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NO. 68066-8-1  
COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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KIDDER MATHEWS & SEGNER, INC., a Washington corporation,

Respondent,

v.

HARBOR MARINE MAINTENANCE & SUPPLY, INC., a  
Washington corporation,

Appellant.

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APPEAL FROM THE SUPERIOR COURT  
FOR SNOHOMISH COUNTY  
THE HONORABLE RICHARD T. OKRENT

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BRIEF OF APPELLANT

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STATE OF WASHINGTON  
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## **INTRODUCTION**

There is, in the words of Corbin on Contracts, an “immense” volume of litigation over real estate brokers' rights to a commission.<sup>1</sup> Although the brokers may view an attempt to avoid the payment of a commission as nothing more than an attempt to “beat” the agent out of a commission, often times the refusal is founded in the sincere and well founded belief that the broker has done little or no work for a sizeable commission. The latter is precisely the case here. The Respondent, GVA Kidder Mathews (hereinafter “Kidder”) did virtually nothing to locate the property, and did not assist in any manner in negotiating the lease terms, and did not prepare any of the eventual lease documents, yet brought this action to collect over \$100,000.00 as a commission.

Harbor Marine, Inc. (hereinafter “Harbor”) was looking for new lease space at the Everett Marina after having been advised that the Port of Everett (hereinafter “POE”) would be terminating its existing lease due to the port's redevelopment plans. (CP 42) Upon learning this news, Harbor began its own search for a new place to lease. (CP

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<sup>1</sup> See 1 A. Corbin, Contracts § 50 (1963); *Real Estate: Transactions*, William B. Stoebuck, John W. Weaver 18 Wash. Prac., Real Estate § 15.8 (2d ed.)

42-43) As a result of its own efforts Harbor learned of the Norton building, the property it eventually leased. (CP 43) However, at the time of its investigation the Norton building was occupied and therefore unavailable for lease. (CP 43) Furthermore, based upon the information provided by the building owner the prospects of the building becoming available were not promising. (CP 43) Upon learning that the Norton property would not be available, Harbor began negotiating with POE regarding the property owned by POE.

After Harbor's negotiations had stalled with POE, Harbor engaged Mathew Henn (hereinafter "Henn") who was employed by GVA Kidder Mathews (hereinafter "Kidder") to assist in the negotiations. (CP 44) Before commencing the engagement Kidder presented Harbor with a Client Representation Agreement ("CRA"). The CRA, however, is far from a model of clarity. Although it is an agreement between Harbor and Kidder, it does not obligate Harbor to pay a commission in the event a lease agreement is reached. Instead, it provides that the "Client (Harbor) hereby requires that a brokerage commission in consideration of brokerage services rendered shall be paid by Owner to Agent<sup>2</sup>". (CP 94)

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<sup>2</sup> *emphasis added*

This language was confusing to Harbor at first blush. Before signing the CRA Harbor's President asked Henn who would pay the commission. (CP 4; CP 49) In response, Henn stated in no uncertain terms that it would be the property owner, not Harbor, who would be responsible for the commission. (CP 4; CP 49) In reliance upon this representation Harbor signed the CRA, and Henn began to engage in negotiations with the POE. (CP 4; CP 49) In those negotiations and in the proposals made to POE Henn was consistent in including terms that required the POE to pay the commission. (CP 45; CP 54) When this language was rejected by the POE, the Henn responded a second time to Harbor question that the owner, POE, would be responsible for the payment of any commission. (CP 45)

In short, Henn on multiple occasions and in response to direct questions from Harbor, Henn misrepresented the import of the agency agreement.

But that is not the end of the story. Henn was not successful in negotiating a deal with the POE. Harbor finally grew tired of the lack of progress, and began to revisit alternatives on its own with the same property owner that Harbor had contacted on numerous occasions prior to the engagement of Kidder, the owner of the Norton building.

(CP 46) Kidder did not participate in the lease negotiations whatsoever. (CP 46) In fact, the Henn had less than minimal involvement in the eventual lease transaction entered into by the principal.

Finally, after the Harbor executed the lease which is the basis of Kidder's commission claim Henn, in writing, stated that it was the owner of the property, not Harbor, who was "legally" obligated to pay the commission. (CP 49; CP 73)

#### ***ASSIGNMENTS OF ERRORS***

1. The trial court erred in granting Kidder's motion for summary judgment awarding Kidder a judgment against Harbor for a lease commission.

2. The trial court erred in granting Kidder's motion for summary judgment and rejecting Harbor's claim that Kidder was not entitled to a commission as it was not the procuring cause of the lease.

3. The trial court erred in granting Kidder's motion for summary judgment and rejecting Harbor's claim that the CRA does not obligate Harbor to pay a commission.

### **STATEMENT OF ISSUES**

1. Did the trial court err in determining that, as a matter of law, the “procuring cause rule” did not apply under the terms of the CRA?

2. Did the trial court err in determining that, as a matter of law, the CRA was unambiguous and entitled Kidder to a commission regardless of Kidder’s involvement in the eventual lease agreement?

### **PROCEDURAL HISTORY OF THE CASE**

Kidder filed the instant action claiming, inter alia, that Harbor “received the benefits of Kidder Mathews’ efforts yet failed to pay for the same.” (CP 191). Kidder moved for summary judgment on its claim contending, among other things, that it was “the procuring cause” of the lease between Norton and Harbor. (CP 173).

Harbor responded to this motion by setting forth in detail facts that would support its contention that Kidder was not the procuring cause of the lease agreement. (CP 42 - 73) Harbor further contended that the CRA did not obligate it to pay a commission, but instead, that obligation, if any was the obligation of the owner of the leased property. (CP 44; CP 49) Furthermore, and most importantly, this contention was supported by the direct and specific representations

made by Henn, both before the CRA was signed and during the lease negotiations with the POE.

