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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

BUSHMAN FARMS, INC.,

Plaintiff-Appellant,

v.

Appeal No.2014AP002989

DAIRYLAND REAL ESTATE, LLC,

Defendant-Respondent.

On Appeal from an Order and Judgment entered in
Wood County Circuit Court, Case No. 2013CV000090,
the Honorable Todd P. Wolf, presiding

**BRIEF OF DEFENDANT-RESPONDENT,
DAIRYLAND REAL ESTATE, LLC**

BRAZEAU, LA CHAPELLE, KRYSHAK &
NETTESHEIM, LLP

J.P. LA CHAPELLE
State Bar No. 1068933

Attorneys for Dairyland Real Estate, LLC
262 West Grand Ave.
Wisconsin Rapids, WI 54495
Telephone: (715) 423-1400

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ISSUE PRESENTED FOR REVIEW

I. Did Dairyland Real Estate, LLC perform under the terms of its agreement with Bushman Farms, Inc., such that Dairyland Real Estate, LLC is entitled to retain its commission earned on the sale of Bushman Farm Inc.'s farm real estate?

The trial court answered "yes."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Dairyland Real Estate, LLC does not request oral argument or publication.

STATEMENT OF THE CASE

The plaintiff-appellant, Bushman Farms, Inc. ("Bushman") sued the defendant-respondent, Dairyland Real Estate, LLC ("Dairyland"), for return of an \$82,950 real estate commission previously paid to Dairyland by Bushman. The trial court dismissed Bushman's claim, entitling Dairyland to keep its commission, based on a finding that Bushman's demand for a return of the commission is a breach of the implied duty of good faith and fair dealing implicit in every contract. (Bushman's App. 130: 20-25, 131:1.) Bushman appeals that decision.

This case revolves around the covenant of good faith and fair dealing implicit in every contract. Dairyland maintains that it performed in all respects with the spirit of the contract, and Bushman received the benefit of the bargain the parties made, namely, the name of a buyer and a signed offer to purchase, which ultimately led to Bushman netting \$3.3 million in the sale of its farm. Therefore, Dairyland's position is that it is entitled to keep the commission it earned on that sale. Bushman argues for a strict construction of the contract (which would prohibit Dairyland from being able to perform), while at the same time denying that it breached the implied duty of good faith and fair dealing, entitling Bushman to a return of the commission.

STANDARD OF REVIEW

This case involves both contract interpretation and the issue of good faith and fair dealing. The interpretation of a contract presents a question of law over which the court of appeals exercises *de novo* review. *Borchardt v. Wilk*, 156 Wis. 2d 420, 427, 446 N.W.2d 653, 656 (Ct. App. 1990). However, whether a party's conduct is consistent with good faith and fair dealing necessarily depends on the facts of the particular case and

is ordinarily determined by the finder of fact. *Peddie v. Sterling Jewelers, Inc.*, 282 F. Supp. 2d 947, 952 (E.D. Wis. 2003).

When presented with a mixed question of law and fact, a court must find the relevant facts and determine if those facts fulfill a legal standard. *DOR v. Exxon Corp.*, 90 Wis. 2d 700, 713, 281 N.W.2d 94 (1979), *aff'd*, 447 U.S. 207, 100 S.Ct. 2109, 65 L.Ed.2d 66 (1980). The standard of review for mixed questions of law and fact has two parts. First, the court will apply the clearly erroneous standard to the facts. *Noll v. Dimiceli's, Inc.*, 115 Wis. 2d 641, 643, 340 N.W.2d 575 (Ct. App. 1983). Second, the court will address the legal conclusion *de novo*. *Exxon Corp.*, 90 Wis. 2d at 713. However, this court may give weight to the circuit court's legal conclusion if the legal conclusion and factual findings are significantly intertwined. *Leasefirst v. Hartford Rexall Drugs, Inc.*, 168 Wis. 2d 83, 89, 483 N.W.2d 585 (Ct. App. 1992).

