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No. 52065-6-II

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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TERRY OKEN PHILLIPS, a married individual,  
Appellant,

v.

PATRICK WILLIAMS, an individual, ANNETTE CHAPMAN &  
CHARLES CHAPMAN, husband & wife,  
Respondents.

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AMENDED APPELLANT'S BRIEF

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## I. INTRODUCTION

This action arises from defendant Fred Beeman's ("Beeman") sexual molestation of plaintiffs K.N.Z. and R.L.M. Plaintiffs brought this action against Beeman as well as his siblings, Debby Dilling ("Dilling") and Chris Beeman ("Chris") (collectively "the siblings"). Plaintiffs contend that, under the unique facts of this case, the siblings owed the plaintiffs a duty to warn plaintiffs of Beeman's proclivities and/or to take steps to protect the plaintiffs from Beeman.

On the siblings' motions to dismiss or for summary judgment, the trial court concluded that the siblings owed no duty to plaintiffs, and therefore dismissed this action as to the siblings. CP 297-302.<sup>1</sup>

The only question presented with this appeal is whether the trial court properly concluded, as a matter of law, that the siblings owed no duty to plaintiffs. Issues regarding the breach of that duty, proximate causation, and damages are not presently at issue. The sole issue concerns the existence of a legal duty.

## II. ASSIGNMENT OF ERROR

A. The trial court erred in granting the siblings' motion for summary judgment.

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<sup>1</sup> Plaintiffs' claims against Beeman remain pending.

Phillips' cross-claims for damages and should not have been dismissed on summary judgment.

#### ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The trial court erred in granting respondents (Williams and Chapmans) motion for summary judgment dismissing appellant Terry Phillips' cross-claims against Williams and Chapmans because it did not consider anything in the Declaration of Terry Phillips in Opposition to Summary Judgment that occurred after the amendment to the joint venture agreement, that admitted Phillips as a member, was signed (February 3, 2017).

ASSIGNMENT OF ERROR NO. 2: The trial court erred when it did not designate which documents it relied on in making its ruling on summary judgment. We do not know whether it considered Phillips Declaration in Opposition to the Summary Judgment that set forth genuine issues of material fact substantiating Phillips' cross-claims for damages for breach of joint venture agreement and breach of fiduciary duty by respondents Williams and Chapmans.

## ISSUES PRESENTED

1. Did appellant Phillip's Declaration in Opposition to Summary Judgment contained genuine issues of material fact regarding Phillips claims for damages against Williams and Chapmans for breach of fiduciary duty and breach of the joint venture agreement after the amendment to joint venture agreement was signed.

2. Did the trial court consider Phillips Declaration in Opposition to Summary Judgment before it dismissed Phillips' cross-claims for damages against Williams and Chapmans. The trial court's ruling did not designate which documents it considered in its ruling pursuant to RAP 9.12 or CR 56(h).

## STATEMENT OF THE CASE

### I. Operative & Procedural Facts

In or about June 30, 1994, Keith Anderson, Patrick Williams, Charles Chapman & Annette Chapman entered into a written Joint Venture Agreement.<sup>1</sup> Keith Anderson, Patrick Williams and Annette Chapman are all real estate brokers in Washington. Each of the four (4) members took title (individually) as 25% tenants in common in the office

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<sup>1</sup> CP 15, Ex 1

building at 1012 Esther St., Vancouver, Washington (“Office Building”).

The Office Building was the sole asset of the joint venture.<sup>2</sup>

On February 2, 2017, Anderson sold his 25% interest in the Office Building to Terry Phillips for the sum of approximately \$175,000<sup>3</sup>.

Phillips is also a real estate broker in Washington.<sup>4</sup>

On February 3, 2017, Anderson, Williams and Chapmans signed an Amendment to the Joint Venture Agreement whereby Anderson, Williams and Chapmans agreed to Anderson’s sale of his 25% of the Office Building to Phillips, and Phillips became a member of the joint venture (“Amendment to Joint Venture Agreement and Joint Venture Agreement may be referred to collectively as “Joint Venture Agreement”).<sup>5</sup> The Amendment to the Joint Venture Agreement provided:

“Section Nine, Assignments and Transfers: Keith A. Anderson desire to sell his 25% interest at 1012 Esther to Terry Phillips. By signature below, all members agree to the sale and Phillips will record his purchase interest and become a member of the Joint Venture.”

The Amendment to Joint Venture did not say when it would become effective and did not say anything about Phillips having already

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<sup>2</sup> CP 69

<sup>3</sup> CP 69

<sup>4</sup> CP 69

<sup>5</sup> CP 15, Ex 1

taken title to the 25% of the Office Building on February 2, 2017, one (1) day prior to the Amendment being signed on February 3, 2017.

Effectively after February 3, 2018, Phillips had all of the member benefits contained in the Joint Venture Agreement, including the right to participate in the management and disposition of the sole asset of the joint venture, the Office Building. However, within weeks of Phillips' purchase into the joint venture, Williams and Chapmans froze Phillips out of all information and decision making concerning the Office Building.<sup>6</sup> Phillips was not notified by Williams and Chapmans and did not participate in the listing of the Office Building on RMLS. And, Phillips was not notified by Williams and Chapmans about any third party offers to purchase the Office Building that resulted from the RMLS listing. Phillips was not able to exercise the same rights as Williams and Chapmans under the Joint Venture Agreement to preserve his 25% interest in the Office Building, by exercising his right of first refusal and buying out Williams and Chapmans 75% interest.<sup>7</sup>