Conspicuously absent from the record before the trial court was any response from Kidder or Henn to the statements made by Harbor regarding the representations made by Henn both before the CRA was executed, during the negotiations with the POE, or after the lease was consummated. Accordingly, Harbor's allegations that Henn represented that it would be the owner of the property, and not Harbor, who would be responsible for the payment of any commissions are undisputed.

The trial court granted Kidder's motion for summary judgment. It held that the CRA was a fairly straightforward agreement, and further ruling that the procuring cause rule did not apply. From this ruling this timely appeal followed.

### **STATEMENT OF FACTS**

The Appellant, HARBOR MARINE, INC. (hereinafter "Harbor") had occupied property owned by the Port of Everett (hereinafter "POE") at the Everett Marina. Harbor operates a retail establishment providing both marine services and equipment as well as service for water craft. Beginning in the year 2000 POE began discussions at its

port commission meetings regarding redevelopment plans for the port property. (CP 138). Harbor's President, Lauren Bivins (hereinafter "Bivins ") was aware of these plans through discussions with POE officials and through his attendance at POE commission meetings. (CP 42 - 43; CP 138). Faced with the possibility that Harbor might lose its lease with POE due to the redevelopment plans, Bivins began to investigate other space that might be available for lease to operate his business. (CP 138). This investigation including searching for available space through the internet as well as talking to other brokers in the area. (CP 138). During this initial investigation Bivins spoke with Coast Real Estate, a broker that was representing POE. (CP 138). Since 2002 Harbor occupied its existing leased space on a month-to-month tenancy from POE. (CP 42).

In 2008, well before Kidder was engaged, Bivins contacted a friend who told him that a building located at the Everett Marina owned by Norton Industries (hereinafter "Norton") might be available for lease. (CP 43). As a result of this information Bivins contacted Norton and inquired about the property. (CP 43) Norton told Bivins

that the property was currently occupied, but that the current tenant<sup>3</sup> was having difficulty meeting its lease obligations. (CP 43) Schack advised Bivins that Norton was attempting a work out with TC, and Schack believed that a work out would be successful. Because of this neither Bivins or Schack believed the TC property would be available. (CP 43).

Bivins kept in contact with Schack periodically throughout 2009 regarding the availability of the TC property. (CP 43). In October, 2009, Schack informed Bivins that the issue with the tenant had not been resolved, and that he had given the tenant a “drop dead” date of the end of December, 2009, to resolve the tenant’s defaults. (CP 43) He further advised Bivins that the resolution involved the sale of the TC business, and an assumption of the TC lease by the purchaser. If this occurred, the Norton property would not be available. (CP 43). Bivins made yet another contact with Schack in late December, 2009, at which time he was advised that the sale of the TC business was in jeopardy due to issues with the Department of Ecology, but that Schack had extended the time to obtain a work

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<sup>3</sup> The current tenant was a business known as TC Systems, and will be referred to as “TC”. All contact with Norton was through its owner, Jim Schack (hereinafter “Schack”). (CP 43).

out to the end of March, 2010. (CP 43 - 44).

From all of these conversations Bivins concluded that the TC property would not be available, and looked elsewhere for available lease space. (CP 44). As a fall back position Bivins had been in contact with POE regarding property being developed by POE known as the MSRC building. (CP 44). The discussions continued without any apparent progress into early February, 2010, and at the suggestion of Harbor's attorney, Kidder and Henn were contacted with the idea in mind that they would assist with the negotiations with POE. (CP 44)

A meeting was scheduled between Henn and Bivins, at which time Bivins explained the history of his negotiations with POE, and Harbor's needs as a tenant. At the conclusion of that meeting it was decided that Harbor would engage Kidder to assist in the negotiations with POE only. (CP 44)

The following day Henn came to Harbor's retail store, and presented Bivins with a proposed "Client Representation Agreement" (hereinafter the "CRA"). (CP 44; CP 94).

The CRA contains the following specific terms:

"This agreement shall serve to confirm that Harbor

Marine, Inc. is in the process of looking at various facility alternatives to lease or purchase for their office, warehouse, and manufacturing requirement. Harbor Marine, Inc. shall hereinafter be referred to as "Client". Owner or Owner's agent shall hereinafter be referred to as "Owner." It is hereby confirmed that GVA Kidder Mathews, hereinafter referred to as "Agent", exclusively represents Client."

"It is hereby confirmed that in the event of the consummation of a lease renewal, new lease, or purchase of a facility, Client hereby requires that a brokerage commission in consideration of brokerage services rendered shall be paid by Owner to Agent, as follows:"<sup>4</sup>

"Lease Agreement: Owner agrees to pay Agent a commission in the amount of five percent (5%) of the total base rents for years 1-5 of the Lease Term and two and one-half percent (2.5%) for years 6-10 of the lease term, one-half (½) payable at mutual execution of the Lease Agreement, and one-half (½) due at Commencement Date of the Lease Agreement."<sup>5</sup>

"In consideration of this Agreement, Agent agrees to utilize reasonable effort and diligence to achieve the purpose of this Agreement."<sup>6</sup>

Bivins reviewed the CRA and specifically asked Henn about the commission language contained in the CRA. (CP 44). In response to Bivins direct question regarding the payment of the commission,

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<sup>4</sup> CRA, paragraph 2 [*emphasis added*]

<sup>5</sup> CRA, paragraph 4 [*emphasis added*]

<sup>6</sup> CRA, paragraph 9 [*emphasis added*]

Henn responded that Bivins should not worry about the payment of the commission “because the Port would be paying the commission”. (CP 44; CP 49). It was based upon this representation from Henn that Bivins signed the CRA. (CP 44).

