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WISCONSIN COURT OF APPEALS
DISTRICT IV

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

BUSHMAN FARMS, INC.

Plaintiff-Appellant,

v.

Appeal No: 2014AP002989

Circuit Court Case No: 2013CV000090

DAIRYLAND REAL ESTATE, LLC,

Defendant-Respondent.

APPELLANT'S BRIEF

APPEAL FROM THE CIRCUIT COURT FOR WOOD COUNTY,
THE HONORABLE TODD P. WOLF, CIRCUIT COURT JUDGE,
BRANCH III, PRESIDING

FIRST LAW GROUP S.C.

A limited liability service corporation

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iv
WISCONSIN STATUTES.....	v
OTHER AUTHORITIES	v
STATEMENT OF ISSUES PRESENTED FOR REVIEW AND HOW THE TRIAL COURT DECIDED THEM	1
STATEMENT WHETHER ORAL ARGUMENT IS NECESSARY	1
STATEMENT WHETHER OPINION SHOULD BE PUBLISHED	1
STATEMENT OF THE CASE	1
NATURE OF THE CASE.....	1
PROCEDURAL STATUS OF CASE LEADING UP TO APPEAL.....	2
DECISION OF THE TRIAL COURT	3
STATEMENT OF FACTS.....	5
ARGUMENT	10
STANDARD OF REVIEW.....	10
SUMMARY OF ARGUMENT.....	10
I. SINCE THERE WAS NO SUCCESSFUL CLOSING TO ONE OF THE TWO PERSONS IDENTIFIED IN THE LISTING CONTRACT, THE TRIAL COURT COMMITTED ERROR IN CONCLUDING A REAL ESTATE COMMISSION WAS PAYABLE	11

II.	DAIRYLAND REAL ESTATE OWED A FIDUCIARY DUTY TO BUSHMAN FARMS	13
A.	DAIRYLAND REAL ESTATE PAID ITSELF A COMMISSION IN VIOLATION OF THE FIDUCIARY DUTIES IT OWED BUSHMAN FARMS WHEN IT TOOK THE \$82,950 COMMISSION WITHOUT DISCLOSING TO BUSHMAN FARMS THAT IT WAS NOT ENTITLED TO SUCH COMMISSION UNDER THE TERMS OF THE LISTING CONTRACT	15
B.	DAIRYLAND REAL ESTATE PAID ITSELF A COMMISSION IN VIOLATION OF THE FIDUCIARY DUTIES IT OWED BUSHMAN FARMS WHEN IT TOOK AN \$82,950 COMMISSION WITHOUT ENSURING THE CLOSING STATEMENT WAS IN ACCORDANCE WITH THE LISTING CONTRACT	16
C.	DAIRYLAND REAL ESTATE BREACHED ITS DUTY OF SUPERVISING WILLIAM BAKER WHO ATTENDED THE CLOSING	17
D.	DAIRYLAND REAL ESTATE BREACHED ITS FIDUCIARY DUTY AND ACTED IN ITS SELF INTEREST TO THE DETRIMENT OF BUSHMAN FARMS WHEN IT TOOK THE \$82,950 AT CLOSING	17
III.	DAIRYLAND REAL ESTATE’S RIGHT TO A COMMISSION WAS BASED UPON THE LISTING CONTRACT NOT UPON THE OFFER TO PURCHASE.....	19
IV.	BUSHMAN FARMS DID NOT BREACH ANY DUTY OF GOOD FAITH	20

A.	BUSHMAN FARMS HAD NO DUTY TO INFORM DAIRYLAND REAL ESTATE THAT THE OFFER TO PURCHASE HAD BEEN ASSIGNED TO A THIRD PARTY NOT MENTIONED IN THE LISTING CONTRACT.....	23
B.	THERE WAS NO AGREEMENT FORBIDDING ASSIGNMENT OF THE OFFER TO PURCHASE	23
C.	DAIRYLAND REAL ESTATE COULD HAVE PROTECTED ITSELF BY PROVIDING IN THE LISTING CONTRACT THAT A COMMISSION WAS PAYABLE IF AN ASSIGNEE OF ONE OF THE TWO PERSONS NAMED IN THE LISTING CONTRACT ACQUIRED THE REAL ESTATE	24
D.	THE TRIAL COURT’S DECISION REWROTE THE LISTING CONTRACT	25
	CONCLUSION	26
	CERTIFICATION OF FORM AND LENGTH OF APPELLANT’S BRIEF	28
	CERTIFICATION OF COMPLIANCE WITH WIS. STAT. §809.19(12)(F) (ELECTRONIC BRIEF CERTIFICATION)	29

TABLE OF AUTHORITIES

<i>Alexopoulos v. Dakouras</i> , 48 Wis. 2d 32, 179 N.W.2d 836 (1970).....	16
<i>Bank of Cal. v. Hoffmann</i> , 255 Wis. 165, 38 N.W.2d 506 (1949).....	14
<i>Beidel v. Sideline Software, Inc.</i> , 213 WI 56, 348 Wis.2d 360, 823 N.W.2d 514	25
<i>Degner v. Moncel</i> , 6 Wis.2d 163, 93 N.W.2d 857, 859 (1959).....	14
<i>Dykstra v. Arthur G. McKee & Co.</i> , 92 Wis.2d 17, 284 N.W.2d 692, 702–703 (App.1979) affirmed, 100 Wis.2d 120, 301 N.W.2d 201 (1981)).....	13
<i>Ford v. Wisconsin Real Estate Examining Board</i> , 48 Wis.2d 91, 179 N.W.2d 786, (1970)	13
<i>GMAC Mortgage Corp. v. Gisvold</i> , 215 Wis. 2d 459, 572 N.W. 2d 466 (1998).....	10
<i>Hortman v. Otis Erecting Co., Inc.</i> , 108 Wis.2d 456, 322 N.W.2d 482, (App.1982).....	13
<i>Journal/Sentinel, Inc. v. Pleva</i> , 155 Wis. 2d 704, 456 N.W. 2d 359 (1990).....	12
<i>Levy v. Levy</i> , 130 Wis. 2d 523, 388 N.W. 2d 170 (1986)	12
<i>Libowitz v. Lake Nursing Home, Inc.</i> , 35 Wis. 2d 74, 150 N.W.2d 439 (1967).....	12
<i>Mkt. St. Assoc. Ltd. P’ship v. Frey</i> , 941 F.2d 588 (7 th Cir. 1991)	25
<i>Pincus v. Pabst Brewing Co.</i> , 893 F. 2d 1544 (7 th Cir. 1990)	13

