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**COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON**

MORPHO DETECTION, INC.,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

REPLY BRIEF FOR APPELLANT

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INTRODUCTION AND SUMMARY

This case was on course to be adjudicated in an orderly fashion consistent with the rules of civil and appellate procedure, but its resolution has been delayed by Respondent Department of Revenue's bait-and-switch litigation tactics and its refusal to recognize well-established procedural doctrines. By reversing the Superior Court, this Court can put the case back on track.

Washington imposes a use tax on "consumers" of goods within the State. As relevant here, a business may be a consumer if its activities are conducted on "real property of or for the United States" and if they constitute "installing" under the statutory scheme. RCW 82.04.190(6). Appellant Morpho Detection, Inc. (MDI) brought this action for a refund of tax it paid on explosive-detection systems. It sought and obtained summary judgment on the ground that its activities did not satisfy the real-property component of the statutory definition. The Department appealed. In its briefing, it addressed only the real-property issue, and it correctly informed Division I that the parties disputed whether MDI had installed the systems and that the question of installation was "likely the primary issue that will be litigated if the case is remanded." The Court of Appeals reversed.

On remand, the Department abruptly changed course. Disregarding its prior express representations about the nature of the proceedings to be conducted on remand, it seized upon isolated language in Division I's opinion to argue that the Court had somehow resolved the installation issue and that its supposed holding on that issue was now law of the case—this, even though the Department had not moved for summary judgment on the merits of installation; no party had briefed the legal standards governing installation; no court had made any factual findings concerning installation; and no party had raised the issue of installation in the prior appellate briefing.

That position is indefensible, and the Department cannot defend it. Its arguments founder on the reality that one of two things must be true: either (1) Division I did not resolve the issue of installation, or (2) if it did, Division I clearly erred in resolving that issue. Either way, the law-of-the-case doctrine does not apply.

Relying on Rule 12.2—which is referenced nowhere in Division I's opinion—the Department argues that Division I must have reached out to resolve the installation issue, and that it did so without any legal analysis or factual findings. The Department's speculation is unpersuasive, as is its suggestion that this Court should now decide the merits of installation, an issue never previously raised by the Department. Although

the Department sententiously asserts (Br. 2) that “[a]t some point, litigation must end,” that point should be *after*, not *before*, the parties have had an opportunity to address the merits of the issues. The approach the Department would have this Court take is contrary to principles of due process and would undermine the orderly administration of justice.

This Court should reverse and remand the case to the Superior Court to allow it to address the question of installation, just as the Department promised in the first appeal.

ARGUMENT

A. The Department’s arguments are internally inconsistent

The Department’s arguments contain a fundamental contradiction. The Department repeatedly asserts (Br. 11, 15, 16, 20, 23) that Division I “undisputedly” held that MDI installed the electronic-detection systems and therefore was a consumer under Washington tax law—a ruling which the Department argues (Br. 16) is now law of the case. Yet the Department also claims (Br. 21) that no exception to the law-of-the-case doctrine applies here because the prior opinion contains no clear error. Both cannot be true.

If, as the Department suggests, Division I indeed resolved MDI’s status as a consumer as a matter of law, then the only way it could have done so was based on its professed understanding that “Morpho conceded

at trial that it installed the detection systems in Washington.” CP 759. The Department admits as much, attempting to derive a broad holding from Division I’s opinion by arguing that “the Court explained the rationale for resolving more than just the real property issue: Morpho conceded that it installed the systems and that fact was undisputed. The Court repeated this reasoning three separate times.” Dep’t Br. 16.

If the Department is correct on that point—that is, if Division I relied on what it perceived to be MDI’s “conce[ssion] at trial” and actually reached the issue of installation—then Division I’s decision must have been clear error. As all agree, installation *was* disputed, and MDI had not “conceded [the issue] at trial”—no trial had taken place at all.

