

Lunsford v. Fraley,

No. 37303-0-I

Washington Court of Appeals

April 4, 1997

**D. S. LUNSFORD AND LINDA LUNSFORD, HUSBAND AND WIFE,
APPELLANTS,**

v.

**HARRY FRALEY AND THERESA FRALEY, HUSBAND AND WIFE, AND THE
MARITAL COMMUNITY COMPOSED THEREOF, AND;**

**JOHN DOE THOMAS AND JANE DOE THOMAS HUSBAND AND WIFE;
WINDERMERE REAL ESTATE/EAST, INC., A WASHINGTON
CORPORATION; AND KATH HAWKES AND JOHN DOE HAWKES,
HUSBAND AND WIFE; AND DON RILEY AND JANE DOE RILEY, HUSBAND
AND WIFE;**

**AND SUSAN JONES AND JOHN DOE JONES, HUSBAND AND WIFE; AND
AUDREY LILY AND JOHN DOE LILY, HUSBAND AND WIFE, DON DEASY
AND JANE DOE DEASY, HUSBAND AND WIFE, RESPONDENTS.**

**HARRY FRALEY AND TERESA FRALEY, HUSBAND AND WIFE, AND THE
MARITAL COMMUNITY COMPOSED THEREOF, THIRD-PARTY
APPELLANTS, V. BETTY CHANDLER AND ROBERT L. CHANDLER,
HUSBAND AND WIFE, AND THEIR MARITAL COMMUNITY; THIRD-PARTY
RESPONDENTS.**

[6] Appeal from Superior Court of King County. Docket No: 93-2-06026-2. Date filed: 08/18/95.

[7] For Appellants: Stephen T. Araki, 500 108th Avenue NE # 900, Bellevue, WA 98004-5500.

[8] For Defendants: John W. Demco, John Demco P.s., 5224 Wilson Ave. S., Seattle, WA 98118. John C. O'Rourke, P.o. Box 98741, Des Moines, WA 98198. Richard D. Bozarth, Attorney At Law, 1124 S 274th Pl, Des Moines, WA 98198. Anthony C. Johnson, Johnson & Spurr, 1417 4th Ave Ste 201, Seattle, WA 98101-2219. Emily J.

Tsai, PO Box 98741, Des Moines, WA 98198.

[9] For Respondents: John W. Demco, John Demco P.s., 5224 Wilson Ave. S., Seattle, WA 98118.

[10] Authored by Walter E. Webster. Concurring: Ann L. Ellington, Mary K. Becker.

[12] WEBSTER, J. -- This breach of fiduciary duty action concerns an agent's common law duty to disclose a material fact in a residential real estate transaction. Here, the Lunsfords were trying to buy the Fraleys' home. Windermere Real Estate Company represented both, and the three of them signed a dual agency addendum. During the negotiations an agent learned from the Fraleys that a third party would make an offer on the house. The parties dispute whether the agent told the Lunsfords. After the Fraleys accepted the other offer, the Lunsfords sued Windermere, alleging that it should have disclosed the other offer. Because a reasonable jury could find that the Lunsfords might have changed their bargaining position had they known of the new offer, it could be a material fact that Windermere should have disclosed. Further, nothing in the dual agency addendum excused Windermere from disclosing information about another offer that it learned about from the Fraleys. Hence, the trial court erred in granting summary judgment to Windermere, and we reverse.

[13] **FACTS**

[14] Theresa and Harry Fraley wanted to sell their home, so they listed it with Juliet Tuck, a Windermere real estate licensee. Tuck worked in Windermere's Bellevue West office. D. S. and Linda Lunsford wanted to buy a house, and Betty Chandler, a real estate licensee associated with Windermere Real Estate/East, Inc. represented them.