<i>Rasmussen v. Blue Cross Blue Shield United of Wis., Inc.</i> , 2000 WI App. 220, 239 Wis. 2d 120, 619 N.W.2d 147	10
<i>Re/Max Realty 100 v. Basso</i> , 203 WI App. 146, 266 Wis. 2d 224, 667 N.W.2d 857	17
<i>Schaller v. Marine Nat. Bank</i> , 131 Wis.2d 389, 388 N.W.2d 645 (Ct. App. 1986).....	20, 23, 24
<i>Schweiger v. Loewi & Co. Inc.</i> , 65 Wis. 2d 56, 221 N.W.2d 882 (1974).....	16
<i>Town Bank v. City Real Estate Dev., LLC</i> , 2010 WI 134, 330 Wis. 2d 340, 793 N.W. 2d 476.....	10, 12
<i>Upton v. Tribilcock</i> , 91 U.S. (1 Otto) 45, 23 L.Ed. 203 (1875)	13
<i>Zastrow v. Journal Communications, Inc.</i> , 2006 WI 72, 291 Wis. 2d 426, 718 N.W.2d 51	14, 15
<i>Zweck v. D P Way Corp.</i> , 70 Wis.2d 426, 234 N.W.2d 921 (1975)	13

WISCONSIN STATUTES

Wis. Stat. § 452.133	15, 18
Wis. Stat. § 452.133(1).....	14
Wis. Stat. § 452.133(2)(a)	18
Wis. Stat. § 452.133(2)(b)	18

OTHER AUTHORITIES

2 Am. Jur., Agency, p. 203, sec. 252.....	14
---	----

Wisconsin Jury Instruction-Civil 3044.....	4, 20
Wis. Adm. Code REEB 24.08	12
Wis. Adm. Code REEB § 17.08(1)	17
Wis. Adm. Code REEB § 17.08(2)	16
12 Am. Jur. (2d), Brokers, pp. 921, 922, sec. 182.....	12
Restatement, 2 <i>Agency 2d. Sec. 381</i>	16

**STATEMENT OF ISSUES PRESENTED FOR REVIEW AND
HOW THE TRIAL COURT DECIDED THEM**

1. Whether Dairyland Real Estate, LLC earned a real estate commission under its Listing Contract with Bushman Farms, Inc. when no successful closing and sale to one of the two persons identified in the Listing Contract took place?

Answered by the Trial Court: Yes.

2. Whether Bushman Farms, Inc. breached its duty of good faith under the Listing Contract by failing to inform Dairyland Real Estate, LLC it was not entitled to payment of a real estate commission because the sale of the real estate was not to one of two persons identified in the Listing Contract?

Answered by the Trial Court: Yes.

STATEMENT WHETHER ORAL ARGUMENT IS NECESSARY

Oral argument is not necessary.

STATEMENT WHETHER OPINION SHOULD BE PUBLISHED

The opinion to be rendered in this case need not be published.

STATEMENT OF THE CASE

NATURE OF THE CASE

The plaintiff-appellant, Bushman Farms, Inc. (herein “Bushman Farms”), brought this action against the defendant-respondent, Dairyland Real Estate, LLC (herein “Dairyland Real Estate”) seeking return to Bushman Farms of an \$82,950 real estate commission.

PROCEDURAL STATUS OF CASE LEADING UP TO APPEAL

Bushman Farms commenced this civil action on February 19, 2013, before the Wood County Circuit Court seeking judgment against Dairyland Real Estate in the sum of \$82,950 plus interest at the legal rate. Such \$82,950 constituted the amount of real estate commission paid Dairyland Real Estate. The Complaint is entry number number 2 of the Record on Appeal (herein “R.2”). This matter was tried to the court without a jury on September 23, 2014, at the conclusion of which the Honorable Todd P. Wolf, Circuit Court Judge, dismissed the Bushman Farms Complaint. R.36, p. 16. The Order & Judgment dismissing the Bushman Farms Complaint was rendered and entered on October 6, 2014. R.26. Such Order & Judgment is also found in the Appendix to this Brief at pp. 101-102 (herein “App. pp. 101-102”). The trial court’s oral ruling from the bench on September 23, 2014, at the conclusion of evidentiary portion of the trial is found at R.36 and App. 103-119.

Bushman Farms moved for reconsideration. R.29; App. 120-123. On November 18, 2014, the court heard and denied Bushman Farms’ motion for reconsideration. The transcript of the court’s ruling on Bushman Farms’ motion for reconsideration is found at R.38; App. 125-134. The Order denying Bushman Farms’ motion for reconsideration is found at R.32; App. 124.

Bushman Farms instituted this appeal by filing its Notice of Appeal dated December 23, 2014.

DECISION OF THE TRIAL COURT

After this case was trial to the court without a jury on September 23, 2014, the Honorable Todd Wolf, Circuit Court Judge, presiding, made an oral decision from the bench. R.36; App. 103-119. The trial court found Dairyland Real Estate had participated in formulating the Farm Listing Contract, which were trial exhibits 1, 2 and 3. R. 36, p.4-5 and R.25, Tr. Ex. 1, 2 and 3. The court recited with regard to the Listing Contract:

“It is understood that commission will only be paid upon successful closing and full payment if property is sold to the buyer, and then in brackets, or buyers listed in addendum B. This agreement is an amendment and supersedes any other agreement we have signed in relationship to this transaction...” R.36, p.5, l. 4-10.

