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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

07-15-2015

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

BUSHMAN FARMS, INC.

Plaintiff-Appellant,

v.

APPEAL NO. 2014AP2989

DAIRYLAND REAL ESTATE, LLC,

Defendant-Respondent.

**APPELLANT'S BRIEF IN RESPONSE TO WISCONSIN
REALTORS® ASSOCIATION AMICUS CURIAE BRIEF**

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The Plaintiff-Appellant, Bushman Farms, Inc. (herein “Bushman Farms”), by its attorneys respectfully submits this Brief in response to the Wisconsin Realtors® Association Amicus Curiae Brief (herein “Amicus Brief”).

SUMMARY OF RESPONSE TO AMICUS BRIEF

The Amicus Brief incorrectly asserted the real estate broker, Dairyland Real Estate, LLC (“Dairyland”) was entitled to retain an unearned real estate commission because a real estate broker may not give legal advice to its principal. In issue in this appeal is whether Dairyland earned a real estate commission in the first instance, not whether it could or could not give legal advice to its principal as to whether Dairyland thought it had earned that commission.

The assertion in the Amicus Brief that Dairyland’s duties ended after the closing begs the question of whether Dairyland was entitled to take the commission check from the closing.

The insinuation in the Amicus Brief that Dairyland did not have the opportunity to determine if it had earned a commission (and therefore may keep the commission check) must be rejected. Dairyland’s agent, William Baker, attended the closing and took the commission check with him without reviewing the closing documents. It was not the fault of Bushman Farms that Dairyland’s agent did not review the closing documents.

There is no good faith requirement on the part of Bushman Farms to pay an unearned commission to Dairyland.

The Listing Contract is the document which determines whether Dairyland had earned a real estate commission, not the offer to purchase.

Finally, waiver was not even referenced by the trial court in its decision and Section III of the Amicus Brief for that reason should be disregarded.

RESPONSE TO OVERVIEW

Contrary to the assertion on page 1 of the Amicus Brief, neither Bushman Farms nor its attorney, Michael Salm, knew the actual owners of the limited liability company. R.37, pp. 124-125.

Contrary to the assertion on page 2 of the Amicus Brief, the broker, Dairyland, had requested that all communications be channeled through Dairyland's own attorney, yet it failed to hire an attorney in connection with this transaction. R.37, pp. 56-58, 74-75; R.25, Tr. Ex. 6. The record does not show the Bushmans knew Dairyland chose not to communicate with its legal counsel about this transaction. After having requested that all communications be conducted through Dairyland's legal counsel, the suggestion in the Amicus Brief suggests that Bushman Farms must be faulted for operating under the premise that Dairyland would follow up on its own suggestion must be rejected.

I. THE FACT THE BROKER SHOULD NOT PRACTICE LAW DID NOT JUSTIFY ITS KEEPING AN UNEARNED COMMISSION

Section I.A. of the Amicus Brief incorrectly suggests strictures forbidding real estate brokers from practicing law justified Dairyland's taking and keeping an unearned commission. This assertion misses the point because Dairyland was to

be paid a commission in the first instance only if it had earned it under the Listing Contract. If Section I.A. of the Amicus Brief leads analysis anywhere, it is to the conclusion that Dairyland should have followed up with its own legal counsel and not have taken the commission check before it had done so. Dairyland had requested all communications be channeled through its legal counsel but never bothered to hire such legal counsel. R.37, pp. 56-58, 74-75; R.25, Tr. Ex. 6. Does the Amicus Brief at pages 4 and 5 seriously contend it was acceptable for Dairyland, or any broker for that matter, to accept and retain an unearned real estate commission because the broker had no duty to tell its principal the commission was unearned because such presented a forbidden topic?

**II. NO TERMINATION OF A BROKER'S DUTY, AT CLOSING
OR OTHERWISE, JUSTIFIED THE TAKING AND WRONGFUL
RETENTION OF AN UNEARNED COMMISSION**

Section I.B. at pages 6 and 7 of the Amicus Brief suggests Dairyland was justified in keeping the unearned commission because its duties ceased at closing. If the real estate commission were unearned under the Listing Contract, aside from issues of good faith as the trial court suggested was the case (see R.38, p. 5, l. 1-14), then this court should reject the contention in the Amicus Brief that Dairyland may retain an unearned real estate commission because its duties terminated at closing. Does the Amicus Brief seriously suggest retention of an unearned commission is justified because the broker was able to walk away unimpeded from the closing with a commission check? Should this court accept the suggestion that it give comfort and sanction to the taking and retention of an unearned

commission because the broker's duties ended at closing? What if, for example, a broker is overpaid by \$10,000 at closing; may the broker keep the unearned \$10,000 because the broker's duties ended at closing? It is likely the Amicus Brief would not have taken the same position if the facts of this case involved a broker being underpaid \$10,000 at closing. Would such underpaid broker be foreclosed from seeking the additional \$10,000 solely because events at closing constituted the last word? The answer to this question is a resounding no.

