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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Case No. 323757

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

WASHINGTON PROFESSIONAL REAL ESTATE, LLC,
d/b/a Prudential Almon Realty,

Plaintiff/Respondent

vs.

DR. KIPP YOUNG, et ux.,

Defendants/Appellants

BRIEF OF APPELLANTS

D. R. (ROB) CASE (WSBA #34313)
Larson Berg & Perkins PLLC
Attorneys for Appellants

105 North 3rd Street
Yakima, WA 98901
Phone: (509) 457-1515
Fax: (509) 457-1027

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A. INTRODUCTION

A.1. Nature of Case. This case is a real estate commission dispute from a residential sale. The plaintiff/respondent is a licensed real estate brokerage and the defendants/appellants were the listing-homeowner clients of the brokerage. CP 529 (Findings of Fact 1.1 & 1.7). The parties signed an “Exclusive Listing Agreement” that (following an extension) ran through December 31, 2008. CP 529 (FF 1.9). The Listing Agreement also included a 365-day “tail” provision. CP 530 (FF 1.12); CP 107 (Exclusive Listing Agreement, p.2, ¶8.a.) & plaintiff’s trial exhibit 1.1 (Exclusive Listing Agreement, p.2, ¶8.a.).

The Listing Agreement covered a house and 2.15 acres. The house, 2.15 acres and an additional 6.5 acres (that were not covered by the Listing Agreement) were jointly sold on March 19, 2009. The sale occurred within the 365-day tail duration. The transaction price was not segregated between the house and 2.15 acres (on one hand) and the additional 6.5 acres (on another hand). *See infra*, pp.31-33 (section D.17.)

The issues for resolution by this court are (1) whether the trial court’s interpretation/construction of clause “C”¹ of the tail was correct;

¹ The tail provision consists of three disjunctive, unlabeled clauses. For ease of discussion, the trial court labeled the three clauses “A”, “B” and “C”. *See* CP 464 (letter ruling, p.4, bottom ¶). The defense will likewise use those labels on this appeal. The specific language and scope of each clause will be fully set out below. *See infra*, pp.30-31 (section D.16.).

and (2) whether the plaintiff presented sufficient evidence to specify its alleged damages and whether the trial court's methodology and actual award were correct.²

A.2. Current Procedural Setting. This appeal follows a bench trial wherein a monetary Judgment was entered in favor of the plaintiff. CP 540-542 ("Order and Judgment") & CP 543-568 ("Defendants' Notice of Intent to Appeal to Division Three"). The trial court initially issued a letter ruling, followed later by formal "Findings of Fact and Conclusions of Law" that incorporated the letter ruling. See CP 461-467 (letter ruling) and CP 527-539 ("Findings of Fact and Conclusions of Law").³

A.3. Procedural History. This case has previously been before Division Three. The parties' respective appellate positions were reversed on that prior appeal. Specifically, the defendants were the respondents on the prior appeal whereas they are the appellants now, and vice versa for the plaintiff (*i.e.*, it was the appellant previously and is the respondent now).

² This is not a procuring cause case. Division Three previously upheld summary dismissal of the plaintiff's procuring cause claim. See *Washington Professional Real Estate LLC v. Young*, 163 Wn. App. 800, 811, 260 P.3d 991 (2011). The only remaining claim is for breach of contract specifically arising under the tail provision.

³ In an attempt to promote clarity, this brief will refer to the findings and conclusions recited in the letter ruling by lowercase references, and will refer to the Findings and Conclusions recited within the formal "Findings of Fact and Conclusions of Law" by uppercase references. For rulings that are recited in both documents (either literally or via equivalent language), this brief will use hybrid designations – *i.e.*, "F/findings" and "C/conclusions".

The prior appeal followed summary judgment. This court affirmed dismissal of the procuring cause claim, but remanded the plaintiff's breach of contract claim for further trial-court proceedings. *See Washington Professional Real Estate v. Young*, 163 Wn. App. at 811 & 818-819.

Following remand, each side filed a renewed motion for summary judgment. Each side remained convinced that the material facts were undisputed (or mostly undisputed) and that only questions of law remained. *See e.g.*, CP 314-328 (plaintiff's "Memorandum of Authorities in Support of Motion for Summary Judgment", dated 05-14-12) & CP 419-437 ("Memorandum Supporting Defendants' Renewed Motion for Summary Judgment", dated 05-21-13).

Both renewed motions were denied. *See e.g.*, CP 389-390 ("Order Denying Plaintiff's Motion for Summary Judgment", entered 07-27-12) & CP 453 ("Order Denying Defendants' Motion for Summary Judgment", entered 07-17-13). A bench trial was then held on November 11-14, 2013. *See* CP 527 (lns.14-15).

A.4. Scope of Appeal and Relief Requested. The defendants submit that the trial court erred in its overall result, in multiple C/conclusions of Law, and in a few F/findings of Fact.⁴ The defendants

⁴ As stated above, hybrid references to "C/conclusions" and "F/findings" cover both the letter ruling and the formal Findings and Conclusions. *See supra*, p.2, n.3.

ask this court to reverse the trial court's decision and to direct that Judgment be entered in the defendants' favor.

The defendants further seek an award of costs and fees pursuant to the terms of the Listing Agreement and applicable law. *See* plaintiff's trial exhibit 1.1 (Exclusive Listing Agreement, p.3, ¶14); CP 108 (Exclusive Listing Agreement, p.3, ¶14) & RCW 4.84.330. Specifically, the defendants seek costs and fees for all appellate and trial proceedings.

A.5. Primary Challenge is to the C/conclusions of Law and to the Overall Result Rendered. The material facts have always been undisputed (or mostly undisputed). The trial court, via its letter ruling, specifically noted as follows:

Most of the critical facts in this matter are really not disputed. Interestingly, the facts relied upon by the Court of Appeals (interlocutory appeal of Judge Lust's ruling on Summary Judgment) are borne out by the testimony presented during the trial.

CP 461 (letter ruling, p.1, 1st ¶); *see also* CP 463 (letter ruling, p.3, last ¶); *accord* RP 454 (closing argument by plaintiff's counsel: "there are a lot of undisputed facts") & RP 497 (rebuttal closing argument by plaintiff's counsel: "The facts for the most part are not in dispute").

The defendants' primary challenge is to the trial court's C/conclusions and to the overall result rendered. The central question has always been a legal one, specifically: what is the correct

interpretation/construction of the “tail”? That question is subject to *de novo* review by this court. *See infra*, p.34 (section E.1.).

A.6. Secondary Challenge is to the F/findings of Fact. The defendants also challenge a few F/findings of Fact. Those F/findings are challenged both substantively (*i.e.*, incorrect/false content) and because of the wording/semantics employed (*i.e.*, incorrect/imprecise phraseology).

Substantively, there is a degree of overlap and redundancy between certain F/findings and C/conclusions. *E.g.*, *See & Compare* CP 535 (FF 1.57) & CP 538 (CL 2.7-2.8). This creates confusion as to whether those rulings are truly “findings” or “conclusions”. *See e.g.*, *Scott's Excavating Vancouver, LLC v. Winlock Properties, LLC*, 176 Wn. App. 335, 342, 308 P.3d 791 (2013) (appellate courts “review a conclusion of law erroneously labeled a finding of fact as a conclusion of law[,] and review a finding of fact erroneously labeled as a conclusion of law as a finding of fact”, bracketed material added).

Also substantively, the defendants challenge every F/finding whereby the trial court used a prior, expired, unconsummated purchase offer to determine the “fair market value” of the additional acreage (that was not covered by the Listing Agreement but was sold concurrently).

As to wording/semantics, the trial court used the following words and phrases rather interchangeably: “information”, “knowledge”,

“became aware of”, “learned”, “marketing”, “advertising”, “activities” and “efforts”. *See e.g.*, CP 532 (FF 1.34-1.36); CP 535 (FF 1.57); CP 538 (CL 2.7-2.8); CP 462 (letter ruling, p.2, penultimate ¶) & CP 465-466 (letter ruling, pp.5-6). To be explained below, these words and phrases are not interchangeable or synonymous. They correspond to different clauses of the tail, which is critically important. *See infra*, pp.30-31 (section D.16.).

A.7. Brief Overview of the Underlying Series of Events. During the term of the listing, John Place noticed the plaintiff’s “for sale” sign at the property and he retrieved an advertising flyer from the attached box. *See* CP 531-532 (FF 1.29). John Place was not personally interested in buying the property, and he was not a licensed real estate agent. However, he thought his sister and brother-in-law (*i.e.*, Pat and Tom Eastman) might be interested in the property. *See* CP 532 (FF 1.30).