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<sup>6</sup> CP 69

<sup>7</sup> CP 15, Ex 1

On April 20, 2017, Anderson filed a lawsuit against Phillips alleging that Phillips had not paid the second and final installment payment for Anderson's 25% interest in the Office Building.<sup>8</sup>

On May 1, 2017, Williams (as a 25% owner and listing broker) listed the Office Building for sale on RMLS for the sum of \$799,900. Williams and Chapmans signed the listing agreement without notice, discussion or consent by Phillips. Phillips was excluded from this business decision to sell the sole asset of the joint venture by Williams and Chapmans and did not sign the listing agreement or agree to the price or terms of the listing.<sup>9</sup>

On June 5, 2017, Williams and Chapmans filed an answer and counter-claim against Phillips.<sup>10</sup>

On June 13, 2017, Phillips filed an answer and counter-claim against Anderson, and a cross-claim against Williams and Chapmans based on misrepresentation, breach of the Joint Venture Agreement (including breach of fiduciary duty).<sup>11</sup> Phillips cross-claim for breach of fiduciary duty stated:

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<sup>8</sup> CP 3

<sup>9</sup> CP 69, Ex 2

<sup>10</sup> CP 14

<sup>11</sup> CP 15

“9. Plaintiff and defendants are parties to a Joint Venture Agreement dated June 30, 1994, as amended. The subject property is governed by the Joint Venture Agreement.

“10. Pursuant to the Joint Venture Agreement, plaintiff and defendants Williams and Chapmans owed a duty of loyalty and care to Phillips (attached as Exhibit “1”).

“11. Plaintiff and defendants Williams and Chapmans breached their duty of loyalty and care by their failure to share material facts about the subject property when asked by Phillips.”

Phillips’ cross-claim also requested partition of the Office Building which also triggered the right for Phillips to exercise his right of first refusal to buy out Williams and Chapmans’ interest in the Office Building. Phillips cross-claim was filed after Williams and Chapmans had already listed the only asset of the joint venture, the Office Building, on RMLS without agreement or discussion with Phillips.<sup>12</sup>

Within days of Phillips’ filing his cross-claim, on or about June 14, 2017, Williams and Chapmans (only) signed a purchase & sale agreement to sell 100% of the Office Building (including Phillips 25% interest) to Elizabeth Christy for the sum of \$649,000.<sup>13</sup> This price was \$150,900 less than Williams and Chapman had listed the Office Building with RMLS just one (1) month prior. Williams and Chapmans did not discuss or deliver the Christy offer to Phillips before Williams and Chapmans signed the purchase & sale agreement. And, Phillips did not waive his right of

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<sup>12</sup> CP 15

<sup>13</sup> CP 23, Ex F, CP 69, Ex 3

first refusal to purchase Williams and Chapmans' 75% interest in the Office Building after the Christy offer was received by because Phillips did not know Williams and Chapmans intended to sign it.<sup>14</sup> The Christy sale fell through for reasons not disclosed to Phillips by Williams and Chapmans.

On July 24, 2017, Williams and Chapmans (only) signed a purchase & sale agreement to sell 100% of the Office Building (including Phillips 25% interest) to Thomas Hackett for \$660,000.<sup>15</sup> This sale price was \$139,900 less than Williams and Chapmans had listed the Office Building with RLMS just two (2) months prior.<sup>16</sup> Again Williams and Chapmans did not discuss or deliver the Hackett offer to Phillips before they signed the purchase & sale agreement. And, Phillips did not waive his right of first refusal to purchase Williams and Chapmans' 75% interest in the Office Building because Phillips did not know about Williams and Chapmans' intent to sign the purchase & sale agreement before it was signed.<sup>17</sup> The Hackett sale also fell through for reasons not disclosed to Phillips by Williams and Chapmans.

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<sup>14</sup> CP 69

<sup>15</sup> CP 69, Ex 4

<sup>16</sup> CP 69, Ex 2

<sup>17</sup> CP 69

On, August 4, 2017, Williams and Chapmans filed a motion to compel the sale and partition of the Office Building to Christy.<sup>18</sup> Williams and Chapmans' declarations in support of the motion to compel specifically attached the Christy purchase & sale agreement, requesting a court order to sell to Christy for \$649,000. In comparing the dates on the Christy and Hacket purchase & sale agreements, is unclear why Williams and Chapmans sought approval of the Christy sale when they had also signed a purchase & sale agreement with Hackett in between the filing of their motion to compel and the hearing on that motion. However, based on the Christy purchase & sale agreement attached to Williams and Chapmans' declarations, the trial court granted the motion and ordered partition and the sale of the Office Building to Christy for \$649,000.<sup>19</sup>

At that same time, the trial court also ordered that a referee be put in place in the meantime to resolve disputes between the parties.<sup>20</sup> However, that never happened in this case. The referee would have directed the next steps in the partition action after the Christy sale fell apart, such as allowing all members of the joint venture the opportunity to review and discuss any subsequent offers and allowing the members to exercise their right of first refusal under the Joint Venture Agreement.

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<sup>18</sup> CP 24

<sup>19</sup> CP 38

<sup>20</sup> CP 38

At the motion to compel the partition, the trial court did not address Phillips' pending claims for breach of joint venture agreement, breach of fiduciary duty, misrepresentation, or Phillips' damage claim against Williams and Chapmans.<sup>21</sup>

On November 15, 2017, Phillips made an offer to purchase Williams and Chapmans 75% of the Office Building for \$560,000.<sup>22</sup> Phillips communicated that offer through Williams and Chapmans' attorney.<sup>23</sup> Williams and Chapmans did not respond with either an acceptance, rejection or counter-offer to Phillips' offer.