Following execution of the CRA Henn began negotiations with POE. Over the course of the next two months Henn made five (5) separate lease proposals to POE regarding Harbor’s lease of the POE property. (CP 44) Each of these proposals contained the following provision:

“Procuring Broker Commission: Matthew P. Henn of GVA Kidder Mathews (Agent) exclusively represents Tenant on this transaction. As a condition of entering into a lease agreement, the Landlord shall pay a commission equal to five percent (5%) of the total base rent consideration for the first sixty-six (66) months of the lease term, and two and one-half percent (2.5%) of the total base rent consideration for the balance of the Lease Term, one-half (50%) due upon Lease Execution and one-half (50%) at the commencement date.” (CP 44 [*emphasis added*]).

POE responded to the very first such proposal that contained this language by providing a strikeout version of the lease, in which the commission language was significantly altered. Specifically, the revisions submitted by POE provided:

“Procuring Broker Commission: Matthew P. Henn of

GVA Kidder Mathews (Agent) exclusively represents Tenant on this transaction. ~~As a condition of entering into a lease agreement, the Landlord shall pay a commission equal to five percent (5%) of the total base rent consideration for the first sixty-six (66) months of the lease term, and two and one-half percent (2.5%) of the total base rent consideration for the balance of the Lease Term, one-half (50%) due upon Lease Execution and one-half (50%) at the commencement date. Any commission paid to Broker shall be the responsibility of Tenant.~~<sup>7</sup> (CP 45; CP 54).

Henn responded to POE the same day the response from POE was received, February 26, 2010, by email. Although Henn's response addresses some of the changes to the proposal made by POE, conspicuously absent from Henn's response was any mention of the changes made by POE to the section of the proposal dealing with the commission. (CP 46; CP 56)

Upon receipt of the POE response it was provided to Bivins for his review. (CP 56) Bivins specifically questioned the changes to the language pertaining to the payment of a commission. (CP 45; CP 49). For the second time Henn responded to Bivins by stating that POE would be responsible for payment of the commission notwithstanding the port's revision of this section. (CP 45; CP 49).

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<sup>7</sup> The strikeout text was deleted by POE. The underlined text was added by POE. (CP 54). The original proposal from Henn was dated February 19, 2010, and the POE response was dated February 26, 2010. (CP 50).

After receiving Bivins comments to the response from POE, Henn submitted another lease proposal to POE, and again inserted the same language contained in the original proposal requiring POE to pay the commission. (CP 46). Interestingly, this proposal was sent by email from Henn to the POE representative, which email consisted of eighteen (18) separate paragraphs. (CP 57-58). However, although this second proposal from Henn required POE to pay the commission, there was no mention in the email regarding POE's payment of the commission.(CP 57-58).

POE responded with yet another proposal on April 14, 2010. (CP 59, CP 60). But once again POE had reinserted language in the proposal that required Harbor to pay any commission to Kidder. (CP 64).

In late March, 2010, Bivins became frustrated with the lack of progress with POE. (CP 46). It was at about this time that the last three (3) month extension that Schack had given TC to resolve the lease/purchase issues was about to expire, so Bivins contacted Schack again. On April 7, 2010, Bivins corresponded with Schack by email dated April 7, 2010, wherein he requested an update on the status of the existing tenant. (CP 66; CP 46-47). Schack responded

and the two set up a meeting the following Monday (April 12, 2010). At that time Schack advised Bivins that the TC tenants were not going to survive, and that the property would be available soon. (CP 47). Within an hour or two Bivins and Schack had negotiated the basic terms of a lease, and a proposed Lease was provided to Harbor eleven (11) days later. (CP 47).

About this same time Henn was still negotiating with POE. Henn advised Bivins that he was going to be out of town for an extended period of time, and during this period he was going to be unavailable. (CP 47). The day before leaving, Henn sent Bivins the most recent POE proposal, which like all the POE responses before, included a provision requiring Harbor pay any commission to Kidder. (CP 47; CP 67). As with all other previous responses to offers from POE, Henn fails to even mention in his communication with Bivins that POE has, once again, included a provision requiring Harbor to pay any lease commission. (CP 67)

Henn and Bivins finally connected on April 27, 2010, after Bivins had received the proposed written lease agreement from Norton. In that conversation Bivins told Henn that he has successfully negotiated a lease with Norton. Following that conversation, Henn

sent Bivins an email in which he stated:

“ . . . [Y]ou might want to talk with jim<sup>8</sup> that he is legally required to pay a fee unless you would rather pay the fee.” (CP 48; CP 73)

Viewing all of the communications regarding the CRA, Henn told Bivins before Bivins signed the CRA that the property owner, not Harbor, would be responsible for payment of the commission; he reaffirmed this statement after the POE revised the very first lease proposal; and again confirmed this statement after Harbor had successfully negotiated a lease with Norton without Kidder’s involvement. In fact, in the last such statement Henn concludes that under the CRA Norton was “legally required” to pay the commission.

The facts of this case present the exact scenario that Stoebuck was referring to, i.e., where the refusal to pay a commission is founded in the sincere and well founded belief that the broker has done little or no work for a sizeable commission.<sup>9</sup> Bivins had contact with Norton well in advance of his association with Kidder. All of the substantive contact, and certainly the lease negotiations, were between Bivins and Norton without any involvement by Kidder. In fact,

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<sup>8</sup> “jim” refers to Norton’s President, Jim Schack.

<sup>9</sup> See Footnote 1, *supra*.