John Place did not promptly send any information about the property to the Eastmans. Rather, it is undisputed that the first time he communicated with the Eastmans about the subject property was after the listing expired. *See* CP 532 (FF 1.35). It is also undisputed that the only information he relayed was either the property’s address or its multiple listing service (MLS) number – nothing else. *See* CP 532 (FF 1.30). Finally, it is also undisputed the Eastmans did not secure any information from the plaintiff directly, did not secure any information from any source

other than John Place, and did not secure any information during the term of the listing. *See* CP 465-466 (letter ruling). This is the basic story.

B. ASSIGNMENTS OF ERROR

The following “Assignments of Error” are largely interrelated and, thus, they are presented in no particular order and will be jointly argued. It is not necessary for the defendants to prevail on each Assignment in order to secure a reversal. Rather, if this court agrees with any single Assignment, a reversal should be ordered.

B.1. Use of the Generic Clause C to Trump the Preceding More-Specific Clause B. The trial court erred when it interpreted and applied a generic clause of the “tail” provision in such a way as to effectively trump a preceding more-specific clause, thereby achieving a result via the generic clause that was not possible under the specific clause. This violates the applicable canons of contract interpretation/construction.⁵

B.2. Misinterpretation of Clause C of the Tail. The trial court erred when it interpreted and applied the timing element of clause C

⁵ As previously noted, the trial court labeled the three disjunctive clauses of the tail “A”, “B” and “C” for ease of discussion, and this brief is likewise using those labels. *See supra*, p.1, n.1. By way of introduction, clause C is the generic clause and clause B is the preceding more-specific clause. Thus, the defendants’ first Assignment is that the trial court erred when it interpreted and applied clause C (the most generic clause) to reach a result that was not possible under clause B (the more-specific preceding clause). Clause A is also a specific clause, but it has always been undisputed that the attendant facts do not fit clause A. *See e.g.*, CP 465 (letter ruling, p.5, 2nd ¶); *accord* RP 275, lns.10-12 (trial testimony of Chris Pauling, the owner-operator of the plaintiff, on this topic).

(i.e., “during the term of this agreement”) as not pertaining to when the ultimate buyers learned of the property, but rather as only pertaining to when an intermediary (even if that intermediary is not a licensed realtor) learned of the property. That was an unreasonable construction when considered in context of the language and structure of the other clauses.

B.3. Misapplication of the Rules on Construing Ambiguities Against the Drafter. The trial court erred when it (incorrectly) construed ambiguities within the tail provision against the defendants despite having ruled (correctly) that the tail was indeed ambiguous and (correctly) that the plaintiff was the drafter of the contract.

B.4. Failure to Consider and Follow the “Object and Purpose” of Tail Provisions. The trial court erred when it interpreted and applied the tail provision without regard for the underlying “object and purpose” of tail provisions, which led to a strained construction and illogical result.

B.5. Granting Relief on an Arguments Not Advocated by the Plaintiff. The trial court erred when it granted relief to the plaintiff on arguments that its counsel did not advocate. This includes applying clause C of the tail, and also using the expired Richards’s offer to determine the value of the additional 6.5 acres.

B.6. C/conclusions and/or F/findings that Lack Sufficient Basis. The trial court erred when it made C/conclusions and/or F/findings that

lack sufficient basis. Even assuming *arguendo* that the trial court's interpretation of clause C of the tail was correct (which, as stated, the defendants do not concede), the trial court's F/findings do not support each of its C/conclusions. More specifically, the F/findings do not support the particular C/conclusions that are challenged on this appeal.

In a similar vein, a few of the trial court's F/findings and C/conclusions are not supported by substantial evidence and are unsound. This includes every F/finding and C/conclusion whereby a prior, expired, unconsummated purchase offer from a different couple (*i.e.*, Dan and Lisa Richards) as the basis for determining the value of the additional acreage (that was not covered by the Listing Agreement) that the Eastmans bought together with the subject property without any segregation as to the value of the additional acreage. *See* CP 466 (letter ruling, p.6, section entitled "Commission Calculation"); CP 467 (letter ruling, p.7, #6); CP 531 (FF 1.19) & CP 539 (CL 2.13-2.15).

C. FINDINGS AND CONCLUSIONS CHALLENGED

C.1. Challenge to Findings 1.33, 1.34, 1.34 and 1.36: The defendants challenge each use and/or mention of the word "information" within these Findings. For example, Finding 1.33 begins by saying that "Dr. Pat Eastman reviewed information provided by her brother, Dr. John Place" *See* CP 532 (FF 1.33). As stated above, specific words and

phrases (including the word “information”) correspond to different clauses of the tail. *See supra*, pp.5-6; *see also infra*, pp.30-31 (section D.16.).

It is undisputed that any “information” Pat Eastman (and/or her husband, Tom Eastman) received from John Place about this property was quite limited. The trial court found that John Place merely sent the street address of the property. *See* CP 532 (FF 1.30, saying: “Dr. Place sent the address of the Young Property to Dr. Eastman by email, but he did not send her a copy of the flier.”). Somewhat different, John Place’s actual testimony was that he did not remember sending (or even knowing) the street address, and that he probably only relayed the property’s multiple listing service (MLS) number. *See* RP 119, ln.17 – RP 120, ln.7 (trial testimony by John Place on this topic). This discrepancy is immaterial; the critical point is that the only “information” sent to the Eastmans was either the address or the MLS number – nothing else.

The defendants dispute whether John Place’s learning of the property’s address or MLS number – exclusively via the sign and flyer – is properly characterized as “information” such that the generic clause C should govern rather than the sign-and-advertising-specific clause B. They also dispute whether the Eastmans received any other “information”.

C.2. Challenge to findings Embedded in the Letter Ruling. The defendants challenge the following sentences from the letter ruling (which,

as previously noted, was explicitly incorporated within the “Findings of Fact and Conclusions of Law”):

The court concludes that Dr. Place became aware of the Young property during the listing agreement because of the marketing conducted by the Plaintiffs [*sic*, Plaintiff]. He communicated that information to Mrs. Eastman after the agreement had expired [but] during the tail period.

(Underscore emphases & bracketed material added.) CP 462 (letter ruling, p.2, penultimate ¶). As before, the defendants dispute whether John Place’s learning of the address or MLS number from “marketing”—namely the sign and attached flyer – is properly characterized as “information” such that the generic clause C of the tail should govern rather than the sign-and-advertising-specific clause B.

C.3. Challenge to Conclusion 2.7. The defendants challenge Conclusion of Law 2.7, which in full reads as follows:

The Eastmans discovered the Young Property because of the knowledge Dr. John Place acquired through the activities of Ms. Meg Irwin during the listing period.

(Underscore emphases added.) CP 538 (CL ¶2.7). Again, the only “knowledge” that John Place relayed to the Eastmans was the property’s address or MLS number – nothing more. Moreover, he gleaned that knowledge exclusively from the sign and flyer, so the only “activities” that are potentially at-issue are the posting of the sign and flyer. Once again, the defendants submit that the sign-and-advertising-specific clause B of

the tail should govern rather than the generic clause C.

C.4. Challenge to Conclusion 2.8 and to Similar conclusions

Embedded in the Letter Ruling. The defendants challenge Conclusion of Law 2.8, which in full reads as follows:

The information acquired by the Eastmans was acquired by them through the direct result of the marketing done by Prudential Almon.

(Underscore emphases added.) CP 538 (CL 2.8). Likewise, the defendants challenge conclusions recited on pages 5 and 6 of the letter ruling, which read as follows:

In this case, the Eastmans discovered the property because of the knowledge Dr. Place acquired through the activities of the broker that occurred during the listing period. Thus, the information was acquired as a direct result of the marketing done by PA. The fact that that information was relayed to the Eastmans indirectly is clearly covered by the provision. This part of the tail provision does not require that the Eastmans have contact with the Broker or even see, witness or benefit from the marketing directly. It specifically states that the information relied upon by the purchasers can be obtained indirectly. The information transmitted by Dr. Place was available to him because of PA's marketing during the listing agreement. He was, essentially, trying to assist the Eastmans by finding properties he thought they would like to purchase. The ultimate purchase was during the tail period and would not have occurred but for the marketing efforts of PA during the listing agreement. The purpose of the listing agreement was to make known that the property was for sale and to provide information about the property to entice a sale. That is exactly what happened here.

I do not think the Youngs' interpretation of the tail provision, i.e. that it only applies if the information form a third party is conveyed to the purchaser during the term of the listing agreement is the more reasonable of the two because the phrase "during the

course [*sic*, term] of this agreement” modifies and refers to when information was secured from the Broker’s marketing activities. The Eastmans didn’t secure any information from the Broker. Dr. Place did. The position taken by the Plaintiff, that the phrase “during the term of this agreement” only refers to when the information from the Broker was secured or obtained, so long as that information was communicated to and relied upon the buyer regardless of when they consummated the sale is the more reasonable.

