

FILED  
NOVEMBER 3, 2014  
Court of Appeals  
Division III  
State of Washington

NO. 323757

---

**COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON**

---

WASHINGTON PROFESSIONAL REAL ESTATE LLC, d/b/a

Prudential Almon Realty,

Respondent

v.

DR. KIPP YOUNG and CARMEN YOUNG, husband and wife,

Appellant.

---

**RESPONSE TO APPELLANTS' BRIEF**

---

Amy L. Remy  
WSBA NO. 37525  
Finney, Falk & Remy, PLLP  
117 N. 3<sup>rd</sup> Street, Suite 201  
Yakima, WA 98907  
(509) 453-5604  
[Amy@FFNRLaw.com](mailto:Amy@FFNRLaw.com)

Attorneys for Respondent

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. PROCEDURAL HISTORY .....1

III. FACTS.....2

IV. LAW AND ARGUMENT.....3

    A. Prudential’s efforts were the procuring cause of the sale,  
    and Prudential accomplished what it undertook to do:  
    procure a buyer on terms acceptable to the Youngs. ....4

    B. Prudential is entitled to a commission under the terms of  
    the listing agreement. ....6

        1. The terms of the “tail” provision are unambiguous  
        and applicable. ....6

        2. *When* the Eastmans learned of the defendants’ listing  
        is irrelevant because the “tail” provision of the  
        Agreement is applicable. ....8

    C. The sale price of \$833,000 is supported by sound  
    reasoning. ....10

V. CONCLUSION .....11

**TABLE OF AUTHORITIES**

**Cases**

Roger Crane & Associates v. Felice, 74 Wn.App. 769, 776, 875 P.2d 705 (1994)..... 5, 6

Lee v. Lozier, 88 Wn.App. 176, 181, 945 P.2d 214 (1997)..... 3

Lloyd Hammerstad, Inc. v. Saunders, 6 Wn.App. 633, 636 (1972) ..... 7

Professionals 100 v. Prestige, 80 Wn.App. 833, 911 P.2d 1358 (1996)..... 6

Washington Professional Real Estate LLC, d/b/a Prudential Almon Realty v. Dr. Kipp and Carmen Young, 63 Wn.App. 800 (2011). ..... 1

## I. INTRODUCTION

This is a real estate commission dispute. Appellants (“Youngs”) were owners of certain residential real estate located in Yakima County and contracted to list their home for sale with Respondent (“Prudential”) who is a licensed real estate brokerage company.

As a result of Prudential’s actions as the contracted listing agent, the Youngs’ house sold to the Eastmans; however, the Youngs refused to pay Prudential any commission. Prudential was forced into litigation to collect the commission owed pursuant to the Listing Agreement entered into between the Youngs and Prudential.

## II. PROCEDURAL HISTORY

Prudential filed a complaint against the Youngs for breach of contract in Yakima County Superior Court on August 18, 2009, under cause number 09-2-03042-1.

On June 9, 2010, the lower court entertained competing motions for summary judgment and granted the Youngs’ motion which would have dismissed Prudential’s case in its entirety.

Prudential appealed the decision to this Court. On September 15, 2011, this Court reversed the lower court’s decision by published opinion. Washington Professional Real Estate LLC, d/b/a Prudential Almon Realty v. Dr. Kipp and Carmen Young, 63 Wn.App. 800 (2011).

The Youngs' petition for review to the Supreme Court was denied on February 8, 2012, as noted at 173 Wn.2d 1017 (2012).

On July 18, 2012, Prudential moved for summary judgment and the court denied the motion as a matter of law.

On July 17, 2013, the Youngs moved for summary judgment and the court denied the motion as a matter of law.

Finally, the matter came before the court for a bench trial on November 11-14, 2013. The court awarded Prudential commission, attorneys' fees, and costs pursuant to the Listing Agreement. This Court should uphold the decision of the trial court and affirm the court's order.

