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NO. 69155-4-I
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

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DEAN CURRY,
APPELLANT

v.

VIKING HOMES, ET AL.
RESPONDENTS.

APPEAL FROM THE SUPERIOR COURT OF SNOHOMISH COUNTY
CAUSE NO. 09-2-07715-9

APPELLANT'S REPLY BRIEF

Edward C. Chung
WSBA# 34292
Attorney for Appellant

CHUNG, MALHAS, MANTEL & ROBINSON, PLLC
600 1st Avenue, Suite 400
Seattle, WA 98104
Phone: (206) 264-8999
Facsimile: (206) 264-9098

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TABLE OF CONTENTS

	PAGE
I. INTRODUCTION	1
II. SUMMARY OF REPLY TO VIKING HOMES RESPONSE.....	1
III. REPLY TO VIKING’S RESPONSE TO APPELLANT’S BRIEF	3
A. PURSUANT TO CR 56 (H), SUMMARY JUDGMENT COURT ORDERS MUST LIST ALL BRIEFS AND EVIDENCE CONSIDERED. WHILE THE TRIAL COURT RULED NO GENUINE ISSUES OF MATERIAL FACT EXISTS, THE COURT ACKNOWLEDGES THAT VIKING RESPONDED TO PLAINTIFF’S REQUEST FOR ADMISSIONS AND THAT PLAINTIFF RESPONDED TO VIKING FIRST SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS. MOREOVER, THE COURT INDICATED IT CONSIDERED THE DECLARATION OF PLAINTIFF; HOWEVER, IT IS SILENT IN ITS COURT ORDER AS TO WHICH PIECES OF EVIDENCE IT RELIED UPON IN GRANTING VIKING’S MOTION FOR SUMMARY JUDGMENT..	3
B. RESPONDENT IN its RESPONSE TO APPELLANT’S BRIEF SEEKS TO ONLY NOW BRIEF THE GROUNDS FOR SUMMARY JUDGMENT WHERE IT DID NOT DO SO IN ITS INITIAL MOTION FOR SUMMARY JUDGMENT. MOREOVER, APPELLANT’S LEGAL CLAIMS ARE PRECLUDED FROM THE GRANTING OF SUMMARY JUDGMENT.	4
IV. CONCLUSION.....	6

Appendices

APPENDIX A: Court Transcript, Page 19, Lines 13-25.....	
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TABLE OF AUTHORITIES

Table of Cases

	PAGE
<i>Save-Way Drug, Inc. v. Standard Investment Co.</i> 5 Wn.App726, 490 P.2d 1342 (1971).....	4
<i>Stet ex rel Duvall v. Seattle City Counsel</i> 71 Wn2d 462, 429 P.2d 235 (1967).....	5
<i>Foot v. Hayes</i> 64 Wn2d 293, 391 P.2d 551 (1964).....	5
<i>Renz v. Spokane Eye Clinic, P.S.</i> , 114 Wn.App. 61	5
<i>People v. Mortg. Co. Vista Views Builders</i> 6 Wn. App. 744, 496 P.2d 354 ((1972)	6
<i>MCollough v. DuPoint de Nemours (E.I.) & Co.</i> , 68 Wn.2d 127, 411 P.2d 89 (1966).....	6
<i>Jones v. Brandt</i> , 2Wn.App 471 P.2d 696 (1970).....	6

Other Rules

CR 56 (h).....	3
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I. INTRODUCTION

The Appellant, Dean Curry, submits this reply in support of his January 11, 2013 brief, petitioning the Washington State Court of Appeals for appellate relief from the Snohomish County Superior Court's granting of Defendant/Third Party Plaintiff, Viking Homes' Inc.'s Motion for Summary Judgment. For the reasons set forth below, Appellant respectfully requests that this Court reject the arguments presented in Respondent's Response and remand this matter to the trial court to carry on with discovery and trial.

II. SUMMARY OF REPLY TO VIKING'S HOMES' RESPONSE

Respondent, Viking Homes Inc. ("Viking") in the instant case provides that the trial Court was not under an obligation to memorialize the evidence it relied upon in granting Viking's Motion for Summary Judgment. Tellingly, there were significant amounts of discovery conducted that, in the light most favorable to the non-moving party, reveals that the trial court had significant volumes of evidence wherein Summary Judgment should not have been granted. In fact, there were 27

pages of Plaintiff's Responses, with supporting exhibits, sent to Viking's former legal counsel¹.

In terms of whether genuine issues of material fact exist, the Court may look at all pleadings, motions and declarations. In terms of pleadings, Viking filed a claim against its contractors. In their Complaint, they make a number of allegations as to the quality of the workmanship done. Is this not an admission to the merits of Plaintiff's pending case? As for motions,, Viking's Motion for Summary Judgment did not address the merits of Plaintiff's legal claims, it only addressed the lack of evidence it alleged was not produced. That said, it can assuredly put aside that the allegation no discovery was conducted is simply untrue. Moreover, Viking's Response, *for the first time*, now argues each claim as if it did so in the underlying proceeding; it did not. Finally, Petitioner's declaration silently considered in the trial court, provides numerous issues of material fact on de novo wherein this case should be remanded.

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¹ It is Appellant's belief that many of these responses to interrogatory requests were either never requested from Respondent's prior legal counsel or never sent to Respondent's present legal counsel. To say no discovery was conducted it a misrepresentation and the opposing party, if they have these exhibits, should disclose it to the Court.

