

ORIGINAL

COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON  
No. 43018-5-I

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VIEWPOINT - NORTH STAFFORD LLC, a Delaware limited liability company, VIEWPOINT AT SHOREWOOD LLP, a Washington limited liability partnership, ROBERT S. ROBERTS and ANNE G. ROBERTS,  
Appellants/Plaintiffs

v.

CB RICHARD ELLIS, INC., a Delaware corporation, ARIA ASSET MANAGEMENT LLC, MICHELLE E. BROCK, JAMES N. DONNERSTAG, MERRIAH J. HARKINS, JULIE BROCK HERZOG and DANIEL W. BROCK,  
Respondents/Defendants.

Appeal from the Superior Court of Pierce County  
The Honorable Edmund Murphy  
No. 10-2-10785-7

BRIEF OF APPELLANTS

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12/12/18  
43018-5-I  
APPELLANTS  
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JAMES N. DONNERSTAG  
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JULIE BROCK HERZOG  
DANIEL W. BROCK  
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VIEWPOINT - NORTH STAFFORD LLC  
VIEWPOINT AT SHOREWOOD LLP  
ROBERT S. ROBERTS  
ANNE G. ROBERTS

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## **I. Introduction**

Mr. and Mrs. Roberts were looking for a replacement property that would qualify for tax deferred of any gain on the sale of real property held in Viewpoint at Shorewood, LLC, which they owned. When a person sells business or investment property and has a gain, he or she generally has to pay tax on the gain at the time of sale. 26 USC §1031 provides an exception which allows the seller to postpone paying tax on the gain if the proceeds are reinvested in similar property as part of a qualifying like-kind exchange.

Mr. Donnerstag was a commission real estate agent for C.B. Richard Ellis, Inc. ("CBRE") in Los Angeles, California.

Mr. Roberts contacted Mr. Donnerstag and asked him to help locate a replacement property that would qualify for a 26 USC §1031 exchange. It was expected by all the parties that Mr. Donnerstag would receive a commission upon the closing of such transaction.

Mr. and Mrs. Roberts were conservative and wanted a conservative, safe investment. They rejected a Red Robin restaurant property at the last minute because they thought it was too risky. They then told Mr. Donnerstag that they would simply pay the tax. He urged them not to pay the tax, instead to quickly find another qualifying property.

Next, Mr. Donnerstag introduced the Roberts to the idea of purchasing a tenant in common interest (“TIC”) in a real estate project being promoted by DBSI, Inc. The offering involves more than a simple real estate transaction. In addition to the undivided fractional interest in real estate, the buyer was required to agree to a non-negotiable tenant in common agreement, agree to lease the entire property back to DBSI, Inc. or an affiliate and enter into a management agreement with DBSI, Inc. or an affiliate. The investor was promised regular monthly payments at 7% per annum with the opportunity to obtain an additional 3% profit on the sale of the property. In essence the investor was buying a stream of payments while all the managerial efforts were provided by DBSI, Inc. or an affiliate.

The parties differ in their recollection of the phone conversation when Donnerstag told Roberts about the DBSI TIC offering. Mr. Roberts recalled that Mr. Donnerstag told him that DBSI had been in business for 27 years and that this was a safe, conservative investment. Mr. Donnerstag’s recalled that he told Mr. Roberts that he had attended a seminar on the TIC investments and if Mr. Roberts was interested he would put him in touch with someone from DBSI. Mr. Donnerstag admits he told Mr. Roberts that he would receive a referral fee on the sale of the TIC. Donnerstag would not have been paid anything had the Roberts not purchased the DBSI TIC.

Mr. Donnerstag emailed George Brock, who worked for DBSI, and asked Brock to find a “low risk” investment for Mr. Roberts because that was what Mr. Roberts wanted. Donnerstag also had conversations with David Rottman and with Michele Brock, both of whom worked for DBSI’s securities broker affiliate DBSI Securities Corp. All of these conversations were related to the Roberts’ TIC transaction and the referral fee to be paid to Mr. Donnerstag.

The DBSI TIC sold to the Roberts is a security in the form of an investment contract and was sold as such to the investing public. It was sold through DBSI’s affiliate DBSI Securities Corp which was a registered securities broker.

The central issue in this appeal are (a) if Mr. Donnerstag’s involvement in the transaction was a significant contributing factor in the sale of a security such that he is a “seller” under the Washington Securities Act or (2) if his conduct constituted providing “material aid” to the seller.

The trial court held that Donnerstag could not be considered a seller or material aider and dismissed him and CB Richard Ellis from the case. This appeal ensued.

## **II. Assignments of Error**

### **1. Assignment of Error**

- A. The trial court erred in granting respondents CB Richard Ellis, Inc. and James Donnerstags' motion for summary judgment dismissing them from the case in its order of December 12, 2011 and in its order re: final judgment dated January 13, 2012.

