2009. CP 93 (lns.29-30); CP 227 (lns.4-5). On Saturday morning, the Eastmans and the Places were walking around town when they bumped into Linda Rockwell. CP 93-94; CP 226-227. Dr. Place was familiar with Mrs. Rockwell and knew that she lived next door to the subject property. CP 94 (lns.1-2); CP 226-227. In casual conversation, the Places asked Mrs. Rockwell if she knew whether the subject property had sold or whether it might still be available. CP 94 (lns.1-3); CP 227

(Ins.6-8). Mrs. Rockwell “said she didn’t know”, but she promised to ask Dr. Young. CP 94 (Ins.3-4); CP 227 (Ins.6-7). This was a chance encounter. There is no evidence to suggest that the Places and Eastmans were searching for properties on this Saturday morning, nor that they set out to find Mrs. Rockwell in order to ask her about the subject property.

Later, Mrs. Rockwell called Dr. Young. CP 94 (Ins.5-6); CP 227 (Ins.9-11). Dr. Young said that he and his wife were no longer sure that they would be selling the property. CP 94 (Ins.6-7); CP 186 (Ins.8-13). By this time, at least two listings (one via Lakemont, and one via the plaintiff) had proved unsuccessful. However, Mrs. Rockwell gave Dr. Young a telephone number for the Eastmans, and Dr. Young agreed to call them. CP 94 (Ins.7-8); CP 186 (Ins.16-23).

B.8. The Eastmans Tour the Property, Offers are Exchanged & Closing Occurs, All *Without Any Involvement by the Plaintiff*

Dr. Young telephoned the Eastmans and agreed to show them the property on the following day, Sunday, January 25, 2009. CP 94 (Ins.8-10); *Appellant’s Brief*, p.6 (2nd ¶); CP 186-187. The tour occurred as planned, but no realtors were present. *Appellant’s Brief*, p.6 (2nd ¶).

Subsequently, on Wednesday, January 28, 2009, the Eastmans toured the property again, this time accompanied by their own realtors

(Creekside). *Id.*, pp.6-7. Thereafter, the Eastmans submitted an offer and, after some back-and-forth negotiations, a deal was ultimately reached with the Youngs. *Appellant's Brief*, pp.6-7. Closing occurred on March 20, 2009. *Id.*, p.7 (2nd ¶).

Throughout this time and these events, the plaintiff was not involved in any way. Specifically, the plaintiff did not negotiate with the Eastmans, nor with the Eastmans' realtors. The plaintiff never telephoned the Eastmans. The plaintiff did not provide any information to the Eastmans. The plaintiff did not prepare the contract or any of the closing documents. CP 94 (Ins.25-28).

The listing was expired and these were new prospective buyers. Thus, the Youngs handled everything directly.

B.9. Knowledge by Dr. Place and Mrs. Rockwell that the Subject Property Might be For Sale

Throughout its *Appellant's Brief*, the plaintiff stresses that Dr. Place probably would not have known that the subject property was for sale if he hadn't see the plaintiff's sign. *See e.g., Appellant's Brief*, p.4 (last two lines), p.13 (last ¶), & pp.16-17. This contention seems to be a mixture of fact and theory. Factually, it is true that Dr. Place first learned that the property was for sale upon seeing the sign. However, it is not

necessarily true that Dr. Place wouldn't have discovered that fact independently of seeing the sign.

Even before the original listing via Lakemont, Mrs. Rockwell knew that the Youngs were interested in selling the property. CP 94 (Ins.13-19); CP 196 (Ins.21-25). The Youngs discussed their plans with their neighbors, including the Rockwells. CP 94 (Ins.13-19); CP 196 (21-25). Thus, when the Places and the Eastmans bumped into Mrs. Rockwell, it is quite possible that the topic might have come up. The Eastmans were from out-of-state, and it would've been natural for the group to discuss why the Eastmans were in town.

Accordingly, the court should have some skepticism about the plaintiff's contention that the only possible way Dr. Place could've learned that the property was for sale was via the plaintiff's sign. Even if he hadn't seen the sign, the group still would've bumped into Mrs. Rockwell and the property may have still been discussed.