(Underscore emphases and bracketed material added; original underscore emphasis omitted.) CP 465-466 (letter ruling, p.5, 6th ¶ – p.6, top ¶).

Again, the only “information” that was relayed to and/or received by the Eastmans was the property’s address or MLS number – nothing more. Dr. Place gathered that information from the sign and flyer, those items constitute “marketing” and/or “advertising”, they were the only “activities” and/or “efforts” that Dr. Place experienced, and thus the sign-and-advertising-specific clause (*i.e.*, clause B) ought to govern rather than the generic clause (*i.e.*, clause C).

C.5. Partial Challenge to Conclusions 2.11 and 2.12, and to Similar conclusions Embedded in the Letter Ruling. The defendants partially challenge Conclusions of Law 2.11 and 2.12. Via those Conclusions, the trial court ruled that the defendants’ urged interpretation of the tail was a “reasonable” one (which the defendants do not challenge), yet the trial court also ruled that the defendants’ interpretation was “less reasonable” than the plaintiff’s competing interpretation. *See* CP 538 (CL

2.11-2.12). The defendants challenge the “less reasonable” conclusion, and also challenge the comparison methodology in general. *See infra*, pp.43-45 (section E.6.).

Likewise, the defendants partially challenge similar conclusions recited on pages 5 and 6 of the letter ruling, which, in full, read as follows:

I do not think the Youngs’ interpretation of the tail provision, i.e. that it only applies if the information from a third party is conveyed to the purchaser during the term of the listing agreement is the more reasonable of the two because the phrase “during the course [*sic*, term] of this agreement” modifies and refers to when information was secured from the Broker’s marketing activities. The Eastmans didn’t secure any information from the Broker. Dr. Place did. The position taken by the Plaintiff, that the phrase “during the term of this agreement” only refers to when the information from the Broker was secured or obtained, so long as that information was communicated to and relied upon the buyer regardless of when they consummated the sale is the more reasonable.

(Bracketed material added; underscore emphases on words “when” in original.) CP 465-466. On the same bases, the defendants also partially challenge the conclusions numbered as 3 and 4 within the letter ruling. *See* CP 466 (letter ruling, p.6, ##3-4).

The trial court ruled (correctly) that the tail provision is ambiguous and (correctly) that the plaintiff was the drafter of the contract. *See* CP 529 (FF 1.8) & CP 538 (CL 2.10); *see also* CP 465-466 (letter ruling, p.5, 5th ¶ – p.6, top ¶) & CP 466 (letter ruling, p.6, #3). When it came time to construe the ambiguities, however, the court misapplied the rules on

construction of ambiguities.

C.6 Challenge to F/findings and C/conclusions as to the “Fair Market Value” of the Additional Acreage. The defendants challenge every F/finding and C/conclusion whereby the trial court used the expired, unconsummated, purchase offer by Dan and Lisa Richards as the basis for determining the “fair market value” of the additional 6.5 acres (that were not covered by the Listing Agreement) that the Eastmans purchased concurrently with the house and 2.15 acres.

C.7. Challenge to Additional C/conclusions. The defendants challenge Conclusions 2.5 and 2.6, as well as the conclusions numbered as 2 and 5 within the letter ruling. These C/conclusions say that the plaintiff breached the contract, that a sufficient causal relationship existed between the plaintiff and the subject sale to warrant granting relief to the plaintiff, and that the plaintiff is entitled to a commission. *See* CP 538 (CL 2-5-2.6) & CP 466 (letter ruling, p.6, ##2 & 5). These C/conclusions are essentially summations that depend on other Findings and Conclusions. Thus, when those other Findings and Conclusions fail (as they should, for the reasons substantiated in this brief), so should these additional C/conclusions.⁶

⁶ The defendants’ intent is to challenge each and every F/finding and C/conclusion that – if left undisturbed – could conceivably justify an affirmance of the

D. STATEMENT OF THE CASE

D.1. Division Three's Prior Factual Summary is a Good Starting Point, but Does *Not* Address Every Issue of Relevance. As noted above, the material facts have always been undisputed (or mostly undisputed). The underlying series of events is summarized fairly well in Division Three's prior ruling on this case. See *Washington Professional Real Estate LLC v. Young*, 163 Wn. App. 800, 803-808, 260 P.3d 991 (2011).⁷ In the interests of judicial economy, the defendants would prefer to fully incorporate that summary by reference and to immediately move into legal argument. However, this is not possible for at least two reasons.

First, Division Three's prior summary was presented "in the light most favorable to Prudential" because of the procedural setting then at issue (*i.e.*, review following summary dismissal). See *Washington Professional Real Estate v. Young*, 163 Wn. App. at 803 (citing *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000)). By contrast, the actual trial evidence on certain points was actually more favorable to the

overall result rendered by the trial court. However, due to the overlap and redundancy between certain F/findings and C/conclusions, the internal inconsistencies among the F/findings and also the nature of the arguments presented on this appeal (which largely hinge on semantics/phraseology), it is possible that one or more potentially-important F/findings or C/conclusions may have been missed. For clarity, the defendants do not concede that any omission has occurred, if any has occurred it was entirely unintentional, and the defendants ask this court and plaintiff's counsel to focus on the core of this brief rather than on the possibility of a minor unintentional omission.

⁷ Excerpts of *Washington Professional Real Estate v. Young*, 163 Wn. App. 800 (2011) can be found at CP 322-328.

defendants' position. Second, this appeal touches on a few issues that were not implicated on the prior appeal. Those additional issues include the trial court's application of clause C and also the fact that additional acreage (that was not covered by the Listing Agreement) was included in the subject sale.

Accordingly, the defendants feel compelled to offer clarifications and emphases to this court's prior factual summary. On the critical points, the defendants will offer specific citations to the trial court's (unchallenged) F/findings and to the actual evidence presented at trial.⁸

D.2. The Trial Court's Findings of Fact are Also a Good Starting Point. The trial court's Findings are also a fairly good summary of the underlying series of events. *See* CP 527-537. However, certain clarifications and emphases (and, of course, challenges) need to be taken into consideration.⁹

D.3. The Buyers *Never* Saw the "For Sale" Sign or the Attached Flyer. It is, and has always been, undisputed that the Eastmans never saw the "for sale" sign or the attached flyer – only John Place did. *See e.g.*, CP

⁸ To the extent that any differences exist between this court's prior factual summary and the factual summary presented in this brief, it is the defendants' intent that the contents of this brief should prevail.

⁹ Again, it is the defendants' intent to challenge each and every F/finding and C/conclusion that – if left undisturbed – could conceivably justify an affirmance of the overall result rendered by the trial court. *See supra*, pp.15-16, n.6.

533 (FF 1.40); RP 122 (Ins.6-11, trial testimony by John Place on this topic); RP 151 (Ins.2-11, trial testimony by Pat Eastman on this topic) & RP 230 (Ins.8-25, trial testimony by the Eastmans' buyers' agent, Sue Gifford, on this topic).

D.4. John Place Did Not Forward Any "Information" About the Property to the Buyers Until *After* the Listing Had Expired. It is, and has always been, undisputed that John Place – despite personally seeing the sign and flyer during the term of the listing – did not forward any “information” whatsoever (whether derived from the sign/flyer or from some other source) to the buyers until after the listing had expired.

The listing agreement (following an extension) expired on December 31, 2008, whereas John Place did not forward any information about this property to the Eastmans until sometime in January 2009. *See e.g.*, CP 532 (FF 1.31 & 1.35); CP 462 (letter ruling, p.2, penultimate ¶); CP 529 (FF 1.9); CP 531 (FF 1.21); RP 119, ln.17 – RP 120, ln.17 (trial testimony by John Place on this topic) & RP 143, ln.4 – RP 146, ln.22 (trial testimony by Pat Eastman on this topic).

D.5. The *Only* "Information" John Place Sent to Buyers About the Property was Either its Street Address or the MLS Number – Nothing Else. It is, and has always been, undisputed that the only “information” that John Place sent to the Eastmans was either the property’s address or

MLS number – nothing else.

As mentioned above (*see supra*, p.10), the trial court ruled that John Place forwarded the street address, but during his actual trial testimony he conceded that he probably only sent the MLS number. *See and Compare*, CP 532 (FF 1.30); RP 119, ln.17 – RP 120, ln.23 (trial testimony by John Place, conceding, *inter alia*: “It may have been [only] the listing number [that was sent via email]. . . . I didn’t even learn the address, the number of it until they moved in”, bracketed material and ellipsis added).