### **2. Issues Pertaining to Assignment of Error**

- A. Is introducing a potential buyer of securities to a seller of securities for the purpose of inducing the buyer to purchase securities with the expectation of being paid if the buyer completes the transaction a substantial contributive factor in the sale of the securities?
- B. Does receiving a percentage of the sale price as a referral fee from a seller of securities for locating a potential buyer and introducing him or her to the seller make the receiver of the fee a "seller" of the securities under RCW 21.20.430(1)?
- C. Does locating a potential buyer and introducing him or her to the seller of securities in exchange for a referral fee constitute "materially aiding" in the sale of the securities under RCW 21.20.430(3)?

D. Is introducing a potential buyer of securities to a seller of securities for the purpose of inducing the buyer to purchase securities a substantial contributive factor in the sale of the securities?

### **III. Statement of the Case**

1. Facts pertaining to the sale of securities to Plaintiffs.

Appellant Bob Roberts is 81 years old; his wife Anne Roberts is 71 years old.<sup>1</sup> Mr. and Mrs. Roberts owned Viewpoint at Shorewood LLC, which in turn owned a portion of Viewpoint at Shorewood apartment building.<sup>2</sup> When the apartment sold in 2008, the Roberts were looking for another real property to buy in exchange for their ownership in the apartment building. They hoped to do this through a §1031 exchange<sup>3</sup> otherwise known as a tax deferred exchange which is provided for in 26 USC § 1031. A "1031 exchange" is unique because the entire transaction is treated as an exchange and not just as a simple sale which allows the taxpayer defer payment of tax on any gain until the acquired property is sold. This qualification is important because sales are taxable

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<sup>1</sup> CP 451 (Ex 1 to Plaintiff's Response to Defendants' Motion for Summary Judgment: Declaration of Robert Roberts).

<sup>2</sup> CP 122 - 123 (Ex A to Defendants' Motion for Summary Judgment: Bob Roberts' depo 85:4 - 86:16)

<sup>3</sup> CP 127 - 128 (Ex A to Defendants' Motion for Summary Judgment: Bob Roberts' depo 95:24 - 96:8)

with the IRS in the year of the sale and §1031 exchanges allow the taxpayer to defer payment of the tax on the gain. To obtain §1031 treatment of the transaction, a taxpayer must identify the property for exchange before closing, identify the replacement property within 45 days of closing, and acquire the replacement property within 180 days of closing. A Qualified Intermediary must also be used to facilitate the transaction.

While Mr. and Mrs. Roberts would have liked to do a §1031 exchange they were also concerned with the safety of their investment and were prepared to simply pay the tax if a suitable exchange property could not be found<sup>4</sup>.

Defendant James Donnerstag is a commercial real estate broker for defendant CB Richard Ellis, licensed and working in California.<sup>5</sup> Mr. Roberts and Donnerstag had met in college about 60 years ago and Roberts' mother once used Donnerstag to find a replacement tenant for a property she owned in California<sup>6</sup>.

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<sup>4</sup> CP 499, 503 (Ex 2B & Ex 2C to Plaintiff's Response to Defendants' Motion for Summary Judgment: Robert Roberts depo 110:18 - 25; Ex 44 to Donnerstag depo).

<sup>5</sup> CP 98 (Declaration of James Donnerstag, attached to Defendants' Motion for Summary Judgment).

<sup>6</sup> CP 479-480 (Ex 2A to Plaintiff's Response to Defendants' Motion for Summary Judgment: Donnerstag depo 81:6 - 8; 82:10 - 25).

When the Viewpoint at Shorewood apartment complex sold Mr. Roberts sought out the assistance of Donnerstag in finding a suitable property to qualify for a 26 USC §1031 tax free exchange. Bob Roberts told Donnerstag he preferred a single tenant, net lease property with a strong tenant, conservative deal with a lease term that was either medium or long, in a good location and good economics.<sup>7</sup>

Over the next several months, Donnerstag presented several properties for consideration by the Roberts. Eventually, the Roberts selected a Red Robin building in Kent, Washington. At the last minute, the Roberts decided not to purchase this building because they felt it too risky<sup>8</sup>. At that point, the 26 USC §1031 roll-over time limit was fast approaching and the Roberts told Donnerstag they were resigned to paying the capital gain tax on the sale of Viewpoint. Donnerstag urged them to quickly find another property to avoid paying the tax.<sup>9</sup>

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<sup>7</sup> CP 481 (Ex 2A to Plaintiffs' Response Memorandum to Defendants' Motion for Summary Judgment: Donnerstag depo 87:18 - 23).

<sup>8</sup> CP 499 - 500 (Ex 2B to Plaintiff's Response to Defendants' Motion for Summary Judgment: Robert Roberts depo 110:1 - 111:5).

<sup>9</sup> CP 500 (Ex 2B to Plaintiffs' Response Memorandum to Defendants' Motion for Summary Judgment: Roberts depo 110:25 - 111:25).