B.10. The Sign and/or Flyer Played *No Role* in Mrs. Rockwell's Decision to Call the Youngs

More importantly, there is no evidence to suggest that Mrs. Rockwell mentioned the sign and/or the flyer when she called Dr. Young. CP 94 (Ins.20-23). Likewise, the sign and flyer were not

somehow responsible for the Places and the Eastmans bumping into Mrs. Rockwell.

The plaintiff argues that its sign “set in motion” everything that occurred, but that is simply not true. The Eastmans never saw the sign -- only Dr. Place did. The Eastmans didn’t even learn about the property until after the sign was taken down.

At most, the sign caused the group to drive by the property, which occurred after the listing expired. That’s it. It didn’t cause the chance encounter with Mrs. Rockwell, it didn’t cause Mrs. Rockwell to call Dr. Young, and it certainly didn’t cause the March 20th closing, which occurred approximately four to five months after Dr. Place saw the sign (*i.e.*, March vs. September or October).

If Mrs. Rockwell hadn’t put the parties in touch, the sale would not have occurred. To be argued below, she was the “procuring cause”, not the sign.

C. ARGUMENT AND ANALYSIS

C.1. Standard of Review

The defense agrees with the plaintiff that this appeal is subject to a “de novo” standard of review. *See Appellant’s Brief*, pp.8-9. The defense submits, and the plaintiff appears to agree, that the material facts are

undisputed. *See e.g., id.*, p.21 (whereby the plaintiff asks this court to direct entry of summary judgment in the plaintiff's favor).

C.2. Procuring Cause Doctrine

The procuring cause doctrine is well-established, and is extensively discussed in *Roger Crane*. Procuring cause is typically a question of fact. But when, as here, the material facts are undisputed, the question is answered as a matter of law. *Roger Crane*, 74 Wn. App. at 776 (CP 83).

“The broker must set in motion the series of events culminating in the sale ‘and, in doing so, accomplish what he undertook under the agreement.’” (Underscore added.) *Roger Crane*, 74 Wn. App. at 776 (quoting *Bonanza Real Estate, Inc. v. Crouch*, 10 Wn. App. 380, 385, 517 P.2d 1371 (1974)). The plaintiff accurately recites the first component of this standard but conveniently omits the second component. *See e.g., Appellant's Brief*, p.13 (2nd ¶). This is telling.

“Mere commencement of performance is not sufficient.” *Roger Crane*, at 776 (CP 83). Even if the broker sets something in motion, he will not be deemed the procuring cause if there is a “break in continuity”. *Id.*, at 777 (citing, with approval, *Staubus v. Ried*, 652 S.W.2d 293 (Ms. Ct. App. 1983)). This is because the broker's duty “is to

bring a buyer and seller to agreement”, and “until that is done his right to commission does not accrue.” *Roger Crane*, at 777 (citing, with approval, *Briggs v. Rector*, 88 A.D.2d 778, 451 N.Y.S.2d 520 (1982)).

An incidental or minimal connection to the ultimate sale does not make the broker the procuring cause. *See e.g.*, CP 298-300 (citing decisions from other jurisdictions). Introducing the buyer to the property is not enough. *See* CP 299 (citing *Shalimar Development, Inc. v. FDIC*, 257 Va. 565, 572, 515 S.E.2d 120 (1999)). As written by one court, the broker bears the burden of showing “that his efforts dominated the transaction.” CP 299 (citing *Gilmer v. Fauteux*, 168 Vt. 636, 638, 723 A.2d 1150 (1998)).

C.3. The Plaintiff Was *Not* the Procuring Cause of this Sale

Against these standards, the plaintiff was clearly not the procuring cause of the Eastman-Young transaction. The plaintiff did not “bring the buyer and seller to an agreement”. If anyone did that, it was Mrs. Rockwell and/or the parties themselves. The plaintiff did not “accomplish what it undertook under the agreement”. Specifically, the plaintiff did not find the Eastmans; Dr. Place did that. The plaintiff did not negotiate with the Eastmans; the Youngs did that directly. And the plaintiff played no role in closing the transaction.

