Supreme Court No. 97904-9

Court of Appeals No. 78716-1-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

HOWARD and BEATRICE SEELIG,

Appellants,
v.

308 FOURTH AVENUE SOUTH JOINT VENTURE et al.

Respondents,

PETITION FOR DISCRETIONARY REVIEW OF APPELLANTS HOWARD AND BEATRICE SEELIG

Submitted By:
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

RULES

OTHER AUTHORITIES

I. IDENTITY OF MOVING PARTY

Petitioners are Howard and Beatrice Seelig.

II. STATEMENT OF RELIEF SOUGHT

Petitioners request that the Washington Supreme Court accept discretionary review of the unpublished decision in this case by the Court of Appeals, Division One (hereinafter the "Court of Appeals"). Slip Opin. No. 78716-1-I (Oct. 28, 2019), attached hereto as Appendix A.

III. SUMMARY OF ARGUMENT

Petitioner Howard Seelig ("Seelig") was a partner in a joint venture (the "Joint Venture") that owned and operated an apartment building in Seattle. Seelig performed a multitude of valuable services for the partnership with respect to the property, and later became an employee of the Joint Venture when he assigned his partnership interest to his children. In 2012, Seelig reacquired his interest.

Throughout his tenure, Seelig served the Joint Venture. As an accommodation, Seelig agreed to defer part of his compensation. Nonetheless, Seelig was assured he would be fully compensated for his efforts and at one point was promised that the deferred compensation would be paid out upon the sale of the property that would make funds available to the Joint Venture for such purpose. The Joint Venture then repudiated its promise to pay Seelig.

When Seelig sued, the Joint Venture argued that Seelig could not recover because he lacked a broker's license as required by RCW Ch. 18.85 *et seq*. After the trial court granted summary judgment in the Joint Venture's favor, Seelig appealed and the Court of Appeals affirmed in part but remanded Seelig's claims with respect to payment(s) due.

On remand, Seelig sought limited discovery (6 interrogatories and 2 requests for production) per the case schedule, but the Joint Venture refused to answer and did not seek a protective order. The Joint Venture stated that discovery was a "waste of time and money" and thereafter filed a second motion to dismiss. In the response brief, Seelig sought a motion to compel discovery to further document his claims for compensation.

The trial court granted summary judgment to the Joint Venture and allowed it to escape Seelig's discovery requests in their entirety. Seelig again appealed, but the Court of Appeals affirmed the decision below, concluding that Seelig was a real estate broker engaged in brokerage activities, and could not receive compensation without a broker's license.

Seelig now respectfully asks this Court to accept review as there is a substantial public interest in workers and/or partnership members and/or employees obtaining agreed-upon compensation for valuable services rendered, which was denied without explanation and without any opportunity to obtain discovery.

IV. STATEMENT OF THE CASE

1. Factual Summary.

In 1970, Seelig founded a business to purchase, rehabilitate, and operate the Downtowner Apartments at 308 Fourth Ave. in Seattle (the "Downtowner" or the "property"), which provided housing for thousands of low income and elderly tenants until it was sold 40 years later. CP 91.[1]

Seelig negotiated with Joint Venture partner/attorney Henry Goldschmidt ("Goldschmidt") to receive compensation for services and expenses regardless of amounts allowed by the Federal Housing Administration ("FHA"), which limited fees to 6% of gross revenue. *Id.*[2]

Seelig's role encompassed a multitude of activities, such as raising equity capital, acting as the engineer and general contractor to renovate the Downtowner, overseeing an annual audit, preparing tax returns, handling insurance claims, and negotiating various agreements with the City of Seattle. CP 93. Seelig did *not* market or sell the property. CP 94.

In 2005, Seelig transferred his interest in the Joint Venture. CP 93.

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[1] Besides Seelig, the other Joint Venture partners were Milton and Martin Seelig, Ralph and Ruth Abrams, Henry Goldschmidt, Beatrice Goldschmidt, and Alfred Slaner. *Id.*

[2] To that end, the original Joint Venture agreement stated in relevant part:

> The managers acknowledge that F.H.A. regulations provide for a cumulative cash flow return of (6%) percent on the investment. The managers agree that said cumulative cash flow return shall be paid to the Joint Venturers prior to payment of management fees, provided that, subject thereto, the *obligation to pay management fees shall also be cumulative.* It is agreed that (1) *the managers are not obligated to provide management without compensation for personal effort....*

CP 284-285 (emphasis added).

To induce Seelig into continuing his work for the Downtowner, the Joint Venture—through Goldschmidt—promised to pay Seelig a bonus and his deferred compensation out of the proceeds of the sale for his tireless work on behalf of the Joint Venture. *Id.*; *see also* CP 309-310.

On February 17, 2011, the Joint Venture's counsel wrote explaining the need for a compensation agreement. CP 90. On February 23, 2011, Goldschmidt provided Seelig with a draft; Seelig commented and returned it. *Id.* On March 2, 2011, the Joint Venture's counsel represented a compensation arrangement was done. CP 90, 112.[3]

Seelig continued to manage the Downtowner as an *employee* of the Joint Venture until September 26, 2011, when Goldschmidt removed Seelig and appointed himself manager ahead of the property's sale. CP 93-94; *see also* CP 115. The Downtowner was then sold in 2012. CP 57.[4] Despite millions of dollars in net proceeds, Seelig was not paid his bonus and/or deferred compensation from the proceeds as promised for the valuable services he rendered for decades.

