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No. 67116-2-1

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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

PHILIP BASKARON

Appellant,

v.

CAMERON ENTERPRISES; CAROLYN CHAWLA,  
Respondents.

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**APPELLANT'S OPENING BRIEF**

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## I. INTRODUCTION

This case involves the contractual relationship between a real estate agent and his client. Appellant, Philip Baskaron is a licensed business broker and real estate agent in the state of Washington. Respondent, Carolyn Chawla, his client, is the owner and operator of several gas stations in the Puget Sound region.

In August, 2008, Mr. Baskaron introduced Mrs. Chawla to Naresh Kaushal and Ravinder P. Kaushal. These individuals were interested in either managing or purchasing several of Mrs. Chawla's gas stations and are the co-defendants in the superior court case. Prior to these introductions, Mr. Baskaron had acted as agent and broker for Mrs. Chawla and her husband on other gas station transactions before Mr. Chawla passed away. Protracted negotiations took place between the parties. Mr. Baskaron acted as Mrs. Chawla's agent during these negotiations. During these negotiations, attorney Jeffery Laws acted as the closing agent, helping to draft letters of understanding and other documents.

Contemporaneous to these negotiations, Mr. Baskaron acted as broker on another gas station sale for Mrs. Chawla. The respondent was so pleased with Mr. Baskaron's services that she wrote a letter expressing her trust in him, thankful that he was "soldiering on" to sell her other locations. Despite assurances that she would do so, Mrs. Chawla never signed a broker agreement with Mr. Baskaron.

During negotiations conducted by the Appellant for the Respondent, the parties determined that a membership agreement or operating agreement to transfer the Respondents' interest in the gas stations would be more advantageous than a straight sale.

On December 10<sup>th</sup>, 2008, the parties entered into a management and option agreement. The amount of monies received by the respondent

from this agreement thus far exceeds \$970,000.00. Mr. Baskaron received no commission for his services and filed suit to recover his fees.

This Court is asked to review the grant of Cameron Enterprises'/Carolyn Chawla's motion for summary judgement.

## II. ASSIGNMENTS OF ERROR

### A. Granting Chawla's Summary Judgement Motion

The Court erred in dismissing the Appellant's case based upon the lack of evidence to determine if a contract existed between the parties.

1. Respondent outwardly manifested mutual assent that a contract existed between her and the Appellant by confirming the scope of Appellant's employ in correspondence prior to the sale, by having Appellant follow up leads per a handwritten note from the Respondent, and by using Appellant as her broker contemporaneous to this sale on another gas station owned by respondent.

**Statement of Issue:** Viewed in a light most favorable to the Appellant, is there enough evidence to demonstrate mutual assent that a contract existed between the parties?

2. Appellant was the sole catalyst of contact between the buyer and the seller and a subsequent written agreement between the buyer and seller existed.

**Statement of Issue:** Under procuring cause doctrine does the lack of a written contract between a broker and seller provide

recovery of commission fees when the broker is the sole catalyst between the buyer and seller for the transaction and a subsequent written agreement between the buyer and seller exists?

3. Appellant and Respondent never entered into a written contract regarding the conveyance of Respondent's interest in her gas stations.

**Statement of Issue:** Does the Statute of Frauds govern the conveyance of an individual's interest in a business venture that does not include the transfer of real property?

### III. STATEMENT OF THE CASE

In this action, Appellant, a licensed real estate broker, asserts his right to a 6% commission on \$970,000.00 (Nine Hundred and Seventy Thousand Dollars) received by the Respondents Cameron Enterprises and Carolyn Chawla under the terms of a management and option agreement (MOA) that Mrs. Chawla entered into on December 10<sup>th</sup>, 2008. The MOA was a facilities management agreement of several ARCO gas stations owned by Respondent with a purchase option for the buyers. CP 416-446.

In early 2007, Appellant was hired by the Respondent Carolyn Chawla to sell her interest in several ARCO gas stations. CP 382-383. Mrs. Chawla is the sole owner of Cameron Enterprises, Inc. CP 296, L 19-21; CP 297, L 12,13.