Donnerstag's compensation is commissioned based. At the point the Red Robin deal fell apart, Donnerstag was not entitled to any compensation from the Roberts for his work to date since no transactions had closed.

[MR. MCGAUGHEY]: Had the DBSI transaction not come together and the Roberts had simply paid the taxes and not bought another property, would they have owed you any money?

[MR. DONNERSTAG]: No.<sup>10</sup>

On March 20, 2008, Donnerstag attended a 3-hour seminar presented by DBSI and its affiliated companies at the Hyatt Regency Century Plaza in Los Angeles<sup>11</sup>. Donnerstag was told about the DBSI tenant-in-common ("TIC") programs and the potential for earning referral fees if he referred clients into the TIC programs.

[MR. MCGAUGHEY]: And what other topics were presented at that meeting?

[MR. DONNERSTAG]: They talked about their TIC programs.

Q. What did they say about them?

A. I don't remember much detail, but I do remember that they had one program which was I guess you'd call it an ordinary TIC program, and one program whereby they had

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<sup>10</sup> CP 493 - 494 (Ex 2A to Plaintiffs' Response Memorandum to Defendants' Motion for Summary Judgment: Donnerstag depo 146:22 147:1).

<sup>11</sup> CP 459 (Ex 2A to Plaintiffs' Response Memorandum to Defendants' Motion for Summary Judgment: Donnerstag depo 29:11 34:2).

a master lease associated with the TIC program<sup>12</sup>.

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[MR. MCGAUGHEY]: Was the topic of paying referral fees brought up?

[MR. DONNERSTAG]: What?

Q. Paying referral fees.

A. Yes.

Q. What did they say about that?

A. They invited brokers to bring to them potential TIC buyers and that they would pay referral fees.

Q. Did they say how much or what percent?

A. They may have, but I don't recall what that was.

Q. Did they give you somebody to talk to if you wanted to refer a potential TIC purchaser?

A. Yes.<sup>13</sup>.

These TIC interests were presented as securities and sold through the DBSI Securities Corporation, which was a licensed securities broker. Donnerstag was not licensed to sell securities.<sup>14</sup> Donnerstag knew that it was improper for a real estate licensee to pay referral fees to a non-licensed person.

[MR. MCGAUGHEY]: In connection with your work as a real estate broker, have you ever paid referral fees to any non-real estate broker in connection with a real estate transaction?

[MR. DONNERSTAG]: No.

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<sup>12</sup> CP 462 (Ex 2A to Plaintiffs' Response Memorandum to Defendants' Motion for Summary Judgment:: Donnerstag depo 32: 9 17).

<sup>13</sup> CP 463 (Ex 2A to Plaintiffs' Response Memorandum to Defendants' Motion for Summary Judgment: Donnerstag depo 33:4 - 18).

<sup>14</sup> CP 458 (Ex 2A to Plaintiff's Response to Defendants' Motion for Summary Judgment: Donnerstag depo 19: 7 - 9).

Q. Is that permitted under the CB Richard Ellis internal procedures and guidelines?

A. No.

Q. It's not permitted?

[MR. EMCH]: Well, objection to the extent it calls for a legal conclusion.

A. Well, I'm told not to do that<sup>15</sup>.

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[MR. MCGAUGHEY]: Has it been your understanding over the last 20 years that it was a violation of the California real estate rules and laws for you to pay a nonlicensed person, non-real estate licensed person a referral fee in connection with referring you a potential real estate transaction?

[MR. EMCH]: Objection, vague, also calls for a legal conclusion.

Q. I'm asking your understanding.

[MR. EMCH]: You can answer.

[MR. DONNERSTAG]: You want me to answer?

MR. EMCH: You can answer if you understand the question.

[MR. DONNERSTAG]: I only knew that we were not supposed to do it, but I don't know the law. I just know we're not supposed to do it<sup>16</sup>.

Shortly after attending the DBSI seminar, Donnerstag called Bob Roberts to tell him about the DBSI program. Not surprisingly, the parties remember this conversation somewhat differently. Mr. Roberts testified as follows about this conversation:

[MR. EMCH] Why are you suing CBRE?

[MR. ROBERTS] Because they told us through Mr.

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<sup>15</sup> CP 472 (Ex 2A to Plaintiff's Response to Defendants' Motion for Summary Judgment: Donnerstag depo 56:9 - 20).

<sup>16</sup> CP 473 - 474 (Ex 2A to Plaintiff's Response to Defendants' Motion for Summary Judgment: Donnerstag depo 57:24 - 58:24).

Donnerstag as their agent that this was a company that had been in business for 27 years with a good track record, and it was a safe, conservative investment. . . .<sup>17</sup>

Donnerstag testified about that conversation as follows:

[MR. MCGAUGHEY]: Do you remember a conversation with Bob Roberts, your first conversation with Bob Roberts about DBSI?