The buyer at the closing was Greenwood Acres, LLC. R.36, p. 10, l.21-25. The buyer was changed to Greenwood Acres, LLC at the request of Attorney Gill who represented the buyer. R.36, p. 12. l. 20-p. 13, l. 6. Even though the change of the buyer to Greenwood Acres, LLC was done at the request of the buyer, not by Bushman Farms, the court found there was a good faith breach by Bushman Farms when the buyer became Greenwood Acres, LLC:

So I would—at this point in time I find that there—with that implied duty of good faith, that with understanding that everything at that point in time was either in Westers’ hand or the Bushman Farms, Inc.’s hand as far as now how that ultimate purchase was going to take place and who was going to be the ultimate buyer on that, that if the argument is and which it is now that the Court should strictly conform itself to the contract that was reached, I would find that then there is a good faith breach on behalf of Bushman Farms, Inc. here in the sense that now the buyer becomes Greenwood Acres, LLC, which in essence was formulated through the advice of Mr. Weyert’s (sic) attorney here simply to put it in that really for tax purposes, that the breach on that and **any duties were owed were actually Bushman Farms, Inc.’s duties toward Dairyland to make them aware now that they were going to ask that they be excluded now with their commission** with the fact that now I almost want to say eve of closing because it sounds like it was pretty close when that decision was being made. R.36, p. 13, l.16-p.14, l.10. (emphasis added)

The trial court went in to analogize:

...to rule otherwise would simply allow actually anyone to list a buyer such as to list myself as a buyer and then ultimately have my wife buy the property and turn around and say now you -- she wasn't listed as a listed buyer, and therefore, no commission should be paid. I think to do so would run amuck of the case I just cited here, the Court of Appeals decision regarding the inherent good faith and infuses every contract and the 3044 instruction that I normally give even to a jury here regarding what the expectations were." R. 36, p. 15, l. 6-15.

The court indicated Bushman Farms violated a duty of good faith by not disclosing the change of the buyer which was requested by the buyer. R. 36, p.15.

In denying Bushman Farms' motion for reconsideration the trial court recited that if the Listing Contract were read strictly, then Bushman Farms would be correct. R.38, p. 5, l. 8-12. But in affirming the dismissal of the Bushman Farms Complaint, the trial court relied upon the trial court's interpretation of the applicability of good faith to this situation. R.38, p. 5, l.12-14; p.6, l. 12-14. The trial court also commented:

Now, whether I point blank said that Bushman is the one that violated or breached any sort of duty as far as good faith is concerned, I would have thought It tried to avoid that type of comment because I'm not—I don't think I was necessarily saying that Bushman Farms itself was doing anything underhandedly or anything that was in violation of good faith. R. 38, p. 5, l.15-21.

In denying the motion for reconsideration the trial Court made a finding that the Listing Contract provided Dairyland Real Estate would be paid a commission only upon successful closing of the property to one of two purchasers, that Dairyland Real Estate did not hire legal counsel before the closing, that Dairyland Real Estate took a commission check in the sum of \$82,950 and that it since has refused to return such sum to Bushman Farms. R.38, p. 8, l. 3-9 and R.26, pp. 1-2.

The trial court ruled Bushman Farms' claim against Dairyland Real Estate

should not succeed because of the applicability of the principle of good faith.

R.38, p. 7, l. 18-23.

STATEMENT OF FACTS

The following facts were established at the September 23, 2014, trial. The Bushman Farms real estate subject to the Listing Contract consisted of 1181 acres. R.37, p. 8 and R.25, Tr. Ex. 1. Trial Exhibits 2 and 3, the addenda to the Listing Contract were signed after the Listing Contract had been signed. R.37, pp. 10-12 and R.25, Tr. Ex. 2 and 3. The Amendment to Listing Contract (Tr. Ex. 3) provided a commission would be paid only if the real estate were sold to one of the two parties identified on Addendum B (R. 25, Tr. Ex. 3); those two persons were Goedhart Westers, who was William Baker's client, and Jerry Gordon, who was Joseph Bradley's client. R.37, pp. 12-13. The Listing Contract recited "Bill has one buyer, Joe Bradley has one buyer." R. 25, Tr. Ex. 1, l. 273-274. The wording found on lines 277-280 of the Listing Contract was a combination of and a result of everyone's input who attended a meeting at the Bushman home; William Baker testified at deposition that Joseph Bradley's wording was found in lines 277-280. R. 37, pp. 26-27.

William Baker was working for Dairyland Real Estate as a real estate salesperson during the Bushman Farms transaction. R. 25, Tr. Ex. 8 and 13.

A Farm Offer to Purchase for \$4,147,500 was executed by Bushman Farms and by Goedhart Westers. R. 37, pp. 13-14; R.25, Tr. Ex. 4. William Baker assumed that, after February 6, 2012, the transaction was in the hands of the

attorneys. R.37, p. 44.

The closing took place on March 19, 2012. R.25, Tr. Ex. 16 (Seller's Closing Statement). William Baker, who attended the closing on behalf of Dairyland Real Estate, does not know if anyone on behalf of Dairyland Real Estate even looked at the closing statement or the warranty deed before William Baker took the commission check. R.37, pp. 18-19. At the time of the closing, William Baker did not know whether the sale had been to Goedhart Westers, even though he left the closing with the \$82,950 commission check. R.37, p. 28. William Baker turned the commission check for \$82,950 over to Dairyland Real Estate; Dairyland Real Estate then cut William Baker a check for \$58,000, but shortly after the closing, William Baker discovered that his license was not valid and Dairyland Real Estate cancelled payment of the \$58,000 check it had made out to and delivered to William Baker. R. 37, p. 19. Although Dairyland Real Estate had issued a check to William Baker shortly after the closing for an amount in excess of \$58,000, Dairyland Real Estate kept that money because William Baker was not licensed as a real estate agent at that time. R.37, pp. 52-53.

Joseph Bradley, the owner of Dairyland Real Estate, had been in the real estate business for 12 years as of the trial. R. 37, p. 65. He admitted the real estate commission was payable only if the subject real estate were sold to one of the two buyers identified on Addendum B, who were Goedhart Westers and Jerry Gordon.

R.37, pp. 48-50 and R.25, Tr. Ex. 3. The Listing Contract (R.25, Tr. Ex. 1) read at lines 277-279:

It is understood that commission will only be paid upon successful closing and full payment if property is sold to the buyer[s] listed in Addendum B. This agreement is an amendment and supersedes any other agreement we have signed in relation to this transaction.