However, on November 30, 2017 (15 days after Phillips made the offer to buy out Williams and Chapmans' interest), Williams and Chapman signed a purchase & sale agreement to sell 100% of the Office Building (including Phillips 25% interest) to the McElevey Revocable Living Trust for \$550,000.<sup>24</sup> Again, this sale price was \$249,900 less than Williams and Chapmans had listed the Office Building on RMLS just six (6) months prior. And, again Williams and Chapmans did not discuss or deliver the McElevey offer to Phillips before they signed the purchase & sale agreement. And, Phillips did not waive his right of first refusal to

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<sup>21</sup> CP 38

<sup>22</sup> CP 69, Ex 6

<sup>23</sup> CP 69, Ex 6

<sup>24</sup> CP 69 Ex 5

purchase Williams and Chapmans' 75% interest in the Office Building because Phillips did not know about Williams and Chapmans' intent to sign the purchase & sale agreement before it was signed.<sup>25</sup>

In fact, Phillips pending offer to Williams and Chapmans dated November 15<sup>th</sup> was for \$10,000 more than the McElevey offer, and Phillips had communicated his own offer to Williams and Chapmans 15 days before the McElevey offer. Phillips also suggested that commission for the transaction could be waived (by Williams, Chapmans and Phillips) since they were all brokers as well as owners of the Office Building. This would have netted Williams and Chapmans more money from a sale to Phillips.<sup>26</sup> Part of Phillips rationale for his offer to buy out Williams and Chapmans was his concern about residual liability for the condition of the Office Building with any third party buyer, because of the age and condition of the Office Building.<sup>27</sup>

Meanwhile, on December 1, 2017, Anderson and Phillips resolved their claims against each other, and Anderson was dismissed from the pending action.<sup>28</sup> After December 1<sup>st</sup>, the remaining parties to this action are Phillips, Williams and Chapmans.

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<sup>25</sup> CP 69

<sup>26</sup> CP 69

<sup>27</sup> CP 69

<sup>28</sup> CP 52

On January 12, 2018, escrow closed and McElevy took 100% title to the Office Building.<sup>29</sup>

On March 30, 2018, Williams and Chapmans initially filed a 12(b) motion against Phillips. However, because the trial court looked outside of the pleadings to evaluate Williams and Chapmans request for dismissal, the trial court treated their motion as a summary judgment motion. But, the court did not consider Phillips' Declaration in Opposition to Summary Judgment which supported his breach of joint venture agreement and breach of fiduciary claim against Williams and Chapmans for the listing and sale of the Office Building (the only asset of the joint venture) without Phillips knowledge and consent, and Williams and Chapmans' failure to notify him of the Christy, Hackett and McElevy offers which triggered Phillips' right to buy out Williams and Chapmans 75% interest in under Phillips' right to exercise his right of first refusal in the Joint Venture Agreement.

On May 30, 2018, the trial court granted summary judgment against Phillips on all claims contained in Phillips cross-claims against Williams and Chapmans.<sup>30</sup> However, the trial court did not designate which documents it considered in granting the motion for summary

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<sup>29</sup> CP 69, Ex 5

<sup>30</sup> CP 73

judgment pursuant to the requirements of RAP 9.12 or CR 56(h).

Therefore, Phillips is uncertain whether the trial court considered any of the genuine issues of material fact contained in his Phillips' Declaration in Opposition to Summary Judgment regarding his damage claim against Williams and Chapmans for breach of the Joint Venture Agreement and breach of fiduciary duty.

## ARGUMENT

### I. Standard of Review

“When matters outside the pleading have been considered by the trial court on 12(b)(6) motion, the appellate court treats the motion as a motion for summary judgment and applies the same standard of review that applies to summary judgment under CR 56.” *Granville Condo. Homeowners Ass’n v. Kuehner*, 177 Wn.App. 543, 550-551, 312 P.3d 702 (2013).

We review summary judgment orders de novo. *Durland v. San Juan County*, 182 Wn.2d 55, 69, 340 P.3d 191 (2014). Summary judgment is appropriate only if there is no genuine issue of material fact in the pleadings, affidavits, and depositions on file, and the moving party is entitled to judgment as a matter of law. CR 56(c). Material facts are those upon which the outcome of the litigation depends. *Greater Harbor 2000 v. City of Seattle*, 132 Wn.2d 267, 279, 937 P.2d 1082 (1997)

The burden of showing there is no issue of material fact falls upon the party moving for summary judgment. *Hash by Hash v. Children's Orthopedic Hosp. and Medical Center*, 110 Wn.2d 912, 915, 757 P.2d 507 (1988), also *Malnar v. Carlson*, 128 Wn.2d 521, 535, 910 P.2d 455 (1996)

As set forth below, the genuine issues of material facts in the Declaration of Terry Phillips in Opposition to Summary Judgment regarding respondents Williams and Chapmans listing the sole asset of the joint venture and their failure to obtain waiver of Phillips' right of first refusal support remand to the trial court on Phillips' damages claim against Williams and Chapmans for breach of joint venture agreement and breach of fiduciary duty.

## II. Trial Court's Failure to Designate Documents Considered in its Ruling on Summary Judgment.

Civil Court Rule 56(h) states: "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."

Rules of Appellate Procedure 9.12 states: "...The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention to the trial court before the order on summary judgment was entered. Documents or other evidence called to the attention of the trial court but not designated in the order shall be made a part of the record by supplemental order of the trial court or by stipulation of counsel."