2. Procedural Summary.

On April 29, 2014, Seelig sued the Joint Venture. CP 4-7. On February 27, 2015, the trial court granted the Joint Venture's first motion

[3] The Joint Venture refused to honor Seelig's discovery requests and failed to tender a copy of the final agreement signed by all partners confirming acceptance. CP 123-125.
[4] The agreed purchase price was $14.3 million. CP 216.

for summary judgment. CP 40-41. Seelig appealed.

On December 18, 2017, the Court of Appeals affirmed summary judgment as to whether Seelig was terminated in bad faith and entitled to a bonus from the Downtowner's sale. CP 201, 203. On Seelig's claim for compensation, the Court of Appeals vacated the summary judgment order and remanded for further proceedings. CP 204.[5] After the appellate mandate in March 2018, the trial court issued a new case schedule which included a discovery cutoff deadline of November 26, 2018 and a trial date of January 14, 2019. CP 26-27, 74.

On May 10, 2018, Seelig served discovery requests on the Joint Venture consisting of only 6 simple interrogatories and 2 requests for production of documents. CP 123-126. On May 22, 2018, the Joint Venture filed a new summary judgment motion. CP 8-24. On June 11, 2018, Seelig moved for a continuance and order compelling the Joint Venture to respond to discovery. CP 74-76. On June 13, 2018, days after the deadline for its responses had passed, the Joint Venture objected to Seelig's requests, calling them a "waste of time and money." CP 123.

On June 20, 2018, the trial court granted summary judgment to the Joint Venture *even though discovery was incomplete* and the deadline to

[5] The Court of Appeals observed that the Joint Venture misquoted a statute central to its position, and remand would establish a better record. *Id.*

complete discovery was months away. CP 190-192. Seelig appealed and on October 28, 2019, the Court of Appeals affirmed the ruling below. CP 28-38; Appx. A.[6] Seelig now petitions this Court to accept review, reverse the Court of Appeals, and remand for further proceedings.

V. ISSUES PRESENTED FOR REVIEW

1. The Court of Appeals erred when it held that Seelig is statutorily barred from receiving compensation from the Joint Venture for his valuable services to the Downtowner.

2. The Court of Appeals also erred when it held that Seelig's activities were not exempt from the broker's license requirement.

3. The Court of Appeals also erred when it held that Seelig was not entitled to a CR 56(f) continuance to conduct limited discovery that would demonstrate a genuine issue of material fact in the action.

VI. GROUNDS FOR RELIEF AND ARGUMENT

A. Standard for Review.

Discretionary review of an appellate decision can be granted if "the petition involves an issue of substantial public interest that should be determined by the Supreme Court." R.A.P. 13.4(b)(4).[7]

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[6] The Court of Appeals found that RCW 18.85.331 prohibited Seelig from collecting compensation from the Joint Venture because he did not possess a broker's license, that Seelig was not exempt from the same, and discovery seeking production of a services agreement would be "fruitless." CP 34-36.

[7] Review can also be appropriate to interpret the import of a statute. *See Hartley v. State*, 103 Wn.2d 768, 773-74, 698 P.2d 77 (1985).

Here, review should be accepted because there is a substantial public interest in this Court providing definitive clarity on whether the Real Estate Brokers and Managing Brokers Act governs promised compensation for valuable services rendered by a member or employee of a partnership. Thus, the issues presented in this case fall squarely within the criteria for the acceptance of review under R.A.P. 13.4(b)(4).

B. Summary Judgment is Subject to *de novo* Review.

A summary judgment order is reviewed *de novo*, *i.e.*, by engaging "in the same inquiry as the trial court." *Beaupre v. Pierce Cty.*, 161 Wn.2d 568, 571, 166 P.3d 712 (2007). Summary judgment is only proper if there is no genuine issue of material fact. CR 56(c); *see also Hansen v. Friend*, 118 Wn.2d 476, 824 P.2d 483 (1992) (reasonable persons must reach but one legal conclusion based on the evidence). Evidence is viewed in a light most favorable to the non-moving party, *i.e.*, Seelig. *Id.* Here, the trial court erred as there are unresolved factual questions necessitating remand and a trial on the merits.

C. Compensation for Seelig's Services Does Not Require Him to Possess a Real Estate Broker's License.

1. Seelig Was Not a Real Estate Broker.

The Court of Appeals accepted the Joint Venture's argument that Seelig was performing real estate brokerage services and therefore not entitled to collect compensation without a broker's license. Appx. A at 5.

The licensing statute provides a prerequisite to a "suit for commission":

> *[i]t is unlawful for any person to act as a real estate broker,* managing broker, or real estate firm *without first obtaining a license therefor*, and otherwise complying with the provisions of this chapter.
>
> *No suit or action shall be brought for the collection of compensation as a real estate broker*, real estate firm, managing broker, or designated broker, *without alleging and proving that the plaintiff was a duly licensed real estate broker*, managing broker, or real estate firm before the time of offering to perform any real estate transaction or procuring any promise or contract for the payment of compensation for any contemplated real estate transaction.