ARGUMENT

- I. The doctrine of good faith and fair dealing bars Bushman's claim that Dairyland should now return the commission it earned on the sale of Bushman's farm.**

Every contract carries an implied covenant of good faith and fair dealing in the performance of its terms. *Save Elkhart Lake v. Village of Elkhart Lake*, 181 Wis. 2d 778, 787, 512 N.W.2d 202 (Ct. App. 1993). The contract at issue in this case is the Listing Contract entered into between Dairyland and Bushman, for the marketing and sale of Bushman's farm. In most basic terms, Dairyland was entitled to a commission if the farm was sold to one of two named prospective buyers, whose names were disclosed by Dairyland, to Bushman. One of those prospective buyers was Goedhart Westers. Goedhart Westers is the same individual who would later form Greenwood Acres, LLC, the named entity that took title to the Bushman farm at closing.

During the entire term of the Listing Contract, Bushman made no objection to the fact that Dairyland would receive a commission on the sale; even after Bushman knew the ultimate buyer was Greenwood Acres, LLC. In fact, Dennis Bushman, one of the principals of Bushman Farms, Inc., stated under oath that he had no issue with paying the commission to Dairyland because he felt the company [Bushman Farms, Inc.] owed it. (R.18, Ex. E – Dennis Bushman Dep. 44:1-20.) Even David Bushman, who was adamantly opposed to selling the farm, raising numerous objections

with the other principals of Bushman Farms, Inc. while the sale was pending, did not cite any objection to paying a commission. (R.18, Ex. E - David Bushman Dep. 38:21-25, 39:1-10.)

It was not until after the closing (when Bushman discovered that one of the agents of Dairyland did not have a valid real estate license during the term of the Listing Contract) that Bushman thought the commission should be returned, and proceeded to sue Dairyland. (R.18, Ex. E – Dennis Bushman Dep. 44:21-25.) This is the point in time where Bushman breached the duty of good faith and fair dealing it owed to Dairyland. Bushman, in its arguments, fails to acknowledge this important fact – Bushman’s breach took place *after* closing, when Bushman sued Dairyland for a return of the commission, on a pure technicality.¹ (Bushman’s App. 130:20-25; 131:1.)

¹ Bushman’s complaint demands the return of a commission which it voluntarily paid, on two separate theories: (1) Nonperformance by Dairyland because the ultimate sale was to Goedhart Westers’ limited liability company (as opposed to Goedhart Westers, individually); and (2) one of the agents of Dairyland did not have a valid realtor’s license during the term of the Listing Agreement. As to the second argument, *Schlueter v. Latek*, 821 F. Supp. 2d 1079 (E.D. Wis. 2011), directly interprets Wis. Stat. § 452.20 Limitation on actions for commissions. *Schlueter* holds that Chapter 452 of Wisconsin Statutes provides no cause of action for the return of a commission voluntarily paid. Thus, Bushman has not pursued its second theory of recovery on appeal.

Bushman's pursuit of a return of the commission because the farm was ultimately sold to Goedhart Westers' limited liability company, as opposed to Goedhart Westers, individually, constitutes a breach of good faith and fair dealing on Bushman's part. Conduct that may not constitute a breach when the contract is read literally may still violate the duty of good faith – the key inquiry is whether a party truly sought to accomplish the agreement's objectives. *Foseid v. State Bank of Cross Plains*, 197 Wis. 2d 772, 796-797, 541 N.W.2d 203 (Ct. App. 1995).

Again, the parties' agreement was quite simple: Dairyland would provide Bushman with the names of two interested buyers and in return, Bushman would pay Dairyland a commission in the event either of those two buyers purchased Bushman's farm. The parties memorialized their agreement in writing with the Listing Contract. The objective of the agreement was to get Bushman's farm sold, for an amount acceptable to Bushman, with Dairyland receiving a commission. Dairyland not only provided the names, but a written offer to purchase was procured from one of those buyers, Goedhart Westers, as a result of Dairyland's efforts.