[15] When the Lunsfords decided to make an offer for the Fraley's home, Windermere gave each of them a Consensual Dual Agency Addendum. Under that addendum, the Fraleys and Lunsfords recognized that Chandler and Tuck were "Consensual Dual Agents" who would represent both parties. Still, the addendum limited the disclosure of confidential information by Windermere to one or the other:

[16] Except for known material defects or other specific disclosures required by law, Seller and Buyer agree that the salesperson shall not be liable to either party for refusing or failing to disclose confidential or privileged information without permission which in the sole discretion of the salesperson could harm one party's bargaining position including, but not limited, to financing information, motivation, price, terms, negotiating

strategies or other private matters. The Fraleys and the Lunsfords consented to the addendum, and waived "any claims they may have arising from this [dual agency] relationship."

[17] Although the parties subsequently agreed on price, they had difficulty resolving issues arising from the Fraleys' earlier remodeling that was done without permits. The parties made written counteroffers, but never signed an identical purchase and sale agreement. During this process, the Lunsfords understood that Windermere would show the house to potential buyers.

[18] While the Fraleys and Lunsfords negotiated, Kath Hawkes, another Windermere real estate licensee, showed the property to the Thomases. The Fraleys told Chandler that they expected to receive a higher offer from another buyer. Chandler alleges that she told the Lunsfords about the Thomas offer, but the Lunsfords deny it. Nevertheless, the Lunsfords believed that they had a binding agreement with the Fraleys. The Thomases offered to buy the home, and the Windermere agents, in conjunction with a Windermere broker, decided that the Fraleys and the Lunsfords had no binding agreement, and that Hawkes would present the Thomases' offer. And Windermere did not advise the Lunsfords that it would present the Thomas offer. The Fraleys sold to the Thomases.

[19] Although the Lunsfords sued the Fraleys, the Thomases, Windermere, its agents, and its broker, it soon nonsuited the Fraleys and the Thomases, and eventually nonsuited all defendants save Windermere. The Lunsfords and Windermere then participated in a mandatory arbitration. That produced a \$200 nominal damage award to the Lunsfords for Windermere's breach of fiduciary duty; the arbitrator also awarded them attorney fees. When Windermere filed for trial de novo, the parties stipulated to the facts and filed cross motions for summary judgment. The trial court granted Windermere's motion for summary judgment and for attorney fees, then granted the Fraleys' motion for attorney fees. The Lunsfords appeal both awards.

[20] **Discussion**

[21] **Fiduciary Duty Cause of Action**

[22] The Lunsfords assert two breaches of fiduciary duty: (1) failing to disclose the Thomas offer to them, and (2) actively promoting the interests of the Thomases over their interests, resulting in a conflict of interest. *fn1

[23] A principal and an agent create an agency relationship by consenting to it. *fn2

Likewise, two principals can consent to the agent's request to simultaneously serve them, even though they have adverse interests in a transaction. *fn3 If both principals consent, the agent's relationship with each principal is characterized as a dual agency. *fn4 Although it may increase the agent's remuneration, dual agency is perilous. *fn5 For the agent owes each principal the duties of utmost good faith, loyalty, and disclosure. *fn6 Despite having two principals, the dual agency must disclose information relevant to the affairs entrusted to the agent. *fn7 But an agent need not disclose confidential information of one principal to the other principal. *fn8

[24] **Failing to Disclose**

[25] Thus, under the common law, Windermere had a duty to disclose it if the information was material to the transaction, but not if it was confidential. Usually, materiality is a factual issue. *fn9 But if all reasonable minds could only reach one Conclusion, the issue can be decided as a matter of law. *fn10 The Restatement offers one measure of materiality, focusing on whether the agent should know that the information will affect the principal's actions:

[26] An agent may have a duty to act upon, or communicate to his principal or to another agent, information which he has received, although not specifically instructed to do so. The duty exists if he has notice of facts which, in view of his relations with the principal, he should know may affect the desires of his principal as to his own conduct or the conduct of the principal or of another agent. *fn11 Some reasonable people would agree that the existence of another offer (for more money) is material to a principal attempting to purchase a house. As a result, because Chandler learned from the Fraleys of another offer, a jury could find she breached her duty if she didn't disclose it.