We do not know what the trial court considered because the Declaration of Phillips in Opposition to Summary Judgment contained genuine issues of material fact about: 1) Williams and Chapmans' listing of the sole asset of the joint venture, the Office Building, on RMLS without notifying Phillips, discussing the price and terms of the listing and without Phillips' consent and signature on the listing agreement; and 2) Williams and Chapmans' subsequent acceptance of the three (3) separate third party offers to purchase the Office Building, that resulted from the RMLS listing (including 25% titled in Phillips' name), without notifying Phillips or allowing Phillips to exercise his right of first refusal. Williams and Chapmans did these things after Phillips was added as a member of the joint venture (February 3, 2017) and concurrently with Phillips filing his cross-claims against Williams and Chapmans for breach of Joint Venture Agreement and breach of fiduciary duty.<sup>31</sup>

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<sup>31</sup> CP 15

III. Williams and Chapmans' Sale of Office Building without Phillips' Waiver of Right of First Refusal was Breach of the Joint Venture Agreement.

A. Trial Court's Ruling on Phillips' Breach of Joint Venture Agreement Claim was in Error (May 30, 2018)

The trial court granted summary judgment against Phillips on the issue of breach of the Joint Venture Agreement. But, the trial court only looked at actions of Williams and Chapmans' actions up to February 2, 2017, before the Amendment to Joint Venture Agreement was signed on February 3, 2017, and held in pertinent part:

“A breach of contract is actionable only if the contract imposes a duty, the duty is breached, and the breach proximately causes damage to the claimant. *Larson v. Union Investment & Loan Co.*, 168 Wash. 5 12 P.2d 557 (1932). In the instant case Phillips is alleging that Williams breached the Joint Venture Agreement by allowing liens and encumbrances to attach to the property before the agreement was signed. However, a breach of contract action requires that the duty be impose and then breached. As a matter of law, Williams could not have breached a duty under by the Joint Venture Agreement prior to signing the agreement. Williams and Chapmans are entitled to summary judgment on this cross claim.”<sup>32</sup>

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<sup>32</sup> CP 73

B. Phillips' Declaration in Opposition to Summary Judgment Raised Genuine Issues of Material Fact re Williams and Chapmans' Breach of Joint Venture Agreement.

Phillips Declaration set forth the following genuine issues of material fact which occurred after February 3, 2017, which were not considered by the trial court in its ruling:

On May 1, 2017, three (3) months after Phillips was added as member to the joint venture, Chapmans signed a listing contract for Williams' to sell the sole asset of the joint venture, the Office Building, for \$799,900. Phillips was not notified by Williams and Chapmans prior to Chapmans signing the listing agreement with Williams, and the listing price and terms were not discussed with Phillips. The RMLS listing included Phillips' 25% title interest in the Office Building without his consent. There was nothing in the written Joint Venture Agreement that gave Williams and Chapmans the authority to sell the only asset of the joint venture without unanimous consent, at a minimum notice to Phillips and discussion.<sup>33</sup>

Following the RMLS listing, on June 14, 2017, four (4) months after Phillips was added as a member to the joint venture, Williams and Chapmans signed a purchase & sale agreement with Elizabeth Christy to

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<sup>33</sup> Section Two of the Joint Venture Agreement states all members will participate in management of the joint venture.

sell the Office Building for \$649,000. Williams and Chapmans did not notify Phillips before they agreed to sell the only asset of the joint venture (the Office Building) to Christy.<sup>34</sup> This sale included Phillips' 25% interest as a tenant in common.

Following the RMLS listing, on July 24, 2017, five (5) months after Phillips was added as a member to the joint venture, Williams and Chapmans signed a purchase & sale agreement with Thomas Hackett to sell the Office Building for \$660,000. Williams and Chapmans did not notify Phillips, provide him with the offer or allow him to exercise his right of first refusal before they agreed to sell the only asset of the joint venture (the Office Building). This sale included Phillips' 25% titled interest as a tenant in common.

Following the RMLS listing, on November 30, 2017, six (6) months after Phillips was added as a member to the joint venture, Williams and Chapmans signed a purchase & sale agreement to sell the Office Building to the McElevey Trust for \$550,000. However, this time, Phillips had already submitted an offer to Williams and Chapmans' attorney to buy out their 75% interest in the Office Building for \$580,000 pursuant to his right of first refusal. But, Williams and Chapmans signed

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<sup>34</sup> Section Nine of the Joint Venture Agreement gives Phillips the right of first refusal to buy out Williams and Chapmans' 75% interest in the Office Building.

the purchase & sale agreement with McElevey anyway 15 days after Phillips notified them that he wanted to buy out their interest. Phillips wanted to buy out Williams and Chapmans interest in the Office Building for essentially \$30,000 more than the pending McElevey offer was for. This sale included Phillips' 25% title interest as a tenant in common.

In the meantime, Williams and Chapmans had sought court approval in August 2017, to sell the Office Building to Christy for \$649,000. McElevey was not a buyer identified or approved by the trial court on August 25, 2017, and the sale price to McElevey was for \$550,000, which was \$99,000 less than the trial court had approved with the Christy sale for \$649,000.<sup>35</sup>

C. The Trial Court Should have Considered Phillips' Claims for Breach of Joint Venture Agreement (First Right of Refusal) under Section Nine of the Joint Venture Agreement.

The essential elements of a joint venture are (1) a contract, express or implied; (2) a common purpose; (3) a community of interest; and (4) an equal right to a voice, accompanied by an equal right to control. *Paulson v. Pierce County*, 99 Wn.2d 645, 654-55, 664 P.2d 1202, (1983) A partnership relationship is fiduciary in character and imposes the obligation of candor and utmost good faith.