At best, the plaintiff had an “incidental” connection to this sale, which was the sign. The plaintiff does not identify any other supposed connection. *See Appellant’s Brief.*

While it is true that Dr. Place saw the sign, he didn’t buy the property and, equally important, there were substantial “breaks in continuity” between him seeing the sign and the Eastmans actually buying the property. Dr. Place saw the sign in September or October, but he didn’t mention the property to the Eastmans until January. This was after the listing contract had expired (although there is no evidence to suggest that Dr. Place knew that). When Dr. Pat Eastman traveled to Yakima to look at houses, the subject property was not on the itinerary. It was only out of convenience that the group drove by the property, because it was near other houses that were on the itinerary. When they arrived at the property, the sign was gone. Dr. Place commented, “Well, it’s off the market”, and Dr. Pat Eastman concedes that they “didn’t do anything at that point.” The idea was fleeting and dead.

It was only because of a chance encounter with Mrs. Rockwell, who lives next door to the subject property, that the Eastmans actually made contact with the Youngs. The sign played no role in that encounter.

The plaintiff views everything that occurred after Dr. Place saw the sign as “fruit of that tree”, in a manner of speaking. This is fundamentally

inconsistent with the above-quoted standards -- mere commencement of performance is not enough, the broker must bring the parties to a deal, and there must not be any breaks in continuity. *Roger Crane*, at 776-777. It is also, as explained in the following section, contrary to the reasoning and outcomes in *Roger Crane* and *Lloyd Hammerstad*.

C.4. *Lloyd Hammerstad* and *Roger Crane* Are Dispositive on the Issue of “Procuring Cause”

Judge from the broker’s perspective, the facts in *Lloyd Hammerstad* and *Roger Crane* were more compelling, yet the broker still wasn’t entitled to a commission. In both cases, the buyer was driven to the property by his realtor. See *Lloyd Hammerstad*, 6 Wn. App. at 633 (CP 72); *Roger Crane*, 74 Wn. App. at 771 (CP 78). Thus, there was no question that the buyer learned of the property directly from the realtor. By contrast, the Eastmans certainly did not learn of the subject property directly from the plaintiff.

In *Lloyd Hammerstad*, the realtor discussed prices with the buyer. See *Lloyd Hammerstad*, at 634 (CP 72). In both cases, the realtor scheduled an appointment for the buyer to see the interior of the house. See *Lloyd Hammerstad*, at 634-635 (CP 72-73); *Roger Crane*, at 771 (CP 78). By contrast, the plaintiff here did not discuss any prices with the

Eastmans, nor did the plaintiff arrange a tour of the property. In fact, no communication whatsoever occurred between the Eastmans and the plaintiff.

Fairly compared, the realtors in *Lloyd Hammerstad* and *Roger Crane* certainly did more than the plaintiff did in the instant case. Those realtors introduced the buyers to the property, peaked the buyers' interest, arranged showings, communicated directly with the buyers, and generally tried to facilitate a deal. Here, the plaintiff's only connection is that a family member of Dr. Pat Eastman saw the plaintiff's sign several months earlier. If that alone were sufficient to establish procuring cause, then the realtors in *Lloyd Hammerstad* and *Roger Crane*, who certainly did more than the plaintiff in this case, ought to have prevailed. But they didn't.

In *Roger Crane*, the realtor's efforts (which exceeded the plaintiff's efforts in the instant case) were deemed "minimal". See *Roger Crane*, at 776 (CP 83). There was not a sufficiently "clear connection" between the realtor and the ultimate sale. *Id.*, at 777 (CP 84). The realtor "tried to be instrumental", but the true procuring cause was a mutual friend (Mr. Wolfe) who put the buyer in touch with the seller. *Id.* Thereafter, the parties negotiated the deal directly. *Id.* This mimics the instant case. If anyone was the procuring cause here, it was Mrs. Rockwell. The plaintiff's sign was certainly of lesser (if any) importance.