Henn was not even available when Harbor was negotiating with Norton. Henn's only involvement with the Norton property was a ten minute visit to the property at which time the property was, according to Schack, still not available. (CP 48) As a matter of fact, Henn later admitted in email correspondence to Bivins that at the time they visited the property on March 24, 2010, he did not believe the property was available at that time, or would be available in the near future. (CP 116) There was no evidence in the record before the court that Kidder had any further contact with Schack or Norton following this visit to the property. It was Bivins actions, not the actions of Kidder, that resulted in the lease agreement. Bivins was the sole procuring cause of this lease. (CP 49)<sup>10</sup>

### ***ARGUMENT***

The trial court granted Kidder's motion for summary judgement and held that it was entitled to a commission under the terms of the CRA executed between Kidder and Harbor. In so ruling the trial court reasoned that the CRA was a straightforward agreement by which Harbor was obligated to pay a commission to Kidder in the event it

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<sup>10</sup> It is further important to note that following the one visit to the property Henn contacted Schack and requested that Schack sign a listing agreement for the Norton property, which request Schack refused. (CP 48).

entered into any lease during the term of the CRA irrespective of Kidder's involvement. The trial court further held that the procuring cause rule did not apply, and that Kidder was entitled to a commission even if it was not the procuring cause of the lease.

1. ***Review of the Court's Order on Summary Judgment.***

The standard of review of an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court.<sup>11</sup>

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.<sup>12</sup> A material fact is one upon which the outcome of the litigation depends in whole or in part.<sup>13</sup> In a summary judgment motion, the burden is on the moving party to demonstrate that there is no genuine issue as to a material fact and that, as a matter of law,

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<sup>11</sup> *Jones v. Allstate Ins. Co.*, 146 Wash.2d 291, 300, 45 P.3d 1068 (2002).

<sup>12</sup> CR 56(c).

<sup>13</sup> *Morris v. McNicol*, 83 Wash.2d 491, 494, 519 P.2d 7 (1974).

summary judgment is proper.<sup>14</sup> The moving party is held to a strict standard. Any doubts as to the existence of a genuine issue of material fact is resolved against the moving party. In addition, we consider all the facts submitted and the reasonable inferences therefrom in the light most favorable to the nonmoving party.<sup>15</sup> The motion should be granted only if reasonable persons could reach but one conclusion.<sup>16</sup>

In the instant case Harbor respectfully submits that the trial court erred in the application of these basic rules. First of all, Harbor believes that a genuine issue of material fact exists with regard to the proper interpretation of the CRA. Harbor submits that it was never the intent of the parties to obligate Harbor to pay the commission. Not only is this contention supported by the plain language of the CRA<sup>17</sup>, but is also consistent with the express representations made by Henn both before execution of the CRA, as well as the express representations made by Henn during the lease negotiations. Even

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<sup>14</sup> See *Hartley v. State*, 103 Wash.2d 768, 774, 698 P.2d 77 (1985).

<sup>15</sup> E.g., *Citizens for Clean Air v. Spokane*, 114 Wash.2d 20, 38, 785 P.2d 447 (1990).

<sup>16</sup> *Go2Net, Inc. v. C I Host, Inc.*, 115 Wash.App. 73, 60 P.3d 1245 (2003)

<sup>17</sup> By its terms the CRA requires the "Owner" to pay the commission.

more important is the undisputed evidence that even Kidder believed that the CRA obligated the owner of the property, not Harbor, to pay any commission that would result from the lease agreement, which evidence was apparently disregarded by the trial court.

Furthermore, Kidder asserted in its complaint and argued in its motion for summary judgment that the lease agreement was the result of Kidder's efforts, in essence arguing that its efforts were the procuring cause of the lease. Harbor, in response argues that the lease was the result of its efforts which preceded the engagement of Kidder by a significant period of time, and which continued later without Kidder's assistance. Viewing all of the disputed and undisputed evidence, and all reasonable inferences therefrom, in a light most favorable to Harbor, it was error to determine as a matter of law that the CRA could be interpreted to require Harbor to pay a commission without considering the both parties evidence of their intent.<sup>18</sup> This was simply not a case that should have been determined on summary judgment.

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<sup>18</sup> Because the trial court determined that the procuring cause rule did not apply, the court did not consider the facts regarding the application of the procuring cause rule. However, if the trial court had correctly determined that the procuring cause rule applied, it would have been error to conclude that Kidder was the procuring cause as a matter of law.

**2. *The Court Erred in Interpreting the CRA.***

The trial court erroneously held that, as a matter of law, the CRA clearly provided that Harbor was obligated to pay a commission. Harbor respectfully submits that the interpretation of the CRA is not a simple or straightforward as viewed by the trial court.

Kidder relies upon the following language in the CRA:

“It is hereby confirmed that in the event of the consummation of a lease renewal, new lease, or purchase of a facility, Client hereby requires that a brokerage commission in consideration of brokerage services rendered shall be paid by Owner to Agent, as follows:”

The CRA then continues with six (6) different events, each of which provides that the “Owner agrees” to pay Agent a commission. None of these paragraphs provides or even suggests that the Client will pay a commission to Agent.<sup>19</sup> So the question is whether or not this language unambiguously provides that Harbor agreed to pay Kidder a commission if it entered into any agreement for the lease of any property throughout the term of the agreement irrespective of Kidder’s involvement in that transaction.