[MR. DONNERSTAG]. Yes.

Q. Who was on the phone?

A. Just the two of us.

Q. And do you remember who called who?

A. I called him.

Q. What was the purpose of your call?

A. On that call, I informed him that I had attended a seminar given by DBSI for real estate brokers and that they talked about various programs they had, some of which were tenant in common programs and that if he chose to look at that kind of thing, that I could put him in touch with them, and he indicated that he would like to look at that sort of thing.

Q. And subsequent to that conversation, you let DBSI know about Mr. Roberts' existence?

A. Yes.

Q. Would that have been the same day?

A. Pardon me?

Q. Would that have been the same day?

A. It would have been promptly thereafter. I can't say it was the same day or not.

Q. At the time you had this conversation with Mr. Roberts and suggested DBSI, did you have an expectation that you would receive a referral fee if Mr. Roberts purchased a DBSI TIC interest?

A. Yes, and I disclosed that to Mr. Roberts on that initial call<sup>18</sup>.

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<sup>17</sup> CP 498 (Ex 2B to Plaintiff's Response to Defendants' Motion for Summary Judgment: Roberts depo 72:14 - 19).

<sup>18</sup> CP 482 - 484 (Ex 2A to Plaintiff's Response to Defendants' Motion for Summary Judgment: Donnerstag depo 112:24 - 114:4)

Mr. Donnerstag had a pretty good sense of what the Roberts were looking for in terms of a replacement investment for the proceeds from apartment building they had just sold.

[MR. MCGAUGHEY]: So at that point you'd been talking to Mr. Roberts I think you said 50 times over the previous eight or nine months about what he was looking for in real estate; is that right?

[MR. DONNERSTAG]: Yes.

Q. Do you think you had a pretty good sense of what he was looking for from those conversations?

A. Yes<sup>19</sup>.

Donnerstag contacted DBSI about the Roberts, following up with an email to George Brock at DBSI on March 31 (11 days after the DBSI seminar). That email said:

“As discussed, my client Bob and Anne Robert are in an exchange and are open to talking to you about your programs. My understanding is they have to identify by April 12th and close by April 24th. They are presently looking at the CVS zero spendable deal whereby they can pull out their principal after the close of escrow. I understand this is a Stauback deal.

I am hopeful you can show them something that is better for them and also with low risk. I believe they have about \$2,000,000 in cash and have to cover about 2.2 Million in debt.”<sup>20</sup>

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<sup>19</sup> CP 485 (Ex 2A to Plaintiff's Response to Defendants' Motion for Summary Judgment: Donnerstag depo 116:3-10).

<sup>20</sup> CP 503 (Ex 2C to Plaintiff's Response to Defendants' Motion for Summary Judgment: Donnerstag depo Exhibit 44).

Donnerstag told Brock to show the Roberts a “low risk” investment because “that was the criteria the Roberts had.”

[MR. MCGAUGHEY]: Why did you tell Mr. Brock that the Roberts, that you were hoping he could show them something with low risk?

[MR. DONNERSTAG]: That was the criteria that the Roberts had<sup>21</sup>.

Donnerstag next had telephone conversations about the Roberts with David Rottman who worked for DBSI Securities. Donnerstag and Rottman discussed the referral fee that Donnerstag with receive.

[MR. MCGAUGHEY]: Did you discuss a referral fee with Mr. Rottman?

[MR. DONNERSTAG]: Just that there would be a referral fee.

Q. So you did discuss it with him; is that correct?

A. Yes<sup>22</sup>.

The Roberts were contacted by David Rottman, who is identified as with DBSI Securities on the business card from Mr. Donnerstag’s files<sup>23</sup>. The Roberts were presented with various DBSI investments and selected the DBSI North Stafford investment.

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<sup>21</sup> CP 486 (Ex 2A to Plaintiff’s Response to Defendants’ Motion for Summary Judgment: Donnerstag depo 123:20 - 24).

<sup>22</sup> CP 466 (Ex 2A to Plaintiff’s Response to Defendants’ Motion for Summary Judgment: Donnerstag depo 44:7 - 12).

<sup>23</sup> CP 505 (Ex 2D to Plaintiff’s Response to Defendants’ Motion for Summary Judgment: Donnerstag depo Ex 42).

At some point prior to the closing of the North Stafford transaction, Rottman identified that property to Donnerstag as the one chosen by the Roberts<sup>24</sup>. Michelle Brock of DBSI Securities also sent Donnerstag the selling brochure on this North Stafford investment<sup>25</sup>.

Donnerstag did nothing to check on DBSI or the North Stafford property<sup>26</sup>. Even though CB Richard Ellis had done the appraisal on the North Stafford property for DBSI, Donnerstag did not even bother to check the CB Richard Ellis computers about the property<sup>27</sup>.

Before the closing of the DBSI North Stafford transaction, Donnerstag also had conversations about his referral fee with DBSI's Michelle Brock.

