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FILE COPY

STATE OF WISCONSIN
BEFORE THE REAL ESTATE BOARD

IN THE MATTER OF
DISCIPLINARY PROCEEDINGS AGAINST

DENNIS C. HURST, and
MARY JO PRIEN,
RESPONDENTS

:
:
:
:
:
:

FINAL DECISION
AND ORDER

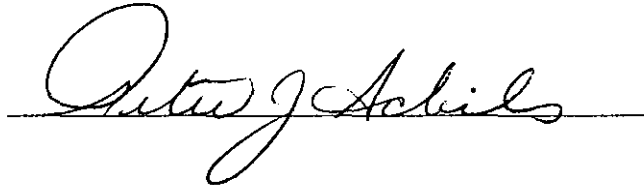
The State of Wisconsin, Real Estate Board, having considered the above-captioned matter and having reviewed the record and the Proposed Decision of the Administrative Law Judge, makes the following:

ORDER

NOW, THEREFORE, it is hereby ordered that the Proposed Decision annexed hereto, filed by the Administrative Law Judge, shall be and hereby is made and ordered the Final Decision of the State of Wisconsin, Real Estate Board.

The rights of a party aggrieved by this Decision to petition the Board for rehearing and the petition for judicial review are set forth on the attached "Notice of Appeal Information."

Dated this 6TH day of DECEMBER, 1990.



by Attorney Wm Pharis Horton. Written closing arguments were filed in the matter, with the last of these received on July 13, 1990. A transcript of the proceedings was received on October 3, 1990.

Based on the entire record in this matter, the undersigned recommends that the Real Estate Board adopt as its final decision in the matter the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Dennis C. Hurst (Hurst), c/o First United Realty, Inc., 2523 Dartmouth Drive, Janesville, Wisconsin 53545, is licensed as a real estate broker in the State of Wisconsin by license #22943, issued December 5, 1979.

2. Mary Jo Prien (Prien), N3059 Youth Cabin Road, Monroe, Wisconsin 53566, is licensed as a real estate broker in the State of Wisconsin by license #33554, issued on January 10, 1985.

3. At all times material to this matter, Hurst and Prien were employed by Keefe Real Estate, Inc., P.O. Box 790, Monroe, Wisconsin 53566, a real estate corporation licensed in the State of Wisconsin by license #11987, issued on December 4, 1975.

4. On or about March 18, 1985, Hurst entered into a residential listing contract with Daisy and Louis Koenig (Koenigs), granting Keefe the exclusive right to sell the Koenigs' residential property located at 711 16th Avenue, Monroe, Wisconsin.

5. Following the expiration of the listing contract, Prien entered into another listing contract with the Koenigs on or about July 3, 1986. By successive amendments, the term of this contract was extended to March 30, 1987.

6. On March 11, 1987, the Koenigs' son, Steven Koenig, acting under a power of attorney granted by his parents, entered into a contract for the sale of the Koenig property to Steven and Beth Herbst (Herbsts) at a price of \$45,000. The closing date was originally scheduled for May 4, 1987, but was changed by Amendment to Contract of Sale to June 1, 1987. The Amendment was executed on May 3, 1987, by the Herbsts. Steven Koenig agreed to the Amendment, but did not execute the document. It was Prien's intent to have Koenig execute the change at closing, but she neglected to do so.

7. On the morning of May 13, 1987, Prien received a phone call at her home from Marion Phillips, who resided in the property adjacent to the Koenigs' property. Phillips informed Prien that the Phillips house had been treated by Orkin

held both a pesticide applicator and a commercial applicator license in the State of Wisconsin. He had, however, in December, 1985, sold his business, Monroe Quality Pest Control, Inc., to Eron Pest Control, Inc., and the sale was subject to a restrictive covenant not to compete for the period from December 20, 1985 until December 20, 1987.

13. Hurst first became acquainted with Gilliam in 1982, when Gilliam had moved to Monroe and was looking for residential property. They met casually from time to time thereafter, and Gilliam had treated Hurst's house for ants on one or two occasions. Gilliam had told Hurst at some point in time that he had done termite inspections.