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<sup>35</sup> CP 38

A joint venture is essentially a partnership limited to one common goal. *Pietz v. Indermuehle*, 89 Wn.App. 503, 510, 949 P.2d 449 (1988). Consequently, partnership law generally applies to joint ventures as well. *Paulson v. McMillan*, 8 Wash.2d 295, 298, 111 P.2d 983 (1941).

Members of the joint venture are partners and are accountable to each other and the partnership as fiduciaries. *Bishop of Victoria Corp. Sole v. Corporate Business Park, LLC*, 138 Wn.App. 443, 457, 158 P.3d 1183 (2007) A partner has an obligation of good faith and fair dealing to discharge duties to the partnership and other partners under the terms of the Joint Venture Agreement. RCW 25.05.165(4). As part of this obligation, each partner must fully disclose all material information relating to the partnership. *J & J Celcom v. AT&T Wireless Services, Inc.*, 162 Wn.2d 102, 107, 169 P.3d 823 (2007) A partner must avoid self-dealing, secret profits, and conflicts of interest. RCW 25.05.165(2)(a)-(c)

In *Wilson v. Whinery*, 37 Wn.App. 24, 28, 678 P.2d 354 (1984), the elements of a right of first refusal were set out, seller (grantor) must “(1) give the promisee [grantee] notice of a third party’s offer and his intention to accept that offer; (2) allow the promisee (grantee) to submit a competing offer; and (3) reject the promisee’s offer, if any, only on the basis of a reasonable justification.” *Wilson* involved 2 adjacent property owners with one property owner holding a first right of refusal. The case

involved other arguments on “restraint of alienation”, but the controversy arose because the first property owner transferred his interest without giving the second property owner the opportunity to exercise his right of first refusal. The court found that the second property owner was not given adequate notice. And, the court stated that adequate notice was required because the effect of the transfer was to convey a significant interest in the land to a stranger (3<sup>rd</sup> party) who would thereby gain significant control over the property, possibly to the detriment of the second property owner. In *Wilson*, the court stated that right of first refusal had been given to second property owner for a reasonable and legitimate purpose - to facilitate the sale of property which was adjacent to him.

The court reiterated the principle used in Washington cases involving the right of first refusal. A right of first refusal is a prerogative or pre-emptive contractual right that limits the owner’s (grantor) right to freely dispose of its property by compelling the owner to offer it first to the grantee who has the first right to buy. (citing *Northwest Television Club, Inc. v. Gross, Seattle, Inc.*, 26 Wn.App. 111, 116, 612 P.2d 422 (1980), revision not relevant to this matter in 96 Wash.2d 973, 640 P.2d 710 (1982).

In *Northwest Television*, where the underlying relationship was landlord and tenant, the court looked at two (2) issues. First, the court looked at whether a third party offer that contained a contingency of the sale of another property was a triggering event for lessee's (grantee) exercise of its right of first refusal. And, second the court looked at whether lessee's attempt to exercise the right to purchase the property and offer was "in accordance with" the terms of the third party offer. Lessor (grantor) argued that lessee's offer changed the terms and therefore was not "in accordance with". Lessor argued that it was the principal of the lessee entity (not the entity itself) that submitted an offer to lessor and owned the property which was also contingent upon sale before the deal could be consummated. Lessee argued that the variation in its offer was not material. The court agreed that the variation was not material and that the essential terms were the same. And, the court stated whether the variation is material is decided on a case by case basis, something to be resolved by the trial court.

The Joint Venture Agreement in our case did not authorize three (3) of the four (4) members to: 1) list the only asset of the joint venture on RMLS without unanimous approval of price and terms, or 2) or sell the only asset of the joint venture without giving Phillips notice of each offer

and obtaining Phillips' waiver of his right of first refusal after each offer was received by Williams and Chapmans.

The Joint Venture Agreement in our case is completely silent on the required votes for sale of the only asset of the joint venture. And, Williams and Chapmans did not have authority to unilaterally amend the Joint Venture Agreement without approval by Phillips.

Section Nine of the Joint Venture Agreement, entitled "Assignments and Transfers" provided:

"...Each party shall have a right of first refusal to match any offer to purchase another party's interest". (Emphasis added)

It is also important to note that in the Joint Venture Agreement in our case, does not describe the timing or method for exercising the right of first refusal. And, like *Wilson*, there was a reason why Phillips, Williams and Chapmans each held the right of first refusal in this joint venture to buy out each other's interest. If any of the members wanted to leave the joint venture, it would affect the ability of the remaining members to preserve their investment. Phillips was not given the opportunity to preserve his 25% interest in the Office Building by buying out Williams and Chapmans' interest.

Phillips right of first refusal should have followed a mutually agreed upon listing of the Office Building with RMLS, and notice to

Phillips each time a third party offer was received pursuant to the listing to allow Phillips to exercise his right of first refusal if he wanted to buy out Williams and Chapmans 75% combined interest in the Office Building. The right of first refusal should have operated like a condition precedent to Williams and Chapmans' agreement to sell the Office Building in each of the three (3) separate transactions. This raises a genuine issue of material fact about the authority Williams and Chapmans had to enter into the multiple purchase & sale agreements in breach of the "shared management" provision of the Joint Venture Agreement and substantiates Phillips' claims for damages against Williams and Chapmans for Phillips' loss of opportunity to own 100% of the Office Building. Phillips was a 25% owner, in an individual capacity as a tenant in common. Phillips was required to be included in the negotiations on price, terms and consent to the listing and sale of the Office Building which was the only asset of the joint venture. And, under the Joint Venture Agreement, Williams and Chapmans did not have the right to sell Phillips 25% interest in the Office Building (as a tenant in common) without letting Phillips know about the offers and allowing Phillips to exercise his right of first refusal.