Both parties understood that installation was disputed because that is how both parties briefed the issue to Division I. As set forth in the opening brief (at 10), MDI’s position in the prior appeal was that MDI “disputes that it performed such installation and/or that such installation improved any building,” and that installation had “not been ruled on by the Superior Court” and was “not ripe for review.” The opening brief also outlined (at 9) the Department’s position on installation in the prior appeal: “whether Morpho in fact ‘installed’ the systems” was “likely the primary issue that will be litigated if the case is remanded.” To be clear, that was *the Department’s* representation to Division I.

Even if the Department were correct that the issue of installation was raised and decided by Division I—and there are strong reasons to reject that conclusion—then it must have been error to do so and, as explained further below, this Court should grant relief from the law-of-the-case doctrine.

B. Judicial estoppel bars the Department from asserting its law-of-the-case argument

In the opening brief, MDI explained (at 21-22) that judicial estoppel foreclosed the Department from taking inconsistent positions before Division I and the Superior Court on what issues would remain open on remand. Judicial estoppel similarly bars the Department's contention here (Br. 16) that the issue of installation was undisputed. That contention is directly contrary to the Department's prior representations to Division I, in which the Department expressly acknowledged that MDI had made a limited concession of installation for purposes of summary judgment only, and that installation would be litigated on remand.

The Department nevertheless insists (Br. 19-20) that its positions have been consistent. It attempts to explain away the representations in its prior briefing—that is, that installation was disputed and would be litigated on remand—as occurring “before the Court of Appeals held that the installation issue was undisputed.” Dep't Br. 20. According to the

Department (Br. 20), because its “prior statement was made before the Court of Appeals issued its opinion,” there is “nothing inconsistent” about its new position that installation may not be litigated on remand.

The Department’s argument is not an explanation of why judicial estoppel should not apply here; it is an illustration of why the doctrine of judicial estoppel is necessary. That the Department’s “prior statement was made before the Court of Appeals issued its opinion” in the Department’s favor is not a reason to allow the Department to take a different position now. To the contrary, the point of judicial estoppel is that a litigant that advances a position before a court and obtains a favorable judgment must adhere to the same position after it has prevailed, even if adopting a different position might offer some tactical advantage.

In arguing otherwise, the Department misunderstands judicial estoppel and ignores the legal standards governing its application. Judicial estoppel applies when “judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled.” *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 539, 160 P.3d 13 (2007) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001)) (internal quotation marks omitted). As explained in the opening brief, the Department’s tactics on remand—advising the Superior Court that the installation issue had been

“resolved” by Division I’s opinion, CP 836—are “clearly inconsistent” with the position the Department took in the first appeal, thereby “creat[ing] the perception” that Division I “was misled” during the first appeal about the scope of the issues. *See Arkison*, 160 Wn.2d at 538-539. Permitting the Department to benefit from its inconsistency would “impose an unfair detriment” on MDI by depriving it of any opportunity to litigate the installation issue on the merits. *Id.* at 539 (quoting *New Hampshire*, 532 U.S. at 751).

The Department offers no credible response to those arguments. Without citation to any case or other authority, the Department argues (Br. 20) that Rule 12.2 allows it to take inconsistent positions before the courts. That rule provides that “[t]he appellate court may reverse, affirm, or modify the decision being reviewed and take any other action as the merits of the case and the interest of justice may require.” It was not cited in Division I’s opinion in the first appeal, and it does not support the Department’s broad reading of that opinion. It is even less of a basis to avoid the application of judicial estoppel. The rule does not dictate a party’s litigation strategy, and it certainly did not compel the Department to change its litigation position on remand. Instead, it stands for the unremarkable proposition that once the appellate mandate issues, the decision of a higher court is “binding on the parties to the review and

governs all subsequent proceedings in the action in any court.” No Washington decision has applied Rule 12.2 to limit judicial estoppel, and for good reason: a party has an independent duty to maintain consistent positions before the courts and “to avoid inconsistency, duplicity, and . . . waste of time.” *Arkison*, 160 Wn.2d at 538 (citation omitted). The Department’s purported interest in finality cannot justify its “playing fast and loose with the courts.” *New Hampshire*, 532 U.S. at 750 (citation and internal quotation marks omitted); *see id.* at 749 (explaining that a purpose of judicial estoppel is “to protect the integrity of the judicial process” (citation omitted)).