An appellate court's primary goal in interpreting a contract is to

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<sup>19</sup> “Owner”, “Client” and “Agent” are all defined terms in the CRA.

ascertain the parties' intent.<sup>20</sup> In determining the parties' intent the court should consider the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of the respective interpretations advocated by the parties.<sup>21</sup> What the parties intend is a question of fact.<sup>22</sup>

What then was the objective of the CRA? It is clear that the objective was for Harbor to obtain a lease on terms satisfactory to it. This objective would be met if the efforts of the broker were successful. The CRA states specifically that the "consideration" for the agreement is "brokerage services rendered". Stated succinctly, if the broker did his job and a lease was the result then he would be paid. On the other hand, if no brokerage services were rendered that resulted in a lease agreement, then the agent did not perform the

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<sup>20</sup> *Anderson Hay & Grain Co., Inc. v. United Dominion Indus., Inc.*, 119 Wash.App. 249, 254, 76 P.3d 1205 (2003), review denied, 151 Wash.2d 1016, 88 P.3d 964 (2004); *Kenney v. Read*, 100 Wash.App. 467, 474, 997 P.2d 455, 4 P.3d 862 (2000).

<sup>21</sup> *Berg v. Hudesman*, 115 Wash.2d 657, 667, 801 P.2d 222 (1990) (quoting *Stender v. Twin City Foods, Inc.*, 82 Wash.2d 250, 254, 510 P.2d 221 (1973)).

<sup>22</sup> *Anderson Hay & Grain*, 119 Wash.App. at 255, 76 P.3d 1205 (citing *Kenney*, 100 Wash.App. at 475, 997 P.2d 455).

required services and is not entitled to collect a commission. The objective was to pay the broker for work performed, not to give the agent a gift where no services were performed.

What were the subsequent actions of the parties that point to the parties' intent? Before the CRA was signed; during the negotiations; and after the lease was negotiated without the broker's assistance, the broker opined that the owner was "legally" obligated to pay a commission. The contention now advanced by Kidder that it is entitled to be paid a commission regardless of its involvement is directly contrary to its actions and conduct prior to and after the execution of the CRA.

However, the interpretation of an unambiguous contract is a question of law.<sup>23</sup> Even if the contract language is clear and unambiguous, the trial court may consider extrinsic evidence for the limited purpose of determining the intent of the parties.<sup>24</sup>

In the contract interpretation context, summary judgment is not proper if the parties' written contract, viewed in light of the parties'

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<sup>23</sup> *Stranberg v. Lasz*, 115 Wash.App. 396, 402, 63 P.3d 809 (2003)

<sup>24</sup> *Berg*, 115 Wash.2d at 669, 801 P.2d 222; *Go2Net, Inc. v. C I Host, Inc.*, 115 Wash.App. 73, 84, 60 P.3d 1245 (2003); *Bort v. Parker*, 110 Wash.App. 561, 573, 42 P.3d 980, review denied, 147 Wash.2d 1013, 56 P.3d 565 (2002).

other objective manifestations, has two or more reasonable but competing meanings.<sup>25</sup> This is precisely the case here. Kidder suggests that the only interpretation of the CRA is that it is entitled to a commission anytime that Harbor entered any lease agreement. However, Harbor argues that the interpretation of the CRA could just as easily be that the obligation to pay a commission only arises when Kidder's actions contribute to the formation of the agreement.

In two similar cases it was held that summary judgment was improper when a contradicting reasonably plausible interpretation of an agreement was proffered.<sup>26</sup> In *Scott* the trial court had granted summary judgment on a contract of indemnity determining as a matter of law that the indemnification provisions applied to the defendant. Scott entered into an agreement with Northwest EnviroServices to dispose of hazardous materials. The indemnity provided that it would cover any liabilities arising out of or resulting from performance of the Hazardous Waste Agreement, except for those liabilities caused by Scott's negligence or its misidentification of waste. Scott incurred a

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<sup>25</sup> *Hall v. Custom Craft Fixtures, Inc.*, 87 Wash.App. 1, 10, 937 P.2d 1143 (1997).

<sup>26</sup> *Scott Galvanizing, Inc. v. Northwest EnviroServices, Inc.*, 120 Wash.2d 573, 844 P.2d 428 (1993); *Tanner Elec. Co-op. v. Puget Sound Power & Light Co.*, 128 Wash.2d 656, 911 P.2d 1301 (1996).

liability as a result of a federal enforcement action, not because of its negligence or its misidentification of waste. Scott argued that under the plain language of the agreement the only exception to Northwest's obligation to indemnify Scott was if the claim was the result of its negligence or its misidentification of waste.

But Northwest argued that there may be other circumstances which may expose Scott to a claim which do not lead to an obligation to indemnify other than claims that arise by virtue of Scott's own actions, such as claims that do not arise out of the contract at all. The writing did not refer to any other circumstances under which Northwest would not be obligated to indemnify Scott. The claim against Scott for which it sought indemnity arose out of its CERCLA liability, which were independent of the contract. The appellate court held that Northwest's interpretation of the contract was reasonably plausible that could not be resolved as a matter of law notwithstanding the language of the agreement. Whether or not these claims were intended by the parties to be included under the terms of the indemnity agreement involved issues of material fact which were improperly decided on a summary judgment.

In *Tanner* the court was asked to interpret whether a "point of

use” test should be incorporated into an agreement with respect to “straddling” customers<sup>27</sup>. The court held, as a matter of law, that the point of use test should be incorporated into the agreement despite evidence in the record to the contrary from the utility that such was not the intent of the parties. The utility argued that the language of the agreement did not require the incorporation of the point of use test, and relied upon its own interpretation of the contract language. Although the court expressed that the “point of use” test is a valid mechanism, it conceded that it was not the exclusive mechanism. Accordingly, the interpretation of the contract by the utility was reasonable, and therefore the meaning of the contract could not be determined as a matter of law.

In each of these cases one party offered a reasonably plausible, albeit contrary, interpretation of the contract language. Based upon such a reasonably plausible interpretation it was held error to determine the intent of the parties as a matter of law.