D.6. The Address or MLS Number was Relayed to the Eastmans via Email on *January 15-16, 2009*. John Place relayed the address or MLS number to Pat Eastman via email. The specific email was never produced during discovery and its exact date is not known, but everyone’s best recollection is that the email was sent on January 15 or 16, 2009. *See e.g.*, CP 532 (FF 1.30); RP 118, lns.2-23 (trial testimony by John Place on this topic) & RP 143, ln.4 – RP 146, ln.22 (trial testimony by Pat Eastman on this topic). Manifestly, January 15-16, 2009, is after the date that the listing expired (*i.e.*, December 31, 2008).¹⁰

¹⁰ There is no evidence of any additional emails from John Place to the Eastmans about the subject property prior to the Eastmans flying to Yakima to start viewing houses. Nor is there any evidence of any other method of communication between them about the subject property, such as telephone calls, in-person discussions, faxes, letters, telegrams, etc., prior to the Eastmans flying to Yakima to look at houses.

D.7. After Getting the Email, the Eastmans Were *Unable* to Find any Further Information About the Property. When Pat Eastman received the email, “she could not find any information because the MLS posting on the Internet had expired”. See CP 532 (FF 1.34). Pat Eastman made a general inquiry to her own buyers’ agents (*i.e.*, Sue Gifford and Patty Bemis of Creekside Realty), but, as the trial court found, the buyers’ agents were “unable to find any information about the Young Property”. See CP 532 (FF 1.36); *accord* RP 140, Ins.16-22 (trial testimony by Pat Eastman on this topic). This communication from Mrs. Eastman, and also the buyers’ agents’ attempt to find details about the property, occurred after the date that the listing expired (*i.e.*, December 31, 2008).

D.8. The Email About this Specific Property was Just One of Many About Many Different Properties – *It Held No Special Importance.* John Place concedes that he has no specific memory of sending the email to Pat Eastman. Likewise, Pat Eastman concedes that she received numerous emails about many different properties. As previously noted by this court, Mrs. Eastman describes her brother as “firing off e-mails, you might want to look at this house on line and that house on line.” See *Washington Professional Real Estate v. Young*, 163 Wn. App. at 804.

There is no evidence that the email of January 15-16, 2009, held any special importance to the Eastmans versus the numerous other emails

they had received about other properties. Quite the contrary, when the Eastmans flew to Yakima in January to start touring houses, the subject property was not included on their prearranged itinerary with their buyers' agents. *See* CP 532 (FF 1.37). No doubt, this was because they knew zero details about the subject property – not even whether it was still available. *See e.g.*, CP 532 (FF 1.36) & RP 140, lns.16-22. At this point in the timeline of events, the subject property was completely out of the picture. It was no different from the many other properties mentioned in John Place's barrage of "e-mails . . . [about] this house . . . and that house" that were not included on the itinerary. Although the Eastmans had received the email of January 15-16, 2009, it did not register with them in any significant way. It did not stand out from the other emails about other properties, and they did not give the subject property any special attention or note. This reality was aptly captured by the trial court via a question posed during the plaintiff's closing argument, specifically as follows:

. . . let's . . . assume for a moment that they were getting barraged with information and it really didn't take -- it really didn't stick. They didn't really understand which property it was, and by the time they actually tried to look on the MLS, the listing must have expired because they couldn't get [information on] it.

So does that make any difference to your argument? Because for communication to exist it's not just the tailing [*sic*, telling of the information] it would seem to me, it's also the comprehension by the person whose [*sic*, who is] listing [*sic*, listening] --

(Ellipsis and bracketed changes added.) RP 456, ln.18 – RP 457, ln.3.

D.9. When the Group Drove by the Property, they Had No “Information” About it with Them. On January 24, 2009, Mrs. Eastman, her buyers’ agents and John Place (her brother) drove about the greater Yakima area touring the houses on the itinerary. *See e.g.*, CP 533 (FF 1.38). Coincidentally, at least one of those houses was nearby the subject property. On a whim, John Place recommended that they drive by the subject property. They did so, but they had no information whatsoever with them about the subject property. For instance, the advertising flyer that John Place had previously taken from the “for sale” sign was not present with them in the car. *See* RP 230, Ins.8-25 (trial testimony by Sue Gifford on this topic). Nor did the group have any other information about the subject property with them. They knew nothing about the property.

D.10. Any Information Secured After the Drive-by Viewing was Secured *After* the Listing Had Expired. At this point in the timeline of events, the only “information” that anyone had about the subject property was either the street address or the MLS number – nothing else. Further, the only source of that information was the “for sale” sign and/or advertising flyer that were previously seen by John Place – but never seen by anyone else. *See e.g.*, CP 532 (FF 1.30); RP 119, ln.17 – RP 118, ln.23; CP 533 (FF 1.40); RP 122, Ins.6-11; RP 151, Ins.2-11 & RP 230, Ins.8-25.

Subsequent to the drive-by viewing, the Eastmans (both personally and via their buyers' agents) finally obtained meaningful information about the subject property. They toured the property multiple times, spoke to the Youngs about it, and their buyers' agents eventually located the expired MLS listing. See CP 533-534 (FF 1.42-1.51). However, all of this "information" was secured after the listing had expired. See CP 531 (FF 1.21) & CP 533 (FF 1.38).

The trial court ruled that "Ms. Gifford [one of the buyers' agents] used the expired MLS entry as a basis for [preparing] the Eastmans' offer", which offer ultimately led to a consummated purchase-and-sale transaction. See CP 534 (FF 1.51). For clarity, this court should understand that the Eastmans' offer was submitted on January 28, 2009. See CP 534 (FF 1.52). Thus, the offer was submitted after the listing had expired. There is no evidence of Eastmans and/or their buyers' agents successfully locating, viewing and/or otherwise "using" the MLS listing prior to January of 2009. Even assuming *arguendo* that some "information" was ultimately gleaned from the expired MLS listing, it was secured after the listing expired.

D.11. The Plaintiff Played No Role in the "Negotiations". It is undisputed that the plaintiff did not "negotiate" with the Eastmans at any time. See CP 465 (letter ruling, p.5, 2nd ¶); accord RP 275, lns.10-12 (trial

testimony by Chris Pauling, owner-operator of the plaintiff, on this topic).

D.12. Throughout this Litigation, the Plaintiff Focused Exclusively on the Sign-and-Advertising-Specific Clause (i.e., Clause B).

Via its “Complaint”, the plaintiff focused exclusively on sign-and-advertising-specific clause of the tail (i.e., clause B). See CP 5 (“Complaint”, p.3, ¶4.2, quoting clause B and omitting clauses A and C).

During the original trial-court proceedings and the prior appeal, the plaintiff focused exclusively on clause B. See e.g., *Washington Professional Real Estate v. Young*, 163 Wn. App. at 816-817.

Following remand, the plaintiff focused exclusively on clause B during its renewed motion for summary judgment. See CP 317, lns.15-23 & CP 365, ln.21 – CP 366, ln.2.

Via its “Trial Brief”, the plaintiff focused exclusively on clause B. See CP 455, lns.1-3 (quoting clause B and omitting clauses A and C) and lns.20-23 (mentioning the “sign on the property”) & CP 457, lns.6-12 and lns.15-20 (discussing only clause B-type occurrences).

Via its opening statement, the plaintiff focused exclusively on clause B. See e.g., RP 17, lns.12-24 (“ . . . if the home was sold directly or indirectly to any person to whose attention the property was brought to the signs, advertising, or any other action or efforts of Prudential”, ellipsis

and underscore emphasis added).¹¹

Throughout the presentation of evidence during trial, all focus remained on clause B. This can be generally gleaned from reading the transcripts of every witness's testimony. *See* RP 35-451. More specifically, John Place (who was the only conceivable source of the Eastman's knowledge), admitted that the only source of his knowledge was the sign and flyer. He did not, by contrast, obtain and/or relay information from any other source. This fact is substantiated in the next section below. *See infra*, pp.26-28 (section D.13.)

At the conclusion of its case-in-chief, the plaintiff focused on clause B when opposing the defendants' motion for a directed verdict. *See* RP 298, lns.16-21.

Even in its closing argument, the plaintiff focused exclusively on clause B. *See* RP 460, lns.5-10 ("Dr. Place who heard it, saw it, because of the flier", underscore emphasis added); RP 463 ("there is no ambiguity here. It was a sign. It was a flier", underscore emphasis added) & RP 469, lns.6-8 ("I am simply saying had my client not put the sign up or put the fliers out, this would have never happened", underscore

¹¹ "Action" and/or "efforts" of the broker are also within the coverage of clause B of the tail. *See* plaintiff's trial exhibit 1.1 (Exclusive Listing Agreement, p.2, ¶8.a.) & CP 107 (Exclusive Listing Agreement, p.2, ¶8.a.); *see also infra*, pp.30-31 (section D.16., which recites the full language of the tail).

emphases added).

In turn, defense counsel – understandably – also focused on clause

B. Defense counsel’s closing argument included the following remarks:

. . . There is no other information [at play in this case]. . . .