[MR. MCGAUGHEY]: Did you have a discussion with anybody at DBSI subsequent to your conversation with Mr. Rottman that we just spoke about, subsequent to that, did you have a conversation with anybody at DBSI or its affiliated companies about the size, when I say size, the amount or the percentage, of the referral fee?

[MR. DONNERSTAG]: Yes.

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<sup>24</sup> CP 475 - 476 (Ex 2A to Plaintiff's Response to Defendants' Motion for Summary Judgment: Donnerstag depo 64:20 - 65:4).

<sup>25</sup> CP 487 - 488 (Ex 2A to Plaintiff's Response to Defendants' Motion for Summary Judgment: Donnerstag depo 127:24 - 128:1).

<sup>26</sup> CP 465 (Ex 2A to Plaintiff's Response to Defendants' Motion for Summary Judgment: Donnerstag depo 38:1 - 13).

<sup>27</sup> CP 477 - 478 (Ex 2A to Plaintiff's Response to Defendants' Motion for Summary Judgment: Donnerstag depo 69:12 - 70:2).

Q. Who was that conversation with?  
A. Michelle Brock.  
Q. And was it one conversation or more than one?  
A. More than one.  
Q. How many?  
A. Two.  
Q. Let's step back for a second. I think I'm the one that's been using the term "referral fee." What was the term that DBSI used for that fee?  
A. Referral fee.<sup>28</sup>

Michelle Brock twice flew to Washington from California to obtain the Roberts' signature on the closing documents<sup>29</sup>. Declaration). Sometime during the Roberts' transaction, someone at DBSI apparently got skittish about the legality of paying "referral fees" in connection with the sale of a security, so they made a change so that it would appear that the buyer was paying these fees, rather than DBSI. But the "fee" was still based upon a percentage of the deal.

[MR. MCGAUGHEY]: Was it before or after the Roberts signed the letter of intent, or do you know?  
[MR. DONNERSTAG]: I think it was around that time that Michelle Brock called me to tell me that DBSI had changed their policy on referral fees, and that they were now having the buyer pay the referral fees and they were deducting that amount from the purchase price.  
Q. What was your reaction to that in your own head?  
A. I said I'm surprised, but it's your program. You take care of it.  
Q. Did she tell you why they changed it, changed their policy?

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<sup>28</sup> CP 467 (Ex 2A to Plaintiff's Response to Defendants' Motion for Summary Judgment: Donnerstag depo 45:6 - 23).

<sup>29</sup> 451 (Ex 1 to Plaintiff's Response to Defendants' Motion for Summary Judgment: Robert Roberts Declaration).

A. No.  
Q. Did you question her about the changed policy?  
A. Yes.  
Q. What did you ask?  
A. I said why are you changing? And I got vague answers.  
Q. Was this, this particular discussion, was this in your first or your second call with Michelle Brock?  
A. Second.  
Q. Did she tell you that the -- well, let's step back. Do you know if the fee was based on a percentage of the sales price or was it based on something else?  
A. As I stated, either the sales price or the cash going in, I'm not clear -  
Q. But it was --  
A. -- on that point.  
Q. But you think it was a percentage of something?  
A. Yes.<sup>30</sup>

CB Richard Ellis was paid a fee of \$72,856.25 out of the closing of the Roberts/DBSI North Stafford transaction.

[MR. MCGAUGHEY]: You've been handed Exhibit-27. Why don't you look at it for a second. Did CB Richard Ellis receive a fee in connection with the Roberts transaction of \$72,856.25?  
[MR. DONNERSTAG]: Yes.  
Q. Do you know, was that amount sent to CB Richard Ellis or was it sent to you personally, or how was it received on your end?  
A. To CB Richard Ellis.  
Q. And how much of that \$72,856.25 went into your pocket?  
A. About half.  
Q. And the rest stayed with CB Richard Ellis?  
A. Yes, sir.<sup>31</sup>

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<sup>30</sup> CP 468 - 470 (Ex 2A to Plaintiff's Response to Defendants' Motion for Summary Judgment: Donnerstag depo 46:15 - 48:1).

<sup>31</sup> CP 471 (Ex 2A to Plaintiff's Response to Defendants' Motion for Summary Judgment: Donnerstag depo 54:6 - 19).

Donnerstag prepared the internal CB Richard Ellis forms to process this \$72,856.25 fee and chose to call this fee a “consulting fee” on those forms<sup>32</sup>.

Shortly after the Roberts invested in the DBSI North Stafford property, DBSI filed for protection under the US Bankruptcy Code. Massive accounting fraud was uncovered on the part of DBSI.