### **III. FACTS**

The facts of this case are largely undisputed. The Youngs contracted with Prudential to list their home for sale located at 610 Noble Hill Drive, in Yakima, Washington. The Youngs and Prudential entered into a Listing Agreement which provided for 6% commission, and the award of attorneys' fees and costs incurred in any resulting legal dispute.

The Eastmans purchased the Youngs' home due to Prudential's efforts to sell the house shortly after the contract term expired, but during the "tail" period. Upon closing or shortly thereafter, the Youngs then refused to pay Prudential its commission.

For additional detail, this Court is familiar with the facts as

summarized on pages 802 to 808 of its decision, and the facts at trial remain consistent with this Court's opinion. Washington Professional Real Estate LLC, d/b/a Prudential Almon Realty v. Dr. Kipp and Carmen Young, 63 Wn.App. 800 (2011). Indeed, the lower court in its memorandum points out that most of the critical facts in this matter are not in dispute, and the facts relied upon by the Court of Appeals are borne out by the testimony at trial. CP 461, p.1, paragraph 1.

#### IV. LAW AND ARGUMENT

This Court should uphold factual findings supported by the record and must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. Lee v. Lozier, 88 Wn.App. 176, 181, 945 P.2d 214 (1997). As both sides appear to concede, and the trial court so found, there is little discrepancy in material facts, and the facts are consistent with this Court's published opinion. It follows then that the trial court's findings and legal conclusions based upon these facts are equally as sound. Although this Court has the discretion to review legal conclusions *de novo*, there exists substantial evidence to support the trial court's findings and the resulting legal conclusions.

The Youngs specifically assign error to four findings of fact and six conclusions of law. Then the Youngs generally assign error to the trial

court's letter of opinion and all findings of fact and conclusions of law derived there from. From this catch-all argument, it is clear that the Youngs wish to assign error to all findings of fact and all conclusions of law since the basis of all of the findings of fact and conclusions of law flow from the court's letter of opinion. Thus, in the interest economy and efficiency, Prudential's argument addresses the lower court's findings, conclusions and order in its entirety.

The Youngs' arguments before this Court at this time are not novel. These same arguments have been contemplated by this Court and ruled upon in the prior appeal, contemplated by the trial court and denied, and now the Youngs merely repackage the same arguments yet again in this present appeal.

**A. Prudential's efforts were the procuring cause of the sale, and Prudential accomplished what it undertook to do: procure a buyer on terms acceptable to the Youngs.**

Even though the Youngs may argue that the procuring case doctrine is not at issue, their arguments directly attack the manner in which the Eastmans learned of the Youngs home, and so the doctrine must be addressed here.

Prudential was the listing broker. As the listing broker, Prudential's task was to market the property. Megan Irwin was Prudential's listing agent on the Youngs' property. She provided detailed

testimony at trial regarding her marketing efforts. RP 350. The Youngs did not dispute her efforts at trial. The court found that Ms. Irwin “aggressively executed her responsibilities pursuant to the listing agreement.” CP 527, paragraph 1.15. The court found that Ms. Irwin caused a “For Sale” sign to be placed in the yard of the 610 Noble Hill home and composed a flier containing the details of the property for sale and had many copies of the flier available in a box attached to the “For Sale” sign. CP 527, paragraph 1.16. These efforts resulted in five offers from three potential purchasers, one of which was actually accepted by the Youngs. The court concluded that “the information acquired by the Eastmans [purchasers] was acquired by them through the direct result of the marketing done by Prudential.” CP at 527, paragraph 2.8.

The Youngs argue that all these efforts are irrelevant. But see Roger Crane & Associates v. Felice, 74 Wn.App. 769, 776, 875 P.2d 705 (1994) (Noting that Mr. Brooks’ efforts were minimal, thus implying that the Realtor’s efforts were a factor in that decision.)

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 & Associates v. Felice, 74 Wn.App. 769, 776, 875 P.2d 705 (1994).