Harbor first argues that under the terms of the CRA it is the owner who is responsible for the payment of any commission, not the Client. Not only is this interpretation consistent with the plain language

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<sup>27</sup> Customers whose property lies partially within the utility's distribution area.

of the CRA, it is entirely consistent with the representations made by Henn prior to the execution of the CRA. It is also entirely consistent with the lease proposals made by Henn during the negotiations, as well as the representations made to Harbor when considering POE's responses to those lease proposals. Finally, it is entirely consistent with Henn's email to Harbor after the fact wherein Henn states that it is the owner who is "legally" obligated to pay the commission "unless you (Harbor) would rather pay the fee". (CP 73) Accordingly, both before and after the execution of the CRA Henn treated the obligation to pay a commission as the obligation of the owner, not Harbor.

In order to properly ascertain the intent of the parties to the CRA the court should have applied the context rule, paying particular attention to the circumstances leading to the execution of the contract, the subsequent conduct of the parties and the reasonableness of the parties' respective interpretations.<sup>28</sup>

Harbor further contends Kidder is only entitled to be paid a commission if it is the procuring cause of the lease agreement is a plausible interpretation thereby precluding summary judgment. First, Harbor's interpretation of the CRA is a plausible interpretation

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<sup>28</sup> *Berg*, at 667-69, 801 P.2d 222.

because it is in accord with the normal standards governing the payment of a commission.<sup>29</sup>

Harbor's interpretation is entirely consistent with the language of the CRA. The CRA clearly states that the brokerage commission is "in consideration of brokerage services rendered". It is not just implied that there must be some services provided, this requirement is stated in no uncertain terms. In fact, this language is the embodiment of the procuring cause rule.

However, the CRA further provides:

"In consideration of this Agreement, Agent agrees to utilize reasonable effort and diligence to achieve the purpose of this Agreement."

Not only does the CRA require that some brokerage services be provided, it imposes a standard of performance upon the broker. To assert that Kidder is entitled to a commission regardless of its performance renders these terms irrelevant. Interpretation of contracts in a manner that gives lawful effect to all the provisions in a contract are favored over those that render some of the language

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<sup>29</sup> See *Feely at 683*; and the discussion in Section 3.2, *infra*. Liability for the payment of a commission is based upon the procuring cause rule which requires some causal relationship between the actions of the broker and the sale/lease agreement..

meaningless or ineffective.<sup>30</sup> If Kidder seriously contends that its entitlement to a commission in no manner is dependent upon its providing some level of service, then neither of these specific contract terms have any meaning or reason.

Conversely, these terms have significant meaning to Harbor. Harbor did not believe that Kidder had any meaningful involvement in the agreement reached with Norton, and as a result was not entitled to a commission. (CP 49). This interpretation of the CRA is not only plausible, it is reasonable as well. One of the basic principles of contract is that parties should be compensated for performing services. The corollary to that is those who perform no services should not expect to be paid. Whether or not Kidder earned a commission for the services it performed is certainly a genuine issue of material fact, however, there can be no serious argument that the performance of some level of service is a requirement under the contract.

### 3. ***The Procuring Cause Rule.***

Although the trial court did not believe that the procuring cause rule had any bearing on its decision, it is respectfully submitted that

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<sup>30</sup> *Grey v. Leach*, 158 Wash.App. 837, 244 P.3d 970 (2010)

such a conclusion is clearly error.

**3.1 *The Broker Must be the Procuring Cause of the Transaction to be Entitled to a Commission.***

When a party is employed to procure a purchaser and does procure a purchaser to whom a sale is eventually made, that party is entitled to a commission regardless of who makes the sale.<sup>31</sup> However, the corollary is also true: where the broker is not the procuring cause of the transaction, he is not entitled to a commission.<sup>32</sup> The procuring cause rule provides a default standard for liability to pay a commission where the parties have not agreed on a different standard, or where the parties' agreement as to when a commission will be paid proves ineffective.<sup>33</sup> This principle was recently followed in the case of *Washington Professional Real Estate LLC v. Young*<sup>34</sup>, where the trial court on summary judgment denied the broker's entitlement to a commission under a "tail" provision in a

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<sup>31</sup> *Prof'l's 100 v. Prestige Realty, Inc.*, 80 Wash.App. 833, 836–37, 911 P.2d 1358 (1996) (citing *Willis v. Champlain Cable Corp.*, 109 Wash.2d 747, 754, 748 P.2d 621 (1988) (citing, in turn, *Feeley v. Mullikin*, 44 Wash.2d 680, 683, 269 P.2d 828 (1954)))

<sup>32</sup> *Feeley* at 683.

<sup>33</sup> *Willis v. Champlain Cable Corp.*, 109 Wash.2d 747, 754, 748 P.2d 621 (1988)

<sup>34</sup> *Washington Professional Real Estate LLC v. Young*, 163 Wash.App. 800, 260 P.3d 991 (2011)

listing agreement. In this case the trial court held that the broker had “less than minimal”<sup>35</sup> involvement with the eventual sale, and therefore was not entitled to a commission as a matter of law. The language of the tail provided:

“If the property or any portion thereof or any interest therein is, directly or indirectly, sold, exchanged, leased or is purchased under an option, within 365 days after the expiration of this Agreement to any person with whom a Broker negotiated or to whose attention the Property was brought through the signs, advertising, or any other action or effort of a Broker, Broker's agents, employees or subagents, or on information secured directly or indirectly from or through a Broker during the term of this Agreement, then Seller shall pay Broker the above compensation.”