At the time of the Bushman transaction, there was an agreement with William Baker that William Baker would receive 70 percent of the commission as to sales Mr. Baker was associated with. R. 37, p. 47. Joseph Bradley did not bother to attend the closing and did not see the Warranty Deed, which named Greenwood Acres, LLC as buyer, before the closing. R.37, pp. 50-51 and R.25, Tr. Ex. 17. Joseph Bradley had requested as of February 6, 2012, that all communications be channeled through Dairyland Real Estate's and Bushman Farms' respective attorneys. R. 37, pp. 56-58 and R.25, Tr. Ex. 6. Joseph Bradley, however, did not make himself aware of the attorney for the seller and testified he thought his local attorney would become involved. R.37, pp. 59-60. Joseph Bradley never actually hired an attorney on behalf of Dairyland Real Estate with regard to this transaction. R.37, pp. 74-75.

Shortly after the Listing Contract was signed, Jean Bushman on behalf of Bushman Farms, contacted three surveyors to obtain a prompt survey and the best price for surveying because the deadline for performance of a survey under the contract expired around February 20, 2012. R.37, pp. 80-81. William Baker of Dairyland Real Estate had communicated with one of the surveyors, Badgerland,

but he had not given Badgerland complete information and had obtained an incorrect estimate of the cost of such survey. R.37, pp. 81-83. William Baker had been informed surveyors were not to come onto the property on the date of a Bushman Farms corporate meeting, but William Baker, nevertheless, on the date of such corporate meeting brought a surveyor onto the property. R. 37, pp. 85-86. To Jean Bushman's knowledge, she was not asked to sign an amendment to the Listing Contract which added Greenwood Acres, LLC as a permissible buyer. R.37, p. 109.

Attorney Michael Salm represented Bushman Farms. R.37, pp. 123-124. Neither he nor Bushman Farms knew the actual owners of Greenwood Acres, LLC, the party to which the real estate was sold. R.37, pp. 123-125. Michael Salm, the attorney representing Bushman Farms, played no part in drafting the Listing Contract or any amendment to it. R.37, p. 126. The buyer of the Bushman Farms real estate was not Goedhart Westers but rather was a limited liability company; it was not Michael Salm's idea to change the buyer from Goedhart Westers to a limited liability company. R.37, p. 131.

Alan Bushman, the president of Bushman Farms, had never done business with a broker before doing business with Dairyland Real Estate. R. 37, p. 134. When William Baker and Joseph Bradley came to his house, they informed him they had two possible buyers and he signed the subject Listing Contract on behalf of Bushman Farms. R.37, pp. 134-135. Alan Bushman had never studied real estate law or general law and was not informed before the commission check was

issued that the buyer had been changed. R.37, p. 137. He did not request that the buyer's name be changed from Goedhart Westers to a limited liability company. R.37, p. 138.

Persons other than Goedhart Westers and Jerry Gordon had previously expressed to Alan Bushman an interest in buying the Bushman Farms real estate. R.37, pp. 138-139.

Alan Bushman was never contacted by Attorney Gill who represented Goedhart Westers. R.37, p. 147. Alan Bushman objected to payment of the commission in June, 2012; the attorney representing Alan Bushman was not present at the signing (closing). R.37, pp. 152-153.

Dennis Bushman, secretary of Bushman Farms, Inc. had not used a real estate broker before the subject transaction. R. 37, p. 161. Dennis Bushman had spoken with William Baker about purchase of wooded land but he never got a response from Mr. Baker about the wooded property; as a result, Dennis Bushman brought Tr. Ex. 18 to the closing. R.37, pp. 161-163; R. 25, Tr. Ex. 18. The buyer on the closing statement was identified as Greenwood Acres, LLC. R.37, p. 175; R.25, Tr. Ex. 16.

Attorney Patrick Gill represented Goedhart Westers, but not Bushman Farms; Attorney Gill suggested that the grantee in the deed from Bushman Farms should be Greenwood Acres, LLC – it was his idea. R.37, pp. 177, 182; and R. 25, Tr. Ex. 19 (transcript of the deposition of Patrick Gill), p.10, l. 13-18.

ARGUMENT

STANDARD OF REVIEW

Whether the trial court committed error in concluding Dairyland Real Estate had earned a real estate commission under the Listing Contract presents a question of law. *Rasmussen v. Blue Cross Blue Shield United of Wis., Inc.*, 2000 WI App. 220, ¶ 5, 239 Wis. 2d 120, 123, 619 N.W.2d 147. “The interpretation of an unambiguous contract presents a question of law for this court’s independent review.” *Town Bank v. City Real Estate Dev., LLC.*, 2010 WI 134, ¶ 32, 330 Wis. 2d 340, 793 NW.2d 476.

Since the relevant facts are basically undisputed, a review of the application of the breach of duty of good faith defense presents is a question of law which is reviewed *de novo*. *GMAC Mortgage Corp. v. Gisvold*, 215 Wis. 2d 459, 470, 572 N.W. 2d 466 (1998).

SUMMARY OF ARGUMENT

The Listing Contract (R.25, Tr. Ex. 1, 2 and 3) provided the real estate commission would be paid only upon successful closing and sale of the property to Goedhart Westers or to Jerry Gordon. At the request of the buyer, not Bushman Farms, the real estate was sold to Greenwood Acres, LLC. Under the Listing Contract, as drafted by Dairyland Real Estate, Dairyland Real Estate was not entitled to pay itself a real estate commission. Dairyland Real Estate, which owed a fiduciary duty to Bushman Farms, breached such duty by not disclosing to Bushman Farms that Dairyland Real Estate was not entitled to the \$82,950 real

estate commission and by taking and keeping the commission check.

The failure of Bushman Farms to inform Dairyland Real Estate that it was not entitled to a real estate commission under the Listing Contract did not constitute a breach of Bushman Farms' duty of good faith. The judgment of the trial court which dismissed the Bushman Farms Complaint should be reversed and judgment should be granted Bushman Farms for return to it of the \$82,950 real estate commission.

I. SINCE THERE WAS NO SUCCESSFUL CLOSING TO ONE OF THE TWO PERSONS IDENTIFIED IN THE LISTING CONTRACT, THE TRIAL COURT COMMITTED ERROR IN CONCLUDING A REAL ESTATE COMMISSION WAS PAYABLE

Unlike most listing contracts which require only finding a buyer who is ready, willing and able, the Farm Listing Contract between Dairyland and Bushman Farms included two specially drafted WB-42 Amendments which provided a real estate commission was payable only if there were a successful closing and sale to Goedhart Westers or to Jerry Gordon. R. 25, Tr. Ex. 1, l. 277-280, Tr. Ex. 3. The Farm Listing Contract contained typed provisions at lines 277-280, which read:

"In the absence of the right form [sic] for a [1]-party listing; It [sic] is understood that commission will only be paid upon successful closing and full payment if property is sold to the buyer[s] listed in addendum B. This agreement is an amendment and supersedes any other agreement we have signed in relation to this transaction." (emphasis added). R. 25, Tr. Ex. 1.