Prudential's efforts and expenses, which took place over many months, were much greater than the efforts of the Realtors in both Lloyd Hammerstand and Roger Crane, which extended over a day or two. In this respect, the efforts of Prudential were similar to the efforts of Mr. Erwin in Professionals 100 v. Prestige, 80 Wn.App. 833, 911 P.2d 1358 (1996).

There is no dispute of fact that:

- 1) Prudential's sign made Dr. Place aware that the Youngs's home was for sale, and
- 2) Dr. Place then directed his sister to the property which then led to the sale of the home.

This clear and unbroken chain of events is distinguished from the events as they occurred in both Lloyd Hammerstad and Roger Crane. In both of these cases, there was no causal connection between the listing agents' actions and the eventual sales of the properties. Here, there clearly is a causal connection between Ms. Irwin's efforts and the sale of the home to the Eastmans, and the lower court correctly concluded as much on this point.

**B. Prudential is entitled to a commission under the terms of the listing agreement.**

1. **The terms of the "tail" provision are unambiguous and applicable.**

In the Listing Agreement, the “tail” provision provides that Prudential is entitled to its commission if the property is sold “within 365 days after the expiration of the Agreement to any person...to whose attention the Property was brought through the signs, advertising, or any other action or effort of a Broker...or on the information secured directly or indirectly from or through a Broker during the term of the Agreement.” In this context, the word “through” means “because of.” Washington Professional Real Estate LLC, d/b/a Prudential Almon Realty v. Dr. Kipp and Carmen Young, 63 Wn.App. 800 (2011).

It is implicit in the purpose of a tail provision that there be “some minimal causal relationship” between the activities of the broker during the listing period and the ultimate sale of the property. (at page 813, citing Lloyd Hammerstad, Inc. v. Saunders, 6 Wn.App. 633, 636 (1972)).

In its opinion, the Court of Appeals decided for the first time what the required “minimal causal relationship” requirement of the Lloyd Hammerstad case means in the context of a “tail” provision in a listing agreement, including the “tail” provision at issue in this case. It held that the requirement is satisfied when the listed property is sold, directly or indirectly, “to any person...to whose attention the Property was brought through the signs, advertising, or any other action or effort of [Prudential]...” quoting from Prudential’s “tail” provision. Washington

Professional Real Estate LLC, d/b/a Prudential Almon Realty v. Dr. Kipp and Carmen Young, 63 Wn.App. 800 (2011).

By its holding, the Court of Appeals made clear that if the purchaser's attention to the property is brought about, directly or indirectly, by the broker's actions during the term of the listing agreement in marketing the property, it can more than satisfy the "minimal causal relationship" requirement, even when the purchaser learns of the property after the term of the listing agreement has expired by reason of a third person looking at the property on the purchaser's behalf who then told the purchaser about the property after viewing the broker's signs or advertising.

**2. *When the Eastmans learned of the defendants' listing is irrelevant because the "tail" provision of the Agreement is applicable.***

The Youngs argue that, for Prudential to be entitled to its commission, the Eastmans must have learned of the Youngs' property during the term of the Listing Agreement. However, their argument is inconsistent with the Court of Appeal's finding that the Lloyd Hammerstad "minimal causal relationship" requirement was met by Dr. Place having seen Prudential's sign and brochure in the Youngs' front yard, having encouraged Dr. Pat Eastman's interest in the property by reason thereof, Dr. Eastman having asked her agents about the property,

the reason she drove by to see it, the reason she stopped at the Rockwell home to get a closer look, and the reason she and Dr. Place pursued information on whether it was still for sale. All but the first of these events occurred after the listing agreement had expired.

Were it the view of the Court of Appeals that all of the above events must have occurred during the term of the listing agreement, then it necessarily would have had to uphold the summary judgment in favor of the Youngs and the case would have been dismissed long ago. However, it was not, and the trial court agreed with this Court by correctly determining that *when* the Eastmans learned that the Youngs' home was on the market is irrelevant and/or contemplated by the "tail" provision.