[27] Mr. Lunsford's declaration unequivocally states that "I was not advised of the existence of the Thomases offer and had no knowledge that the offer was to be presented that evening of Friday, the 19th of February." But Chandler's declaration states that she called Mr. Lunsford and informed him of another offer, but he responded that he believed he had already bought the house. When she told him that the new offer would not make the sale contingent on permits, he responded that he would never buy the house without the permits. CP 96-97. On the other hand, Windermere stipulated that "the Lunsfords were not advised that the Thomases' offer would be presented." *fn12 The Lunsfords' general knowledge -- "that the property might be shown to other buyers while they negotiated with the Fraleys"-- is not synonymous with Windermere's knowledge of the existence and terms of the Thomas offer. Given this dispute over a material issue, summary judgment for either party on the breach of Windermere's common law disclosure duty is inappropriate.

[28] Nevertheless, Windermere seeks summary judgment by contending that the dual agency addendum is "the central document to this case," *fn13 from which it argues:

[29] the addendum limits its duty of disclosure to "material defects and other disclosures required by law." Resp. Br. at 14-15.

[30] it says that the Lunsfords had no right to be informed of submission of another offer by another buyer. Resp. Br. at 21.

[31] Windermere proceeded in the only way it could and it acted to protect the interest of all the parties in accordance with the written agency agreements. Resp. Br. at 22-23 (emphasis supplied) (this implies a fact not shown in the record: that Windermere, the Fraleys, and the Thomases also signed a dual agency addendum).

[32] Windermere's handling of the transaction was completely consistent with the addendum. Resp. Br. at 23-24.

[33] Thus, in Windermere's eyes, the agreement describes the full scope of its disclosure duty, and did not require it to disclose the Thomas offer.

[34] On the one hand, the addendum between Windermere, the Lunsfords, and the Fraleys limits Windermere's duties. For example, the agreement recognizes that "Buyer and Seller have different interests." And it describes salespeople as facilitators who will "do their best to see that both parties are treated fairly and honestly." Its concluding paragraph contains a broad waiver: buyer waives "any claims they may have arising from this relationship." Yet the agreement also conveys the idea that Windermere continues to represent both the buyer and the seller. Hence, it is titled "Consensual dual agency Addendum." (emphasis supplied). It states that then agents can "no longer serve as an exclusive representative for the Buyer or the Seller." (emphasis supplied). Further, it comes right out and states that Windermere "will represent both of you." The agreement does not disclose Windermere's relationship with the Thomases, nor did the Lunsfords agree to it.

[35] As regards Windermere's disclosure duties, the agreement allows Windermere to remain mute only if the confidential or privileged information would harm one party's bargaining position:

[36] Except for known material defects or other specific disclosures required by law,

Seller and Buyer agree that the salesperson shall not be liable to either party for refusing or failing to disclose confidential or privileged information without permission which in the sole discretion of the salesperson could harm one party's bargaining position including, but not limited, to financing information, motivation, price, terms, negotiating strategies or other private matters. The first clause ("except for known material defects") excludes liability when Windermere discloses confidential information if the disclosure is required by law. The remainder of this paragraph excludes liability when it fails to disclose "confidential or privileged information . . . which . . . could harm one party's bargaining position." In other words, the Lunsfords can recover for breach of Windermere's disclosure duty when the alleged disclosure is (1) material, and (2) not confidential information which would harm the other principal's bargaining position. We have already concluded that a reasonable juror could find the information material.

[37] Thus, we must determine whether the existence and terms of a different buyer's offer was privileged or confidential information which could harm one party's bargaining position. But we need not decide whether the second offer was "confidential" if disclosure was not harmful to the Fraleys.

[38] Disclosing the existence of a second offer potentially helps the Fraleys -- who might benefit from a bidding war. And it would assist the Lunsfords in deciding whether to submit a new offer. Thus, even if the information was confidential, the addendum does not excuse Windermere's failure to disclose because it would not harm one party's bargaining position. We thus find the addendum to be superfluous, rather than central, to Disposition of this case. It does not define the scope of Windermere's duties, but only excludes a few particularized confidences from disclosure.