Division III held that the trial court’s application of the procuring cause rule employed the incorrect standard. Instead, the obligation to pay a commission was dependent upon the language of the tail. It was clear that during the tail period a standard different than the default procuring cause rule should have been employed.<sup>36</sup> It was not a question of whether the broker was the procuring cause of the sale, but instead whether the sale was to a person with whom the “Broker

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<sup>35</sup> *Washington Professional Real Estate* at 808.

<sup>36</sup> The language of the “tail” was significantly different than the language that would be applied if a sale was consummated during the term of the brokerage agreement.

negotiated or to whose attention the Property was brought through the signs, advertising, or any other action or effort of a Broker, Broker's agents, employees or subagents, or on information secured directly or indirectly from or through a Broker during the term of this Agreement".<sup>37</sup>

It makes perfect sense that the standard should be different during a tail period than it would be during the term of the listing. A sale made during the tail period most likely will not involve the efforts of the broker as the brokerage agreement has either expired or was terminated. Therefore, it would be nonsensical to require a broker to be the procuring cause during the tail period. However, the opposite is true as well. During the time when the brokerage agreement is in effect it should be expected that the broker would have a causal relationship to the deal, either by its direct efforts, such as showing the property or negotiating on behalf of the parties, or indirectly where the buyer/lessor learns of the availability of the property through the broker's advertising or marketing of the property.

The court went on in *Washington Professional* to hold that whether or not the broker was entitled to a commission was to be

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<sup>37</sup> *Id.* at 810.

measured according to the standards stated in the tail, and not according language pertaining to a sale made during the term of the brokerage agreement which was the equivalent of the procuring cause rule. The question, then, was not whether the broker was the procuring cause of the sale, but instead whether or not the property was sold to any person whose "attention" was brought to the property through the broker's efforts. The Court of Appeals reversed the trial court's grant of summary judgment holding that genuine issues of material fact existed with regard to the broker's entitlement to a commission under the language of the tail.

This case does not mean that the procuring cause rule is dead, it merely means that the procuring cause rule is not the standard where the parties have agreed to a different standard. Where there is no different standard, then the procuring cause rule remains the standard to be employed. But here, the CRA used terms that are entirely consistent with the procuring cause rule, and therefore the procuring cause rule applies.

### **3.2 *Kidder is Was Not the Procuring Cause of the Harbor Lease as a Matter of Law.***

Notwithstanding the decision in *Washington Professional*, in

the instant case the procuring cause rule is the standard to be applied. Where the parties' contract includes a standard for liability for a commission that is consistent with the concept of procuring cause of sale, the procuring cause standard applies.<sup>38</sup> *Professionals* involved a letter agreement whereby the broker was promised a commission if he “provided a buyer”. The court held that this language was consistent with the procuring cause rule, and therefore the procuring cause rule would be the applicable standard.

Although not as specific as the language contained in *Washington Professional* or *Professionals*, the language contained in the CRA is consistent with the procuring cause rule. The CRA clearly provides that Kidder would provide “brokerage services”, and even goes so far as to impose a standard of performance.<sup>39</sup>

The determination of whether the activity of a broker was the procuring cause of a sale is generally a question of fact.<sup>40</sup> Similarly, whether or not Kidder was the procuring cause of the Harbor/Norton

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<sup>38</sup> *Prof'ls 100 v. Prestige Realty, Inc.*, 80 Wash.App. 833, 836–37, 911 P.2d 1358 (1996).

<sup>39</sup> “. . . reasonable effort and diligence to achieve the purpose of this Agreement”. (CP

<sup>40</sup> *Zelensky v. Viking Equip. Co.*, 70 Wash.2d 78, 91, 422 P.2d 293 (1966)

lease is a factual question. Harbor had its initial contact with Norton long before Kidder was ever contacted. Harbor repeatedly followed up with Norton without Kidder's involvement, both before and after Kidder was engaged. Kidder's only involvement occurred during one ten minute visit to the property. Even after this visit Kidder had no involvement with Norton, not even so much as to follow up with Harbor. In fact, the only involvement with Norton after the visit to the site was to request that Norton enter into a listing agreement with Kidder, which request was rejected by Norton. (CP 48) After that, two weeks elapsed with no effort on Kidder's behalf to procure a lease for Harbor of the Norton property. It is not difficult to understand why Kidder did not pursue Norton. Norton had rejected Kidder's request that it be paid a commission if it negotiated a lease of Norton's property. Why would Kidder pursue a lease for Norton when it knew that Norton was not willing to pay Kidder a commission? Instead, Kidder focused on other potential landlords who would pay Kidder a commission. If Harbor wanted to further its negotiations with Norton, it would have to be through its own efforts, which is exactly what occurred.

A similar set of circumstances were presented in the case of

*Roger Crane & Associates, Inc. v. Felice*.<sup>41</sup> In this case the court rejected the brokers claim that it was the procuring cause of a sale, and dismissed the broker's claim on a motion for summary judgment. The actions of the broker in *Roger Crane* are very similar to the facts of this case. In *Crane* the broker drove the client by the property, but was unable to show the property due to a scheduling error. After that the broker did nothing more to facilitate the sale of the property. As the trial court observed in granting the summary judgment:

“ . . . the fact remains that there's nothing in this record to support any indication then that he did any more than take this buyer by the house once, or at least one of them, where they viewed it from the outside and drove on.” The record does not indicate there was a clear connection between Mr. Brooks' activities and the ultimate sale of the Felice home.”<sup>42</sup>

There must be some minimal causal relationship between the actions of the broker and the eventual transaction.<sup>43</sup> In *Crane* the court was correct in determining, as a matter of law, that merely making an appointment to view the property and nothing more was

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<sup>41</sup> *Roger Crane & Associates, Inc. v. Felice*. 74 Wash.App. 769, 875 P.2d 705 (1994)

<sup>42</sup> *Id.* at 776-77

<sup>43</sup> *Lloyd Hammerstad, Inc. v. Saunders*, 6 Wash.App. 633, 636, 495 P.2d 349, 51 A.L.R.3d 1145 (1972).

not the required causal relationship. In *Lloyd* the court rejected the broker's claim even though the broker had shown the property to the husband, but the wife had discovered the property on her own after it was shown to the husband and rejected by him.