RCW 18.85.331 (emphasis added).[8] This statute is intended to protect the *public*, not individual property owners or joint ventures that refuse to honor a *private* compensation agreement. RCW 18.235.005.[9]

A "broker" means "a natural person acting *on behalf of a real estate firm* to perform real estate brokerage services under the supervision of a designated broker or managing broker." RCW 18.85.011(2) (emphasis added). A "real estate firm" is "a... legally recognized business entity conducting real estate brokerage services in this state and licensed by the department as a real estate firm." RCW 18.85.011(18).[10]

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[8] The licensing requirement is an affirmative defense for which the Joint Venture had the burden of proof. *See, e.g., Hatupin v. Smith*, 21 Wn.2d 132, 135, 150 P.2d 675 (1944) ("By way of affirmative defenses Smith plead the statute of limitations, and alleged that Hatupin was acting as a real estate broker... and that he had no license to act as such.").

[9] *See also Nuttall v. Dowell*, 31 Wn. App. 98, 639 P.2d 832 (1982) (licensing protects "the general public from negligent, unscrupulous, or dishonest real estate operators.").

[10] Moreover, "[s]ince a broker is an agent for another person, a person who acquires or transfers an interest in land for his own account is not acting as a broker. Therefore, a person who is a partner of a partnership is not so acting if he deals in real estate on behalf of the partnership." 18 Wash. Prac., Real Estate § 15.2 (2d ed.).

Thus, in accordance with RCW 18.85.011, Seelig would be unable to collect the Joint Venture's promised compensation—even if arguably considered a "commission"—if he was a real estate "broker" acting on behalf of a "real estate firm" licensed by the Department of Licensing.

However, there is no evidence in the record that the Joint Venture has ever been licensed as a "real estate firm" for purposes of RCW Ch. 18.85 *et seq*. Also, Seelig's actions were in furtherance of the partnership, and not as someone else's agent.

Seelig plainly could not be a "broker" in his capacity as either a partner or employee of the Joint Venture, and so the types of services he provided are irrelevant as the licensing law simply does not apply to him. The Court of Appeals cited RCW 18.85.331 based on an assumption that Seelig was necessarily a broker. Appx. A at 2. He was not. For this reason alone, this Court should accept review and grant reversal.

2. Seelig Did Not Engage in Brokerage Services.

But even if Seelig was somehow considered to be a "real estate broker" seeking a "commission" subject to the licensing law, his *conduct* fell outside its scope. The enumerated "real estate brokerage services" that constitute acting as a broker include, but are not limited to:

> (h) Performing property management services, which includes with no limitation: Marketing; leasing; renting; the physical, administrative, or financial maintenance of real property; or the supervision of such actions.

RCW 18.85.011(17).[11]

"[W]hether a person acted as a real estate broker through a particular course of conduct is a mixed question of law and fact, in that it requires applying legal precepts (the definition of "real estate broker") to factual circumstances (the details of the person's conduct)." *Erwin v. Cotter Health Centers*, 161 Wn.2d 676, 687, 167 P.3d 1112 (2007).

Case law is illustrative as to the conduct of "brokers" who need a license.[12] In *Erwin*, the parties' agreement established that the claimant would sell or lease certain facilities, and this constituted "brokerage services." *Id.* at 688. In *Main v. Taggares*, the claimant "procured a buyer and negotiated the sale of plaintiff's real estate" for compensation. 8 Wn. App. 6, 504 P.2d 309 (1972). This was also deemed to be acting as a real estate broker. *Id.* at 9; *see also Schmitt v. Coad*, 24 Wn. App. 661, 662, 604 P.2d 507 (1979) (commission for stock sale disallowed when

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[11] Other items include: "(a) Listing, selling, purchasing, exchanging, optioning, leasing, renting of real estate, or any real property interest therein; (b) Negotiating or offering to negotiate, either directly or indirectly, the purchase, sale, exchange, lease, or rental of real estate, or any real property interest therein; [...] (e) Advising, counseling, or consulting buyers, sellers, landlords, or tenants in connection with a real estate transaction; [...] (g) Collecting, holding, or disbursing funds in connection with the negotiating, listing, selling, purchasing, exchanging, optioning, leasing, or renting of real estate...." *Id.*

[12] The definition of "real estate brokerage services" was adopted in 2010 when RCW 18.85.011 was enacted. The only Washington cases to directly mention "real estate brokerage services" under RCW 18.85.011 are *Beauregard v. Riley*, 9 Wn.App.2d 248, 443 P.3d 827 (2019), which clearly involved a real estate agent selling residential real property, and *WGW USA, Inc. v. Legacy Bellevue 530, LLC*, 192 Wn. App. 1002 (2015) (unpublished), in which a party "was performing 'real estate brokerage services,' because he was negotiating a lease of real property." *This Court has not yet had an occasion to address the current version of this statute as written.*

unlicensed claimant acted to procure a buyer); *but see Marble v. Clein*, 55 Wn.2d 315, 320, 347 P.2d 830 (1959) (licensing act "*specifically applies to those engaged in isolated transactions*.") (Emphasis added).

While no case interprets the present definition of "performing property management services," it cannot be that Seelig's oversight, handling of insurance claims, and work on government agreements is the type of "maintenance" contemplated in the statute. CP 93.[13] Upon accepting review, this Court should clarify what activities are covered.

Moreover, Seelig was not acting as a broker transacting a property sale. To the contrary, Seelig's valuable services as either a partnership member or employee had ceased when the Downtowner was sold; he was entitled to compensation from the sale because that event made funds available, *not* because Seelig personally marketed and sold the building.

The evidence shows that Seelig was not conducting the types of activities falling within the scope of "brokerage services," and he would therefore not require a broker's license to obtain promised compensation.