Moreover, the plain language of the "tail" provision rebuts any notion that all of such events must have occurred during the term of the listing agreement. The language "or on information secured directly or indirectly from or through [Prudential] during the term of this Agreement" does not mean that it must be secured by the purchaser as opposed to a third party.

Furthermore, this Court did not find the language of the Agreement to be ambiguous in the previous appeal, and should not do so now. For the sake of judicial consistency, this Court should now find that the "tail"

provision applies even if the information is secured by a third party and then conveyed to the purchaser.

**C. The sale price of \$833,000 is supported by sound reasoning.**

The lower court found that although certain language in the “tail” provision presented some ambiguity, Prudential’s interpretation of the language was more reasonable than the Youngs. CP 537, p. 12, paragraph 2.12. Hence, the “tail” provision applied and Prudential was owed its commission pursuant to the contract.

However, the lower court ruled that the commission be based not on the price paid by the Eastmans of \$925,000, but rather on the amount negotiated and agreed upon between the Youngs and the Richards in the amount of \$833,000, before the sale of the house to the Richards fell through.

The trial court’s reasoning on the sale price of \$833,000 remains sound. The court found that the Eastmans paid \$925,000 for the house and 8.5 acres of land, but that the listing agreement only contemplated the house and 2.15 acres of land. Since the listing agreement did not apply to all the acreage, the court concluded that the commission under the agreement could not be based on the sale of the additional acreage.

Instead, the court looked to the sale price agreed upon between the Youngs and the Richards before the sale fell through because that

negotiation contemplated the house and just the 2.15 acres as per the Listing Agreement. Based on this sale price of \$833,000 and a 6% commission, the court found that the commission owing is \$49,980.

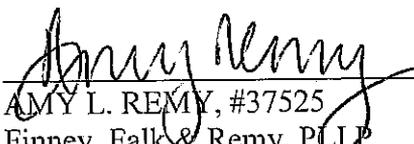
**D. The court correctly awarded attorneys' fees and costs pursuant to the Listing Agreement.**

The Listing Agreement authorizes the award of attorneys' fees and costs to the prevailing party. Prudential is clearly the prevailing party because the court awarded what Prudential sought pursuant to its complaint which was the commission owed pursuant to the Listing Agreement because Prudential procured the sale of the Youngs' house.

**V. CONCLUSION**

This Court should affirm the trial court's ruling to award Prudential commission, attorneys' fees and costs.

RESPECTFULLY SUBMITTED this 3<sup>rd</sup> day of November 2014.

  
\_\_\_\_\_  
AMY L. REMY, #37525  
Finney, Falk & Remy, PLLP  
117 N. 3<sup>rd</sup> Street, Suite 201  
Yakima, WA 98907  
(509) 453-5604  
[Amy@FFNRLaw.com](mailto:Amy@FFNRLaw.com)

Attorneys for Respondent

**CERTIFIED STATEMENT OF TRANSMITTAL**

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington, that the following statement is true and correct:

I am a citizen of the United States, over the age of 18 years, and not a party to or interested in the above-entitled action.

On Nov 3, 2014, I served or caused to be served in the manner indicated below, a copy of the foregoing document upon all interested parties, at the following addresses:

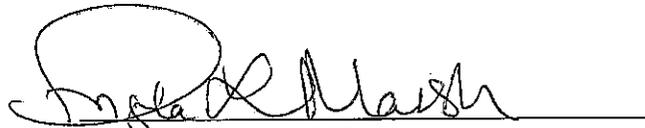
Larson Berg & Perkins PLLC  
D.R. (Rob) Case  
105 N 3<sup>rd</sup> St  
Yakima, WA 98901

Via Hand Delivery

The Court of Appeals, Division III  
Of the State of Washington  
500 N Cedar St  
Spokane, WA 99201

Via e-filing

DATED this 3 day of November 2014, at Yakima,  
Washington.



ANGELA L. MARSH  
Finney, Falk & Remy, PLLP  
Legal Assistant to Amy L. Remy, #37525