It wasn't significant enough to even get the property on the Eastmans' itinerary. At most, it caused Dr. Place to suggest driving by the property. But, it didn't lead the parties to Mrs. Rockwell, and it didn't cause Mrs. Rockwell to call Dr. Young. Without these occurrences, no sale would have occurred. Thus, no "clear connection" exists between the sign and the ultimate sale.

The plaintiff's attempt to distinguish *Lloyd Hammerstad* and *Roger Crane* is conclusory and not well-taken. See *Appellant's Brief*, pp.15-17. The plaintiff asserts,

[1] Had Dr. Place not seen the Prudential sign earlier, he would not have directed his sister to the property. [2] Had his sister not seen the property, she would not have purchased it.

(Bracketed material added.) *Id.* This omits more than it includes. The plaintiff starts with the sign and jumps to the Eastmans buying the property. Conspicuously absent is any mention of Mrs. Rockwell. Mrs. Rockwell was indispensable; that is undeniable. The sign was not indispensable.

It follows, as a matter of established precedent, that the plaintiff was not the procuring cause of the Eastman-Young transaction. *Lloyd Hammerstad* and *Roger Crane* are dispositive on the issue.

C.5. The Plaintiff is *Not* Entitled to a Commission Under the “Tail” Provision of the Contract

As its secondary argument, the plaintiff contends that it should be entitled to a commission pursuant to the “tail” provision, independent of the procuring cause analysis. *See Appellant’s Brief*, pp.19-20. In this regard, the plaintiff focuses on one of the disjunctive circumstances/possibilities under the tail, specifically whether the Eastmans were among those “whose attention the property was brought *through* the signs . . .” (Italic emphasis and ellipsis in original.) *Id.*, p.19. This is the second possibility under the tail. *See* CP 90 (lns.12-18).³

Again, the plaintiff traces everything back to Dr. Place having seen its sign. Because Dr. Place saw the sign and subsequently passed the address onto the Eastmans, the plaintiff contends that “the Eastmans learned of the property ‘through’ or ‘because of’ the Prudential sign”. *Appellant’s Brief*, p.20. The Eastmans did not personally see the sign, but the plaintiff contends that they “indirectly” discovered the property

³ By contrast, the plaintiff advances no argument whatsoever as to first possibility (*i.e.*, whether the Eastmans were persons “with whom [the] Broker negotiated”), nor as to the third possibility (*i.e.*, whether the sale occurred “on information secured directly or indirectly from or through [the] Broker). *See and Compare, Appellant’s Brief*, p.19; CP 90 (lns.12-18); *see also* “Appendix A” to *Appellant’s Brief*. By ignoring these other possibilities, the plaintiff has waived them. *See e.g., Conner v. City of Seattle*, 153 Wn. App. 673, 686, n.37, 223 P.3d 1201 (2009); RAP 10.3, 12.1.

because of the sign. *Appellant's Brief*, p.20.

At the outset, the only reference of “directly or indirectly” within the tail provision is confined to the third possibility (*i.e.*, “or [3] on information secured directly or indirectly from or through a Broker during the term of this Agreement”). (Bracketed material and underscore added.) *See* CP 90 (Ins.12-18); *see also* “Appendix A” to *Appellant's Brief*. However, the plaintiff has not advanced any argument as to the third possibility. Rather, the plaintiff only advances an argument as to the second possibility, which does not contain the “directly or indirectly” phrase (*i.e.*, “or [2] to whose attention the Property was brought through the signs, advertising, or any other action or efforts of a Broker, Broker’s agents, employees or subagents”). (Bracketed material added.) *See* CP 90 (Ins.12-18); *see also* “Appendix A” to *Appellant's Brief*. Thus, the plaintiff’s contention that it’s entitled to a commission if the Eastmans indirectly learned of the property through the plaintiff’s sign is, by a simple textual analysis, invalid.