[39] We need not consider Windermere's relationship with the Thomases. For here, Chandler learned of the Thomas offer from the Fraleys, not the Thomases' agent. Moreover, Windermere never disclosed its representation of the Thomases to the Lunsfords, or sought their consent to that agency. Rather, the addendum promised that Windermere will "represent both of you" [Lunsford and Fraley]. Thus, Windermere cannot fairly contend that its failure to disclose was necessitated by its duties to the Thomases.

[40] In Conclusion on the duty to disclose a material fact, the trial court erred in granting summary judgment to Windermere.

[41] Conflict of Interest/Promoting Other Interests The other fiduciary claim alleged by the Lunsfords focuses on the circumstances surrounding Windermere's presentation of the Thomas offer.

[42] Yet this claim of fiduciary duty breach, as it implicates Windermere's duties to the Fraleys, differs substantially from the previous claim. Importantly in this regard, the "Lunsfords understood that the property might be shown while they negotiated with the Fraleys." *fn14 And Windermere, as the latter's agent, had a duty to present them with all written offers. *fn15 After all, the dual agency agreement recognizes the different interests of buyer and seller. As we noted in the previous section, the addendum limits Windermere's duties. It would be unreasonable to read the agreement as requiring Windermere to refuse to present other offers to the seller. What is more, we reject the invitation to apply the conflict rules from the Rules of Professional Conduct to the relationship between real estate agents and their joint principals. *fn16 Consequently, we do not agree with the Lunsfords when they assert that presentation of the Thomas offer created an irreconcilable conflict of interest.

[43] Nor have the Lunsfords established breach of fiduciary duty by Windermere at a meeting attended by Chandler (their agent), Bruce Downs (a broker in Chandler's office) and Don Riley (broker for the Windermere office that had received the Thomas offer). After a meeting lasting less than an hour, Riley consulted with Windermere's attorney, concluded that the Fraleys and Lunsfords had no binding agreement, and that Windermere would present the Thomas offer. The record does not demonstrate the disclosure of any confidential information at the meeting. Nor does it establish that Windermere promoted the interests of one prospective buyer over another. Windermere simply presented a written offer already received by one of its agents. Although that offer competed with the Lunsfords offer, the Lunsfords recognized that Windermere would continue to represent the "different" interests of the Fraleys. The trial court correctly granted summary judgment as to this allegation of breach of fiduciary duty.

[44] **Damages**

[45] Windermere briefly asserts that "even if plaintiffs had a liability claim, they have no damages. In fact, plaintiffs have now resorted to a claim for 'nominal damages.'" *fn17 Still, Windermere does not argue that the purported absence of compensatory damage is an alternate basis upon which to affirm the trial court. Consequently, it is unnecessary for us to address damages, and we decline to do so.

[46] **Attorney Fee Award To The Fraleys**

[47] The Lunsfords contest the trial court's attorney fee award to the Fraleys. They argue that the Fraleys lacked standing to recover fees because they did not participate in the mandatory arbitration or subsequent trial de novo.

[48] A prevailing party only recovers attorney fees when authorized by contract, statute, or recognized ground in equity. *fn18 Unsurprisingly, a party who seeks contractual attorney fees must generally rely upon a binding contract. *fn19 Because the Lunsfords "never reached a binding agreement with the Fraleys," *fn20 and the dual agency addendum (which is binding) does not include an attorney fee provision, the Fraleys cannot recover fees under the general rule. *fn21 Of course that rule has an exception: a defendant who successfully defends a breach of contract lawsuit by proving the absence of an enforceable contract is entitled to the benefit of the attorney fee provision in the alleged contract.*fn22 Here, the Lunsfords sued the Fraleys for specific performance. Because the Fraleys prevailed after being sued for enforcement, they are entitled to the benefit of the contractual attorney fee provision. The Lunsfords argue however, that the Fraleys lacked "standing" *fn23 to seek fees because they did not participate in the arbitration or summary judgment proceeding. "Standing is a requirement that the plaintiffs have been injured or been threatened with injury by governmental action complained of, and focuses on the question of whether the litigant is the proper party to fight the lawsuit." *fn24 It does not apply to the Fraley's motion for attorney fees. The civil rules, on the other hand, allow a prevailing party to move for fees and costs no later than fifteen days after the court takes action to dispose of all claims of all parties. *fn25 Because the Lunsfords did not designate the judgments entered below, we cannot determine whether the Fraleys complied with CR 54(d). *fn26

