

71591-7

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NO. 71591-7

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

VANTAGE CAPITAL, L.L.C.,

Appellant,

vs.

P.H.T.S., LLC,

Respondent.

APPELLANT'S REPLY BRIEF

Submitted By:

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Vantage submits the following in reply to the Respondent's Brief.

**I. IMPERMISSIBLE SUPPLEMENTATION OF THE RECORD.** PHTS has extensively supplemented the record with a series of articles published in 1981 by the Seattle Post-Intelligencer newspaper. This material was neither presented nor referenced in the trial court, and expands the record impermissibly. *RAP 9.12*. Vantage moves that the reproduced newspaper articles, and reference thereto in Respondent's Brief, be stricken and not considered. Alternatively, in the event the motion to strike is not granted, Vantage moves that the newspaper articles be considered solely to establish what was reported, but not to establish that the reporting was accurate.

**II. HISTORICAL CONTEXT.** PHTS's theory about the origin and intent of RCW 6.23.120 fails to recognize the existing legal context of the time. In 1981, when the statute was enacted, the redefinition of agency relationships now codified in RCW 18.86 *et. seq.* was still years away (and RCW 18.86 did not then exist). In 1981, a listing agent was assumed to be the agent of the seller. *Frisell v. Newman*, 71 Wash. 2d 520, 525-26, 429 P.2d 864, 867-68 (1967) (“*We start from the general and basic premise that, under ordinary circumstances, a real-estate brokerage firm with whom property is appropriately listed for sale becomes the agent of the seller for the purpose of finding a purchaser*”); *McMenamin v. Bishop*

6 Wn. App. 455, 493 P.2d 1016,1018 (1972) (“*Although the listing agreement does not specifically require plaintiff to search for a buyer, such a duty has been imposed by law. It is axiomatic that the listing broker must exercise the utmost good faith and fidelity toward the seller*” citing *Frisell, supra* ); *First Church of Open Bible v. Cline J. Dunton Realty, Inc.*, 19 Wn.App. 275, 574 P.2d 1211 (1978). *Frisell* goes on to state after the above quoted passage:

From this agency relationship springs the duty and obligation upon the part of the listing broker to exercise the utmost good faith and fidelity toward his principal, the seller, in all matters falling within the scope of his employment. *[citations omitted]*. Corollary to and inherent in such realtor's responsibility to his principal, is the rule that the realtor cannot, legally or ethically, purchase or acquire, directly or indirectly, an interest in his principal's property without the explicit consent of his principal based upon a full disclosure by the realtor of all pertinent and material facts within the realtor's knowledge bearing upon the transaction. *[citations omitted]*

*Frisell, supra*, p. 526. *Frisell* characterized the foregoing as “general principles” *Id.* p.527. PHTS’s argument that the broker acting under RCW 6.23.120 is the agent of the buyer (See *Respondents Brief*, p.17) is inconsistent with the general principles prevailing at the time of enactment of the statute. The legislature enacting RCW 6.23.120 more likely assumed that listing brokers were agents of the seller, and with that assumption, as noted by PHTS itself “the offended tone of Vantage’s argument makes sense” (*Respondent’s Brief*, p.17).

The 1981 legislature further likely assumed that the judgment creditor was the successful bidder at the vast majority of the Sheriff's sales under scrutiny. Indeed, the following exchange occurred on the Senate floor in regard to Senator Talmadge's amendment discussed on Page 15 of Respondent's Brief:

POINT OF INQUIRY

Senator Hayner: "Senator Talmadge, on your amendment to the Senate committee amendment, on line 20 it refers to a 'property owner,' but I do not believe it is very clear whether that is indeed the creditor; and I wonder if you would clarify that."

Senator Talmadge: "Senator Hayner, my understanding is that it is meant to be the creditor."

Journal of the Senate, One-Hundred-First Day, April 22, 1981, pg. 1703-1704. The reference to the "property owner" in the context of the statute refers to the successful bidder at the Sheriff's sale who receives the Sheriff's Deed. Clearly, the 1981 legislature was not creating a counter weight to competitive bidding (as occurred in the case at bar), but rather attempting to remediate the consequences of auctions attended only by the foreclosing judgment creditor. (See also *Respondent's Brief* at p. 10-11, in apparent accord).

**III. PHTS'S RESPONSE TO VANTAGE'S SPECIFIC ARGUMENTS.** Vantage raised two primary arguments: (i) the property

was not effectively listed to make the offer a qualifying offer under the statute, and (ii) the broker's actions were so egregiously self-serving as to preclude recovery on an equitable basis. To establish that Mr. Sullivan was a broker listing the property as contemplated by RCW 6.23.120, PHTS argues:

Sullivan is a broker listing the property because he included the property in his record of available properties. Sullivan included the property in his record of available properties by making an offer to buy it. He also advertised it on Zillow.com (*Respondent's Brief*, p.21).

The notion that by offering to buy a property, a broker has thereby included the property in his record of available properties is somewhat of a non sequitur; the argument does concede, as Vantage argues, that Sullivan and PHTS are essentially one and the same. PHTS's argument to this point then is that Mr. Sullivan is a broker listing the property because he advertised it on Zillow and bought it himself. However, PHTS argues in the next section of its brief (*Respondent's Brief* p.21), that the statute does not require a written advertisement (implying that the written advertisement may be evidence of listing but not a necessary component). If a written advertisement is discarded as a requirement to qualify as a broker listing the property, PHTS's argument then is exposed to simply be that Mr. Sullivan is a broker listing the property because he bought it himself. This clearly makes no sense. The legislature must have included

brokers in the equation for a reason other than to buy the property themselves. Otherwise, it would have adopted the probate code upset process cited in Respondent's Brief and opened the process to any buyer. PHTS is on the right track when it argues generally that the legislature contemplated that brokers would get the property out in the competitive free market and generate higher returns (as the Sheriff's statutory publications had apparently failed to do). PHTS does not even try to suggest, however, that Mr. Sullivan did anything consistent with that purpose; the record clearly establishes he did exactly the opposite. In order to defend Mr. Sullivan's conduct, PHTS's is compelled to argue that brokers acting under the authority of the statute are agents of the buyer, and therein PHTS's argument clearly goes awry.