III. IT WAS NOT IMPOSSIBLE FOR DAIRYLAND TO UPHOLD ITS OBLIGATIONS

Section I.C. at pages 7-9 of the Amicus Brief incorrectly suggests it was impossible for Dairyland to do what the law requires. First, Dairyland itself had requested before closing that all communications be channeled through its attorney, but it never bothered to hire an attorney. R.37, pp. 56-58, 74-75; R.25, Tr. Ex. 6. Second, Dairyland's agent, William Baker, attended the closing, took the commission check but did not look at the other closing documents. R.37, pp. 18-19, 28. The record does not show Dairyland even requested a copy of the closing documents from the Bushmans' attorney, Mr. Salm. Dairyland could have asked for the closing documents, but it failed to do so. The Amicus Brief followed Dairyland's footsteps in blaming the Bushmans for William Baker not reviewing the documents at closing. The record, however, shows that Harlan Accola, who was part of the closing company, not Bushman Farms, had requested that William Baker run errands, get lunch and come back later. R.37, p. 17, l. 19 – p. 18, l. 14.

Dairyland presumably could have used e-mail, a telephone, the U.S. mail or facsimile to obtain and review the closing documents before the closing.

Dairyland was obviously aware of the time and place of the closing because it sent William Baker, who appeared at the appointed time and place of the closing, to fetch the commission check. At closing Mr. Baker sat next to Dennis Bushman and across the room from Alan and Jean Bushman where William Baker chitchatted about the weather. R.37, pp. 17-18. Finally, the suggestion that it was impossible for Dairyland to perform its duties at closing (see bottom of page 8, top of page 9 of the Amicus Brief) was not a finding made by the trial court, nor is the Amicus Brief justified in concluding that it was “impossible” for Dairyland to have reviewed the closing documents. The record does not indicate Dairyland asked to review the closing documents before or at the closing, or at any time before William Baker walked off with the commission check.

IV. DAIRYLAND’S FAILURE TO ASSUME CLOSING FUNCTIONS DID NOT JUSTIFY ITS TAKING AN UNEARNED COMMISSION CHECK FROM THE CLOSING

Section I.D. of the Amicus Brief incorrectly suggests Dairyland’s failure to take on closing functions as a separate scope of work justified its leaving the closing with an unearned commission check. Bushman Farms is not basing its claim upon Dairyland’s failure to perform the closing; rather, its claim is that Dairyland should not have taken an unearned commission check from the closing. The record does not reveal Dairyland asked to see any of the closing documents other than the commission check. The assertion near the bottom of page 9 of the

Amicus Brief that Bushman Farms wanted to exclude Dairyland is contradicted by the testimony of the owner and president of Dairyland who admitted he took the initiative to request that all communications be done through Dairyland's and Bushman Farms' attorneys and by his admission that he, on behalf of Dairyland, never actually hired a lawyer in connection with this transaction. R.37, pp. 56-58, 74-75, R.25, Tr. Ex. 6. Contrary to the insinuation near the bottom of page 9 of the Amicus Brief, Dairyland certainly could have requested to look at the deed and the closing statement before walking off with the commission check. Are Wisconsin real estate brokers so unknowledgeable that they should not be expected to determine whether a commission check has been earned under their own Listing Contract?

The Bushman Farms attorney, Michael Salm, did not draft the Listing Contract (R. 37, p. 126), nor was it his idea to change the buyer to a limited liability company (R.37, p. 131), nor was the commission even on his "radar screen" (R.37, p. 127). As between a real estate broker who owes a fiduciary duty to the broker's principal and persons unsophisticated with real estate practice (the Bushmans), the real estate broker should have confirmed the commission was earned before leaving the closing with the commission check.