IV. Williams and Chapmans' Sale of the Office Building Raised Genuine Issues of Material Fact re Williams and Chapmans' Breach of Fiduciary Duty under Section 2 of the Joint Venture Agreement.

A. Trial Court's Ruling on Phillips' Breach of Fiduciary Duty Claim (May 30, 2018)

The trial court granted summary judgment against Phillips on the issue of breach of fiduciary duty and found Williams and Chapmans did not owe any fiduciary duty to Phillips on February 2, 2017, prior to the Amendment to the Joint Venture Agreement being signed. But, the court did not consider the multiple allegations of breach of fiduciary duty in Phillips Declaration in Opposition to Summary Judgment after February 3<sup>rd</sup>, after the Amendment to Joint Venture Agreement was signed.

The trial court granted summary judgment in favor of Williams and Chapmans on the issue of breach of fiduciary duty and held in pertinent part:

“An adverse party to summary judgment may not rest upon mere allegations or denials of the pleading but must set forth specific facts showing that there is a genuine issue for trial. *LaPlante v. State*, 85 Wash.2d 154, 158 (1975). Assertions that a genuine material issue exists will not defeat a summary judgment motion in the absence of actual evidence. *White v. State*, 131 Wash.2d 1, 9 (1997). Any fiduciary duty owed by Williams and the Chapmans did not arise until after the Amendment to Joint Venture agreement was signed on February 3, 2017, the day after Phillips purchased an interest in the Office Building. Phillips has failed to set forth specific facts showing that there is a genuine issue for trial. Summary judgment is appropriate on this claim.”

Again, Phillips contends the trial court completely disregarded Phillips Declaration in Opposition to Summary Judgment which contained the following genuine issues of material fact regarding Williams and Chapmans' breach of fiduciary duty.

B. Phillips' Declaration in Opposition to Summary Judgment on Breach of Fiduciary Duty

Phillips' Declaration set forth the following facts which the trial court did not consider in its ruling:

From the outset, Williams and Chapmans had taken on a management and controlling role in the joint venture – to the exclusion of the newest member Phillips. On May 1, 2017, only three (3) months after Phillips had purchased his 25% interest in the Office Building, Chapmans signed the listing agreement authorizing Williams to list the sole asset of the joint venture (the Office Building) on RMLS for \$799,900. This listing price was exclusively determined by Williams and Chapmans, without notice, discussion or consent by Phillips.<sup>36</sup> The Joint Venture Agreement did not authorize Williams and Chapmans to sell the sole asset of the joint venture, the Office Building (including Phillips 25% titled interest) without Phillips' consent. Phillips was entitled to equal

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<sup>36</sup> Phillips cross-claims for breach of fiduciary duty filed on June 13, 2017, after RMLS listing of Office Building.

management and "voice" under the terms of the Joint Venture Agreement, especially on matters relating to sale of the sole asset of the joint venture.

In the six (6) months after Phillips was added as a member to the joint venture, Williams and Chapmans signed three (3) separate purchase & sale agreements with three (3) different buyers without providing copies of the offers before they were signed by Williams and Chapmans or discussion with Phillips. And, Williams and Chapmans had reduced the price of the Office Building by almost \$250,000 in increments (from listing price) with each purchase & sale agreement.

Even after Phillips gave written notice to Williams and Chapmans on November 15, 2017, that he wanted to buy out their 75% interest in the Office Building, Williams and Chapman sign the last purchase & sale agreement with McElevey on November 24, 2017 for \$30,000 less than Phillips' offered. Williams and Chapmans committed to selling McElevey 100% interest in the Office Building even after Phillips had given them notice that he wanted to keep his 25% interest and buy out their 75% interest to preserve his long term investment.

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C. Trial Court Should Have Considered Section Two of the Joint Venture Agreement on Phillips' Breach of Fiduciary Duty Claim.

Breach of fiduciary duty is a question of fact. *Valentine v. Dept. of Licensing*, 77 Wn.App. 838, 894 P.2d 1352 (1995). In a fiduciary relationship one party "occupies such a relation to the other party as to justify the latter in expecting that his interest will be cared for." (*Liebergesell v. Evans*, 93 Wn.2d 881, 889, 613 P.2d 1170 (1980) (Emphasis added). Breach of Fiduciary Duty is 1) existence of a fiduciary duty, 2) breach, 3) injury and 4) proximate cause.

Revised Uniform Partnership Act set forth in RCW 25.05.150 provides:

"(6) Each partner has equal rights in the management and conduct of the partnership business...

"(10) A difference arising as to a matter in the ordinary course of business of a partnership may be decided by a majority of the partners. *An act outside the ordinary course of business of a partnership and an amendment to the Joint Venture Agreement may be undertaken only with the consent of all of the partners.*" (Emphasis added)

RCW 25.05.160 provides:

"(3) Each partner...shall furnish to a partner...

"(a) Without demand, any information concerning the partnership's business and affairs reasonably required for the proper exercise of the partner's rights and duties under the Joint Venture Agreement..."

RCW 25.05.165 provides:

“(1) The only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care set forth in subsections (2) and (3) of this section.

“(3) A partner’s duty of care to the partnership and the other partners in the conduct and winding up of the partnership business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct or a knowing violation of law.”