[49] Because we find no basis for reversal, we affirm the attorney fee award to the Fraleys. As we reverse the trial court's judgment in favor of Windermere, we decline to address the substantive arguments relating to that attorney fee award.

[50] We reverse the summary judgment (and concomitantly, the attorney fee award) in favor of Windermere. We affirm the judgment for attorney fees in favor of the Fraleys. And we remand for trial the Lunsfords' claim that Windermere failed to disclose a material fact. Affirmed in part, reversed in part.

[51] WE CONCUR

[52] Ann L. Ellington,

[53] Mary K. Becker.

Opinion Footnotes

[54] *fn1 App. Br. at 18.

[55] *fn2 Costco v. World Wide Licensing, 78 Wash. App. 637, 645, 898 P.2d 347 (1995).

[56] *fn3 Investment Exchange Realty, Inc. v. Hillcrest Bowl, Inc., 82 Wash. 2d 714, 717, 513 P.2d 282 (1973).

[57] *fn4 82 Wash. 2d 714, 717, 513 P.2d 282.

[58] *fn5 Brandt v. Koepnick, 2 Wash. App. 671, 674, 469 P.2d 189 (1970).

[59] *fn6 Meerdink v. Krieger, 15 Wash. App. 540, 543-44, 550 P.2d 42 (1976); cmt., Dual Agency in California, 21 U.S.F. L. Rev. 81, 88 (1986).

[60] *fn7 Restatement (Second) of Agency 381.

[61] *fn8 Restatement (Second) of Agency 392, cmt. b, (1958).

[62] *fn9 Brandt, 2 Wash. App. 671, 675, 469 P.2d 189.

[63] *fn10 Cogan v. Kidder, 97 Wash. 2d 658, 666, 648 P.2d 875 (1982) (seeming to hold that failing to disclose dual agency role was material as a matter of law).

[64] *fn11 Restatement (Second) of Agency 381, cmt. a, (1958).

[65] *fn12 Stipulated Fact no. 33, CP 70.

[66] *fn13 Resp. Br. at 13.

[67] *fn14 Stipulated Fact no. 16.

[68] *fn15 WAC 308-124D-020(1).

[69] *fn16 Cf. *Hizey v. Carpenter*, 119 Wash. 2d 251, 259, 830 P.2d 646 (1992).

[70] *fn17 Resp. Br. at 28.

[71] *fn18 *Dempere v. Nelson*, 76 Wash. App. 403, 406, 886 P.2d 219 (1994) rev. denied, 126 Wash. 2d 1015, 894 P.2d 565 (1995).

[72] *fn19 See *Seattle-First National Bank v. Washington Insurance Guaranty Assoc.*, 116 Wash. 2d 398, 412-13, 804 P.2d 1263 (1991).

[73] *fn20 Resp. at 12.

[74] *fn21 *Chan v. Smider*, 31 Wash. App. 730, 737, 644 P.2d 727 (1982).

[75] *fn22 Resp. at 12.

[76] *fn23 *Herzog Aluminum, Inc. v. General American Window Corp.*, 39 Wash. App. 188, 197, 692 P.2d 867 (1984).

[77] *fn24 App. Br. at 33.

[78] *fn26 CR 54(d), cf. CR 54(b)

[79] *fn25 *Black's Law Dictionary* 1260 (5th ed. 1979).