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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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.

**RESPONDENTS' RESPONSE TO AMICUS BRIEF BY
WASHINGTON REALTORS®**

D. R. (ROB) CASE (WSBA #34313)
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A. ARGUMENT AND ANALYSIS

A.1. Prudential's Supposed Connection to the Subject Sale Was "Less than Minimal". It follows that Prudential's Claim Was Properly Dismissed. Under Current Case Law, the Supposed Distinction Between "Listing Brokers" and "Selling Brokers" as Advocated by REALTORS® Simply Doesn't Exist With Respect to the Procuring Cause Standard.

REALTORS® appears to concede that Prudential's connection, if any, to the subject sale was "minimal" at best. By contrast, REALTORS® argues that Prudential was "very involved with the Property" itself. *See Amicus Brief*, p.6 (2nd ¶). But that isn't enough to satisfy procuring cause, and REALTORS® knows it. To be deemed the procuring cause, "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.'" *Roger Crane*, 74 Wn. App. at 776 (quoting *Bonanza Real Estate, Inc. v. Crouch*, 10 Wn. App. at 385). The broker is expected "to bring a buyer and seller to agreement". *Roger Crane*, 74 Wn. App. at 777. Merely being "very involved" with the property doesn't suffice.

With respect to the actual subject sale, the trial court found that "although there may have been some causal relationship, the efforts of Prudential were less than minimal." (Underscore added.) CP 304 (final ¶). REALTORS® attacks this finding as supposedly "incorrect" and

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“improper”. *See Amicus Brief*, p.6 (last line). Apparently, REALTORS® believes that any causal connection, no matter how weak, attenuated or incidental, ought to suffice for establishing procuring cause when a “listing broker” is the claimant. Thus, even a less than minimal connection (which could hardly be legitimately called a “connection” at all) would entitle a listing broker to a commission. As REALTORS® writes, “it should be reasonably anticipated that a listing broker would not have contact with the ultimate purchaser of a property.” *See Amicus Brief*, p.9 (last ¶).

REALTORS® seems to disagree with the Appellant’s own argument, whereby Appellant says it is not seeking compensation simply “for placing a sign in the ground.” *See Appellant’s Reply Brief*, p.7. Under REALTORS®’ argument, that would presumably be enough for the listing broker to prevail, so long as the broker was able to trace backward from the actual buyer until some connection could be established to the sign. The number of months or degrees of separation wouldn’t matter, because any connection would suffice under REALTORS®’ preferred version of the law. Of course, such a rule wouldn’t be “procuring” cause at all.

As the law in Washington currently exists, the relative substantialness/weakness or directness/attenuation of the broker’s

supposed connection to the subject sale is considered. *See Roger Crane*, 74 Wn. App. at 709 (speaking in terms of whether there was “a clear connection”, and denying the claim because the connection was “minimal”); *Lloyd Hammerstad*, 6 Wn. App. at 636 (saying, “there must be some minimal causal relationship”). Granted, the relevant case law has not established a bright-line threshold, but, instead, has only articulated the standard in general terms thus requiring a case-by-case analysis. But a threshold does exist, and Prudential’s connection to the subject sale in the instant case certainly falls short of the mark.

Yes, Prudential placed a sign in the ground and that sign included flyers. But the actual buyers never saw the sign; it had been removed by the date that they actually arrived in Yakima to look at houses. They also never saw the flyer, nor was it ever even mentioned to them. When they came to Yakima to look at houses, the subject property wasn’t on their itinerary. And there were no discussions, negotiations or correspondences of any sort between the buyers and Prudential prior the purchase-and-sale agreement being finalized between the buyers and sellers directly. No dispute exists on any of these points.

The only conceivable “causal connection” that REALTORS® and Prudential can point to is that someone other than the buyers saw the sign and took a flyer, and then several months later that person suggested that

the buyers should drive by the subject property. This person was Dr. Place, and the buyers were her sister and brother-in-law. When they drove by the property, the sign was gone, they didn't have the flyer with them, and the property was off the market. Again, no dispute exists on any of these points.

On a subsequent day, the group had a chance encounter with Linda Rockwell. Based on unrelated events, Dr. Place was familiar with Linda Rockwell and knew that she lived next door to the subject property. The group casually asked Mrs. Rockwell about the subject property, and she put them into contact with the Respondents. Eventually, the buyers and sellers came to an agreement. Prudential played no role whatsoever in the chance encounter with Mrs. Rockwell, nor in Mrs. Rockwell's friendly assistance in facilitating the acquaintance between the buyers and seller. Yet again, no dispute exists on these points.

When evaluated in terms of its relative strength or weakness, Prudential's supposed "causal connection" is razor thin and insignificant. As a matter of law, it is too weak to suffice as procuring cause. Dr. Place and Mrs. Rockwell caused this sale, not Prudential. Prudential had a "less than minimal" connection.