In August, 2008, Mr. Baskaron introduced the Respondent to buyers Ravinder Kaushal and Naresh Kaushal. CP 382-383; In September, 2008, Baskaron negotiated a membership purchase agreement (MPA) involving Cameron and Kaushal. CP 277-278. The MPA identified the parties as Kaushal, Inc. and Carolyn Chawla . CP 391.

The MPA identified five gas stations that include Lynnwood, Poulsbo, Bremerton, and Seattle locations. CP 391. This agreement was executed by the Respondents on September 21<sup>st</sup>, 2008, but never finalized. CP 397.

During negotiations conducted by the Appellant for the Respondent, the parties determined that a membership agreement or operating agreement to transfer the Respondents' interest in the gas stations would be more advantageous than a straight sale. CP 277-278.

In October, 2008, Mr. Baskaron negotiated a new management and option agreement (MOA) between the parties. CP 282-283. On October 14<sup>th</sup>, 2008, attorney Robert Baker drafted a letter detailing the terms of a new (MOA). CP 406-414. The parties identified in the MOA are Kaushal Inc, Carolyn Chawla and Cameron Enterprises, Inc. CP 406. Under the terms of the agreement, Chawla was to receive \$26,000.00 per month and a non-refundable \$1,000,000.00 from Kaushal for the option to purchase the gas stations in the future. CP 411. The MOA lists the Lynnwood, Poulsbo, Bremerton, and Seattle gas stations. CP 412.

On December, 10<sup>th</sup>, 2008, Respondent Chawla entered into a membership and option agreement (MOA). CP 444. The parties were identified as Cameron Enterprises Inc. and Kaushal and Chawla, LLC. CP 416. Under the terms of the agreement, Chawla was to receive \$10,000.00 per month until May, 2009, increasing to \$20,000.00 per month on June 1<sup>st</sup>, 2009, and a non-refundable \$500,000.00 from Kaushal for the option to purchase the gas stations in the future. CP 422. To date this agreement remains in effect and the monthly total paid to Chawla has increased to \$28,000.00. CP 359, L 1-5.

On numerous occasions Respondent Chawla conveyed in writing that Appellant worked on her behalf to sell her interest in the gas stations. In March of 2008, Respondent Chawla directed Baskaron to follow up on a possible lead for the purchase of a store. CP 389. On August 11<sup>th</sup>, 2008,

Respondent expressed her gratitude and confirmed that Appellant continued to work for her selling her remaining gas stations CP 385. Respondent confirmed the scope and authority of Appellant's employment in additional correspondence. CP 387. Further, on October 14<sup>th</sup>, 2008, attorney Robert Baker drafted a letter concerning a management option agreement between the parties. CP 414. A courtesy copy of this letter was sent to Baskaron. CP 414.

Respondent refused to pay Appellant his commission on the monies she received and still receives under the December 8<sup>th</sup>, 2008, management and option agreement. Mr. Baskaron filed suit in King County Superior Court on September 27<sup>th</sup>, 2010, to recover his fee. On April 8<sup>th</sup>, 2011, the honorable Jay White granted Respondents' motion for summary judgement. On April 18<sup>th</sup>, 2010, Appellant filed a motion to reconsider with supporting declarations from attorney Jeffery Laws and Philip Baskaron.

#### IV. ARGUMENT

##### A. Standard of Review

This case was decided on summary judgement, so this court must review the summary judgement order "de novo, taking evidence in the light most favorable to the nonmoving party and engage in the same inquiry as the Superior Court." **Failor's Pharmacy v. Dep't of Soc. & Health Servs.**, 125 Wn.2d 488, 493, 886 P.2d 147 (1994); **Saluteen-Maschersky v. CountryWide**, 105 Wn. App. 846, 850, 22 P.3d 804 (Div. I, 2001). Only when there is no genuine issue of material fact and a reasonable fact finder and reasonable people could reach "but only one conclusion" from all of the evidence is summary judgement appropriate. **Barrie v. Hosts of Am. Inc.**, 94 Wn. 2d 640, 642, 618 P.2d 96 (1980).

**B. The Superior Court Erred by Granting Chawla's Summary Judgment Motion.**

In its oral summation of its ruling, the Superior Court ruled that there was not enough evidence to determine whether a contract existed between the Appellant and Respondent.