The Second Amendment to Listing Contract dated January 4, 2012, states at line 11, "The is [sic] Addendum "B" and lists the buyers as including "1. Goedhart Westers 2. Jerry Gordon". R. 25, Tr. Ex. 3.

Wis. Adm. Code REEB 24.08 reads in part: “A licensee **shall put in writing all listing contracts**...and any other commitments regarding transactions, **expressing the exact agreement of the parties**...” (emphasis added). The exact agreement of the parties was that a commission was to be paid only upon successful closing and sale to Goedhart Westers or to Jerry Gordon. Such never took place.

“...[T]he cornerstone of contract construction is to ascertain the true intentions of the parties as expressed by the contractual language... the purpose of judicial construction is to determine what the parties contracted to do as evidenced by the language they saw fit to use.” *Journal/Sentinel, Inc. v. Pleva*, 155 Wis. 2d 704, 710-711, 456 N.W. 2d 359 (1990). See also *Levy v. Levy*, 130 Wis. 2d 523, 535, 388 N.W. 2d 170 (1986) and *Town Bank v. City Real Estate Dev., LLC*, 2010 WI 134, ¶33, 330 Wis. 2d 340, 356, 793 N.W. 2d 476. Dairyland Real Estate contracted that a commission was to be paid only upon successful closing to one of two specifically identified persons.

In *Libowitz v. Lake Nursing Home, Inc.*, 35 Wis. 2d 74, 150 N.W.2d 439 (1967), the court quoted with approval the following excerpt from the *American Jurisprudence*:

“‘To entitle a broker to his commissions, he must accomplish what he undertook to do in his contract of employment for, as a rule, nothing short of that is sufficient to constitute a performance upon his part...12 Am. Jur. (2d), Brokers, pp. 921, 922, sec. 182.’”

Libowitz, supra, 35 Wis. 2d at 80.

The listing contract should not have been judicially reformed to say

something other than what it does to bestow upon Dairyland Real Estate a commission simply because the real estate was sold to someone:

Pabst also fails to save its case with general principles of contract construction. “ ‘The language of a contract must be understood to mean what it clearly expresses.’ ” *Hortman v. Otis Erecting Co., Inc.*, 108 Wis.2d 456, 322 N.W.2d 482, 484 (App.1982) (quoting *Dykstra v. Arthur G. McKee & Co.*, 92 Wis.2d 17, 284 N.W.2d 692, 702–703 (App.1979), affirmed, 100 Wis.2d 120, 301 N.W.2d 201 (1981)). The time-honored axiom applies here that if parties are allowed to convince courts to reform plainly worded contracts, “contracts would not be worth the paper on which they are written.” *Upton v. Tribilcock*, 91 U.S. (1 Otto) 45, 50, 23 L.Ed. 203 (1875); accord, *Zweck v. D P Way Corp.*, 70 Wis.2d 426, 234 N.W.2d 921, 926 (1975). As terse as it was, and as unfavorable to Pabst as ensuing events proved it to be, the Pabst–Pincus agreement was not susceptible to more than one construction.

Pincus v. Pabst Brewing Co., 893 F. 2d 1544, 1552 (7th Cir. 1990).

As terse as it was and as unfavorable to Dairyland Real Estate as ensuing events proved it to be, the fundamental requirement to make commission payable under the Listing Contract, i.e. that there had been a successful closing and sale to Goedhart Westers or to Jerry Gordon, had not been met. Dairyland Real Estate nevertheless paid itself a commission without informing its principal, Bushman Farms, that it should not have walked away from the closing with a commission check.

II. DAIRYLAND REAL ESTATE OWED A FIDUCIARY DUTY TO BUSHMAN FARMS

Dairyland Real Estate owed a fiduciary duty to Bushman Farms which duty it breached when it left the closing with a commission check: “The essential and basic feature underlying the relation of a broker to his employer is that of agency, and the principles of the law of agency apply throughout.” [citation omitted] *Ford v. Wisconsin Real Estate Examining Board*, 48 Wis.2d 91, 102, 179 N.W.2d 786,

792 (1970). A broker's fiduciary duties arise when “providing brokerage services to a person in a transaction.” Wis. Stat. § 452.133(1). Agents acting in a fiduciary capacity are required to make full disclosure to their principals of all information material to a transaction. *Degner v. Moncel*, 6 Wis.2d 163, 166, 93 N.W.2d 857, 859 (1959). *Bank of Cal. v. Hoffmann*, 255 Wis. 165, 171-171a, 38 N.W.2d 506 (1949) quoted approvingly at length from *American Jurisprudence Second* as follows:

“It is well settled that an agent is a fiduciary with respect to the matters within the scope of his agent. The very relation implies that the principal has reposed some trust or confidence in the agent. Therefore, the agent or employee is bound to the exercise of the utmost good faith and loyalty toward his principal or employer. He is duty bound not to act adversely to the interest of his employer by serving or acquiring any private interest of his own in antagonism or opposition thereto. His duty is to act solely for the benefit of the principal in all matters connected with his agency. This is a rule of common sense and honesty as well as of law.

...

Indeed, it has been stated that in the usual case, it is the duty of the agent to further his principal's interests even at the expense of his own in matters connected with the agency.... ” 2 Am. Jur., Agency, p. 203, sec. 252.

...

Where the agent has violated these principles in dealing with the agent's principal, here Bushman Farms, the transaction is voidable. *Bank of Cal., supra*, 255 Wis. 2d at 171a.

The court in *Zastrow v. Journal Communications, Inc.*, 2006 WI 72, 291 Wis. 2d 426, 718 N.W.2d 51, wrote with regard to fiduciary duty:

This constraint on acting in one's own self-interest has been described as a fiduciary's duty of loyalty. *Id.* However, the duty of loyalty is broader than simply requiring the fiduciary to refrain from acting in his own self-interest (citation omitted). For example, it also may require...fully disclosing to the beneficiary all information relevant to the beneficiary's interest (citation omitted).