. . . The inquiry posed by the tail, the one that might be relevant here, because we are not talking negotiations, we are not talking about other info. We are talking about [clause B, which refers to] [“]attention brought[”]. . . .

. . . There is no question that it [the subject sale] is not because of other information, it’s not because of negotiation, it’s not because of other activities. It anything, it’s only because of the sign slash advertising.

(Ellipses and bracketed material added.) *See* RP 483, Ins.8-9 & RP 294, Ins.17-20.

Via its rebuttal closing argument, plaintiff’s counsel did not advance any specific argument for application of clause C. *See* RP 496-499 (plaintiff counsel’s rebuttal closing argument).

D.13. John Place Admitted that the *Sole Source* of His Knowledge/Information About the Property was the Sign and Flyer. On direct examination by plaintiff’s counsel, John Place repeatedly confirmed that the sole source of his knowledge/information about the property was the sign and flyer. The on-point questions and answers were as follows:

Q. Okay. And so you were communicating or you were trying to help your sister and her husband in their relocation efforts is that what the idea was?

A. Yes.

- Q. Okay. And you were providing -- did you provide information other than [*sic*, from a source other than¹²] the flier to her about his particular piece of property?
- A. No, I had never been in it [*i.e.*, the house]. . . .
- Q. And when were you [*sic*, when you were] driving around with your sister and the real estate agents on that particular day in January, was there any other information that you had that had told you there was a sale? That that house was for sale?
- A. No. No. Just the fact that I had seen the sign

(Bracketed material, ellipses and underscore emphasis added.) RP 107, lns.10-17 & RP 112, lns.5-10.¹³

D.14. The Trial Court's Decision to Apply Clause C of the Tail Came Out of Left Field. The trial court ruled (correctly) that clauses A and B were not satisfied. *See* CP 465 (letter ruling, p.5, 2nd & 3rd ¶¶). However, the trial court ruled (incorrectly) that clause C – the generic clause – was satisfied. *See* CP 465 (letter ruling, p.5, 4th-6th ¶¶).

The trial court's decision came as a complete surprise. Both parties had focused on clause B during trial, and the plaintiff made no

¹² This bracketed clarification is undoubtedly accurate because the trial court specifically (and correctly) found that John Place “did not send her [Pat Eastman] a copy of the flier.” (Bracketed material added.) *See* CP 532 (FF 1.30).

¹³ Admittedly, in these excerpts John Place went on to speculate that he may have conveyed more than merely the street address or MLS listing number, including that the property seemed to be “in the ballpark” size-wise for the Eastmans and that “they would get some good neighbors”. *See* RP 112, lns.10-14. However, as previously noted, his email was never found and he admits that his memory is sketchy as to what information he actually conveyed. *See e.g.*, RP 119, ln.17 – RP 120, ln.23. Also, the trial court did not find that anything other than the street address was conveyed to the Eastmans. *See* CP 532 (FF 1.30). Thus, Mr. Place's speculation is not reliable and should be disregarded. He only conveyed the street address or the MLS number.

meaningful argument vis-à-vis clause C. *See supra*, pp.24-26 (section D.12.)

D.15. Even Chris Pauling, the Owner-Operator of the Plaintiff, Conceded that the *Sole Source* of John Place’s Knowledge/Information was the Sign and Flyer. During his trial testimony, Chris Pauling – the owner-operator of the plaintiff – admitted that the plaintiff’s case was exclusively based on John Place having personally seen the sign and flyer. On both direct and cross-examination, Mr. Pauling repeatedly referenced the sign and flyer (which things, as will be explained below, are covered by clause B, *see infra*, pp.30-31 (section D.16.)). He also used the phrase “because of Prudential’s efforts” (which is also covered by clause B). The on-point questions and answers from Mr. Pauling’s trial testimony were as follows:

Q. Okay. And after that conversation with Sue [Gifford, one of the buyers’ agents], how did you understand the Eastmans learned of the house?

A. My understanding that it is Eastmans learned of the house from Dr. Place, who learned of the house from the sign and flier.

...

Q. Okay. And what was your claim to commission in March of 2009?

A. The fact that buyers had learned of the home from Dr. Place, who was aware of the house for sale because of Prudential’s efforts. . . .

Q. Okay. And what did you discuss with Dr. Place?

A. I asked Dr. Place how he learned of the property. I asked

him his version of events, specifically how did he learn of the property.

Q. Okay.

A. And he told me that he saw the sign and the flier.

Q. Okay. And what did you conclude in your conversations with Pat [Eastman] about how they learned about the property?

A. That they learned of the property from Dr. Place.

Q. And your understanding as to how they had learned is through communications from the brother and brother-in-law, Dr. John Place?

A. Correct, who knew of it because of our efforts.

Q. Right. So they heard about it from Dr. Place, and that linked -- Dr. Place links back to your sign and flier, correct?

A. I don't know if your terminology is significant. The word "link".

Q. Well, what term would you use?

A. Awareness. Knowledge.

Q. Dr. Place was aware because of the sign?

A. Right.

Q. And the Eastmans were aware because Dr. Place was aware?

A. Yes.

(Bracketed material and ellipses added.) RP 257, lns.19-25; RP 260, ln.23
– RP 261, ln.2; RP 261, lns.16-21; RP 265, lns.21-24 & RP 276, ln.19 –
RP 277, ln.9.

Mr. Pauling did not mention any other "information" (distinct from that gleaned via the sign and/or flyer) having been secured "during the term" of the listing (whether by John Place, the Eastmans and/or the

buyers' agents). Rather, the sole event of supposed importance "during the term" was that John Place saw the sign and flyer.

D.16. The "Tail" Provision and Its Three Disjunctive Clauses. In full and without any modification, the "tail" provision reads as follows:

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.

See plaintiff's trial exhibit 1.1 (Exclusive Listing Agreement, p.2, ¶8.a.) & CP 107 (Exclusive Listing Agreement, p.2, ¶8.a.).

For ease of discussion, the trial court labeled and paraphrased the three disjunctive clauses of the tail as follows:

If the property or any portion thereof or any interest therein is, directly or indirectly, sold, exchanged, lease or is purchased under an option, within 365 days after expiration of this agreement to:

- A. Any person with whom a Broker negotiated or,
- B. (a buyer) 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,
- C. (to a buyer based upon) information secured directly or indirectly from or through a Broker during the term of this agreement,

Then Seller shall pay Broker the above compensation.

See CP 464 (letter ruling, p.4).

As previously noted, the defendants are likewise utilizing these A-B-C labels within this brief. *See supra*, p.1, n.1. The basic question is whether clause C was properly interpreted/construed by the trial court.

D.17. Additional Acreage (Not Covered by the Listing Agreement) was Sold Together with the Subject Property. The Listing Agreement only covered the house and 2.15 acres. *See* CP 466 (letter ruling, p.6, 2nd ¶ under “Commission Calculation” section); plaintiff’s trial exhibit 1.4 (MLS listing data sheet); RP 37, ln.9 – RP 38, ln.13 and RP 90, lns.2-.(testimony by plaintiff’s agent, Meg Irwin, on this topic) & RP 350, ln.19 – RP 351, ln.9 (trial testimony of Kipp Young on this topic). However, the Eastmans ended up purchasing the house, the 2.15 acres, and an additional 6.5 acres. *See* CP 466 (letter ruling, p.6, 2nd ¶ under “Commission Calculation” section) & RP 433, lns.6-19 (trial testimony by Carmen Young on this topic). Moreover, the transaction price was not segregated between the house and 2.15 acres (on the one hand) and the additional 6.5 acres (on the other hand). *See e.g.*, CP 466 (letter ruling, p.6, 1st ¶ under “Commission Calculation” section).

Because the additional 6.5 acres were not covered by the Listing Agreement, no commission is owed vis-à-vis those acres (even assuming *arguendo* that a commission is owed for the sale of the house and 2.15 acres pursuant to clause C, which the defendants do not concede).

The trial court characterized the evidence presented as to the fair market value of the 6.5 acres as “very vague.” *See* CP 466 (letter ruling, p.6, 3rd ¶ under “Commission Calculation” section). In fact, defendant Kipp Young testified – as the former owner of the additional acreage, and based on comparison to other nearby listings – that the additional acreage could have a value as high as \$300,000-\$400,000. *See* RP 380, Ins.8-20 (trial testimony by Kipp Young on this topic). He acknowledged that pinpointing the value was “[d]ifficult”, but he made an effort. *Id.*

The plaintiff did not present any information or offer any contrary value estimate(s) as to the additional acreage. The plaintiff also did not advance any argument as to how the additional acreage should be segregated. Quite the contrary, the plaintiff requested a commission on the entire transaction, even though the additional 6.5 acres were not covered by the Listing Agreement. *See e.g.*, CP 466 (letter ruling, p.6, 1st & 2nd ¶¶ under “Commission Calculation” section).