#### **IV. Argument**

##### **1. Standard of Review**

The Court of Appeals reviews orders granting summary judgment de novo, engaging in the same inquiry as the trial court. *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 358, 166 P.3d 667 (2007). On review of any pleadings, depositions, answers to interrogatories, admissions, and affidavits on file, a court may grant summary judgment if there are no genuine issues as to any material fact, thus entitling the moving party to judgment as a matter of law. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005); CR 56(c). When reasonable persons could reach but one conclusion, summary judgment may be granted. *Hansen v. Friend*, 118 Wn.2d 476, 485, 824 P.2d 483 (1992).

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<sup>32</sup> CP 488 - 492 (Ex 2A to Plaintiff’s Response to Defendants’ Motion for Summary Judgment: Donnerstag depo 128:16 - 132:2).

**2. Mr. Donnerstag was a “seller” and CB Richard Ellis was a person who “controls” a seller under the Washington Securities Law**

Plaintiffs’ Washington Securities Law claims have been brought pursuant to RCW 21.20.430, which provides in part:

(1) **Any person, who offers or sells a security** in violation of any provisions of RCW 21.20.010 [offers, sales, purchases by untrue statements or omissions], 21.20.140 (1) or (2) [unlawful to offer or sell unregistered securities], or 21.20.180 through 21.20.230 [related to registration], is liable to the person buying the security from him or her, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at eight percent per annum from the date of payment, costs, and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security, or for damages if he or she no longer owns the security. Damages are the amount that would be recoverable upon a tender less (a) the value of the security when the buyer disposed of it and (b) interest at eight percent per annum from the date of disposition.

\* \* \*

(3) **Every person who directly or indirectly controls a seller** or buyer liable under subsection (1) or (2) above, every partner, officer, director or person who occupies a similar status or performs a similar function of such seller or buyer, every employee of such a seller or buyer who materially aids in the transaction, and every broker-dealer, salesperson, or person exempt under the provisions of RCW 21.20.040 who materially aids in the transaction is also liable jointly and severally with and to the same extent as the seller or buyer, unless such person sustains the burden of proof that he or she did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is

alleged to exist. There is contribution as in cases of contract among the several persons so liable.

RCW 21.20.005 (14) provides the definition of "Sale" or "sell"

(14) "Sale" or "sell" includes every contract of sale of, contract to sell, or disposition of, a security or interest in a security for value. "Offer" or "offer to sell" includes every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value.

Defendant Donnerstag solicited plaintiffs' offer to buy a security from DBSI. Defendant Donnerstag is liable to plaintiffs because he is a "seller" of an unlawful security to plaintiffs a person who offered or sold that security to plaintiffs. Defendant CB Richard Ellis is liable to plaintiffs because it is a "person who directly or indirectly controls a seller" *i.e.*, Mr. Donnerstag. RCW 21.20.430(3).

As discussed above, Donnerstag recommended the DBSI securities to plaintiffs, and contacted DBSI to tell it about plaintiffs. DBSI then contacted the plaintiffs and very quickly closed the sale of the DBSI securities to the plaintiffs. Donnerstag and CB Richard Ellis received a commission/referral fee on this transaction of \$72,856.25, or about 3.5% of the \$2,000,000 cash portion of plaintiffs' purchase price.

A person who participates in the solicitation of a customer; recommends the customer to the issuer or the issuer's broker-dealer; and

obtains a securities transaction-based percentage fee acts as: (1) a securities salesperson or broker-dealer, (2) a seller, and further (3) the person, unless an exemption is proven by the person, is required to be appropriately registered as a securities salesperson or broker-dealer. The tenant-in-common program was a security, Mr. Donnerstag's conduct constituted the offer of a security and his compensated solicitation was a substantial contributing factor in the sale of a security to Viewpoint - North Stafford LLC, Viewpoint at Shorewood LLP, Robert S. Roberts and Anne Roberts, the plaintiffs in this case.

Several Washington opinions hold that whether someone is a seller is “necessarily a question of fact.” *Haberman v. Washington Public Power Supply System*, 109 Wn2d 107, 132, 744 P2d 1032 (1987). *See also In re Metropolitan Securities Litigation*, 532 F Supp2d 1260 (ED Wash 2007). The *Haberman* court also set out the three-pronged test for determining whether or not a defendant's acts were a “substantial contributive factor” in the sale and thus a seller.

“In a similar fashion, we hold that a defendant is liable as a seller under RCW 21.20.430(1) if his acts were a substantial contributive factor in the sales transaction. Considerations important in determining whether a defendant's conduct is a substantial contributive factor in the sales transaction include: (1) the number of other factors which contribute to the sale and the extent of the

effect which they have in producing it; (2) whether the defendant's conduct has created a force or series of forces which are in continuous and active operation up to the time of the sale, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible; and (3) lapse of time. See generally Restatement (Second) of Torts §§ 432, 433 (1977). Whether a defendant's conduct was a substantial contributive factor is necessarily a question of fact.