3. Seelig's Activities Were Covered by an Employee Exemption to the Broker Licensing Requirement.

But even if Seelig was a "real estate broker" as defined by RCW

[13] "Maintenance" is typically defined as "the labor of keeping something (as buildings or equipment) in a state of repair or efficiency." *Truck Ins. Exch. v. Aetna Casualty & Sur. Co.*, 13 Wn. App. 775, 778, 538 P.2d 529 (1975) (analyzing "maintenance" of a vehicle).

18.85.011(2) *and* he engaged in "real estate brokerage services" to seek a commission, he would still be able to receive promised compensation because there is an *"employee" exemption* to the broker licensing law.

The "employee" exemption exists for "[a]ny person who purchases or disposes of property and/or a business opportunity for that individual's own account, or that of a group of which the person is a member, and their employees." RCW 18.85.151(1).

In construing a similar exemption, the Wyoming Supreme Court held that an employee hired to market real property could sue for compensation. *Battlefield, Inc. v. Neely*, 656 P.2d 1154 (Wyo. 1983).[14]

The Oregon Supreme Court also applied an "employee" exemption to benefit a party who performed numerous services for his employer:

> [c]onsidering the evidence as a whole, we think that the parties regarded plaintiff's employment... as just one more activity along with plaintiff's other activities as an employee.

Brown v. Haverfield, 276 Or. 911, 918, 557 P.2d 233 (Or. 1976).

The Sixth Circuit reached the same conclusion under Kentucky

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[14] The Court called out the business that was seeking to avoid payment:

> [w]e see the appellant coming to this court asking it to reach some blatantly inequitable decisions in order to help the corporation avoid its honest obligations.... [*N*]o *member of the public has been adversely affected by anything that Ms. Neely did. The only one complaining is the corporation who hired her knowing she was not a licensed real estate agent, and now, after she has performed for her employer, it seeks to play little statutory interpretation games in an effort to avoid paying her the commissions it promised and the commissions she has earned.*

Id. at 1156-58 (emphasis added).

law, holding that a business could not avoid paying an agreed commission to an employee merely because that individual was not licensed:

> *Appellant did not bring his action as a real estate broker to collect compensation for the sale of real estate. He sued for the breach of his written contract of employment with the corporation. To recover he was not required to allege and prove that he was a duly licensed real estate broker.* [...]
>
> [T]his is not a case where a real estate dealer is bringing suit against an individual to whom or for whom he sold real estate. Appellant, in this case, was employed... on behalf of a corporation which had entered into a written contract with him.... *It is this corporation that seeks to escape liability to the appellant on the ground that he cannot bring an action because he is not a licensed real estate broker.*

Edmonds v. Fehler & Feinauer Const. Co., 252 F.2d 639, 642 (6th Cir. 1958) (emphasis added).

In this case, the Court of Appeals directed its attention to whether Seelig was exempt from the licensing law because of his employment status, noting that "Respondents [Joint Venture] failed to raise this issue in their briefing and instead argued that Seelig was never an employee." Appx. A at n. 10. The Court concluded that the exemption only applies to *existing* employees of those who buy or sell real property, finding " it does not provide a continuing exemption for a person who may have been an employee when a compensation agreement was made but stops being an employee before any sale occurs...." Appx. A at 2, 3 ("Seelig's employment status... [at the time of sale] is the relevant question....").

But contrary to the Court's analysis, there is no timing trigger built

into RCW 18.85.151(1) for the point at which one's employment becomes relevant to the exemption. The statute describes only management activities in the present tense, *i.e.* occurring during an employment tenure—*whenever that may have been.*[15]

Here, Joint Venturer and New York attorney Goldschmidt has admitted that Seelig was "an employee [of the Joint Venture] until 2010 at which time his employment ceased. CP 115. Thus, even if Seelig was a "broker" conducting "brokerage services," the question of Seelig's status as employee subject to a statutory exemption—whether employed at certain times per Goldschmidt's statement or not at all per the Joint Venture's contrary argument—is a genuine issue of material fact suggesting the acceptance of review and propriety of remand.[16]

4. Seelig's Activities Also Fell Within a "Property Management" Exemption to Broker Licensing.

There is yet another statutory exemption for "[a]ny person employed or retained by, for, or on behalf of the owner or on behalf of a

[15] The phrase "employed by" is written in the present perfect tense. *See, e.g., Demorest v. Genesee Cty. Emp. Ret. Comm'n*, 342 Mich. 403, 408, 70 N.W.2d 714 (Mich. 1955) (analyzing phrase "have been so employed"); *Indep. Transp. Co. v. Canton Ins. Office*, 173 F. 564, 565 (W.D. Wash. 1909) ("The word 'employed' is a verb of the past or present tense, and cannot be accurately used potentially to indicate future action, unless qualified by additional words…."). This tense "is used to express action (or to help make a statement about something) occurring *at no definite time in the past*." *Textron Inc. v. C.I.R.*, 336 F.3d 26, 32 (1st Cir. 2003) (emphasis added).

[16] The Joint Venture accepted Seelig was an employee when it suited their original arguments. CP 218 (Sept. 2015 summary judgment motion stating "a duty of loyalty exists between an employee and his employer.").

designated or managing broker if the person is limited in property management to any of the following activities":

> (a) Delivering a lease application, a lease, or any amendment thereof to any person;
> (b) Receiving a lease application, lease, or amendment thereof, a security deposit, rental payment, or any related payment for delivery to and made payable to the real estate firm or owner;
> (c) Showing a rental unit to any person, or executing leases or rental agreements, and the employee or retainee is acting under the direct instruction of the owner or designated or managing broker;
> (d) Providing information about a rental unit, a lease, an application for lease, or a security deposit and rental amounts to any prospective tenant; or
> (e) Assisting in the performance of property management functions by carrying out administrative, clerical, financial, or maintenance tasks.