1. Assignment of Error 1: There is sufficient evidence in the record to determine that a oral contract existed between the parties. Respondent outwardly manifested mutual assent that a contract existed between her and the Appellant by confirming the scope of Appellant's employ in correspondence prior to the sale, having Appellant follow up leads per a handwritten note from the Respondent, using Appellant as her broker contemporaneous to this sale of another gas station that owned by the respondent and her outward manifestations to closing attorney Jeffery Laws.

An oral agreement between parties requires mutual assent to the essential terms of the purported agreement. **Saluteen-Maschersky**, 105 Wn. App. 846, 851, 886 P.2d 147 (1994). Mutual assent generally takes the form of offer and acceptance. *Id.* at 851. Mutual assent may be inferred only from the parties' outward manifestation of intent. *Id.* at 854.

The essential elements of a contract are the subject matter, the parties, the promise, the terms and conditions and the price or consideration. **DePhillips v. Zolt Constr. Co., Inc.**, 136 Wn.2d 26,31, 959 P.2d 1104 (1998). "Employment contracts are governed by the same rules as other contracts." **Kloss v. Honeywell, Inc.**, 77 Wn. App. 294, 298, 890 P.2d 480 (1995). A contract may be oral or written, and may be

implied with its existence depending on some act or conduct of the party sought to be charged. **Hoglund v. Meeks**, 139 Wn. App. 854, 870, 170 P.3d 37 (2007).

Disputes over the existence of oral agreements are not usually decided on summary judgment, because the issue of whether parties manifested mutual assent to form a contract is generally a question of fact. **Duckworth v. Langeland**, 95 Wn. App. 1, 6-7, 988 P.2d 967 (1998); **Crown Plaza v. Synapse Software**, 87 Wn. App. 495, 500, 962 P.2d 824 (1997), **Hoglund**, 139 Wn. App. at 871.

In a summary judgment motion, the moving party must first show the absence of an issue of material fact. **Folsom v. Burger King**, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). All evidence and all reasonable inferences therefrom should be considered in a light most favorable to the nonmoving party. The moving party has the burden of proving that no factual dispute exists that might affect a trial's outcome. **Allstate Ins. Co. v. Raynor**, 143 Wn.2d 469, 475-76, 21 P.3d 707 (2001).

Substantial evidence in the record reflects that the Respondent clearly manifested that a oral agreement existed between her and the Appellant. Respondent's letter of August 11, 2008, to Tom Jacobs acknowledges that the Appellant "has soldiered on with all my five other stores". CP 385. This is clear manifestation by the Respondent of her understanding that the oral contract between her and the respondent concerned the sale of her gas stations: not a car, nor a horse, but her gas stations. The letter further states that the appellant had sold other stores for her; thus she was aware of the commission that he charged for his services. CP 385. Finally, the letter acknowledges Mr. Baskaron's extensive contacts that buyers were benefitting from. CP 385. Telling third parties that Mr. Baskaron worked for her is evidence of her outward manifestation of an agreement between her and the Appellant.

Respondent's letter concerning ARCO Site #82191 is more evidence of her outward manifestation that she believed a oral contact between her and Mr. Baskaron existed. This letter gives instructions to the Appellant on how to proceed with the subject matter at hand: the Respondents' gas stations. CP 387.

More evidence of the oral agreement of the Appellant's employ by the Respondent is her hand written note concerning a lead for one of her stores. CP 389. Again, this demonstrates additional outward manifestation that the Appellant worked on her behalf to sell the gas stations.

Even more telling evidence of the oral contract between the parties is the September 21<sup>st</sup>, 2008, membership purchase agreement (MOA) negotiated by the Appellant on behalf of the Respondents. CP 391-404. This agreement demonstrates the substantial work the Appellant expended on behalf to the Respondent. CP 280-281, CP 277-278. The agreement concerns the Respondents' gas stations and identifies the same individuals that the Appellant introduced to the Respondent. As the declaration of attorney Jeffery Laws indicates, it reflects that the parties moved away from a straight purchase of the gas stations to a membership agreement for various reasons. CP 277-278. Mr. Laws' declaration makes clear that the Respondent was working closely with Mr. Baskaron. CP 277-278. This is a clear manifestation that Mr. Baskaron was working for her.