The trial court rejected the plaintiff’s quantification of damages as “incorrect”. *Id.* The court then ruled that “[t]he best way to determine the fair market value of the extra land is to consider the deal with the Richards.” *See* CP 466 (letter ruling, p.6, 3rd ¶ under “Commission Calculation” section). The Richards had previously offered to buy the house and 2.15 acres for \$833,000. The court compared that offer to the

Eastmans' purchase at \$929,000 for the house, 2.15 acres and the additional 6.5 acres, and concluded that "the fair market value of the 6.5 acres was \$92,000." See CP 466 (letter ruling, p.6, 3rd & 4th ¶¶ under "Commission Calculation" section).

This was a methodology that had not been advocated by the plaintiff. See RP 451-470 (plaintiff counsel's closing argument) & RP 496-499 (plaintiff counsel's rebuttal closing argument). Moreover, the "deal" with the Richards was actually just an expired, unconsummated purchase offer that predated the Eastmans' purchase by six months. See *and Compare*, CP 535 (FF 1.60, confirming that the Eastman transaction "closed on March 19, 2009) & CP 531 (FF 1.19-1.20, confirming that the Richards's offer was "[i]n September 2008" and was "rescinded").

E. APPLICABLE LAW, ANALYSIS AND ARGUMENT

E.1. De Novo Review Applies to C/conclusions Regardless of Whether they are Denominated as C/conclusions or as F/findings. It is well-established that a trial court's legal conclusions are subject to *de novo* review. See e.g., *In re Cross*, 327 P.3d 660, 673 & n.7 (2014) (Washington Reporter citation not yet available). "If what is in fact a conclusion of law is wrongly denominated a finding of fact, it is subject to review as a conclusion of law." *Mid-Town Limited Partnership v. Preston*, 69 Wn. App. 227, 232, 848 P.3d 1268 (1993). The *de novo*

standard also applies as to “whether the trial court’s conclusions of law are properly derived from the findings of fact.” *Gamboa v. Clark*, 180 Wn. App. 256, 267 (2014). It also applies to the “trial court’s interpretation of the language of a contract.” *Washington Fed. v. Gentry*, 179 Wn. App. 470, 490, 319 P.3d 823 (2014).

E.2. The “Substantial Evidence” Standard Only Applies to True F/findings. For true F/findings, the applicable standard of review is “whether substantial evidence supports the findings and whether those findings, in turn, support [the trial court’s] legal conclusions.” (Bracketed change made.) *Scott’s Excavating v. Winlock*, 176 Wn. App. at 341.

E.3. Contract Interpretation/Construction. “Courts must read each contract as an average person would read it without giving it strained or forced meaning.” *Litho Color, Inc. v. Pacific Employers Insurance, Company*, 98 Wn. App. 286, 304, 991 P.3d 638 (1999); *accord Rodriguez by Brennan v. Williams*, 42 Wn. App. 633, 713 P.2d 135 (1986) (“the way it would be understood by the ordinary person”). “[H]indsight is not the test”. *Long-Bell Lumber Co. v. National Bank of Commerce of Seattle*, 35 Wn.2d 522, 529, 214 P.2d 183 (1950). Rather,

The first and best rest in the construction of contracts is to put oneself in the place of the parties at the time the contract was executed; to look at it in prospect rather than in retrospect, for when money disputes have arisen the perspective is apt to be clouded by the unexpected chance of gain or self-interest.

Long-Bell Lumber v. National Bank, 35 Wn.2d at 529.

“Courts should not adopt a contract interpretation that renders a term ineffective or meaningless.” *Cambridge Townhomes, LLC v. Pacific Star Roofing, Inc.*, 166 Wn.2d 475, 487, 209 P.3d 863 (2009).

E.4. The Trial Court’s Decision Violates the *Ejusdem Generis* Cannon of Contract Interpretation/Construction, Which Holds that a Specific Provision Controls Over a Conflicting General Provision.

“Where a contract provides a general and a specific term, the specific controls over the general.” *Diamond B Constructors, Inc. v. Granite Falls School Dist.*, 117 Wn. App. 157, 165, 70 P.3d 966 (2003). This is known as the “*ejusdem generis*” cannon of interpretation/construction. It applies “in both statutory and contract interpretation cases.” *State v. R.J. Reynolds Tobacco Co.*, 151 Wn. App. 775, 784, n.23, 211 P.3d 448 (2009).

“[W]hen there is an inconsistency between a general and a specific provision, the specific provision ordinarily qualifies the meaning of the general provision”. *Mayer v. Pierce County Medical Bureau, Inc.*, 80 Wn. App. 416, 423, 909 P.2d 1323 (1995).

There are few published Washington decisions on the *ejusdem generis* cannon of construction vis-a-via contractual interpretation. However, other courts have previously written as follows:

The rationale of the rule of ejusdem generis is that all words in a writing should be given effect if possible; that where specific words enumerating members of a class are followed by general words capable of including the class and others the former would be rendered meaningless if the latter were given their full and natural meaning, since the latter include the former, and that the incompatibility should be reconciled by construing the general words as referring to the same kind as those enumerated by the specific words, and thus give meaning to both.

(Underscore emphasis added.) *Employers Liability Assur. Corp. v. Morse*, 261 Minn. 259, 264-265, 111 N.W.2d 620 (1961) (quoting *Orme v. Atlas Gas & Oil Co.*, 217 Minn. 27, 39, 13 N.W.2d 747 (1944));

This rule, which applies to statutes and contracts, is a familiar one, and requires that where general words follow particular words, the former are to be regarded as applicable to the persons or things particularly mentioned; and the rule applies even if the general words are broad enough to cover other persons and things, unless something in the instrument plainly indicates that they are to be otherwise applied.

(Underscore emphasis added.) *Standard Ice Co. v. Lynchburg Diamond Ice Factory*, 129 Va. 521, 106 S.E. 390, 393 (1921) (no Virginia Reporter citation available);

A conflict between two provisions in an agreement makes the agreement susceptible to two interpretations and therefore ambiguous. . . . In such a situation, [i]t is a good principle of contract construction, that language which deals with a specific situation prevails over more general provisions if there is ambiguity or inconsistency between them. . . . Indeed, [g]enerally, in the construction of contracts, it is held that if the apparent inconsistency is between a clause that is general and broadly inclusive in character and one that is more limited and specific in its coverage, the latter should be held to operate as a modification and *pro tanto* nullification of the former.

(Ellipses added in lieu of original quotations and citations; also underscore emphasis added.) *A&L Holding Co. v. Southern Pacific Bank*, 34 S.W.3d 415, 418-419 (2000);

. . . when a provision specifically addresses the issue in question, it prevails over any conflicting general language.

(Ellipsis and underscore emphasis added.) *Deep Six, Inc. v. Abernathy*, 246 Ga. App. 71, 74, 538 S.E.2d 886 (2000);

Ambiguity exists in a contract where, as written, the contract is susceptible to more than one meaning. . . . However, where ambiguities exist in a contract between two provisions, the more specific provision relating to the subject matter controls over the more general provision. . . . Therefore, where one intention is expressed in one provision of a contract and a conflicting intention appears in another provision, full effect should be given to the more principal and specific provision, and the general provision should be subjected to such modification or qualification as the specific provisions make necessary.

(Ellipses added in lieu of original quotations and citations; also underscore emphasis added.) *Brzozowski v. Northern Trust Co.*, 248 Ill. App.3d 95, 99, 618 N.E.2d 405 (1993);

In addition, [w]hen interpreting contract language, specific provisions ordinarily will be regarded as qualifying the meaning of broad general terms in relation to a particular subject. . . . Thus, where specific or exact terms seem to conflict with broader or more general terms, the former is more likely to express the meaning of the parties with respect to the situation than the general language.

(Ellipses added in lieu of original quotations and citations; also underscore emphasis added.) *A.G. Cullen Const., Inc. v. State System of Higher*

Educ., 898 A.3d 1145, 1168 (2006) (no other citation available);

A special clause, fitting special circumstances, must prevail over a general clause, applicable generally to other situations.

Fox Realty Co. v. Montgomery Ward & Co., 124 F.2d 710, 714 (1941);

It is axiomatic that when general and specific terms in a contract may related to the same thing, the more specific provision should control.

Corso v. Creighton University, 713 F.2d 529, 533 (1984);

When a particular occurrence falls within a general clause of a contract, and also within the precise terms of a specific provision, a presumption arises that the specific . . . provision, rather than the general, is controlling.

(Ellipsis added.) *Southern Ry. Co. v. Coca Cola Bottling Co.*, 145 F.2d 304, 307 (1944);

A contract provision specifically dealing with a particular subject controls over a general provision dealing with that same subject.