As between buyer and seller, it has been established that the legislature would have assumed the broker to be working for the seller, not the buyer. The legislature would have assumed that brokers would be acting in the interest of the property owner (who, during the redemption period is still the judgment debtor the legislature was trying to protect) to find a buyer and earn a commission. With that alignment of interests, the statute makes sense, and the conflict of loyalties PHTS imagines does not arise. In the case at bar however, there really was no broker acting as the statute envisions. Mr. Sullivan's target was the property, not a

commission, and his broker's license was the pass that got him in the marketplace. It is inconceivable that the legislature would have even contemplated, much less condoned, the misleading, incomplete, ill-timed, and self-serving advertisement posted in this case. PHTS's generalized puffing about the merits of the statute does not sanctify what really happened here: a broker used the statute to create for himself a unique opportunity to buy distressed property, promoting solely his self-interest while actively discouraging competition; in defense of this conduct, PHTS has no choice but to argue that this is just the way the legislature wanted it to be.

#### **IV. CONCLUSION**

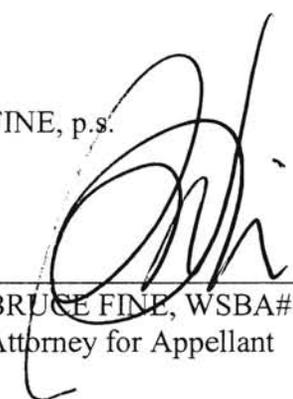
PHTS's brief is largely a theoretical narrative which seeks to justify the broker's self-serving conduct by lauding the underlying purpose of the statute. RCW 6.23.120 may have been well intentioned to redress a flawed process, but the facts of this case do not reflect what the statute envisioned. When it has to narrow the focus of the argument from the merits of the statute to the specific conduct of Mr. Sullivan, PHTS has to sacrifice plausible general reasoning to a contorted non sequitural argument. In order to justify Mr. Sullivan's concern solely with his own self-interest, PHTS is forced to argue that brokers acting under the statute are agents of the buyer, but as has been demonstrated, that agency

alignment subverts the role of the broker contemplated by the statutory scheme. Mr. Sullivan caused to be published a listing which (i) sets an asking price of \$170,000.00, when the minimum qualifying offer under the statute would have been at least \$100,000.00 less; (ii) does not describe the offer and acceptance process of RCW 6.23.120 in any manner; (iii) was posted only one day before the expiration of the redemption period; and (iv) does not indicate the deadline for offers (which would have been one day after the listing was published). PHTS makes no effort to address these specific challenges to the listing. Rather PHTS derisively suggests that Vantage assumes “the legislature expected real estate brokers to make public service announcements about the statute rather than look after the interest of their buyers”. (*Respondent’s Brief* p. 22). Nothing PHTS says about the intent of the statute justifies Mr. Sullivan’s conduct, and nothing PHTS says about Mr. Sullivan’s conduct makes it consistent with the intent of the statute. While PHTS professes to have improved the lot of Mr. Glinsky, the original debtor, PHTS had no misgiving about challenging and thwarting Mr. Glinsky’s preferred course of action to assign his redemption rights. A well intentioned statute can be abused and to that realty applies the maxim of statutory construction that a statute should be interpreted in the manner that best advances the perceived legislative purpose, giving the greatest weight to

the spirit and intent of the statute rather than its literal expression.<sup>1</sup> Mr. Sullivan was not a broker listing the property in the sense contemplated by the statute, and the offer he generated is thus not a qualifying offer. Moreover, Mr. Sullivan's use of the statute for his own self-serving purposes is sufficiently egregious and inequitable to preclude judicial intervention on his behalf.

Respectfully Submitted July 28, 2014

FINE, p.s.



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<sup>1</sup> The meaning of words in a statute is not gleaned from those words alone but from 'all the terms and provisions of the act in relation to the subject of the legislation, the nature of the act, the general object to be accomplished and consequences that would result from construing the particular statute in one way or another.' *State v. Krall*, 125 Wash.2d 146, 148, 881 P.2d 1040 (1994) (quoting *State v. Huntzinger*, 92 Wash.2d 128, 133, 594 P.2d 917 (1979) )

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Bruce Fine, states as follows:

I am the attorney for the Appellant herein. On the 28th day of July, 2014,  
I sent via Halo Messenger Service the Original and one copy of Appellant's  
Reply Brief to the Court as follows:

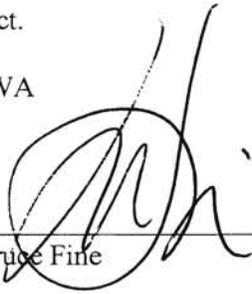
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I further certify that on July 28, 2014, I send a copy of Appellant's Reply Brief to  
counsel for Respondent, P.H.T.S., LLC by email in accordance with prior agreed  
practice as follows:

Rodney Harmon  
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I declare under penalty of perjury pursuant to the laws of the State of Washington,  
that the foregoing is true and correct.

DATED July 28, 2014 at Seattle, WA

  
\_\_\_\_\_  
Bruce Fine

*[Vertical stamp: FILED JUL 23 11 3 07]*