The objective was met when the transaction closed less than two months later, and Bushman netted \$3.3 million (as shown on seller's closing statement). This was after Bushman had been trying to sell its farm for the past five or six years, maybe more, with no success. (R.18, Ex. E – Alan Bushman Dep. 6:7-9.)

If a party exacts another's promise to perform an act, the law implies a counter-promise against arbitrary or unreasonable conduct by the party exacting the promise. *Ekstrom v. State*, 45 Wis. 2d 218, 222, 172 N.W.2d 660 (1969). Bushman and Dairyland had a deal. Dairyland upheld its end of the deal, and was instrumental in finally getting the Bushman farm sold. Now Bushman does not want to pay the commission. Why? Because the name of the grantee on the deed, the deed signed by Goedhart Westers, is "Greenwood Acres, LLC," as opposed to "Goedhart Westers," individually. Arbitrary? Yes. Unreasonable? Yes... "absurd" is another word that comes to mind. Bushman's argument on why the commission should be forfeited by Dairyland is a prime example of when a court should look at substance over form.

If the purpose of contract law is to enforce the reasonable expectations of parties induced by promises, then at some point it becomes necessary for courts to look to the substance rather than to the form of the agreement, and to hold that substance controls over form. What courts are doing here, whether calling the process “implication” of promises, or interpreting the requirements of “good faith,” as the current fashion may be, is but a recognition that the parties occasionally have understandings or expectations that were so fundamental that they did not need to negotiate about those expectations. When the court “implies a promise” or holds that “good faith” requires a party not to violate those expectations, it is recognizing that sometimes silence says more than words, and it is understanding its duty to the spirit of the bargain is higher than its duty to the technicalities of the language.

Arthur Linton Corbin, *Corbin on Contracts* § 570 (West Supp.1993).

We have reached the point which Corbin describes above – substance here should control over form, and Dairyland should be entitled to keep its commission. The law supports Dairyland’s position. Acting with good faith includes refraining from taking unfair advantage of another through technicalities of law or failure to provide information or give notice. *Peddie v. Sterling Jewelers, Inc.*, 282 F. Supp. 2d 947, 953-954 (E.D. Wis. 2003). By suing Dairyland, demanding the commission be returned because Goedhart Westers’ limited liability company, as opposed to Goedhart Westers, individually, was the ultimate purchaser, Bushman has breached its duty of good faith and fair dealing. Imagine the precedent that would be set to hold otherwise.

Bushman wants to retain the benefit of the bargain it made with Dairyland, yet deny Dairyland a commission. A breach of the covenant of good faith and fair dealing exists if one party denies another party the benefit of an agreed-upon bargain. *Zenith Ins. Co. v. Employer Ins.*, 141 F.3d 300, 308 (7th Cir. 1998). Bushman's actions seek to deny Dairyland the benefit of the agreed-upon bargain, the commission. Bushman's actions constitute a breach of good faith and fair dealing.

Bushman's demand for a return of the commission is all the more unreasonable because Bushman itself agreed that Goedhart Westers could assign the offer to purchase to his limited liability company. Actions taken to frustrate the purpose of an agreement may constitute a breach of good faith. *Foseid v. State Bank of Cross Plains*, 197 Wis. 2d at 796-797. After taking the signed offer from Bushman and presenting it to Goedhart Westers, Dairyland was essentially left out from any further communications from the parties. Instead, Bushman conducted all further negotiations through its corporate attorney, who in turn communicated with Goedhart Westers' attorney. Bushman, in its appellate brief, spends a considerable amount of time attempting to make a big deal out of this fact. But what happened is not all that unusual – the realtor found the buyer and

facilitated the transaction. The attorneys took over from there, and hammered out the details. (Bushman's App. 110: 4-7; App. 114-115.)