RCW 18.85.151(13).

The Joint Venture maintained that not only was Seelig a broker who engaged in brokerage activities—neither of which is true—but any services he provided outside the property management exemption disqualified him from invoking its benefit. The Joint Venture failed to cite authority for this proposition, likely since there is none. CP 132. Despite this fact, the Court of Appeals later adopted the Joint Venture's argument without any reference to precedential reasoning. Appx. A at 3.

It does not appear there is any other Washington case analyzing this issue, supporting the need for this Court's review. There is, however, precedent suggesting a contrary conclusion to the Court of Appeals.

Kilthau v. Covelli recognized that whether an implied contract for

compensation exists between parties is a *question for the trier of fact*. 17 Wn. App. 460, 563 P.2d 1305 (1977), *review denied*, 89 Wn.2d 1010 (1977). *Kilthau* upheld a partial award to a party who rendered valuable services but struck an added commission due to a lack of licensure. *Id.*[17] *Kilthau* demonstrates that the licensing requirement is not one-size-fits-all—rather, compensation can be paid for certain services but not others.

A similar result was reached in *St. John Farms, Inc. v. D.J. Irvin Co.*, where Division Three observed that the party seeking compensation was unaware of a licensing requirement. 25 Wn. App. 802, 804, 609 P.2d 970 (1980), *review denied*, 94 Wn.2d 1002 (1980).[18]

Here, the Joint Venture argued that Seelig may have performed some activities defined *within* the RCW 18.85.151(13) exemption. But this fact does not equally compel the opposite conclusion, *i.e.*, doing *anything outside* the enumerated types of activities should result in a

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[17] *Cf. Springer v. Rosauer*, 31 Wn. App. 418, 641 P.2d 1216 (1982) (denying commission for finding stock purchasers under the former act, which lacked a similar exemption).

[18] The Court stated:

> [p]laintiffs reasonably assumed that Irvin had complied with... the prerequisites to doing business as a dealer in agricultural products.... In these circumstances, RCW 20.01's *purpose in protecting the public* from financially irresponsible dealers *would not be furthered by denying a recovery to plaintiffs*. Instead, unjust enrichment would result if Irvin is allowed to keep the delivered lentils without paying for them. Thus, *the trial court properly recognized the plaintiffs' right to a recovery*....

Id. at 808-09 (emphasis added).

categorical bar to recovery.[19] This issue should be considered on remand.

D. At a Minimum, Seelig Should Have Received a CR 56(f) Continuance Because the Joint Venture Refused to Answer Pending Discovery Requests.

When a party is unable to present essential facts justifying opposition to a summary judgment motion, the trial court "may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just." CR 56(f). A CR 56(f) continuance is the preferred course of action "if a party does not believe the facts have been sufficiently developed...." *Hoffman v. Ketchikan Pulp Co.*, 2019 WL 3937413, at *4 (2019) (unpublished).

A continuance may be denied when the requesting party "does not offer a good reason for the delay in obtaining the desired evidence," or "does not state what evidence would be established through the additional discovery," or "the desired evidence will not raise a genuine issue of material fact." *Pitzer v. Union Bank of California*, 141 Wn.2d 539, 556, 9 P.3d 805 (2000), *quoting Tellevik v. Real Property*, 120 Wn.2d 68, 90, 838 P.2d 111 (1992). A denial is reviewed for an abuse of discretion. *See, e.g., Bavand v. OneWest Bank*, 196 Wn. App. 813, 385 P.3d 233 (2016).

[19] Indeed, if Seelig was performing property management activities as set forth in the definition of "real estate brokerage services," then he would be *exempt* from licensing if he in fact performed those tasks as an *employee* of the Joint Venture. *Compare* RCW 18.85.011(17)(h) *with* RCW 18.85.151(13)(e).

In *Keck v. Collins*, Division Three found an abuse of discretion and reversible error when the trial court refused to grant a continuance, stating:

> [w]ith the trial date still three and one-half months away and the dispositive motions deadline still three months away, respondents would suffer no prejudice if the trial court continued the summary judgment hearing.... Denying a continuance under these circumstances would untenably elevate deadlines over justice and technicalities over the merits, and thus, deny appellants an opportunity to try their case to a jury.

181 Wn. App. 67, 89, 325 P.3d 306 (2014), *aff'd*, 184 Wn.2d 358, 357 P.3d 1080 (2015).

When Seelig moved for a continuance on June 11, 2018, he was not dilatory in preparing discovery. Rather, he had proffered a reasonable number of requests to the Joint Venture on May 10, 2018, yet the Joint Venture refused to answer, calling them a "waste of time and money." CP 123-126. The Joint Venture's disregard of Seelig's requests was wrongful; this Court confirmed in *Neighborhood All. of Spokane Cty. v. Spokane Cty.* that a protective order is the sole remedy to avoid discovery:

> [t]he County... *did not respond to the interrogatories or requests for production at all. This was improper*. Under our rules, answers to interrogatories are to be served within 30 days of service, CR 33(a), and the same is true for requests for production, CR 34(b), *or else the party must seek a protective order. The County was required to respond* to the Alliance's requests.... Since discovery was not allowed to proceed, the record is incomplete, and *we remand to the trial court for appropriate discovery.*

172 Wn.2d 702, 718, 261 P.3d 119 (2011) (emphasis added).[20]

Also, like the appellants in *Keck*, Seelig's discovery cutoff and trial date were months away (November 26, 2018 and January 14, 2019, respectively) when the trial court denied a continuance on June 20, 2018.