...

The courts of Wisconsin have followed the general principles we set out above. For example, we have held that a fiduciary relationship results in the legal assumption of the “obligation to act for another’s benefit.” (citation omitted) The fiduciary’s duty of loyalty is “to act solely for the benefit of the principal in all matters connected with the agency, even at the expense of the agent’s own interests.” (citation omitted)

2006 WI 72, ¶¶ 28, 29, 31, 291 Wis. 2d at 444-446.

Wis. Stat. § 452.133 entitled “Duties of Broker” recites some of the duties Dairyland Real Estate owed to Bushman Farms:

(2) Broker’s duties to a client. A broker providing brokerage services to his or her client owes the client the duties that the broker owes to a person under sub. (1) and all of the following additional duties:

(a) The duty to loyally represent the client’s interests by doing all of the following:

1. Placing the client’s interests ahead of the broker’s interests.

...

(b) The duty to disclose to the client all information known by the broker that is material to the transaction and that is not known by the client or discoverable by the client through reasonably vigilant observation...

(c) The duty to fulfill any obligation required by the agency agreement...

Dairyland Real Estate expressly contracted to furnish Bushman Farms with all material facts affecting the transaction and agreed not to place Dairyland Real Estate’s interests ahead of Bushman Farms interests. R. 25, Tr. Ex. 1, l. 120-124.

A. DAIRYLAND REAL ESTATE PAID ITSELF A COMMISSION IN VIOLATION OF THE FIDUCIARY DUTIES IT OWED BUSHMAN FARMS WHEN IT TOOK THE \$82,950 COMMISSION WITHOUT DISCLOSING TO BUSHMAN FARMS THAT IT WAS NOT ENTITLED TO SUCH COMMISSION UNDER THE TERMS OF THE LISTING CONTRACT

William Baker attended the closing and took with him a commission check

for \$82,950.00. However, he had not looked at the closing documents to see if a commission had been earned under the listing contract. R. 37 pp 18-19, 28.

Schweiger v. Loewi & Co. Inc., 65 Wis. 2d 56, 64, 221 N.W.2d 882 (1974)

held: “Where such fiduciary duty exists, the agent has a duty to disclose all material information in its possession as to the transactions involved.

Restatement, 2 *Agency 2d. Sec. 381.*” No disclosure was made to Bushman Farms that, since there was no successful closing to Goedhart Westers or to Jerry Gordon, no commission had been earned under the listing contract and no commission should have been paid to Dairyland Real Estate. *Alexopoulos v. Dakouras*, 48 Wis. 2d 32, 40-42, 179 N.W.2d 836 (1970) confirmed an agent owes a fiduciary duty to account to the principal, here Bushman Farms, for all money received and that the agent has the burden of proving the agent properly disposed of funds which such agent received. Here, Dairyland Real Estate has not accounted for the money wrongfully paid to it, in breach of the fiduciary duty it owed to Bushman Farms.

B. DAIRYLAND REAL ESTATE PAID ITSELF A COMMISSION IN VIOLATION OF THE FIDUCIARY DUTIES IT OWED BUSHMAN FARMS WHEN IT TOOK AN \$82,950 COMMISSION WITHOUT ENSURING THE CLOSING STATEMENT WAS IN ACCORDANCE WITH THE LISTING CONTRACT

REEB § 17.08(2) reads, “A broker-employer shall be responsible for the preparation...and correctness of all entries and real estate forms, **closing statements** and other records even though another person may be assigned these

duties by the broker-employer” (emphasis added). It was the responsibility of Dairyland Real Estate to ensure the correctness of the Closing Statement (R. #25, Tr. Ex. 16), which should have provided for payment of a commission only there had been a successful closing and sale to Goedhart Westers or to Jerry Gordon. Such successful closing and sale was not accomplished and Dairyland Real Estate did not even look at the Closing Statement, much less ensure it was correct and in accordance with the Listing Contract. Such failure was in breach of the fiduciary duties owed by Dairyland Real Estate.

C. DAIRYLAND REAL ESTATE BREACHED ITS DUTY OF SUPERVISING WILLIAM BAKER WHO ATTENDED THE CLOSING

Dairyland also breached its duty of supervision of William Baker, who attended the closing. REEB § 17.08(1) reads in part: “A broker-employer shall supervise the activities of any licensee employed by the broker-employer. Supervision includes but is not limited to the reasonable review of all listing contracts..., offers to purchase, and other documents and records related to transactions...” There was no supervision of William Baker and no reasonable review of the closing statement or other documents at closing by Dairyland Real Estate. Such failure was in breach of the fiduciary duties owed by Dairyland Real Estate.

D. DAIRYLAND REAL ESTATE BREACHED ITS FIDUCIARY DUTY AND ACTED IN ITS SELF INTEREST TO THE DETRIMENT OF BUSHMAN FARMS WHEN IT TOOK THE \$82,950 AT CLOSING

Re/Max Realty 100 v. Basso, 203 WI App. 146, 266 Wis. 2d. 224, 233-234,

667 N.W.2d 857 found the broker in such case had breached duties recited in Wis. Stat. § 452.133 by placing the needs and interests of the broker ahead of the client in violation of Wis. Stat. § 452.133(2)(a) and by failing to disclose information material to the transaction in violation of Wis. Stat. § 452.133(2)(b). Here, Dairyland Real Estate breached these duties by putting its needs and interests ahead of those of Bushman Farms, by failing to provide Bushman Farms information important to the transaction, i.e. that Dairyland Real Estate was not entitled to a real estate commission under the terms of the listing contract it had drafted and entered, and by failing to abide by and fulfill the terms of its own listing contract, including Addendum B which limited the entitlement to a real estate commission to where there had been a successful closing and sale to Goedhart Westers or to Jerry Gordon.

Dairyland Real Estate breached its fiduciary duties by failing to disclose to Bushman Farms that it was not entitled to a commission under the terms of the listing contract, by failing to ensure that the closing statement was in accordance with the listing contract, by failing to supervise William Baker who attended the closing, and in acting in its own self-interest to the detriment of Bushman Farms when it took an unearned \$82,950.00 commission from the closing. In analyzing whether there was any breach of duty of good faith on the part of Bushman Farms, these breaches of the fiduciary obligations owed by Dairyland Real Estate must be considered.