We emphasize that our adoption of a substantial contributive factor test to determine seller liability under RCW 21.20.430(1) is distinct from the test for participant liability pursuant to RCW 21.20.430(3). Our substantial contributive factor analysis simply expands the strict privity approach to sellers so as to include those parties who have the attributes of a seller and thus who policy dictates should be subject to liability under RCW 21.20.430(1), but who would escape primary liability for want of privity.”

*Id at 131-132.*

Here Donnerstag knew the financial condition of plaintiffs, knew their desire for a safe investment, spent months finding investment opportunities that he believed were suitable for plaintiffs and presented them with this investment opportunity for which he knew he would receive compensation if plaintiffs purchased the tenant in common interest he presented to them. He then followed up with the DBSI representatives to ensure that the transaction was completed and that he got his commission. Donnerstag’s conduct meets all three of the enumerated

important considerations for determining if he was a substantial contributive factor in the sale of securities to plaintiffs.

Further, the *Haberman* decision clarifies that its analysis expands the definition of seller to “those parties who have the attributes of a seller and thus who policy dictates should be subject to liability...”. It is common parlance and understanding that a salesman is a person who sells something. Donnerstag is a real estate salesman and in this situation the real estate was wrapped up in a number of other agreements that created a security in the form of an investment contract under Washington law. Donnerstag has the attributes of a seller and should be held liable.

Importantly, the law in Washington strongly suggests that Donnerstag falls squarely within the role of “seller.” The statutory definition of “Sale or Sell” includes exactly what Donnerstag did. He introduced the DBSI security to plaintiffs for the purpose of inducing them to make an offer to purchase the TIC interest. He was not making idle conversation; he was soliciting a sale in order to earn a commission.

In the late 1980s, there were several tests for determining who constituted a “seller.” See the discussion in *Pinter v Dahl*, 486 US 622, 108 S Ct 2063, 100 L Ed 2d 658 (1988) and *Haberman, supra*.

Some jurisdictions those that applied a “privity” test limited “seller” status to only the person who transferred “title” to security and did not include traditional salespeople who merely facilitated the sale.

Other courts applied a “substantial factor” test broadly construing “seller” status to include those who were “a substantial contributing factor in the sales transaction.” *Haberman, supra* at 131.

In *Pinter v Dahl*, 486 US 622, 108 S Ct 2063, 100 L Ed 2d 658 (1988), the US Supreme Court took a middle approach, limiting “seller” status to those who pass title to the security, as well as a **“person who solicits the buyer’s purchase in order to serve the financial interests of the owner.”** *Id* at 655. The *Pinter* Court determined that a “seller” must *necessarily* include agents who “urged the buyer to purchase” **“even though the agent himself did not pass title.”** *Id* at 644. Included in the statutory definition of a “seller” are agents and others who solicit the buyer. *Id* at 646.

In *Hofer v. State of Washington*, 113 Wn2d 148, 776 P2d 963 (1989), the Washington Supreme Court revisited the “seller” issue in light of *Pinter*, rejecting the narrower *Pinter* test and reaffirming the broader “substantial factor” test described in *Haberman*.

Practically speaking, the trial court held that a person who gets a \$72,856.25 commission for convincing an investor to listen to the issuer’s sales pitch cannot be a “seller” as a matter of law. In rejecting the privity test, the *Haberman* court said:

The hunter who seduces the prey and leads it to the trap he has set is no less guilty than the hunter whose hand springs the snare. We find that the activity of the corporate

defendant's agent is tantamount to that of a "seller" within the liberal remedial spirit of the securities laws.

*Haberman, supra* at 128. (quoting *Lennerth v. Mendenhall*, 234 F Supp 59, 65 (ND Ohio 1964)).

The *Haberman* court, as have many other courts applying the substantial factor test, casts a broad net which can scoop within it attorneys, accountants, investment advisors, engineers and other professionals. *Haberman, supra* at 118. *See also In re Metropolitan Securities Litigation*, 532 F Supp2d 1260 (ED Wash 2007) (accountants and underwriters can be “sellers” under the Washington securities law). “Whether a defendant’s conduct was a substantial contributive factor is necessarily a question of fact.” *Haberman, supra* at 132. *See also Simmonds v. Strauss*, 1999 Lexis 10863 (WD Wa 1999) (seller status question of fact where defendant had a substantial economic interest in promoting the stock).

Even when the Washington Supreme Court later carved out from “seller” status those attorneys whose role was limited to “the usual drafting and filing services provided by counsel,” the Court made much of the fact “there is no evidence to indicate Perkins Coie had any personal contact with any of the investors or was in any way involved in the solicitation process” and that Perkins Coie “was not the catalyst in the sales transaction.” *Hines v. Data Line Systems, Inc.*, 114 Wn2d 127, 149-150, 787 P2d 8 (1990). Of course in the Roberts transaction, Donnerstag did have contact with the Roberts, was involved in the solicitation process

and was the catalyst in the sales transaction. “But for” Donnerstag’s solicitation of the Roberts, no securities transaction would have taken place.