The Court of Appeals affirmed the trial court's ruling because it believed requesting production of a "written agreement to pay compensation and/or additional compensation" to Seelig was "fruitless" because Seelig was a broker engaged in real estate brokerage services without a license. Appx. A at 4. However, this finding is erroneous since Seelig is either not a broker, did not perform brokerage services, or his conduct otherwise fell within the statutory employee exemption. At the very minimum an issue of fact exists with respect to each of the above.

The criteria for a CR 56(f) continuance denial are not present here; Seelig did not delay in seeking to acquire evidence, he articulated what evidence would be established through discovery, and a signed compensation agreement would certainly raise a genuine issue of material fact. *Cf. Pitzer*, *supra*.[21] In connection with accepting review and

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[20] *See also Coggle v. Snow*, 56 Wn. App. 499, 508, 784 P.2d 554 (1990) (Respondent would not "have suffered prejudice if the court had granted a continuance, nor do we perceive any prejudice.... We hold that the trial court improperly exercised its discretion in denying the motion for a continuance.").

[21] To the extent the Joint Venture may assert the Court of Appeals precluded discovery when it remanded the matter in December 2017, no such interference is apparent from the record. The Court of Appeals expressed no opinion on the merits of Seelig's claim at that time, and the trial court issued a case schedule that contemplated discovery. CP 202.

remanding, this Court should find it was an abuse of discretion to deny Seelig an opportunity to receive outstanding answers and documents.

VII. CONCLUSION

This case is not about an unlicensed real estate "broker" preying on the public. To the contrary, this case involves compensation promised to a worker/partnership member, and later employee, for the fruits of his labor.

The trial court and Court of Appeals have left Seelig without recourse to enforce an agreement—and even to conduct limited discovery in furtherance of demonstrating the agreement's binding terms. If the Court of Appeals' decision is left to stand, the Joint Venture will profit from Seelig's hard work at his expense. This outcome does not just affect Seelig, but also other similarly situated individuals who have been assured compensation and left twisting in the wind. Therefore, Supreme Court review of this matter is necessary and proper.

DATED this 27th day of November, 2019.

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APPENDIX A

FILED
10/28/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

HOWARD and BEATRICE SEELIG, a marital community,

Appellants,

v.

308 FOURTH AVENUE SOUTH JOINT VENTURE, a New York general partnership, ORT DOWNTOWNER, LLC, a general partner, MARTIN A. SEELIG, a general partner, MICHELLE SEELIG TRUST, a general partner, RACHEL SEELIG TRUST, a general partner, JENNIFER H. SEELIG, a general partner, LAURA S. STRICKLAND, a general partner, MARK E. STRICKLAND, a general partner, GOLDSCHMIDT FAMILY TRUST, a general partner, LAWRENCE E. GOLDSCHMIDT, a general partner, ELLEN C. GOLDSCHMIDT, a general partner, JULIET S. AMES GRANTOR TRUST, a general partner, ALEXANDER K. AMES GRANTOR TRUST, a general partner, SAMANTHA WINSLOW GRANTOR TRUST, a general partner, JESSIE WINSLOW GRANTOR TRUST, a general partner, MARGARET S. LARKIN TRUST, a general partner, MATTHEW S. LARKIN GRANTOR TRUST, a general partner, MICHELLE C. KORNBLAU GRANTOR TRUST, a

No. 78716-1-I

DIVISION ONE

UNPUBLISHED OPINION

FILED: October 28, 2019

general partner, JOEL B. KORNBLAU GRANTOR TRUST, a general partner,

Respondents.

LEACH, J. — Howard Seelig appeals the trial court's summary judgment dismissal of his lawsuit against 308 Fourth Avenue South Joint Venture ("Joint Venture"). First, he claims that he raised genuine issues of material fact about whether he was an employee of Joint Venture and whether he rendered real estate brokerage services to Joint Venture. Next, he claims that he was entitled to a continuance to conduct discovery under CR 56(f) because he identified a supposed agreement that, if found, would show Joint Venture promised in writing to compensate him for managerial efforts.

The services that Seelig rendered for the Joint Venture are not exempt from the licensing requirement. So no genuine issues of material fact exist regarding Seelig's claim for additional compensation for management services. Seelig also fails to establish that the trial court abused its discretion by denying his request for a continuance for discovery.

We affirm.

FACTS

Howard Seelig and several others formed Joint Venture in 1970 to purchase, rehabilitate, and operate a large apartment project in Seattle, the

Downtowner Apartments. The Joint Venture partnership agreement stated that Seelig and his brother, Martin Seelig, would manage the Downtowner.

The Downtowner was a low-income apartment building operated under Federal Housing Authority regulations. In his February 17, 2015, declaration, Seelig describes the services for which he seeks additional compensation. He agrees that he received compensation for management services during his tenure with the property but contends that Joint Venture owes him more.

In 2004, Seelig conveyed his ownership interest in Joint Venture to others but continued as its manager. He managed the Downtowner until September 2011. Joint Venture sold the Downtowner in 2012.