C. The Department misrepresents the scope of Division I’s opinion, which did not substantively analyze installation

As explained in the opening brief (at 16-21), the most reasonable interpretation of Division I’s opinion is that it addressed the real-property component of the definition of “consumer” but did not resolve the question of installation. A contrary reading of the opinion would compel the conclusion that Division I disregarded several of the Rules of Appellate Procedure, including Rule 9.12, which provides that “the appellate court will consider *only* evidence and issues called to the attention of the trial court” (emphasis added), and Rule 10.3(g), which provides that “[t]he appellate court will *only* review a claimed error which

is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto” (emphasis added).

In arguing for a broad interpretation of Division I’s decision, the Department relies heavily (Br. 18) on Rule 12.2, which it says authorized Division I to consider installation even though that issue had not been before the Superior Court on summary judgment and was not briefed by the parties on appeal. The Department goes so far as to suggest that Division I resolved the issue of installation “based on an extensive factual record” and “determined that it was able to conclude that Morpho was a consumer as a matter of law.” That argument suffers from several flaws.

First, Division I’s opinion did not cite Rule 12.2, or even allude to it. *See* CP 754-767. If Division I had intended to invoke Rule 12.2 to reach an issue that was not presented on appeal and had not been resolved by the Superior Court, it would have mentioned that it was doing so.

Second, the Department relies (Br. 17-18) on *Humphrey Industries, Ltd. v. Clay Street Associates, LLC*, 176 Wn.2d 662, 295 P.3d 231 (2013), for its interpretation of Division I’s decision, but that case illustrates why the Department’s interpretation is unsustainable. In *Humphrey Industries*, the court made an express finding that considering an issue not raised by the parties was “necessary to reach a proper decision.” *Id.* at 671 (citation omitted). Here, by contrast, Division I made

no such finding, and it would have had no basis for doing so: resolving the question of installation was *not* necessary to interpret the statute’s real-property language, which all parties agreed presented an analytically distinct issue. Indeed, Division I’s analysis of the real-property issue made no mention of installation. *See* CP 759-767.

Third, as explained in MDI’s opening brief (at 16-18), Division I’s opinion presented no legal analysis of installation. It articulated no legal standards to govern the substantive law of installation. It made no determination of material facts. It did not explain how the law (which it had not articulated) would apply to the facts (which it had not found). Any conclusion by Division I about installation could have been based *only* upon its mistaken understanding of what MDI had conceded. *E.g.*, CP 759 (“Morpho conceded at trial that it installed the detection systems in Washington.”). The Department cannot expand the scope of Division I’s holding by arguing that the conclusion was based on review of an “extensive factual record”—none of which was analyzed by Division I for purposes of installation—and then citing Rule 12.2. That rule does not supply a plausible foundation for such a broad holding.

Nor does Rule 12.2 bolster the Department’s conclusory response (Br. 18-19) to MDI’s arguments about the proper scope of Division I’s opinion under the appellate rules. While the application of Rule 12.2 is

discretionary, Rules 9.12 and 10.3(g) are mandatory, and they governed the scope of Division I's review. The Department's argument amounts to an assertion that Division I made an important substantive decision—resolving the installation issue on the merits—without giving any indication under the governing substantive law, summary-judgment standard, or the appellate rules that it was exercising its discretion to do so. That assertion is baseless.

D. The Department otherwise fails to support its argument for applying the law-of-the-case doctrine

In its opening brief, MDI explained (at 24) that if Division I resolved the installation issue, then its holding was clearly erroneous. The issue of installation had not been presented on summary judgment before the Superior Court; the issue had not been raised on appeal; no party briefed the governing legal standard for “installing” under RCW 82.04.190(6); and there was no identification of undisputed material facts sufficient to satisfy the summary judgment standard. Accordingly, if Division I's decision is construed as resolving the installation issue, it should not be binding under the law-of-the-case doctrine because it is clearly erroneous and its application would deprive MDI of its right to litigate installation. The Department's efforts to overcome that conclusion are unavailing.