REALTORS® advocates for a more liberal standard when the claimant is a listing broker. REALTORS® wants listing brokers to be

awarded commissions whenever any passive, temporary and/or incidental connection exists. However, the existing case law simply does not establish differing procuring cause standards for listing brokers versus selling brokers. Yes, the claimant brokers in *Roger Crane* and *Lloyd Hammerstad* represented the buyer. However, the recitations of law within those decisions are stated generically and universally. Whenever the procuring cause rule is stated, it is stated flatly and without exception. The standard is what it is. Regardless of whether the claimant is a listing broker or a selling broker, there still must be a substantial connection (*i.e.*, something rising above “less than minimal”) for the broker to be entitled to a commission under the procuring cause doctrine. That is the law.

If REALTORS® is advocating for a change in the existing law, it should overtly say so. Moreover, such a request might be better addressed to the Legislature. As the case law currently exists, including the *Roger Crane* and *Lloyd Hammerstand* decisions, all brokers must prove a substantial connection to the subject sale in order to establish procuring cause. Here, Prudential cannot do so. The fact that Prudential was a listing broker doesn't change that conclusion.

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A.2. If the Lower Decision is Reversed, this Case Should be Remanded for Trial. Prudential is *Not* Entitled to Judgment as a Matter of Law.

Without conceding any weakness, the Respondents submit that if this Court is inclined to reverse the trial court's entry of summary judgment in Respondents' favor, then this matter should be remanded for trial. However, the Respondents respectfully submit that this Court should not direct that summary judgment must be entered in Prudential's favor, as the Appellant requests and as REALTORS® would likely also desire. *See Appellant's Reply Brief*, p.17 (last ¶); *Amicus Brief*.

As written by Division Three in *Roger Crane*, "The determination of whether a broker was the procuring cause of a sale is generally a question of fact." *Roger Crane*, 74 Wn. App. at 776 (citing, among others, *Zelensky v. Viking Equipment Co.*, 70 Wn.2d 78, 91, 422 P.2d 293 (1966)). In the instant case, Respondents persist in their position that Prudential's supposed connection to the subject sale "is razor thin and insignificant", and thus too weak to suffice as procuring cause. *See supra*, p.4. Even if this Court disagrees and finds that a conceivably-sufficient connection might exist, the Respondents respectfully submit that the question should be submitted to a jury for determination. However, the third option (*i.e.*, a judicial determination that the connection is sufficient as a matter of law) would, in Respondents' view, be improper.

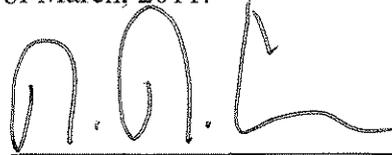
Neither Prudential nor REALTORS® can point to a single precedent wherein similar facts warranted summary judgment in the broker's favor. Thus, entry of judgment in Prudential's favor would significantly change the law, which is what REALTORS® claims it doesn't want to occur. *See e.g., Amicus Brief*, p.5; pp.17-18.

B. CONCLUSION

The trial court's decision should be affirmed. Prudential's supposed connection to the subject sale was "less than minimal". As such, Prudential was not the procuring cause of the subject sale and its claim was properly dismissed. REALTORS® advocates for a weaker standard when the claimant is a listing broker rather than a selling broker. However, current case law is clear that all brokers must have a substantial connection to the subject sale in order to establish procuring cause. The facts of the instant case do not warrant any change in the law.

As a fallback position, Respondents submit that if the trial court's decision is reversed, then this matter should be remanded for trial. Procuring cause is a factual determination. There is no published precedent in Washington wherein this attenuated of a connection was deemed sufficient as a matter of law. Thus, at worst, Respondents should be permitted a jury trial.

DATED this 2nd day of March, 2011.

A handwritten signature in black ink, appearing to read 'D. R. CASE', with a stylized flourish at the end.

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 as follows: On this day, in Yakima, Washington, I sent a copy of this document via overnight U.S. mail, with postage prepaid, to each of the following:

Court of Appeals, Division III (original and one copy)
Clerk's Office
500 North Cedar Street
Spokane, WA 99201-1905
Fax: (509) 456-4288

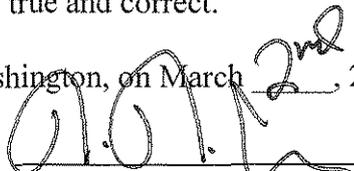
Brian C. Balch
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and, further, that I also hand-delivered a copy of this document to the following:

Joe Falk
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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 March 2nd, 2011.



D. R. (ROB) CASE (WSBA #34313)