Seelig sued for breach of contract after the building was sold. His complaint states only a claim for additional compensation for unpaid management services for the Downtowner, but the record established an unpleaded claim for a bonus due on the sale of the Downtowner. Joint Venture asked the court to dismiss both claims on summary judgment. The trial court granted this request. Seelig appealed this decision.[1] This court affirmed the

[1] Seelig claimed on his first appeal that the trial court erred in granting summary judgment because (1) there were genuine issues of material fact whether he was entitled to a bonus when Joint Venture sold the Downtowner, (2) there were genuine issues of material fact whether Joint Venture terminated him in bad faith, and, of relevance in this appeal, (3) the trial court erred in granting summary judgment on his claim for additional compensation for management services. Seelig v. 308 Fourth Ave. S. Joint Venture, No. 75777-6-I, slip op.

dismissal of the bonus claim but reversed dismissal of the additional management services compensation claim.[2]

After remand, Joint Venture renewed its request for summary judgment. Seelig asked the trial court to continue Joint Venture's request to allow him to conduct additional discovery about a supposed signed agreement for additional compensation that Seelig was unable to confirm exists. The trial court granted summary judgment dismissing Seelig's remaining claim, noting how Seelig cannot "come within any of the exceptions to the statute on the licensing." Seelig appeals.

ANALYSIS

Motion for Summary Judgment

Employee Exemption

Seelig claims that the record shows genuine issues of material fact exist about whether Seelig was an employee of Joint Venture and, thus, exempt from any licensing requirement.

This court reviews an order granting summary judgment de novo.[3] Summary judgment is appropriate when, viewing all facts and reasonable

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(Wash. Ct. App. Dec. 18, 2017) (unpublished), http://www.courts.wa.gov/opinions/pdf/757776.pdf.

[2] The respondents incorrectly quoted RCW 18.85.331, the statute central to its argument on the management services claim. This court vacated the summary judgment on this claim and remanded for proceedings without ruling on the merits of the claim. Seelig, No. 75777-6-I, slip op. at 8.

inferences in the light most favorable to the nonmoving party, no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.[4] We consider the same evidence that the trial court considered.[5]

In his complaint, Seelig sought compensation for his services rendered as manager of the Downtowner. RCW 18.85.331 prohibits a person from performing real estate brokerage tasks without a license.[6] It also prohibits a person from bringing suit to collect compensation as a real estate broker without a broker's license.[7] A person performs real estate brokerage services by "[n]egotiating or offering to negotiate, either directly or indirectly, the purchase, sale, exchange, lease, or rental of real estate, or any real property interest therein."[8]

Seelig admitted in his declaration that he "negotiated a deal with Goodman Real Estate to purchase the Downtowner for $16 million . . . but [the deal] fell through" and that he claimed additional compensation in part due to "his efforts in facilitating a sale transaction of the Downtowner Apartments." He also stated that he "[set] up [the] purchase of the property." Because Seelig

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[3] Hayden v. Mut. of Enumclaw Ins. Co., 141 Wn.2d 55, 63-64, 1 P.3d 1167 (2000).

[4] Lybbert v. Grant County, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000).

[5] Lybbert, 141 Wn.2d at 34.

[6] RCW 18.85.331.

[7] RCW 18.85.331.

[8] RCW 18.85.011(17)(b).

negotiated the purchase of real property, the services that he provided were real estate brokerage services, which require a license.

So Seelig would need to be exempt from the broker's license requirement in order to be compensated in this case. He claims he is exempt under RCW 18.85.151(1), which exempts "[a]ny person who purchases or disposes of property . . . and their employees" from needing a license.[9] He states in his brief,

> [I]f Seelig was an employee of the Joint Venture at the time the Joint Venture promised to pay him management compensation and a bonus when the Downtowner was sold, then he was exempt from the licensing requirement. Whether Seelig was an employee of the Joint Venture at the time the Joint Venture promised to pay him management compensation and the bonus is a genuine issue of material fact.

But Seelig's status as an employee of Joint Venture when the supposed agreement for management compensation was made is not relevant. The statute exempts people who buy or sell real property and their employees; it does not provide a continuing exemption for a person who may have been an employee when a compensation agreement was made but stops being an employee before any sale occurs, as Seelig suggests.

Seelig admits he was not an employee of Joint Venture when it sold the Downtowner. Thus, even if he ever was an employee of Joint Venture, he agrees that he was not an employee when Joint Venture "purchase[d] or

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[9] RCW 18.85.151(1). In this case, the licensing exemptions refer to a real estate broker's license.

dispose[d] of [the] property."[10] Since Seelig's employment status with Joint Venture when it sold the building is the relevant question, no genuine issues of material fact exist as to whether Seelig was an employee of Joint Venture at the relevant time.

Brokerage Services

Seelig also argues that the record shows genuine issues of material fact about whether Seelig rendered exempt real estate brokerage services to Joint Venture. He claims his activities as property manager fell "squarely" within the licensing exemption provided in RCW 18.85.151(13). Joint Venture claims that his activities do not fit within this exemption because he admittedly engaged in real estate brokerage services beyond those described in this exemption.

RCW 18.85.151(13) exempts from the licensing requirement individuals who are "limited in property management" to any of the following activities:

> (a) Delivering a lease application, a lease, or any amendment thereof to any person;
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> (b) Receiving a lease application, lease, or amendment thereof, a security deposit, rental payment, or any related payment for delivery to and made payable to the real estate firm or owner;
>
> (c) Showing a rental unit to any person, or executing leases or rental agreements, and the employee or retainee is acting under the direct instruction of the owner or designated or managing broker;

[10] Respondents failed to raise this issue in their briefing and instead argued that Seelig was never an employee.