III. REPLY TO VIKING'S RESPONSE TO APPELLANT'S BRIEF

- A. PURSUANT TO CR 56 (H), SUMMARY JUDGMENT COURT ORDERS MUST LIST ALL BRIEFS AND EVIDENCE CONSIDERED. WHILE THE TRIAL COURT RULED NO GENUINE ISSUES OF MATERIAL FACT EXISTS, THE COURT ACKNOWLEDGES THAT VIKING RESPONDED TO PLAINTIFF'S REQUEST FOR ADMISSIONS AND THAT PLAINTIFF RESPONDED TO VIKING FIRST SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS. MOREOVER, THE COURT INDICATED IT CONSIDERED THE DECLARATION OF PLAINTIFF; HOWEVER, IT IS SILENT IN ITS COURT ORDER AS TO WHICH PIECES OF EVIDENCE IT RELIED UPON IN GRANTING VIKING'S MOTION FOR SUMMARY JUDGMENT.

Washington State Rule of Civil Procedure 56 (h) provides as follows:

The order granting or denying the motion for summary judgment *shall designate the documents and other evidence called to the attention of the trial court* before the order on summary judgment was entered.

See, CR 56 (h). emphasis added.

In the instant case, no reference was made in the Summary Judgment Order as to which documents were considered. Although Respondent point out that this may not be necessary, it is necessary in this matter since Respondent's initial Motion for Summary Judgment entirely relied upon non discovery being conducted. It should be noted once again, Viking did not brief the prima facie elements of claims in their Motion for Summary Judgment, just that there was no discovery collected. Assuming the Court did consider each of the elements of all claims, they assumed the role of Respondent's obligation. Again, the Respondent's Motion for Summary Judgment, on its face, equates more to a Motion to Strike and

the trial court granting of a Motion for Summary Judgment was overreaching.

B. RESPONDENT IN its RESPONSE TO APPELLANT'S BRIEF SEEKS TO ONLY NOW BRIEF THE GROUNDS FOR SUMMARY JUDGMENT WHERE IT DID NOT DO SO IN ITS INITIAL MOTION FOR SUMMARY JUDGMENT. MOREOVER, APPELLANT'S LEGAL CLAIMS ARE PRECLUDED FROM THE GRANTING OF SUMMARY JUDGMENT.

In Viking's Response to Appellant's Brief, Viking *only now*, seeks to brief the basis for why their Motion for Summary Judgment should be granted. Appellant respectfully ask this Court to revisit Viking's initial Motion for Summary Judgment. The Motion for Summary Judgment, attached hereto as Exhibit A, does not brief its basis for obtaining relief by analyzing Appellant's legal claims raised in his Complaint. Consequently, issues not raised in hearing for summary judgment or as part of Viking's Motion for Summary Judgment cannot be considered for the first time on appeal. *Save-Way Drug, Inc. v. Standard Investment Co.* 5 Wn.App726, 490 P.2d 1342 (1971).

That said, Viking now attempts to address, what they failed to do so in the trial court. They address contract issues and Washington State's Contractor Registration Act. However, factual issues as to whether party followed particular set of statutes in a proceedings could not be

determined by summary judgment. *See, Stet ex rel Duvall v. Seattle City Counsel* 71 Wn2d 462, 429 P.2d 235 (1967).

Viking suggests, that Mr. Curry's declaration should not be considered, even though he himself was a contractor. We ask however the court be mindful that summary judgment cannot be granted where reasonable men might reach differing conclusions when considering, in light most favorable to nonmoving party, factual pattern presented in pleadings, depositions and affidavits, moving party has burden of demonstrative that differing conclusions *are not possible* because there exists no genuine issue of fact. *Foot v. Hayes* 64 Wn2d 293, 391 P.2d 551 (1964); *emphasis added*. Here, it is undeniably possible that there are differing opinions. Moreover, on motion for summary judgment the trial court does *not* weigh evidence or assess witness credibility. Neither does this Court on appeal, "Our job is to pass upon whether a burden of production has been met, not whether the evidence produced is persuasive." That is the jury's role, once a burden of production has been met." *Renz v. Spokane Eye Clinic, P.S.*, 114 Wn.App. 61.

As for contract claims, where different conclusions may be reached from undisputed facts surrounding alleged contract, such contract should

not be entered in an action on it *People v. Mortg. Co. Vista Views Builders* 6 Wn. App. 744, 496 P.2d 354 ((1972).

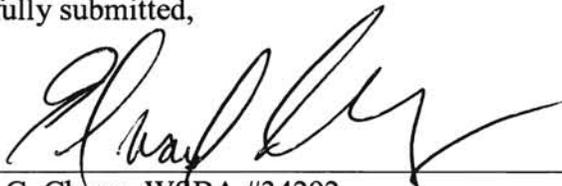
While the trial alleged it needed a copy of the contract, in cases involving relationship of principle and agent may arise from facts, without express contract, and require factual determination to resolve question of whether or not an agency existed, thereby precluding summary judgment. *MCollough v. DuPoint de Nemours (E.I.) & Co* 68 Wn.2d 127, 411 P.2d 894. See also, *Jones v. Brandt* 2Wn.App 471 P.2d 696 (1970); (Whether tender was made, and whether party abandoned contract are questions of fact which, if genuinely in issue, can be resolved only by trial and not a motion for summary Judgment)

IV. CONCLUSION

Based on the arguments contained herein and in Appellant's opening brief, Mr. Curry respectfully requests that this court remand this matter back to the trial court.

Dated this 13th day of March, 2013

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Edward C. Chung', written over a horizontal line.

Edward C. Chung, WSBA #34292
Attorney for Appellant, Dean Curry