1. The Department’s speculation about Division I’s reasoning is implausible

In support of its argument that there was no clear error, the Department relies (Br. 24-25), yet again, on Rule 12.2:

[T]he Court could have concluded the evidence that Morpho installed the systems—which was in the summary judgment and appellate record—was so overwhelming (and based on Morpho’s own documents) that it could be said to be undisputed. Or the Court of Appeals could have concluded that because Morpho did not address the merits of the installation issue, it should find that issue to be resolved for purposes of construing the definition of “consumer.” Under RAP 12.2, the Court of Appeals had the authority to resolve whether Morpho was a “consumer.”

That is not a plausible reading of the opinion or the record in the first appeal. It was not, as the Department suggests (Br. 24), “unclear exactly why the Court of Appeals believed that the installation issue was undisputed.” If Division I reached installation, it plainly did so based on its mistaken understanding that MDI had conceded the issue. The Department characterizes (Br. 24) that as a mere possibility, but in fact, it is certain, because Division I said so. CP 759 (“Morpho conceded at trial that it installed the detection systems in Washington.”). The Department’s hypothesized alternative rationales—none of which are contained in the Division I opinion—represent pure speculation.

2. The merits of installation are not before this Court

In what is evidently intended as a criticism, the Department accuses (Br. 22) MDI of “focus[ing] primarily on procedure” in analyzing the Division I opinion. But this case necessarily turns on questions of procedure. The Department is attempting to defend a judgment that was based on the law-of-the-case doctrine, a doctrine that is codified in the Rules of Appellate Procedure, which govern this Court’s review and that of Division I in the prior appeal. This appeal concerns the propriety of applying that procedure.

Undaunted, the Department suggests (Br. 22) that “there is more than ample evidence in the record to support Division One’s ultimate conclusion,” and for the first time in this litigation it outlines (Br. 22-29) what it believes are the governing legal standards for installation, which it invites this Court to apply to the facts it has presented (also for the first time in this litigation). Essentially, the Department seeks to foreclose MDI from introducing its own evidence and asks this Court to resolve the merits of the installation issue based on the current record.

A threshold flaw in the Department’s argument is that it has been forfeited multiple times over. If the Department wanted to argue that there was sufficient evidence in the record to resolve the installation issue, it should have included that argument in its opposition to MDI’s summary-

judgment motion preceding the Department's first appeal; in its opening appellate brief to Division I; and in its briefing on the law-of-the-case doctrine to the Superior Court below. *See, e.g., Sneed v. Barna*, 80 Wn. App. 843, 847, 912 P.2d 1035 (1996). The Department did not do so, and it provides no justification for this Court to entertain its claims for the first time.

The Department's argument is also contrary to Rule 9.12, which limits this Court's review of a summary judgment decision to the "evidence and issues called to the attention of the trial court." That rule plainly forecloses the Department's argument in this Court because neither the evidence nor issues related to installation were raised in the Superior Court. *See, e.g., Kofmehl v. Baseline Lake, LLC*, 177 Wn.2d 584, 594, 305 P.3d 230 (2013). The Department is not asking this Court to perform the same inquiry as the trial court; it is asking this Court to perform an inquiry that the Superior Court never performed (and that Division I never performed either). Worse, the Department appears to believe that this Court should perform that inquiry based on *the Department's* articulation of MDI's "potential arguments." Dep't Br. 22. Never mind that "[n]ot all" of those arguments "are clear" at this stage of the litigation, the Department has satisfied itself that "[t]hese arguments have no merit," and in the Department's view, that should be enough for this Court. Dep't Br.

22-23. The proceeding the Department contemplates is consistent neither with the appellate rules nor with basic concepts of due process.