Based on the above, and viewed in a light most favorable to the Appellant, reasonable minds could conclude that a oral agreement existed between Mr. Baskaron and Mrs. Chawla. Therefore, the Superior Court erred in ruling that not enough evidence existed to determine if a oral contract existed.

2. Assignment of Error 2: Appellant was the sole catalyst of contact between the buyer and the seller and a subsequent written agreement between the buyer and seller exists.

Washington's procuring cause rule has been applied primarily in the real estate field in order to allow a broker or real estate agent to recover if his or her services have already been performed. **Center Invs. Inc. v. Penhallurick**, 22 Wn. App. 846, 850, 592 P.2d 685 (1979). As the Court of Appeals observed in **Penhallurick**,

Generally, those cases have involved an oral agreement between broker and seller with a subsequent writing between seller and buyer. The courts have held that if the broker was the procuring cause of an eventual sale for which there had been a subsequent writing, the broker was entitled to payment for past services.

**Penhallurick** at 850.

Appellant is the procuring cause of the December 10<sup>th</sup>, 2008, Management and Option Agreement entered into by Chawla. Mr. Baskaron “was a significant catalyst and procuring factor” in the sale of the business interest. Mrs. Chawla admits that but for Mr. Baskaron, she would have never met Kaushal and never received the half-million dollars: “I would have never met them ( Kaushal), so they would have never given it to me.” CP 372. As noted earlier, Respondent recognized how valuable the Appellant was concerning his contacts with potential buyers. CP 385. Finally, Mr. Baskaron helped draft and negotiate the prior September Membership Purchase Agreement that same parties that were ultimately agreed to by Chawla in the final Management Option Agreement of December 10<sup>th</sup>, 2008. CP 382-383, 397, 444.

Viewed in a light most favorable to the Appellant, an agreement existed between him and Mrs. Chawla. Respondent’s outward manifestation evidenced by her letters, and conduct viewed by other

individuals, clearly show that Mrs. Chawla believed that Mr. Baskaron worked for her.

A sale occurred. Defendant Chawla admits so in her deposition. “They (Kaushal) purchased the business interest from me”. CP 369. She received a half-million dollars from the defendants, ( CP 372 L 11-13) and receives \$28,000.00 a month as well. CP 350, L 1-5. If no sale took place, somebody better tell co-defendant Kaushal that they have paid a lot of money for nothing.

This sale is in writing. As noted above, the buyers in the December, 2008, MOA are the same individuals as those in the September, 2008 MPA. The additional individuals in the December MOA are the spouses in the September MPA. CP 382-383.

3. Assignment of error 3. Statute of Frauds RCW 19.36.01(5) does not apply because the Appellant and Respondent never entered into a written contract regarding the conveyance of real property.

The agreement executed between Cameron and Kaushal was not an agreement to sell or purchase real estate. The agreement was for the purchase of a business interest with an credit option for the real property. Defendant Chawla so states in her deposition. “They (Kaushal) purchased the business interest from me.” CP 369-370. The title of the agreement signed by Kaushal and Cameron is Management and Option Agreement. CP 416. The option price of \$500,000.00 to purchase the gas stations in the future was to “[t]o keep them off the market for five years; ” not to transfer them. CP 370.- 371. Therefore, the Statute of Frauds is not applicable.

## CONCLUSION

For the foregoing reasons, Appellant respectfully request that the Court reverse the Superior Court's grant of Cameron Enterprises' and Carolyn Chawla's motion for summary judgment.

Respectfully submitted this 30<sup>th</sup> day of December, 2011.

LIBERTY LAW, LLC

A handwritten signature in black ink, appearing to read 'D. Stirbis', is written over a horizontal line.

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**AMENDED DECLARATION OF SERVICE**

I declare that on the 3<sup>ND</sup> day of January, 2012, the following documents were filed with the Court:

**APPELLANT'S OPENING BRIEF**

and served copies of the above-named documents upon the following addresses via U.S. Mail and Facsimile delivered on the 30<sup>TH</sup> day December, 2011:

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Place: Lakewood, WA