More fully, the plaintiff’s argument, once again, runs contrary to the outcome in *Lloyd Hammerstad*. Like the instant case, a “tail” provision was at issue in *Lloyd Hammerstad*. *See and Compare, Lloyd Hammerstad*, at 634 (CP 72); CP 90 (Ins.12-18). There, the tail provision applied to “any person . . . who has learned through you or your

advertisements, directly or indirectly, that the property was for sale”. See *Lloyd Hammerstad*, at 634 (CP 72). The pronouns “you” and “your” referred to the listing company and to any member of the multiple listing service. *Lloyd Hammerstad*, at 634 (CP 72).

The term “advertisements” within the tail provision in *Lloyd Hammerstad* is certainly equivalent to (if not broader than) the term “signs” in the instant case. Also, the potentially-relevant portion of the tail provision in *Lloyd Hammerstad* explicitly included the clause “directly or indirectly”. This is unquestionably broader than what the plaintiff seeks to invoke in the instant case (*i.e.*, the second possibility), because, as shown above, it does not include the clause “directly or indirectly”.

In *Lloyd Hammerstad*, the realtor (Fairy L. Ross) showed the buyer (Dr. Phillip Ricker) the house during the term of the listing contract. The realtor scheduled a tour of the property, but that appointment was canceled due to an illness in the buyer’s family. See *Lloyd Hammerstad*, at 634-635 (CP 72-73).

Later, after the listing had expired but during the “tail” period, the buyer’s wife accompanied a friend on a social call to the residence. She liked the property and learned that it was for sale. The husband then toured the property with his wife, they submitted an offer, and the sale proceeded to closing. Thereafter, the realtor sued, claiming she was owed

a commission under the tail provision. *Id.*, at 635 (CP 73).

Even though the buyer had unquestionably learned about the property “directly” “through” the realtor, her claim was denied. Regardless of the language of the tail, the trial court ruled that “there must be some minimal causal connection between the activities of the broker during the listing period and the ultimate sale.” *Id.*, at 636 (citing, with approval, *Korstad v. Hoffman*, 221 Cal. App.2d Supp. 805, 35 Cal. Rptr. 61 (1963)). This decision was affirmed by Division Three. *See Lloyd Hammerstad*, at 636 (CP 74).

Accordingly, the mere fact that a party might have learned about a property “through” a broker’s efforts (either directly or indirectly) is not sufficient to warrant a commission, regardless of the language of the tail provision. It follows, as a matter of established precedent, that the plaintiff is not entitled to a commission under the tail provision in the instant case. *Lloyd Hammerstad* is dispositive on the issue.

C.6. *Professionals 100* is Distinguishable and Does *Not* Dictate a Different Outcome

The plaintiff contends that *Professionals 100* is “similar” to the instant case. *See e.g., Appellant’s Brief*, p.11 (#2). The plaintiff also contends that *Professionals 100* stands for the proposition that “[t]he

Realtor does not need to directly find the buyer, nor does the buyer need to learn of the property directly from the Realtor.” *Appellant’s Brief*, p.13.

Both contentions are not well-taken.

Far from being “similar”, *Professionals 100* is clearly distinguishable from the instant case. The distinguishing facts are set forth within finding 31, which reads as follows:

Mr. Erwin [the claimant broker] spent a considerable amount of time and effort in persuading Franciscan Eldercare, through its president, Mr. Wimer, to purchase all of the North Pacific properties, including the Bothell and Enumclaw nursing homes which North Pacific was leasing. This was done through many phone conversations, as evidenced by Exhibit 22, (Telephone Log), two in-person meetings with Mr. Wimer, and by fostering conditions designed to increase the receptivity of Franciscan Eldercare to purchase the properties, including helping to plan a complicated transaction which removed impediments of a sale such as the lease/option to purchase by North Pacific. That impediment was ultimately removed by a settlement finally reached through legal counsel for North Pacific and West Valley. Mr. Erwin also spend [*sic*, spent] significant time and effort attempting to sell the property to others as well, including Regency Care Centers.