14. Following Hurst's suggestion that Gilliam might be able to do the inspection, Prien contacted Steven Koenig, got his approval, and thereafter called Gilliam at approximately 10:00 a.m. on May 18.

15. Prien explained to Gilliam that they needed a termite inspection and the circumstances leading to that need, and she inquired whether Gilliam could do a termite inspection. Gilliam indicated that he could do the inspection, and that he could meet Prien at the Koenig property to carry out the inspection that same morning.

16. Prien met Gilliam at the Koenig property at approximately 11:00 a.m. on May 18, 1987. Over a period of the following 45 minutes, Gilliam carried out the inspection. He first inspected the front porch and some apparent water damage at one corner of the porch. Gilliam pulled off a piece of wood, broke it open, and announced it free of termites. They then went to the Phillips property. Gilliam pulled a piece of wood from the Phillips front porch, broke it open, and indicated that there was indeed termite tunneling. Returning to the Koenig property, Gilliam walked around the house, explaining that he was looking for mud tunnels. He found none. At one point, Gilliam pulled latticework from the porch. Looking beneath the porch, Gilliam found ants, and told Prien that where there are ants, there normally are not termites. The two of them then went into the basement, where Gilliam probed the rafters and foundation of the house with some instrument that Prien could not identify, but which may have been something Gilliam picked up when they entered the basement. Gilliam explained to Prien that he was looking for soft spots or hollow spots, but he found nothing. They then walked around the house again. There were straw bales stacked against the back of the house, but Gilliam did not move these. Gilliam glanced at the garage, but did not inspect it closely.

17. Following the inspection, Gilliam announced to Prien that he would "stake anything on the fact that this house does not have termites", or words of like effect.

Some local houses were treated about 20 years ago, but home owners kept quiet about the problem. Now there is a new rash of owners discovering the problem -- and, as is often the case, the insects weren't detected until damage became visible.

Neither Hurst nor Prien were aware of the nature of the termite problem in Monroe until publication of the newspaper article.

CONCLUSIONS OF LAW

1. The Real Estate Board has jurisdiction in this matter pursuant to Wis. Stats. sec. 452.14.
2. By failing to reduce to writing the agreement of the parties to change the closing date from May 4, 1987, to May 21, 1987, Prien has violated and, by virtue of Wis. Adm. Code sec. RL 17.08, Hurst has violated, Wis. Stats. sec. RL 24.08.
3. Prien and Hurst neither knew nor should have known at the time of the transaction herein that there was a termite problem in the City of Monroe or that there was a "termite area" in Monroe; and neither Prien nor Hurst have therefore failed to discover and to disclose to the Herbsts a material adverse factor, as required by and within the meaning of Wis. Adm. Code sec. RL 24.07(1).
4. All parties to the transaction herein were fully aware of water damage to the Koenig house, and neither Hurst nor Prien therefore failed in their duty to discover and to disclose this material adverse factor to the Herbsts, as required by Wis. Adm. Code sec. RL 24.07(1); nor did they fail to disclose adverse factors discovered through an inspection, as required by and within the meaning of Wis. Adm. Code sec. RL 24.07(2)(d).
5. Reliance by Hurst and Prien on the results of the inspection performed by Gilliam and their subsequent failure to disclose to the Herbsts the fact and results of that inspection do not constitute a failure to discover and disclose a material adverse factor to the buyers as required by, and within the meaning of, Wis. Adm. Code sec. RL 24.07(1), and does not constitute a failure to engage the assistance of a competent inspector or a failure to identify the inspector and describe the inspector's contribution as required by, and within the meaning of, Wis. Adm. Code sec. RL 24.03(2)(a).

respondents relied on the results of Mr. Gilliam's inspection, that reliance was unreasonable and respondent's were therefore not relieved of their responsibility to notify the buyers of both the condition of the adjoining property and of the fact and results of the inspection of the Koenig property. Based upon the entire record, I conclude otherwise.