When individuals within a partnership take on a “managing partner” role and freeze out another partner, they take on even more fiduciary responsibility because they are making 100% of the decisions for the partnership and have stepped in the shoes of the partner being denied their “voice” and right to consent.

“The good faith obligation of a fiduciary relationship not only demands that a partner should not make any false statement to his copartner, but also that he abstain from any and all concealment concerning matters pertaining to the partnership business.” *Boyd v. Graham, Cohen, & Wampold*, 17 Wn.App. 567, 570, 564 P.2d 1175 (1977)

“The partnership relationship is a fiduciary character which carries with it the requirement of utmost good faith and loyalty and the obligation of each member of the partnership to make full disclosure of all known information that is significant and material to the affairs of property of the partnership, *Boyd* at 570, citing *Karle v. Seder*, 35 Wn.2d 542, 214 P.2d 684 (1950). (Emphasis added)

*Karle v. Seder*, 35 Wn.2d 542, 214 P.2d 684 (1950) is a seminal case in Washington, and involved sale of a tavern which was partnership

property. One partner accepted an offer without disclosing to the other partner the material details of the sale. The relationship between the partners was seriously strained and they did not speak to each other *except* when business transactions made it imperative. The issue in the case was a failure of one partner to make full disclosure to the other partner. In *Karle*, the lack of disclosure was in the nature of a side-deal and failure to disclose the true price of the asset being sold. When looking at the partnership relationship and failure of one partner to make full disclosure, the court likened the partnership relationship to “trustee and agent”.

“The general rule that the utmost good faith is required of partners in their relationship with each other, and that, since each is the confidential agent of the other, each has a right to know all that the other’s know and each is required to make full disclosure of all material facts within his knowledge in any way relating to the partnership affairs”... *Karle* at 550

The comparison emphasized that an agent must keep his principal fully informed as to all matters entrusted to the agent, and the state of the business or interests entrusted to him. Any departure from these rules is a fraud in law.

In a similar case, *Bassan v. Investment Exchange Corp*, 83 Wn.2d 922, 524 P.2d 233 (1974), where consent by all partners was lacking, the partner taking the role of decision maker was held to be a trustee of the other partner under RCW 25.04.210.

“The duty of loyalty resulting from a partner’s fiduciary position is such that the severity of a partner’s breach will not be questioned. The question is only whether there has been any breach at all.” *Bassan* at 928 citing *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545 (1928).

*Bassan* involved claims of breach of fiduciary duty and lack of loyalty because one partner was engaged in an inside transaction between himself and the partnership. *Bassan* dealt with the issue of the written partnership agreement not addressing the number of consenting votes that would be needed for a partner who is transacting business for himself (individually) and the partnership. The court found the partner was accountable to the partnership for profits realized when it received a markup on land it sold to the partnership without the consent of the partners.

Section Two of the Joint Venture Agreement in our case states:

“Each party shall be responsible for the management of the joint venture, and shall devote his or her time to such management. The parties may designate one of them, or a third party, to manage the joint venture. *The parties shall be liable to the joint venture for any losses or liability incurred by his or her negligent conduct, or willful acts, that are detrimental to the joint venture, if he or she knew or should have known that such acts would be detrimental, and were taken without the consent of the other parties.*”  
(Emphasis added)

Almost immediately upon buying into the joint venture (February 3, 2017), Phillips was frozen out by Williams and Chapmans on the day-to-day operations and long term decisions affecting the joint venture

which consisted of only one asset, the Office Building. Williams and Chapman listed the Office Building on RMLS on May 1, 2017. Phillips purchased into the joint venture only three (3) months before that for \$175,000. Williams had listed the Office Building for \$799,900 (which divided by it's four members would have equaled a \$199,975 interest for each member of the joint venture). Sale of the Office Building for anything less than \$700,000 (divided by 4 equaled \$175,000 which is the amount Phillips purchased into the joint venture) within such a short time would have caused Phillips to lose out on his investment very quickly.

As an investment, the Office Building operated in the black every month. It had a very small loan against it, and the taxes and maintenance costs were covered by the rents received from a long-term tenant.<sup>37</sup> However, Phillips had no control over his investment into the Office Building. Williams and Chapmans took on a controlling and management role and they excluded Phillips from any information and decision making regarding 1) the decision to list on RMLS and the listing price and terms; 2) notice of the three (3) pending offers before they signed them, and 3) no opportunity to safe guard his investment by buying out Williams and Chapmans 75% interest in the Office Building.

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<sup>37</sup> CP 69

The obligation of fiduciary duty in this case arises by statute and by the Joint Venture Agreement between the members of this joint venture. The written Joint Venture Agreement in this case addresses three genuine issues of material fact here. First, Williams and Chapmans' lack of disclosure when they listed the only asset of the joint venture and subsequently entered into three (3) purchase & sale agreements without notifying Phillips or having any discussion about price and terms before they accepted each of the offers. Second, no discussion with Phillips about the substantial price reductions over the nine (9) months they received the offers. And third, Williams and Chapmans' disregard of Phillips' right of first refusal which would have allowed Phillips to preserve his investment and not take a loss within six (6) months of buying into the joint venture.

The last clause of Section Two of the Joint Venture Agreement in our case is important because it imposes consequences upon a member of the joint venture who acts without the consent of all members. As stated in Section Two, negligent conduct and willful acts in disregard of another member's interest trigger liability for breach of fiduciary duty and damages.

Williams and Chapmans breached their duty of loyalty and care when they concealed their actions from Phillips: listing the Office

Building with RMLS for \$799,900 and subsequently signed the three (3) purchase & sale agreements for the Office Building for \$649,000 (6/14/2017), \$660,000 (7/24/2017), and \$550,000 (11/24/2017). Each time a new purchase & sale agreement was signed with a different third party buyer, the price of the Office Building was reduced substantially by Williams and Chapmans without notice, discussion or consent by Phillips.