III. DAIRYLAND REAL ESTATE'S RIGHT TO A COMMISSION WAS BASED UPON THE LISTING CONTRACT NOT UPON THE OFFER TO PURCHASE

The trial court observed the Farm Offer to Purchase (R. 25, Tr. Ex. 4) was assignable. R. 36, p. 8. However, Dairyland Real Estate's right to a commission was dependent upon the listing contract (R. 25 Tr. Ex. 1), which was clear in providing a commission was payable only upon a successful closing and sale either to Goedhart Westers or to Jerry Gordon. There was no amendment to the Listing Contract which would entitle Dairyland Real Estate to a commission if there were a successful closing to a party other than Goedhart Westers or Jerry Gordon. R. 37 p. 109.

The trial court correctly found the sale to Greenwood Acres, LLC was accomplished at the request of the buyer, not by Bushman Farms: "Now, obviously the transcript of Attorney Gill [attorney for Goedhart Westers] would indicate that that was something that was done on the request of his client or his recommendation to his client...." R. 36, p. 12, l. 20-23. The Listing Contract was negotiated and drafted by Dairyland Real Estate in a face-to-face meeting over the course of several hours and included two special addenda. R. 36, pp. 3-5. Neither at the closing nor at any other time was Bushman Farms asked to sign an amendment to the listing contract that added Greenwood Acres, LLC as a permissible buyer which amendment would entitle Dairyland Real Estate to a commission. R. 36, p. 109. It was not the obligation of Bushman Farms to unilaterally amend the listing contract to provide Dairyland Real Estate would be

entitled to a commission if the sale were to a party other than Goedhart Westers or Jerry Gordon. It was not the obligation of Bushman Farms to reject the proposal made by Attorney Patrick Gill, the buyer's attorney, that the sale be to a third party, Greenwood Acres, LLC, as permitted by the Offer to Purchase.

The trial court found Attorney Gill, who represented the buyer, wanted the property conveyed to Greenwood Acres, LLC. R. 36, pp. 12-13. The duty of good faith was not violated by Bushman Farms in acceding to the request by Attorney Gill that the closing and sale be to an assignee, a third party not listed in the listing contract, which assignment was permitted by the Offer to Purchase. Dairyland Real Estate did not request the court during the course of this lawsuit to reform the listing contract to include assignees of the two buyers, nor did it seek an amendment of the listing contract before it took the commission check at closing. It should not be protected now by using "good faith" to expand the terms the Listing Contract it drafted and signed.

IV. BUSHMAN FARMS DID NOT BREACH ANY DUTY OF GOOD FAITH

Bushman Farms did not breach any duty of good faith it owed to Dairyland Real Estate.

In *Schaller v. Marine Nat. Bank*, 131 Wis. 2d 389, 402-403, 388 N.W.2d 645 (Ct. App. 1986), a case involving whether a bank should have honored checking account overdrafts, the court wrote:

Section 401.201(19) Stats., defines good faith as "honesty in fact in the conduct or transaction concerned." Wisconsin Jury Instruction-Civil 3044 states, in addition to the above statutory

language:

The law implies a promise against arbitrary or unreasonable conduct.

...

The touchstone of good faith is honesty in fact and reasonableness.

The trial court's rationale for dismissing the claim of Bushman Farms, that it breached a duty of good faith, constituted an erroneous application of the good faith doctrine. Bushman Farms suggests it committed no such breach for the following reasons.

First, Bushman Farms committed no wrong in not informing Dairyland Real Estate that the buyer wanted the sale to be to a party other than Goedhart Westers. The trial court seemed to recognize as much when it stated from the bench:

Now, whether I point blank said that Bushman is the one that violated or breached any sort of duty as far as good faith is concerned, I would have thought It tried to avoid that type of comment because I'm not—I **don't think I was necessarily saying that Bushman Farms itself was doing anything underhandedly or anything that was in violation of good faith.** R. 38, p. 5, l.15-21. (emphasis added).

The record does not show any misconduct or acts or omission which could constitute a breach of duty. What Bushman Farms did was not arbitrary or unreasonable.

Second, Dairyland Real Estate owed a fiduciary duty to Bushman Farms which included the duty to inform Bushman Farms it was not entitled to a commission and which included the duty not to take and retain the real estate commission once it was apprised the sale was not going to be to one of the two persons identified in the Listing Contract. The closing and sale to one of two such

persons was an indispensable requisite to Dairyland Real Estate earning a real estate commission. Once Dairyland Real Estate was apprised that the sale was not going to be to one of the two persons identified in the Listing Contract, it should have refrained from taking the commission and, upon learning it was not entitled to a commission after closing, it should have promptly returned such commission to Bushman Farms.

Third, Dairyland Real Estate, on its own initiative, distanced itself from the transaction by informing Bushman Farms that the matter should be followed up by the parties' respective attorneys. R. 25, Tr. Ex. 6. However, Dairyland Real Estate did not even bother to assign the Bushman Farms matter to its own attorney.

R.37, pp. 74-75.

Fourth, had Bushman Farms notified Dairyland Real Estate previous to closing that the closing and sale of the real estate was not to either of the two persons identified in the Listing Contract, Dairyland Real Estate would not have been entitled to a real estate commission under the Listing Contract despite such notification. Bushman Farms informing Dairyland Real Estate that it was not entitled to a commission before closing would simply have confirmed to Dairyland Real Estate, which owed by a fiduciary duty to Bushman Farms, that Dairyland Real Estate should not have taken the \$82,950 commission at the closing.