The following facts are uncontroverted in the record: In March, 1987, both Ms. Prien and Mr. Hurst were employed by Keefe Real Estate, Inc., Monroe, Wisconsin, and Hurst was Prien's supervising broker. Mr. Hurst had first entered into a listing contract with the Koenig's on their Monroe home. Following expiration of that listing, Ms. Prien entered into a second listing contract with the Koenigs on July 3, 1986 which, by successive amendments, was ultimately extended to June 1, 1987.

Stephen Koenig, who had his parent's power of attorney, entered into a contract for the sale of the property with the Herbsts on March 11, 1987. The transaction was scheduled to close on May 4, 1987. With the agreement of all the parties, the closing date was rescheduled to June 1, 1987, and ultimately actually closed on May 21, 1990. Ms. Prien had drafted an amendment moving the closing to June 1, and had intended to have Steven Koenig, who resides and works in Milwaukee, sign the amendment at closing. She neglected to do so, however.

Approximately one week prior to the closing, Ms. Prien received a morning phone call at home from the Koenig's neighbor, a Mrs. Phillips. Mrs. Phillips told Ms. Prien that the Phillips house had been treated for termites, and she expressed the feeling that if their house had termites, then the Koenig house must have them as well. When Ms. Prien got to the office, she called Steven Koenig and described her conversation with Phillips. Mr. Koenig did not feel that it was reasonable to assume that his parents' house had termites merely because the neighboring house did, and he resisted the suggestion that an inspection should be performed. Ms. Prien thereupon went to Mr. Hurst as her supervising broker and described the situation to him. Because neither Hurst nor Prien were confident of the manner to proceed in these circumstances, Mr. Hurst called the W.R.A.'s legal hotline and asked for advice. The exact nature of the inquiry is not entirely clear, though it was disclosed that there was a suspicion that termites might be present, and that the owner was opposed to having an inspection performed. The written response, received on or about May 16, 1987, advised that respondents notify the seller that the only way to avoid disclosure of the possibility of termites would be to have an inspection performed finding the property "clean."

infestation existed. There is insufficient evidence in this record to establish either premise. Complainant offered the testimony of Ms. Cheryl L. Welsh, a Monroe real estate sales person and broker since 1976, for the proposition that on March 13, 1986, Ms. Welsh drafted a listing contract for a property at 607 16th Avenue, approximately one block from the Koenig property, which specifies at the exceptions to warranties section that the "property has had termites." Ms. Welsh also testified, however, that the owners of that property or their attorney had specifically notified her of that fact. On cross examination, she was asked whether she was aware of any widespread problem at that time:

Q . . . Was there in your experience in the market in Monroe an identified termite area that was a matter of common parlance among the realtors in the area?

A. Not until very recently, probably after the lawsuits. And even now I cannot draw a square and say this is exactly where the termites are. . . .

Q. You indicated that as of 1987 in addition to this house you were aware of one or two others that - -

A. I could tell you the names, yes. There were two.

Q. How did you come across that information?

A. Oh, well, the Bender house. . . had such obvious termite damage in it when it was listed that there were holes in the kitchen floor in the kitchen. . . . So we were aware of that home and a home adjoining it where the damage was equally bad; however, I was shocked. My husband and I had a discussion, and I said there were no termites in Monroe until this house came about. And I think the general opinion was both of these properties were down near the old lumber yard, and we were under the impression that they were isolated incidents. [Transcript, May 9, pp. 350-351]

In the examination of Mr. Gilliam, he testified that while driving with Dennis Hurst in 1982, Gilliam told Hurst that he was going to start a pest control business, and asked if there were termites in Monroe. Mr. Gilliam testified that Hurst's answer "was affirmative." [Transcript, May 8, p.93] Even if that testimony is to be accepted, however, it means little. Mr. Hurst testified that he was aware of the situation with the Bender property at all times material to this matter. Moreover, Mr. Gilliam's later testimony when called to testify a second time, indicates that any affirmative knowledge he may have had as to a "termite area" was acquired in 1989.

Both Prien and Hurst categorically and uniformly denied that in May, 1987, they were aware of any termite problem in Monroe, and there is not evidence to demonstrate that the extent of the problem was sufficiently well known in the community at that time so that they either knew or should have known of the problem. Consequently, there is no basis for deciding that there should have been any disclosure made that the Koenig house was located in a "termite area."