Bushman remained very involved in the negotiations with the buyer, through Bushman's corporate counsel. And it was Bushman, through its attorney, who agreed to allow Goedhart Westers to assign the offer to purchase to a limited liability company. Not only did Bushman consent to the assignment, but their attorney drafted a sophisticated form of consent, whereby Goedhart Westers remained personally obligated under the offer to purchase, if his limited liability company failed to consummate the transaction. These factual findings were properly made by the trial court. (Bushman's App. 110: 8-22.)

As to the closing documents showing Goedhart Westers' limited liability company as the purchaser, Bushman had legal counsel both preparing and reviewing those documents; Bushman's had even more time than usual to review the documents; and the court found that, contrary to Bushman's assertions, Bushman actually did review the closing documents. Again, the trial court duly noted these facts in its findings. (Bushman's App. 111-112.)

As to any allegations of Dairyland's lack of involvement surrounding the closing, it was Dairyland that was *prohibited* from entering the rooms where the closing took place. The parties knew Dairyland was present to retrieve the commission check, which it did, immediately after the transaction closed – no objections were raised. Again, these were the findings of the trial court. (Bushman's App. 111:4-10.)

The duty of good faith includes an obligation not to hinder performance. *Metropolitan Ventures, LLC v. GEA Associates*, 2006 WI 71, ¶ 35, 291 Wis. 2d 393, 717 N.W.2d 58. While nothing prohibited Bushman from consenting to an assignment of the offer to purchase to a limited liability company (nor should anything prohibit such an assignment), Bushman cannot now use that consent which Bushman voluntarily granted as a tool to bar Dairyland a commission, through arguing nonperformance under the Listing Contract. To permit Bushman to do so would allow Bushman to unilaterally hinder Dairyland's ability to perform the contract, and for what reason?

Bushman failed to submit any evidence as to why it would even matter if Goedhart Westers assigned his right to purchase the Bushman farm to his limited liability company. And nothing would prohibit

Goedhart Westers, or his LLC, from selling to *any* third party after the closing. Above all, Bushman has failed to show how it was harmed in any way by the assignment, the same assignment to which it consented. Had Bushman wanted to place further restrictions on a sale, or resale of the farm (i.e. retain a right of first refusal for itself), or reserve wood rights, etc., it could have negotiated those terms through its attorney. Remember, the actual offer which is the subject of this transaction and signed by all parties was prepared by the attorneys, not by Dairyland.

II. Bushman has waived any right to demand the commission be returned.

Even if the trial court had found that Dairyland failed to technically perform under the Listing Contract (a finding the trial court did not make), the fact that Bushman did not object to payment of a commission until quite some time after the closing, constitutes a waiver on Bushman's part to raise any such objection now.

Waiver is a voluntary and intentional relinquishment of a known right. *Christensen v. Equity Coop. Livestock Sale Ass'n*, 134 Wis. 2d 300, 303, 396 N.W.2d 762 (Ct. App. 1986). Waiver may be established by conduct, or by express statements. *Id.* Waiver may be established by a

party's acquiescence in the other party's failure to strictly perform. Wis. JJ – Civil 3058 (1993).

Based on the facts of this case, it is next to impossible for Bushman to claim that it did not acquiesce in the sale to Greenwood Acres, LLC, and in the voluntary payment of a commission to Dairyland based upon said sale. Bushman has waived any right it may have had to demand a return of the commission it voluntarily paid to Dairyland, nearly one year prior to Bushman's filing of its lawsuit. *See C.G. Schmidt, Inc. v. Tiedke*, 181 Wis. 2d 316, 321, 510 N.W.2d 756 (Ct. App. 1993) (a party to a contract may waive a contract condition that is for that party's benefit).

III. Bushman's demand for the return of the commission is barred by the doctrine of laches.

Again, assuming, arguendo, that Dairyland failed to technically perform under the Listing Contract, Bushman's demand for the return of the commission is barred by the doctrine of laches. "The elements of the equitable doctrine of laches are: (1) unreasonable delay; (2) knowledge of and acquiescence in the course of events; and (3) prejudice to the party asserting laches. *In re the Estate of Flejter*, 2001 WI App 26, ¶41, 240 Wis. 2d 401, 623 N.W.2d 552.