Colonial Bank, N.A. v. Taylor Morrison Services, Inc., 10 So.3d 653, 655 (2009).

Under these precedents from Washington and elsewhere, the trial court's decision to apply clause C of the tail was erroneous. On the facts of this case, it is beyond dispute that clause B of the tail is more specific and exact than is clause C. The sale in this case traces back to John Place having seen the sign and flyer, and clause B specifically addresses "the signs" and "advertising" of the plaintiff. See plaintiff's trial exhibit 1.1 (Exclusive Listing Agreement, p.2, ¶8.a.) & CP 107 (Exclusive Listing

Agreement, p.2, ¶8.a.). By contrast, clause C generically refers to “information”. *See id.*

The trial court directly recognized that clauses B and C were not consistent with each other, because the court ruled (correctly) that clause B was not satisfied and ruled (incorrectly) that clause C was satisfied. *See* CP 465 (letter ruling, p.5).

By applying the more generic clause C to reach a result that was not possible under the more specific clause B, the trial court effectively rendered clause B meaningless. Clause C was applied in such a way as to effectively swallow clause B. Everything traces back to John Place having seen the sign and flyer, clause B directly addresses “the sign” and “advertising”, clause B was not satisfied, yet the trial court then ruled that the generic clause C was satisfied because John Place gleaned some “information” from the sign and flyer. It is axiomatic that a “for sale” sign and advertising flyer will contain at least some information; if they did not, they would be empty and useless. Thus, that sort of “information” should be covered by clause B (which directly addresses “the sign” and “advertising”). It should not, by contrast, be shifted to clause C.

With respect to “the sign” and “advertising”, clause B more directly expresses the parties’ true intent than does the generic clause C. *A.G. Cullen v. State System*, 898 A.3d at 1168. The term “information”

may literally include that gleaned from the sign and advertising, but the clause that specifically addresses the sign and advertising (*i.e.*, clause B) should be regarded as modifying and qualifying the effective meaning/scope of “information” in the generic clause (*i.e.*, clause C). *Mayer v. Pierce County*, 80 Wn. App. at 423; *Brzozowski v. Northern Trust*, 248 Ill. App.3d at 99. In other words, clause C should be restricted to information that is obtained from sources other than the sign and advertising.

Because this case was about John Place seeing the sign and flyer, clause B should govern. “[T]he specific controls over the general.” *Diamond B v. Granite Falls*, 117 Wn. App. at 165. Accordingly, this court should reverse the trial court’s application of clause C.

E.5. Under the *Noscitur A Sociis* Cannon of Contract Interpretation/Construction, the Trial Court Misinterpreted the Timing Element (*i.e.*, “during the term of this agreement”) of Clause C. Assuming *arguendo* that clause C has any application to the fact of this case (which, for clarity, the defendants do not concede), the trial court still misinterpreted clause C. Specifically, the trial court ruled that the phrase “during the term of this agreement” within clause C only required the subject information to be secured by an intermediary (*i.e.*, John Place, who is not a licensed real estate agent) prior to expiration of the listing, and that

it did not require that information to actually reach the ultimate buyers (*i.e.*, the Eastmans) prior to expiration of the listing. *See* CP 465-466 (letter ruling, pp.5-6). This was an unreasonable construction based on the structure and language of the other clauses.

Under the *noscitur a sociis* cannon of construction, “the meaning of items in a list is ascertained by referring to the others, giving preference to an interpretation that uniformly treats items similar in nature and scope.” (Internal quotation omitted.) *Meresse v. Stelma*, 100 Wn. App. 857, 867, n.10, 999 P.2d 1267 (2000). The doctrine “teaches that the meaning of doubtful words may be determined by reference to their relationship with other associated words and phrases.” *Meresse v. Stelma*, 100 Wn. App. at 867, n.10. The doctrine is sometimes paraphrased as holding that a doubtful word/clause “is known by its associates”. *See e.g.*, *Bourke v. Grey Wolf Drilling Co., LP*, 305 P.3d 1164, 1169 (2013) (no other citation available); *accord Building Energetix Corp. v. EHE, LP*, 294 P.3d 1228, 1234 (2013) (“words are known by – acquire meaning from – the company they keep”) (no other citation available).

In the instant case, each of the other clauses refers to the ultimate buyers, not to a volunteer, lay-person intermediary. They refer to things the buyers must do and/or how the buyers’ attention must be peaked. As written, clause C gives no indication that it is supposed to be different. It

gives no indication that it applies to people other than the buyers. Thus, it should be interpreted and applied consistently with the other clauses. Like the other clauses, clause C should be read as speaking about the ultimate buyers – not about someone else.

The trial court stressed that clause C “specifically states that the information relied upon by the purchasers can be obtained indirectly.” *See* CP 465 (letter ruling, p.5, penultimate ¶). Yes, clause C includes the phrase “directly or indirectly”. However, that phrase applies to how the information is secured by the buyers, not when it reaches the buyers.

It simply makes no sense to conclude that clause C is satisfied when a volunteer, lay-person intermediary learns of information during the listing regardless of whether that information is relayed to buyers before or after the listing expires. The other clauses refer to the buyers, so clause C should similarly be construed as referring to the buyers. “The court harmonizes clauses that seem to conflict in order to give effect to all the contract’s provisions.” *Certain Underwriters at Lloyd’s London v. Travelers Property Cas. Co. of America*, 161 Wn. App. 265, 278, 256 P.3d 368 (2011).

The phrase “during the term of this agreement” in clause C should be construed as requiring the information – whether secured directly or indirectly – to reach the buyers before the listing expires. This court

should reverse the trial court's contrary ruling.¹⁴

E.6. The Trial Court Misapplied the Rules on Construing Ambiguities Against the Drafter. The plaintiff was the drafter of the contract, and the trial court ruled that the tail provision is ambiguous. *See* CP 529 (FF 1.8) & CP 538 (CL 2.11-2.12). The trial court further ruled that the defendants' urged interpretation was a "reasonable" one. *See* CP 465-466 (letter ruling, pp.5-6) & CP 538 (CL 2.11). Accordingly, the trial court should have construed the ambiguities against the plaintiff and in favor of the defendants.

"A contract provision is ambiguous when its terms are uncertain or when its terms are capable of being understood as having more than one meaning." *Mayer v. Pierce County Med. Bureau, Inc.*, 80 Wn. App. 416, 421, 909 P.2d 1323 (1995). As written by the Washington Supreme Court,

If there is any ambiguity or question about the meaning of it, it must be construed most strongly against the party who wrote it.

¹⁴ There is no evidence of John Place having any sort of realtor's license under RCW 18.85 and/or 18.86. This is another reason why his knowledge/information should not be imputed to the Eastmans. If he were duly-licensed, then his knowledge/information would be imputed to the Eastmans (as his clients). *See* RCW 18.86.100(1). But he was simply an unsolicited, lay-person volunteer. The Eastmans were not his clients; he was not legitimately employed by them. Thus, the substance and timing of whatever he learned stays with him – it does not somehow transfer to the Eastmans. This property did not come onto the Eastmans' radar until after the listing had expired. That should not trigger the "tail" provision because, as explained below, tail provisions are only intended to cover prospective buyers who were already in the mix prior to expiration of the listing.

Wilkins v. Grays Harbor Community Hospital, 71 Wn.2d 178, 184, 427 P.2d 716 (1967) (adopting trial court's statement); and

. . . the one who is responsible for the preparation of a contract should be the one to suffer from any ambiguities appearing therein. (Ellipsis added.) *Zinn v. Equitable Life Ins. Co. of Iowa*, 6 Wn.2d 379, 385, 107 P.2d 921 (1940).

“Of course language in a contract for commission which is not clear must be strongly construed against the one who supplied it.” *Stromberg v. Crowl*, 257 Iowa 348, 352, 132 N.W.2d 462 (1965); *accord Foltz v. Begnoche*, 222 Kan. 383, 388, 565 P.2d 592 (1977); *Nicholas v. Bursley*, 119 So.2d 722, 727-728 (1960); *Bourgoin v. Fortier*, 310 A.2d 618, 620 (1973).

The non-drafting parties do not have to win a tug-of-war over competing interpretations. Rather, if the non-drafting parties' urged interpretation is a reasonable one (rather than an unreasonable one), that interpretation must be applied.

Because the defendants' urged interpretation was (and remains) a reasonable one, that is the interpretation the trial court was obligated to use. However, the trial court did not use the defendants' urged interpretation, and instead compared the respective reasonability of the parties' competing interpretations. *See* CP 465-466 (letter ruling, pp.5-6)

& CP 538 (CL 2.11-2.12). This court should reverse the trial court's ruling, and should rule that the phrase "during the term of this agreement" within clause C of the tail requires the subject information to reach the ultimate buyers before the listing expires.