2. Could respondents have reasonably considered Gilliam to be a qualified inspector, and could they have reasonably relied upon his inspection? Mr. Gilliam's testimony was that Mr. Hurst had called him on two or three occasions, and had all but begged him to perform a termite inspection of the Koenig property.

He called me a couple times, anyway, that I can recall, and -- to inspect the house. And I told him, I said, "Dennis," I said, "I'm not licensed, I'm not qualified." And so just to get the whole thing off my back, I told him, I said I'd go over, take a look at it and that'd be it. I said I would not write anything down. "I won't stand behind it; and if something happens, it goes to court, I'm not going to stand behind you." [transcript, May 8, p.96]

Mr. Gilliam testified that after having reluctantly agreed to inspect the Koenig house, Ms. Prien called him, and that they then went to the Koenig house and carried out an inspection which did not reveal the presence of termites.

Q. [by Mr. Castelnuevo] Did you suggest to [Prien] at that time that she should do any follow-up?

A. I just reiterated to her that, you know, my opinion is not worth a whole lot because I don't have the expertise in the termite area, and I don't profess to, never have. That's why I give all my termite leads that come my way to Terminix out of Milwaukee, because they're about the only ones that I personally trust, that type of thing. And I just suggested that, you know, having termites that close, it might be well to have someone else check things out. [Transcript, May 8, pp. 103-104]

Mr. Gilliam testified that following the inspection, both Hurst and Prien requested that he provide a written report, and that he refused.

It was just a request that if I would do it, and I said no. I said I wouldn't put anything on paper and would not stand behind that inspection; so therefore I would not charge anything for it. [Transcript, May 8, p.104]

talked to Mr. Hurst and told him what I had found in the books and what my feeling on it was and he had no other feeling. [Transcript, May 10, pp.603-604]

We got what we felt was a qualified inspection by a qualified independent expert. He accepted the job to do the termite inspection, knowing the importance of the inspection. He related to me his prior experience with termites when he was out in Iowa. He was very emphatic on the fact that he would stake anything on the fact that the house did not have termites. [Transcript, May 10, pp.618-619]

Standing alone, Ms. Prien's testimony would support the conclusion that respondents' reliance on Gilliam's inspection was reasonable. But what of Mr. Gilliam's contention that he repeatedly told both respondents that he was not qualified to carry out the inspection and would not stand behind it? I do not credit that testimony, and instead credit the version of the facts set forth by the respondents. Mr. Gilliam's testimony that he agreed to the inspection only after repeatedly telling both Hurst and Prien that he was not licensed, that he was not in the pest control business, and that he was not qualified to do the inspection, is inherently incredible; and his testimony was marked by evasiveness and contradiction. For example, there are many pages of testimony by Gilliam supporting the absurd proposition that the services he provided in visiting the Koenig property did not constitute a termite inspection.

Q. [by Mr. Horton] When you were contacted about the Koenig home, you were asked to perform what kind of inspection?

A. They asked us to do a termite inspection.

Q. You went to the home?

A. We went to the home

Q. You spent half an hour probing the basement [and] under the porch. Is this correct?

A. If you want to call walking around the basement looking up at the ceilings and walls "probing."

Q. You looked underneath the porch?

A. We attempted to.

A. I did not provide them termite inspection services if that's what you're saying.

Q. I didn't say termite inspection. I said services.

A. What type of services?

Q. By your own testimony, sir, you went to the Koenig home approximately May 18 of 1987 and spent about a half hour there.

A. That's right.

Q. Were those services?

A. I wouldn't consider them services.

Q. You did not refuse payment, however; did you?

A. No.

The suit brought by Eron was not the only action in which Mr. Gilliam was a defendant. He was also a defendant in a civil action brought by the Herbsts, and that suit was still pending during the investigation of this disciplinary matter. Mr. Gilliam therefore had two very good motives for concocting the story he told in this case, and that story conflicted in some particular with the testimony of every other witness.