In the instant case, Kidder did much less than was present in either *Crane* or *Lloyd*. Although it may be argued that Kidder had some involvement, there is, at minimum, a genuine issue of material fact as to whether or not Kidder had the required "minimal causal relationship" that resulted in the eventual lease. Kidder says they did; Harbor says they did not; only a trial on the merits can resolve this dispute.

4. ***Kidder is not Entitled to a Commission Merely Because it "Exclusively Represents" Harbor.***

Kidder's argument is that even if it is not the procuring cause of the lease, it is entitled to be paid a commission based upon the language in the CRA which provides that it "exclusively represents" Harbor. The essence of Kidder's argument is that it is entitled to be paid a commission if Harbor enters into any lease during the term of the CRA.

Merely because an exclusive agency may exist, the principal

(owner) is free to negotiate its own deal without being obligated to pay the agent unless such is prohibited by the agreement.<sup>44</sup> In *Sunnyside* the property owner gave the broker the “exclusive right to sell” the owner’s property. However, the agreement was silent as to the obligations of the parties if the owner sold without the aid of the broker. The court held that the owner was not liable for a commission based upon the terms of the agreement because the agreement failed to restrict the owner from making his own deal. In other words, if the broker wishes to obtain a commission with regard to a transaction done by the owner without the broker, it must so specifically state in the brokerage agreement.

The opinion in *Sunnyside* devoted a significant amount of discussion regarding the three types of agency that are normally created, the two that are germane here are an exclusive agency or an exclusive right to sell.<sup>45</sup> However, in the end the court determined that the term used to describe the agency relationship is immaterial. The court in *Sunnyside* considered three types of agency, “sole agents”,

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<sup>44</sup> *Sunnyside Land & Inv. Co. v. Bernier*, 119 Wash. 386, 205 P. 1041 (1922)

<sup>45</sup> Real Estate: Transactions, William B. Stoebuck, John W. Weaver 18 Wash. Prac., Real Estate § 15.4 (2d ed.)

“exclusive agency” and the “exclusive right” to sell, but declined to differentiate between the three. Instead, and in affirming the owner’s right to sell the property without being liable for a commission, the court held:

“But we cannot think there is any essential difference in the contract, no matter which of the phraseologies is used. Primarily the contract is in each instance one agreeing to pay a commission in case the broker procures a purchaser for the listed property able, ready, and willing to take it on the terms the owner offers it for sale, and if the grant of an exclusive agency for that purpose means, as the rule adopted by us presupposes, that the owner will not list the property with another agent during the life of the agency, the grant of an exclusive right can mean no more.”<sup>46</sup>

In the instant case Harbor did not promise to pay a commission without regard to Kidder’s efforts. At a very minimum Harbor expected to perform brokerage services, and lacking thereof, Harbor is not, as a matter of law, obligated to pay a commission.

**5. Harbor is Entitled to Recover its Reasonable Attorney’s Fees on Appeal.**

The CRA provides, in part:

“If Agent employs an attorney to enforce any of the terms of this agreement, and is successful either in whole or in part whether by trial or otherwise, Owner agrees to pay the attorney’s fees and costs incurred by

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<sup>46</sup> *Sunnyside* at 390-91 [emphasis added]

Agent.”

The broad language “[i]n any action on a contract” found in RCW 4.84.330 encompasses any action in which it is alleged that a person is liable on a contract, as in the case here. Kidder contends that Harbor is obligated under the CRA to pay a commission. The CRA contains a provision providing for the payment of attorney’s fees to the prevailing party in any action upon that contract.<sup>47</sup>

In the instant case Harbor contends that the CRA does not obligate it to pay a commission, and is entitled to an award of reasonable attorney’s fees should it prevail on that claim.

### **CONCLUSION**

The trial court erred in determining, based upon viewing the evidence, and reasonable inferences therefrom, in a light most favorable to Harbor, that no genuine issue of material fact existed with regard to the interpretation of the CRA. Based upon the evidence there are certainly factual issues to resolve with regard to Harbor’s liability for a commission.

Furthermore, the court erred in determining that the procuring

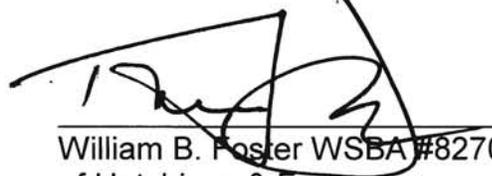
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<sup>47</sup> *Herzog Aluminum, Inc. v. General American Window Corp.*, 39 Wash.App. 188, 692 P.2d 867 (1984).

cause rule does not control Kidder's entitlement to a commission. The CRA does not establish any other standard for the payment of a commission, and therefore the default standard, the procuring cause rule, applies. In fact, because the CRA clearly states that it is providing brokerage services, it has used procuring cause language. Genuine issues of material fact exist as to whether or not Kidder had the minimal causal relationship with the Harbor/Norton lease so as to entitle it to the payment of a commission.

The decision of the trial court should be reversed, and the case remanded for trial. The Appellant is further entitled to an award of its reasonable attorney's fees on appeal.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "W. B. Foster", is written over a horizontal line. The signature is stylized and somewhat cursive.

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