E.7. The Trial Court Failed to Consider and Follow the "Object and Purpose" of Tail Provisions. A contract must be "given a practical and reasonable interpretation that fulfills the object and purpose of the contract rather than a strained or forced construction that leads to an absurd conclusion, or that renders the contract nonsensical or ineffective." *Washington Public Utilities Districts' Utilities System v. Public Utilities Dist. No. 1 of Clallam County*, 112 Wn.2d 1, 11, 771 P.2d 701 (1989).

The Washington Supreme Court has stated the underlying objective and purpose of a "tail" provision thusly:

The reason and purpose of such extension provisions are expressed in *Messick v. Powell*, 314 Ky. 805, 811, 23 S.W.2d 897, 27 A.L.R.2d 1341:

"real estate brokerage is a highly competitive business and it is a logical conclusion that the provision was intended to protect the agent beyond the duration of the exclusive 'agency or right' to sell the property in order that he might not be deprived of his compensation for finding and presenting a purchaser during that period should the owner sell to him. Without such protection, it would have been an easy matter for owners to circumvent his right by postponing acceptance until the definite time had expired.
***"

(Underscore emphasis added.) *Whiting v. Johnson*, 64 Wn.2d 135, 140,

390 P.2d 985 (1964) (quoting and applying *Messick v. Powell*, 314 Ky. 805, 811, 23 S.W.2d 897 (1951)). Likewise, as long ago stated by the Supreme Court of New York, such a clause is intended to serve as “a shield to protect the agent, not a sword to injure his principal.” *Shipman v. Wilkeson*, 112 N.Y.S. 895, 897 (1908).

In the instant case, the subject property was not on the Eastmans’ radar “during th[e] period” of the listing. The listing expired at the end of December and John Place did not send the email to Pat Eastman until January. Thus, there was no possibility (nor attempt by) the defendants to “postpone[e] acceptance until the definite time [of the listing] had expired.” Quite the contrary, it was impossible for the defendants to accept any offer by the Eastman during the listing because, again, the subject property was not even on the Eastmans’ radar until January and their offer was not submitted until January 28, 2009. *See* CP 534 (FF 1.52).

Contrary to the object and purpose of a tail provision, the trial court permitted the tail provision to be used as a “sword” rather than as a “shield”. By stretching clause C so as to cover completely new parties who were not even looking for a house during the listing period, and by interpreting clause C so broadly as to swallow and render clause B ineffective, the trial court abandoned the “object and purpose” of the tail

provision. The trial court gave clause C a “strained [and] forced construction”. Clause C was elevated over the more specific clause B, such that clause B was rendered wholly “ineffective”.

This court should reverse the trial court’s decision and reaffirm that tail provisions only apply to prospective buyers who were actually looking for a house and actually learned about the subject property “during the term of th[e] agreement”.

E.8. The **Only** Connection Between the Plaintiff and the Subject Sale is that John Place Saw the Sign and Flyer. The Sale Was **Not** Caused by Any Other “Information”, “Knowledge”, “Action”, “Activities”, “Effort” and/or “Marketing” by the Plaintiff. As explained above, the trial court used several critical words and phrases rather interchangeably in its F/findings and C/conclusions. But these words and phrases are not interchangeable or synonymous. They correspond to different clauses of the tail, which is critically important. *See supra*, pp.30-31 (section D.16.).

There is not “substantial evidence” to support any F/finding and/or C/conclusion to the effect that this sale occurred based on “information”, “knowledge”, “action”, “activities”, “effort” and/or “marketing” from and/or by the plaintiff. “Substantial evidence means evidence in the record of a sufficient quantity to persuade a fair-minded, rational person of the truth of the finding.” *State v. Sweany*, 162 Wn. App. 223, 232, 256

P.3d 1230 (2011).

Both John Place (who was the exclusive source of the Eastmans learning about the subject property) and Chris Pauling (who is the owner-operator of the plaintiff) conceded at trial that nothing else was at-play in this situation. The only connection between the Eastmans and the plaintiff was that John Place had previously seen the sign and flyer. *See* RP 107, lns.10-17; RP 112, lns.5-10; RP 257, lns.19-25; RP 260, ln.23 – RP 261, ln.2; RP 261, lns.16-21; RP 265, lns.21-24 & RP 276, ln.19 – RP 277, ln.9; *see also supra*, pp.28-39 (section D.13.)

The trial court unequivocally ruled that “[t]he Eastmans didn’t secure any information from the Broker.” *See* CP 465-466. Yet, the court then inconsistently ruled that the generic “information” clause (*i.e.*, clause C) was satisfied. This court should reverse that decision.

This sale did not occur based on any information secured from the plaintiff during the term of the listing. It occurred because John Place told the Eastmans – after the listing had expired – that he had previously seen the sign and flyer (and then because of the chance encounter with Linda Rockwell at a café, *see* 163 Wn. App. at 804-805). This should not be characterized as “information” under clause C. It should be characterized as the “sign” and/or as “advertising”, and it should be controlled by the sign-and-advertising-specific clause (*i.e.*, clause B). Because clause B

was not satisfied, Judgment should have been for the defendants.

E.9. There Are *Zero* Washington Precedents Wherein a Tail Provision was Stretched to Cover People Who Did Not Even Learn About the Subject Property Until After the Listing Had Expired. If ratified by this court, the trial court's decision will have sweeping consequences. The contract in this case is a standard form MLS document. *See* plaintiff's trial exhibit 1.1 (Exclusive Listing Agreement) & CP 106-109 (Exclusive Listing Agreement). It is frequently used throughout Washington. There is no telling how many additional, unsuspecting sellers might be forced to pay a commission under similar, post-hoc, attenuated circumstances.

The better result (and the only one that is consistent with the authorities cited herein) is to restrict the tail to covering only those people who personally learned about the property during the term of the listing. The trial court's decision is a major departure and it should be reversed.

E.10. The Trial Court Erred by Granting Relief to the Plaintiff on Arguments that the Plaintiff Did Not Make. "Unless a theory of recovery is disclosed in the pleadings or is tried by the express or implied consent of the parties, a court may not base its decision thereon." *Harrington-McGill v. Old Mother Hubbard Dog Food Co., Inc.*, 22 Mass. App. Ct. 966, 968, 494 N.E.2d 1043 (1986). Otherwise, serious procedural problems can arise, as the other party "may be effectively foreclosed from

presenting any evidence [or argument] on the very issue that is [supposedly] dispositive of the case.” (Internal quotation omitted; bracketed material added.) *Harrington-McGill v. Old Mother Hubbard*, 22 Mass. App. Ct. at 968. The record must confirm “that the parties understood [that] the evidence [was] aimed at the unpleaded issue.” (Internal quotation omitted; bracketed material in original.) *Id.*

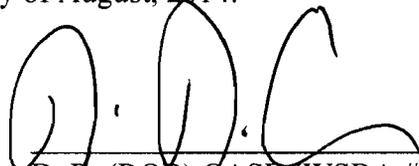
Here, the plaintiff focused exclusively on clause B, so much so that clause A and C were omitted from the “Complaint” and from plaintiff’s “Trial Brief”. See CP 5 (“Complaint”, p.3, ¶4.2, quoting clause B and omitting clauses A and C) & CP 455, Ins.1-3 (plaintiff’s “Trial Brief”, quoting clause B and omitting clauses A and C). The plaintiff advanced no meaningful argument for application of clause C. See RP 451-470 (plaintiff counsel’s closing argument) & RP 496-499 (plaintiff counsel’s rebuttal closing argument). Likewise, the plaintiff did not argue that the expired, unconsummated Richards’s offer established the value of the additional acreage. See *id.* As a matter of fairness, the trial court’s unexpected use of these unpled, un-argued theories should not stand.¹⁵

F. CONCLUSION

The defendants should be granted a reversal, plus costs and fees.

¹⁵ When this use of the Richards’s offer is negated, the result is that the plaintiff did not present sufficient evidence to quantify (and segregate) its alleged damages.

DATED this 29th day of August, 2014.



D. R. (ROB) CASE (WSBA #34313)
Larson Berg & Perkins PLLC
Attorneys for Respondents

DECLARATION OF SERVICE

I, LINDSEY R HOISINGTON, do hereby declare and state: On this day, in Yakima, Washington, I sent copies of this document via overnight U.S. mail, with postage prepaid, to the following:

Court of Appeals, Division III (original and one copy)
Clerk's Office
500 North Cedar Street
Spokane, WA 99201-1905

and, further, that on this day, I hand-delivered a copy of this document to the following:

Amy L. Remy (one copy)
Finney, Falk, Naught & Remy, PLLP
117 North Third Street, Suite 201
Yakima, WA 98901

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

SIGNED at Yakima, Washington, on August 29th, 2014.



Lindsey R Hoisington