Professionals 100 v. Prestige Realty, Inc., 80 Wn. App. 833, 840, 911 P.2d 1358 (1996). By contrast, as explained above, the plaintiff here did

not “spend a considerable amount of time” working of the subject transaction. To the contrary, the plaintiff did not do anything on this sale. The plaintiff made no telephone calls to the Eastmans or their realtors (Creekside). The plaintiff did not meet in-person with the Eastmans, did not persuade the Eastmans to buy the property, and did not otherwise expend any effort on the subject transaction. Thus, although Mr. Erwin was deemed the procuring cause in *Professionals 100*, that was a fact-specific outcome and has no bearing on the instant case.

With respect to the broker not “directly” finding the buyer, that notion has no application to the instant case. As previously explained, the plaintiff’s only argument under the tail is confined to the second possibility, which does not include the “directly or indirectly” clause. *See supra*, p.21. And procuring cause is not established simply by finding the buyer and/or introducing the buyer to the property, whether that occurs directly or indirectly. *See supra*, pp.14-15. The broker must “bring the buyer and seller to agreement” and “accomplish what he undertook under the agreement.” *Roger Crane*, at 776-777.

C.7. The Defense Should be Awarded Costs and Fees

Paragraph 14 of the listing contract entitles the prevailing party, both in the lower court and on appeal, to an award of costs and fees. *See*

“Appendix A” to *Appellant’s Brief; Appellant’s Brief*, p.20. Accordingly, if the plaintiff does not prevail on this appeal, the defense is entitled to such recoveries.

D. CONCLUSION

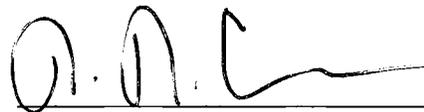
The plaintiff did not earn a commission on the subject transaction. The plaintiff did not find the buyers, did not negotiate with the buyers, and did not make any effort to facilitate and/or close the transaction. The plaintiff asks this court to view everything as having been “set in motion” by Dr. Place seeing the plaintiff’s “for sale” sign at the property. However, the buyers never saw the sign, the buyers had no awareness of the property until after the sign was removed and after the listing had expired, and when the property was not on the buyer’s itinerary when they were looking at houses. No less than four or five months elapsed between Dr. Place seeing the sign and the date that the buyers actually made contact with the sellers. That contact was facilitated by Mrs. Rockwell following a chance encounter outside a café. The sign played no role in causing this encounter.

At most, the plaintiff had a very “incidental” connection to this sale. This is woefully insufficient to establish procuring cause. *Lloyd Hammerstad* and *Roger Crane* are dispositive on the issue.

With respect to the “tail” provision, the plaintiff’s only argument is as to the second possibility (*i.e.*, whether the Eastmans were among those “whose attention the property was brought through the signs . . .”). However, this provision does not include the “directly or indirectly” clause. By a simply textual analysis, the plaintiff cannot prevail under the tail. Moreover, *Lloyd Hammerstad* considered stronger facts and a similar tail provision, and no commission was owed therein. This is dispositive.

This court should (a) affirm the trial court’s entry of summary judgment in the defendant’s favor, and (b) award costs and fees to the defense incurred on this appeal.

DATED this 11th day of November, 2010.



D. R. (ROB) CASE (WSBA #34313)
Larson Berg & Perkins PLLC
Attorneys for Respondents

DECLARATION OF SERVICE

I, D. R. (ROB) CASE, do hereby declare and state: On this day, in Yakima, Washington, I sent copies of this document (including the materials in the Appendix) via FedEx overnight, with postage prepaid, to the following:

Court of Appeals, Division III (original and one copy)
Clerk's Office
500 North Cedar Street
Spokane, WA 99201-1905

and, further, that on this day, I hand-delivered a copy of this document to the following:

Robert E. Lawrence-Berrey, Jr. (one copy)
Finney, Falk, Lawrence-Berrey & Naught, PLLP
117 North Third Street, Suite 201
Yakima, WA 98901

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

SIGNED at Yakima, Washington, on November 11th, 2010.



D. R. (ROB) CASE