Not surprisingly, the Department cites no Washington authority to support its theory that it is appropriate for this Court to reach the merits of the installation issue at this stage of the proceedings. Instead, it relies on a Seventh Circuit decision that addressed the standards for conducting an evidentiary hearing in a habeas case. Dep't Br. 22. In that case, the court held that "when a state court has made no explicit or implicit factual findings, or when these findings are inadequate, some kind of hearing is necessary to resolve the facts upon which the outcomes of habeas proceedings so frequently turn." *Weidner v. Thieret*, 932 F.2d 626, 631 (7th Cir. 1991). That fact-finding hearing, of course, occurs in the trial court, not the appellate court. *See id.* Such a hearing is necessary to evaluate "the entire evidence," and such a hearing has never occurred in this matter. *Id.* (citation omitted). Instead, the Department has cherry-picked what it perceives to be evidence of installation in the first appeal to support its argument. It would be manifestly unjust to proceed to the merits at this juncture, as if the Department's one-sided depiction of evidence in support of a separate issue in the first appeal represented the universe of relevant evidence. *See* RAP 2.5(c)(2). The record is not sufficiently developed for this Court to consider facts and issues never

presented to the Superior Court. *See* RAP 2.5(a); RAP 9.12. MDI deserves a chance to present its evidence at trial, or at least in response to a summary-judgment motion presented in the Superior Court.

3. The Department failed to preserve its baseless argument that MDI has engaged in piecemeal litigation

Without citing any authority, the Department argues (Br. 31) that “[i]t is not at all clear that it was appropriate to move for summary judgment based on a phrase within a statutory definition, while attempting to preserve other factual and legal arguments related to the same statute.” If the Department wished to raise such an objection to MDI’s motion for summary judgment, it should have done so in the trial court in 2014, when the motion was filed. But the Department failed to raise the issue in its opposition brief, and its objection is forfeited. CP 141-164; *see, e.g., Sneed*, 80 Wn. App. at 847. Nor did the Department raise the unpreserved argument in its appeal to Division I.

The Department’s argument is baseless in any event because it confuses a party’s *claim* with *arguments* in support of a claim. MDI’s amended complaint contained a single claim for a refund of taxes. *See* CP 27-32. Under Civil Rule 56, MDI was free to move for summary judgment on its single claim for refund based on any argument that it believed to satisfy the summary-judgment standard, and its other

arguments in support of that claim would remain outstanding for trial unless the Department successfully defeated them on summary judgment.

In this instance, MDI originally obtained a full summary judgment on the real-property language in the statute, *see* CP 730-732, so no trial ensued on issues (such as installation) that were not resolved on summary judgment. In granting MDI's motion for summary judgment, the Superior Court ordered as follows:

The Department shall refund Plaintiff the use taxes Plaintiff paid the Department related to the explosive detection machines sold by Plaintiff that were subsequently deployed in Washington, together with penalties and interest paid on such taxes (totaling \$5,389,839.13) plus statutory interest pursuant to RCW 82.32.060 from the dates of payment to the date of refund.

CP 732. The Superior Court's grant of summary judgment was an appealable final judgment because it was a "final determination of the rights of the parties in the action." CR 54(a)(1); *see* RAP 2.2(a)(1). Indeed, the Department filed a notice of appeal, *see* CP 733-739, not a notice for discretionary review. It cannot possibly claim now that such a procedure was improper.

For that reason, the Department's heavy reliance (Br. 32-35) on *Bank of America, N.A. v. Owens*, 177 Wn. App. 181, 311 P.3d 594 (2013) is misplaced. The court's opinion in that case makes clear that the

plaintiff, Bank of America, asserted multiple claims for relief; most pertinent, “the Bank amended its complaint to add a claim in rem.” *Id.* at 185. The bank’s in rem claim was not initially adjudicated by the trial court because “it was rendered moot” through a grant of summary judgment in favor of the bank on its other claims. *Id.* at 187. When the case returned to the trial court on remand, the bank moved for summary judgment on its in rem claim, and the trial court granted an in rem judgment. *Id.* at 188. The court of appeals explained the problem with that procedure:

Here, the trial court’s “preserving and tolling” the Bank’s in rem claim did not constitute “disposing” of that claim, as contemplated by CR 54(b) and RAP 2.2(d). Yet, the trial court made no express determination in its judgment nor did it enter findings of fact that there was no just reason for delay as is required to allow an appeal of a judgment disposing of less than all the claims to go forward without discretionary review being granted.