Applying the facts of this case to the above rule, Bushman was fully aware, and agreed, that Greenwood Acres, LLC would be the purchaser of the Bushman farm. Bushman acknowledged and acquiesced in the commission being paid to Dairyland at the closing. It took over seven months after payment of the commission for Bushman to raise the objection it now makes, namely that the ultimate buyer was not Goedhart Westers. As the commission was voluntarily paid, Dairyland had no reason to expect that Bushman would object after the fact. To now require Dairyland to return over \$80,000 in commissions certainly would be prejudicial, as that money has long since been expended in the operations of the business.

IV. The trial court's interpretation that Dairyland is entitled to a commission under the terms of the Listing Contract is fair and reasonable.

In construing a contract, the court must adopt the construction that will result in a reasonable, fair and just contract as opposed to one that is unusual or extraordinary, or produces unfair results. *Columbia Propane, L.P. v. Wisconsin Gas Co.*, 2003 WI 38, ¶25, 261 Wis. 2d 70, 92, 661 N.W.2d 776. A court will construe a contract “[so] far as reasonably practicable...[to] make it a rational business instrument.” *Borchardt v. Wilk*, 156 Wis. 2d 420, 427, 456 N.W.2d 653 (Ct. App. 1990); *see also*

Superl Sequoia Ltd. v. Carlson Co., 615 F.3d 831, 836 (7th Cir. 2010) (“[j]udges endeavor to read contracts to make economic sense.”).

The trial court’s finding that Dairyland is entitled to keep the commission it earned is not only fair and reasonable, it makes economic sense. Bushman seeks to renege on the agreement it made with Dairyland, yet retain the benefit of the bargain, namely, the \$3.3 million it netted from the sale. Again, Bushman had been trying to sell its farm for over the past five years – but for Dairyland’s efforts, the sale to which Bushman not only agreed, but negotiated the terms, would not have occurred. Had Dairyland known that Bushman would object to paying a commission if Goedhart Westers were to, after signing a binding contract to purchase, assign that contract to his limited liability company, Dairyland would not have provided his name to Bushman in the first place. To deny Dairyland a commission on these grounds produces an unfair result.

CONCLUSION

Apparently the \$3.3 million Bushman farms received on the sale of its farm was not enough – Bushman also wants Dairyland to provide its services free of charge.

For the reasons stated above, the trial court's dismissal of this case should be upheld. Dairyland rightfully earned its commission on the sale of Bushman's farm, and Dairyland is entitled to keep that commission. Any efforts by Bushman to deny Dairyland a commission smacks of bad faith.

Dated: May 18, 2015.

Respectfully submitted,
BRAZEAU, LA CHAPELLE, KRYSHAK &
NETTESHEIM, LLP

/s/ J.P. La Chapelle

J.P. La Chapelle, State Bar No. 1068933
Attorneys for Dairyland Real Estate, LLC
262 West Grand Ave.
Wisconsin Rapids, WI 54495
Telephone: (715) 423-1400

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 3,152 words.

Dated: May 18, 2015

/s/ J.P. La Chapelle

J.P. La Chapelle, State Bar No. 1068933

CERTIFICATE OF COMPLIANCE WITH
WIS. STAT. § 809.19 (12)

I hereby 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).

I further certify that:

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

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

Dated: May 18, 2015

/s/ J.P. La Chapelle

J.P. La Chapelle, State Bar No. 1068933

CERTIFICATION OF MAILING OR DELIVERY

Pursuant to Wis. Stat. § 809.80(3) and (4), I certify that this brief was delivered to a 3rd party commercial carrier in the City of Wisconsin Rapids, Wood County, Wisconsin, on May 18, 2015, and left there to be delivered for service on the opposing parties within 3 calendar days.

Dated: May 18, 2015

/s/ J.P. La Chapelle

J.P. La Chapelle, State Bar No. 1068933