A. BUSHMAN FARMS HAD NO DUTY TO INFORM DAIRYLAND REAL ESTATE THAT THE OFFER TO PURCHASE HAD BEEN ASSIGNED TO A THIRD PARTY NOT MENTIONED IN THE LISTING CONTRACT

In *Schaller, supra*, the court confirmed the bank's failure to give notice that checks would be dishonored did not violate the duty of good faith. *Id.* 131 Wis.2d at 402-403. Likewise, in the instant matter, Bushman Farms did not violate the duty of good faith by failing to give Dairyland Real Estate notice that the buyer had decided to assign the offer to purchase to a third party which was not identified in the Listing Contract. The trial court seemed to recognize Bushman Farms did not violate the duty of good faith:

Now, whether I point blank said that Bushman is the one that violated or breached any sort of duty as far as good faith is concerned, I would have thought It tried to avoid that type of comment because I'm not—I don't think I was necessarily saying that Bushman Farms itself was doing anything underhandedly or anything that was in violation of good faith. R. 38, p. 5, l.15-21. (emphasis added).

The trial court seemed to reason that it was not fair that Dairyland Real Estate not be paid a commission, not that Bushman Farms had violated a duty of good faith.

B. THERE WAS NO AGREEMENT FORBIDDING ASSIGNMENT OF THE OFFER TO PURCHASE

The *Schaller, supra*, court also reasoned the plaintiff in that case had obtained no agreement allowing it to overdraw its account or obliging the bank to inform the plaintiff of a potential overdraft. *Id.* 131 Wis. 2d at 403. Likewise, in the instant matter, there was no agreement forbidding assignment of the Offer to Purchase or requiring Bushman Farms to inform Dairyland Real Estate that the Offer to Purchase had been assigned by the buyer, not by it. Dairyland Real Estate, whose owner and the supervisor of William Baker had been in the business

for 12 years certainly must have known that in many instances offers to purchase are assignable.

C. DAIRYLAND REAL ESTATE COULD HAVE PROTECTED ITSELF BY PROVIDING IN THE LISTING CONTRACT THAT A COMMISSION WAS PAYABLE IF AN ASSIGNEE OF ONE OF THE TWO PERSONS NAMED IN THE LISTING CONTRACT ACQUIRED THE REAL ESTATE

The *Schaller, supra*, court reasoned there was no breach of the duty of good faith because the plaintiff account holder at the defendant bank could have easily protected itself: “Additionally, SPA was not at the bank’s mercy. All SPA needed to do to avoid possible loss resulting from returned checks was to monitor the status of its own account.” (*Id.*, 131 Wis. 2d at 403), and “We cannot see how the bank’s decision to discontinue certain courtesies, even if it gave SPA no advance notice of that decision, constituted dishonesty or taking unfair advantage.” *Id.*, 131 Wis. 2d at 404. Dairyland Real Estate could have taken steps to avoid the harm which it now asserts it will suffer if the listing contract it negotiated is implemented as written. It could have requested the Listing Contract provide a real estate commission was payable if there were a successful closing to Goedhart Westers or to Jerry Gordon, or to an assignee of either such person. However, the Listing Contract which Dairyland Real Estate drafted and which Bushman Farms signed did not so provide. Bushman Farms never agreed to pay a real estate commission if the sale of its real estate were to any party other than Goedhart Westers or Jerry Gordon.

D. THE TRIAL COURT'S DECISION REWROTE THE LISTING CONTRACT

The trial court's judgment had the practical effect of rewriting the listing contract by re-introducing a standard provision found in many listing contracts that a commission is payable if the seller enters any offer which creates an enforceable contract for the sale of real estate, i.e. the broker procures any buyer who is ready, willing and able. See R. 25, Tr. Ex. 1, l. 58-59. However, both Dairyland Real Estate and Bushman Farms expressly agreed to forego such standard provision and instead agreed a commission was payable only upon successful closing to Goedhart Westers or to Jerry Gordon. R. 25, Tr. Ex. 1, l. 277-280 and Tr. Ex. 3. Permitting Dairyland Real Estate to recover a commission under this record would constitute a judicial reformation and amendment of the listing contract after the fact to create an obligation on the part of Bushman Farms and an entitlement in favor of Dairyland Real Estate which the parties rejected during their negotiations and to which they never agreed.

The excerpt immediately below taken from the concurring opinion in *Beidel v. Sideline Software, Inc.*, 213 WI 56, ¶ 61, 348 Wis.2d 360, 398-399, 832 N.W.2d 514 is instructive in this case, particularly because the party asserting lack of good faith was a seasoned real estate brokerage company:

I agree that unnecessarily injecting good faith and fair dealing into a contract, especially when the terms of the contract are clear, is improper. See dissent, ¶ 69. Indeed, the Seventh Circuit is rightly wary of using the doctrine of good faith and fair dealing to overcome the rights and responsibilities set forth in a contract. See *id.*, ¶ 72 (quoting *Mkt. St. Assoc. Ltd. P'ship v. Frey*, 941 F.2d 588, 593, 595 (7th Cir. 1991) (“[I]t is unlikely that Wisconsin wishes, in the name of good faith to make every contract signatory his brother's keeper...It would be quixotic as well as presumptuous for judges to undertake

through contract law to raise the ethical standards of the nation's business people.”))

The terms of the Listing Contract were clear. Judicially rewriting the Listing Contract to add a provision which the parties had rejected in their negotiations, should be rejected.

CONCLUSION

The Order & Judgment (R. 26) should be reversed by this court and judgment should be granted in favor of Bushman Farms against Dairyland Real Estate in the sum of \$82,950.00 plus interest and costs because there was no successful closing to either Goedhart Westers or to Jerry Gordon. Bushman Farms did not breach any duty of good faith with respect to the Listing Contract, the only document under which Dairyland Real Estate could be entitled to a real estate commission, by failing to inform Dairyland Real Estate that it was not entitled to payment of a real estate commission. Bushman Farms did not breach any duty of good faith in any other manner.

Respectfully submitted this 21st day of April, 2015.

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CERTIFICATION OF FORM AND LENGTH OF APPELLANT’S BRIEF

I certify that this Brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) for a Brief produced using the following font: Proportional Serif font: minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this Brief is 7,251 words.

Dated this 21st day of April, 2015.

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CERTIFICATION OF COMPLIANCE WITH WIS. STAT. § 809.19(12)(f) (ELECTRONIC BRIEF CERTIFICATION)

I certify that:

I have submitted an electronic copy of this Brief, excluding the Appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12)(f).

I further certify that:

This electronic Brief is identical in content and format to the printed form of the Brief as filed as of this date.

A copy of the Certificate has been served with the paper copies of this Brief and filed with the court and served on all opposing parties.

Dated this 21st day of April, 2015.

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