Id. at 192-193. On that basis, the court of appeals held that the “trial court erred by allowing the Bank to resurrect its in rem claim on remand, in effect allowing the Bank to sit on its in rem theory and raise it upon not prevailing on its initial theory.” *Id.* at 193.

The procedure discussed in *Bank of America* bears no resemblance to this litigation and has no relevance here. The Superior Court entered a

full summary judgment on a single claim in favor of MDI on the basis of the real-property language in RCW 82.04.190(6), concluding as a matter of law that MDI was entitled to a refund. *See* CP 732. There were no other outstanding claims left for resolution. Installation did not satisfy the summary-judgment standard, so it was not decided at that juncture. The Department cannot seriously suggest that the Superior Court should have proceeded with a preemptive trial on the merits of installation even though it had already granted a full summary judgment to MDI on the same claim.

In any event, the Department never moved for summary judgment on installation, so it has no basis to complain. Now that the Superior Court's determination on the real-property issue has been reversed on appeal, MDI has a right to go to trial on a fact issue that was not determined at summary judgment. That is not "piecemeal litigation strategy." Dep't Br. 34. It is ordinary litigation.

4. The Department presents no authority supporting its argument that MDI was required to move for reconsideration

The Department asserts that MDI was required to seek reconsideration after Division I issued its opinion, but it cites no authority for that view. The most the Department can muster (Br. 29-30) is conclusory arguments about the general need to seek reconsideration to correct mistakes, supported by authorities that are not from Washington

and are not specific to the law-of-the-case doctrine. The Department cites no cases analyzing Rule 2.5(c)(2), and it provides no authority establishing that a party forfeits its ability to claim manifest injustice under Rule 2.5(c)(2) by failing to move for reconsideration.

The Department also provides no authority relevant to the narrow posture of this appeal, in which its law-of-the-case argument concerns an issue that was never raised before the prior appellate court and that was considered, if at all, only through the court's clearly erroneous understanding of MDI's concession, and where judicial estoppel bars the Department from bringing its law-of-the-case argument in any event. All of those factors inform Rule 2.5(c)(2)'s manifest-injustice standard, as does Rule 1.2(a), which provides that the appellate rules should facilitate resolution on the merits in the interests of justice. The Department's heavy-handed argument requiring MDI to file a motion for reconsideration to "correct" an opinion that was, at most, ambiguous, does not withstand scrutiny. Instead, the Department's proposed rule is poor policy and would create practical problems for parties and the courts by encouraging the filing of needless motions for reconsideration.

According to the Department (Br. 30), if only MDI had moved for reconsideration in the prior appeal, it "may have avoided two years of additional litigation over the scope and correctness of the decision." But

the best way to have avoided that “additional litigation” would have been for the Department to have honored the representation it made to Division I, thereby allowing the Superior Court to proceed with a trial on the merits of installation. The Department’s revisionist approach cannot obscure the undisputed record outlined in MDI’s opening brief (at 8-11): the Department did not raise the issue of installation in its opening brief in the prior appeal; no party briefed the issue of installation before Division I; the Department represented that installation would be an issue if there was a remand; MDI expressly disputed installation; and both parties represented that MDI conceded installation only for purposes of summary judgment on the real-property issue before the court on appeal. No party believed that installation was before Division I in the first appeal, and no party claimed that installation had been resolved until the Department changed its litigation strategy *on remand*. MDI reasonably relied on what the Department represented in its briefing before the Superior Court and Division I. The delays in this case have been caused by the Department’s opportunistic change of position, not by MDI’s inability to divine that it should burden the courts with a motion for reconsideration on an issue that was never raised.

CONCLUSION

The judgment of the Superior Court should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

September 4, 2018

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CERTIFICATE OF SERVICE

On September 4, 2018, I caused to be served upon the below named counsel of record, at the address stated below, via the method of service indicated, a true and correct copy of the foregoing document:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: September 4, 2018, at Seattle, Washington.

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