The testimony of Ms. Prien and Mr. Hurst, on the other hand, was consistent with each other's and with all other testimony given except the testimony of Mr. Gilliam. Their version of the facts was the more probable, and their general credibility was excellent. Both witnesses' appearance, manner, demeanor, apparent frankness and intelligence enhanced their credibility. Both shared an apparently accurate recollection of, and capacity for consecutive narration of the acts and events in question. Finally, while both Mr. Hurst and Ms. Prien had an obvious motive to testify as they did, that motive was certainly no greater than Mr. Gilliam's motive to testify as he did. Accordingly, to the extent that the version of the facts presented by the testimony of Mr. Hurst and Ms. Prien conflicts with the testimony of Mr. Gilliam, the latter testimony is discounted. I therefore find that Mr. Gilliam spoke only to Ms. Prien regarding the inspection, that he readily agreed to carry out the inspection, that he reported to Ms. Prien his employment history with a firm (Orkin) that did extensive termite work, that he

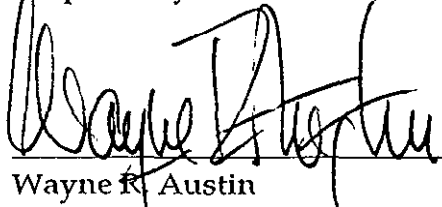
treat all parties fairly (RL 24.025, Code). Nor did respondents have an obligation under Wis. Adm. Code sec. RL 24.03(2)(a) to disclose the services provided by Gilliam. That section requires that where licensees are incompetent to perform services, they must in providing those services engage the assistance of one who is competent and must identify the person providing the services and the services provided. Even if it is assumed that inspection services would be included in the coverage of the cited section, it was Steven Koenig rather than the respondents who employed Mr. Gilliam.

Finally, there is an allegation that respondents failed to disclose to the buyers that there was water damage to the porches of the Koenig house. That damage was obvious, and Mr. Herbst testified that prior to the purchase of the property he was aware of and recognized the necessity to repair the damage in question. I conclude that Wis. Adm. Code sec. RL 24.07 does not require formal disclosure to the buyer of an adverse factor already known to the buyer.

Having concluded that there is not a preponderance of the evidence supporting a finding that respondents have violated the real estate statutes and code in terms of Mr. Gilliam's termite inspection, I recommend that the board dismiss the Complaint as to those allegations. Having found that all parties to the transaction were aware of and had agreed to the change in the closing date, I conclude that failure to ensure that the parties executed a formal amendment to that effect is of little real significance, and I therefore recommend that no discipline for that technical violation be imposed.

Dated at Madison, Wisconsin this 23rd day of October, 1990.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Wayne R. Austin", is written over a horizontal line.

Wayne R. Austin
Administrative Law Judge

WRA:BDLS:839

NOTICE OF APPEAL INFORMATION

(Notice of Rights for Rehearing or Judicial Review,
the times allowed for each and the identification
of the party to be named as respondent)

The following notice is served on you as part of the final decision:

1. Rehearing.

Any person aggrieved by this order may petition for a rehearing within 20 days of the service of this decision, as provided in section 227.49 of the Wisconsin Statutes, a copy of which is attached. The 20 day period commences the day after personal service or mailing of this decision. (The date of mailing of this decision is shown below.) The petition for rehearing should be filed with the State of Wisconsin Real Estate Board.

A petition for rehearing is not a prerequisite for appeal directly to circuit court through a petition for judicial review.

2. Judicial Review.

Any person aggrieved by this decision has a right to petition for judicial review of this decision as provided in section 227.53 of the Wisconsin Statutes, a copy of which is attached. The petition should be filed in circuit court and served upon the State of Wisconsin Real Estate Board.

within 30 days of service of this decision if there has been no petition for rehearing, or within 30 days of service of the order finally disposing of the petition for rehearing, or within 30 days after the final disposition by operation of law of any petition for rehearing.

The 30 day period commences the day after personal service or mailing of the decision or order, or the day after the final disposition by operation of the law of any petition for rehearing. (The date of mailing of this decision is shown below.) A petition for judicial review should be served upon, and name as the respondent, the following: the State of Wisconsin Real Estate Board.

The date of mailing of this decision is December 11, 1990.

WLD:dms
886-490