> (d) Providing information about a rental unit, a lease, an application for lease, or a security deposit and rental amounts to any prospective tenant; or
>
> (e) Assisting in the performance of property management functions by carrying out administrative, clerical, financial, or maintenance tasks.

Seelig admitted that the various tasks for which he seeks compensation included negotiating a deal for the Downtowner, facilitating a sale transaction for the Downtowner, negotiating about and then leasing and renting the Downtowner, advertising and consulting with potential buyers, marketing the property, ensuring the property was in compliance with federal regulations, resolving legal complaints for the property, and preparing tax returns. He also admitted in his declaration that his "primary role was that of the Joint Venture's chief executive officer (CEO) and chief financial officer (CFO)."

So undisputed facts in the record show that Seelig's activities were not limited to those described in RCW 18.85.151(13). He does not fit within the exemption. Also, these additional tasks that Seelig performed include real estate brokerage services.[11] No genuine issues of material fact exist as to whether Seelig rendered real estate brokerage services beyond the property management activities listed in RCW 18.85.151(13). The trial court did not err by granting summary judgment to Joint Venture.

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[11] RCW 18.85.011(17)(b).

CR 56(f) Continuance

Seelig asserts that the trial court should have granted his request for a continuance for discovery under CR 56(f).

A trial court may deny a CR 56(f) continuance request for a number of reasons: "'(1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party does not state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact.'"[12] We will affirm a trial court's decision to deny a CR 56(f) motion absent a showing of manifest abuse of discretion.[13]

Here, Seelig claims he was entitled to conduct discovery to find a "written agreement to pay compensation and/or additional compensation to him." The alleged written agreement purported to compensate Seelig for his "services rendered as the manager of the [b]uilding." Seelig's "services rendered as the manager" include real estate brokerage services, as described above. So any search for an agreement for management services is fruitless. Even if Seelig finds this supposed written agreement through discovery, that agreement would provide for compensation for service that included brokerage services, Seelig

[12] Baechler v. Beaunaux, 167 Wn. App. 128, 132, 272 P.3d 277 (2012) (quoting Turner v. Kohler, 54 Wn. App. 688, 693, 775 P.2d 474 (1989)).

[13] Lake Chelan Shores Homeowners Ass'n v. St. Paul Fire & Marine Ins. Co., 176 Wn. App. 168, 183, 313 P.3d 408 (2013).

does not have a broker's license, a person cannot sue for compensation for brokerage services without a license, and Seelig's activities are not exempt from the licensing requirement.

Seelig did not identify any evidence that he might obtain through discovery that would raise a genuine issue of material fact. The trial court did not abuse its discretion in denying Seelig's CR 56(f) motion.

Seelig also states that he should be entitled to a continuance for discovery because "[i]f the [a]greement does not exist, then Goldschmidt may have perpetrated an elaborate fraud on Seelig by misrepresenting that the [a]greement had been signed by the Joint Venture." However, Seelig did not plead a claim for fraud or misrepresentation in his original complaint. So the trial court did not abuse its discretion in denying Seelig's CR 56(f) motion.

Attorney Fees

Joint Venture requests an award of attorney fees and costs pursuant to RAP 14.1 and RAP 18.9(a), claiming that Seelig's appeal is frivolous. We disagree.

RAP 18.9(a) permits the court to require a party to pay the fees and costs of another party for defending a frivolous appeal.[14] "'An appeal is frivolous if it raises no debatable issues on which reasonable minds might differ and it is so

[14] Kinney v. Cook, 150 Wn. App. 187, 195, 208 P.3d 1 (2009).

totally devoid of merit that no reasonable possibility of reversal exists.'"[15] An appellate court resolves any doubts about whether the appeal is frivolous in favor of the appellant.[16]

Joint Venture argues that Seelig's arguments are "belied by the rules of procedure, the plain language of a state statute, and uniform case law." It claims that Seelig has presented no debatable issues or close questions.

While Seelig's arguments do not persuade this court, an appeal is not frivolous merely because it is unsuccessful.[17] And this court reaches for the first time the merits of an issue that Seelig raised in his first appeal.

For these reasons, we deny the request for fees and costs.

CONCLUSION

We affirm. Because Seelig admitted that he was not an employee of Joint Venture when it sold the Downtowner, no genuine issue of material fact exists about whether Seelig was an employee of Joint Venture at any relevant time. Additionally, Seelig admitted to performing services that do not qualify him under the licensing requirement exemption. No genuine issue of material fact exists about whether Seelig rendered real estate brokerage services to Joint Venture.

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[15] Hernandez v. Stender, 182 Wn. App. 52, 61, 358 P.3d 1169 (2014) (quoting Protect the Peninsula's Future v. City of Port Angeles, 175 Wn. App. 201, 220, 304 P.3d 914 (2013)).

[16] Protect the Peninsula's Future, 175 Wn. App. at 220.

[17] Protect the Peninsula's Future, 175 Wn. App. at 220.

Finally, because Seelig did not identify any evidence that would entitle him to an exemption from the licensing requirement, the trial court did not abuse its discretion in denying his CR 56(f) motion. We deny Joint Venture's requests for attorney fees and costs.

Leach, J.

WE CONCUR:

Mann, ACJ

Dwyer, J.

OSERAN HAHN SPRING STRAIGHT & WATTS P.S.

November 27, 2019 - 10:00 AM

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