Even the narrower Pinter test recognizes the need to include as sellers those who solicit offers to purchase securities.

An interpretation of statutory seller that includes brokers and others who solicit offers to purchase securities furthers the purposes of the Securities Act to promote full and fair disclosure of information to the public in the sales of securities. In order to effectuate Congress' intent that § 12(1) civil liability be in terrorem, see *Douglas & Bates*, 43 Yale L.J., at 173; *Shulman*, 43 Yale L.J., at 227, the risk of its invocation should be felt by solicitors of purchases. The solicitation of a buyer is perhaps the most critical stage of the selling transaction. It is the first stage of a traditional securities sale to involve the buyer, and it is directed at producing the sale. In addition, brokers and other solicitors are well positioned to control the flow of information to a potential purchaser, and, in fact, such persons are the participants in the selling transaction who most often disseminate material information to investors. Thus, solicitation is the stage at which an investor is most likely to be injured, that is, by being persuaded to purchase securities without full and fair information. Given Congress' overriding goal of preventing this injury, we may infer that Congress intended solicitation to fall under the mantle of § 12(1). *Pinter v. Dahl*, 486 US 622, 646-47, 108 S Ct 2063, 100 L Ed 2d 658 (1988).

Defendant Donnerstag received a substantial commission to make laudatory statements about DBSI to prime the pump for the sales pitch by DBSI. Under Washington law Donnerstag is a “seller” and is liable for the sale to Roberts.

**V. Conclusion**

The DBSI TIC investment is a security in the form of an investment contract. Donnerstag's conduct makes him a seller of securities and also constitutes material aid in connection with the sale of the TIC security. He was acting as a securities salesman and thus his employer CB Richard Ellis was acting as a securities broker.

The court should reverse the trial court and remand the case with instructions for it to enter partial summary judgment in favor of Appellant on the issues of whether or not Donnerstag was a seller, whether or not Donnerstag materially aided in the sale of the DBSI TIC to Appellant, whether or not CB Richard Ellis is liable for Donnerstag's conduct as a control person under the Washington Securities Act.

May 2, 2012

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Richard M. Layne".

Richard M. Layne, WSBA #9325  
Attorney for Appellants

1 COURT OF APPEALS  
2 DIVISION II  
3 OF THE STATE OF WASHINGTON  
4 No. 43018-5-I  
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7 VIEWPOINT - NORTH STAFFORD LLC, a Delaware limited liability company, VIEWPOINT  
8 AT SHOREWOOD LLP, a Washington limited liability partnership, ROBERT S. ROBERTS  
9 and ANNE G. ROBERTS,

10 Appellants

11 v.

12 CB RICHARD ELLIS, INC., a Delaware corporation, ARIA ASSET MANAGEMENT LLC,  
13 MICHELLE E. BROCK, JAMES N. DONNERSTAG, MERRIAH J. HARKINS, JULIE  
14 BROCK HERZOG and DANIEL W. BROCK,

15 Respondents.  
16

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17 **DECLARATION OF SERVICE OF OPENING BRIEF.**  
18

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19  
20 I, the undersigned, declare that I am employed by the Law Office of Richard M. Layne, I  
21 am over the age of 18 years, am not a party to the above entitled litigation, and I am competent to  
22 be a witness herein.

23 On May 2, 2012, I served a true and correct copy of the following documents in the  
24 above captioned case:

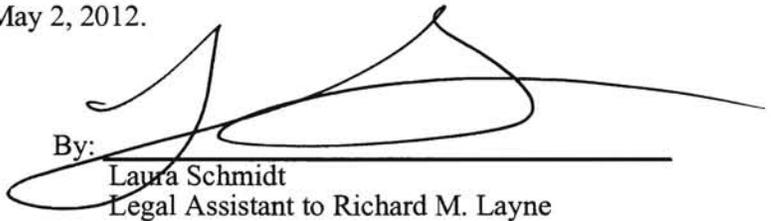
25 **Appellants' Opening Brief**  
26

1 together with a true and correct copy of this Declaration of Service upon the following counsel  
2 for the parties of record in this action via U.S. Postal Service, postage fully prepaid thereon and  
3 properly addressed and directed as follows, and I further declare that, of even date, I caused to be  
4 transmitted said document to said counsel via First Class Mail and email to the address shown  
5 below:

6  
7 Christopher R. Osborn  
8 Christopher G. Emch  
9 Foster Pepper PLLC  
10 1111 Third Avenue  
11 Suite 3400  
12 Seattle, WA 98101-3299  
13 EmchC@foster.com  
14 OsboC@foster.com

15 I declare under penalty of perjury under the laws of the State of Washington that the  
16 foregoing is true and correct.

17 Signed at Portland, Oregon this May 2, 2012.

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21  
22  
23  
24  
25  
26  
By:   
Laura Schmidt  
Legal Assistant to Richard M. Layne