**V. BUSHMAN FARMS' REQUEST FOR RETURN OF THE
UNEARNED REAL ESTATE COMMISSION DID NOT VIOLATE
THE DUTY OF GOOD FAITH**

Section II found at pages 10-13 of the Amicus Brief begs the question of whether the commission was earned and does not address the issue of whether

requesting return of an unearned real estate commission violates an implied duty of good faith. It was not arbitrary or unreasonable to request return of something that has not been earned. The trial court found Bushman Farms did not do anything underhanded or anything that was in violation of good faith. R.38, p. 5, l. 15-21. What the Amicus Brief incorrectly suggests is that, since no one caught Dairyland before it cashed the real estate commission check, Bushman Farms has no recourse. Such is not a proper application of the principle of implied good faith.

The Amicus Brief in the middle of page 11 invites this court to set a bad precedent in arguing the offer to purchase should take precedence over the Listing Contract when determining entitlement to the real estate commission. The Listing Contract is the document to which Dairyland and all real estate brokers should look to determine whether a commission has or has not been earned. As pointed out on page 7 above, the attorney representing Bushman Farms did not draft the Listing Contract, nor was it his idea to change the buyer to a limited liability company. Dairyland must bear a principal responsibility because it informed Bushman Farms all communications were to be channeled through Dairyland's lawyer, but it never even bothered to hire a lawyer. R.37, pp. 56-58, 74-75, R.25, Tr. Ex. 6. Dairyland purposefully and deliberately put itself outside the loop. This was the course of conduct or dealing between Bushman Farms and Dairyland, as requested by Dairyland itself. (See bottom of page 11 of the Amicus Brief.)

In response to the assertion near the top of page 13 of the Amicus Brief, the

substance of the Listing Contract was that there had to have been a successful closing to one of two individuals, an event which did not take place. Further, the record does not show that Westers was buying the property. Neither Bushman Farms nor its attorney, despite efforts, knew the actual owners of Greenwood Acres, LLC. R.37, pp. 124-125.

**VI. THE TRIAL COURT DID NOT BASE ITS DECISION UPON
WAIVER AND WAIVER SHOULD NOT BE CONSIDERED
BY THIS COURT**

In response to Section III of the Amicus Brief on pages 13 and 14, the trial court did not mention waiver in its decision or make any findings or conclusions regarding waiver. R.36 and R.38. Waiver, which was not found by the trial court but which was referenced in Dairyland's Respondent's Brief, was addressed in Section IV on pages 8 and 9 of the Bushman Farms' Reply Brief filed with this court.

This court should not accede to the request to make findings and conclusions on a matter which was not even addressed by the trial court. Not only did the trial court not mention waiver, much less make findings and conclusions, but this court should decline to address waiver at this time. *Terpstra v. Soiltest, Inc.*, 63 Wis. 2d 585, 593, 218 N.W.2d 129 (1974): "The adoption of a new rule of law on appeal when the question was not raised at trial might well work hardship on the adversary. It would also deprive this court of the informed

thinking of the trial judge on the matter.”¹ Further, Michael Salm, the Bushman Farms attorney, spent some time trying to figure out the identity of the owners of Greenwood Acres, LLC, the buyer, but could not. R.37, pp. 124, 125. Mr. Salm was just looking to see whether the offer to purchase was legally enforceable; the impact of the two named buyers, although he had tried to figure out who was actually buying, he could not find out. R.37, p. 127.

Michael Salm played no part in drafting the Listing Contract or any amendment to the Listing Contract and did not even have the amendment to the Listing Contract identifying the two buyers; rather the scope of his work was to determine whether the Offer to Purchase was legally enforceable. R.37, pp. 126-127; R.25, Tr. Ex. 3.

CONCLUSION

The Amicus Brief requests this court to establish poor precedent based upon the unusual facts of this case. This court should resist the temptation to look at the offer to purchase rather than the Listing Contract to determine whether Dairyland was entitled to the real estate commission. Looking at the Listing Contract is particularly important where a specially drafted Listing Contract severely curtails the entitlement to a real estate commission.

This court should also resist the temptation to excuse the laxity of the real estate brokers in not even reviewing closing documents, irrespective of whose

¹ Waiver was not mentioned nor were findings or conclusions made by the trial court with regard to waiver. R.36 and R.38. Waiver was referenced in Dairyland motion for summary judgment but such motion was denied. R.15, p. 6 and R.21.