Williams and Chapman breached their duty of loyalty and care to Phillips by failing to notify Phillips of the three (3) pending offers and disregarding Phillips' right to see the offers before they were accepted by Williams and Chapmans as required under Section Two of the Joint Venture Agreement.

Williams and Chapmans breach their duty of loyalty and care to Phillips by selling short on the Office Building (including Phillips 25% interest) without any regard for Phillips notice to them that he wanted to buy their 75% interest to preserve his long term investment and recoup the price he had paid just a few months earlier to buy into the joint venture.<sup>38</sup>

Williams and Chapmans' breached their duty of loyalty and care by severely discounting the price of the sole asset of the joint venture so they could exit the joint venture quickly. Williams and Chapmans had owned their portions of the Office Building for many years (since 1994)

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<sup>38</sup> CP 69

and they would realize a good profit from the sale of the Office Building. However, Phillips' interest was to hold on to the Office Building for long term investment and he had just bought into the joint venture.<sup>39</sup>

Phillips' damage claim is based on the willful acts of Williams and Chapmans while they were in 100% control of the joint venture which caused Phillips to lose the ability to buy out their interest under Section 2 and Section Nine of the Joint Venture Agreement. The lost opportunity to own 100% of the Office Building was Phillips' damage claim and should have continued on to trial. Phillips suffered damages because he had no "voice" in losing his 25% interest and selling short on his long term investment - only six (6) months into the joint venture. Phillips' damage claim was not a speculative claim. The 75% interest of Williams and Chapman is a definitive number. The real estate market in this region was strong in 2017. Phillips had the contractual right to purchase out Williams and Chapmans under the Joint Venture Agreement, and the forum of a pending partition action, but was prevented from proving up his damages at trial.

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<sup>39</sup> CP 69

## CONCLUSION

The trial court's ruling was prejudicial to Phillips because it did not look at any conduct by Williams and Chapmans after the Amendment to Joint Venture Agreement was signed (February 3, 2017), as alleged in Phillips Declaration in Opposition to Summary Judgment. The trial court only focused on the initial pleadings in Phillips' cross-complaint against Williams and Chapmans for conduct prior to February 3, 2017, relating to tax liens and the condition of the joint venture property. However, much of Williams and Chapmans breach of their partnership obligations came after Phillips was added as a member. Williams and Chapmans actions in disregard of the Joint Venture Agreement were a compilation of events that followed their failure to disclose their listing of the only asset of the joint venture on RMLS. The RMLS listing triggered all of the offers to purchase that came in and were unilaterally handled by Williams and Chapman to the exclusion of Phillips' rights of notice (before acceptance) and right of first refusal under the Joint Venture Agreement.

Phillips contends the right of first refusal supported his damages claim for breach of fiduciary duty and breach of joint venture against Williams and Chapmans for: (1) their failure to notify him that they were listing the only asset of the joint venture on RMLS; (2) their failure to

disclose the pending offers to Phillips when Phillips owned 25% as a tenant in common before Williams and Chapmans accepted the three offers; (3) their failure to obtain Phillips consent to the drastic price reductions each time they attempted to re-sell the Office Building; and (4) their failure to obtain Phillips' waiver of his right of first refusal each time before Williams and Chapmans signed the purchase & sale agreements.

Williams and Chapmans kept attempting to sell the Office Building and wanted out of the joint venture. Williams and Chapmans had benefitted from a long term investment since 1994, but Phillips had just purchased his 25% interest six (6) months prior and wanted the benefit of a long term investment. Phillips damages claim is based on Williams and Chapmans complete disregard of Phillips' financial interest in holding onto the Office Building and Phillips buying out Williams and Chapmans 75% interest until he could recoup his investment like Williams and Chapman had the opportunity to do.

Phillips should have been permitted by the trial court to pursue his damage claim against Williams and Chapmans under the terms of the Joint Venture Agreement for the loss of business opportunity. Williams and Chapmans took 100% control of the joint venture away from Phillips and caused Phillips to lose the opportunity to buy out Williams and Chapmans' interest and own the entire Office Building for an adequate

75% interest until he could recoup his investment like Williams and Chapman had the opportunity to do.

Phillips should have been permitted by the trial court to pursue his damage claim against Williams and Chapmans under the terms of the Joint Venture Agreement for the loss of business opportunity. Williams and Chapmans took 100% control of the joint venture away from Phillips and caused Phillips to lose the opportunity to buy out Williams and Chapmans' interest and own the entire Office Building for an adequate time to recoup his investment like Williams and Chapmans were able to do.

Phillips requests reversal of the trial court order on summary judgment and remand to the trial court regarding his damages consistent with this Court's opinion.

DATED this 11<sup>th</sup> day of December, 2018

VANCOUVER LAND LAW CORP.

*Cassie N. Crawford*

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Cassie N. Crawford, WSBA #26241  
Attorney for Appellant

**CERTIFICATE OF SERVICE**

I certify that I caused the foregoing AMENDED APPELLANT'S BRIEF to be served on the following:

Albert Schlotfeldt  
900 Washington St., Ste. 1020  
Vancouver, WA 98666-0570

by email, a true copy to the foregoing on the 11<sup>th</sup> day of December, 2018

VANCOUVER LAND LAW CORP

*Cassie N. Crawford*

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Cassie N. Crawford, WSBA# 26241  
Attorney for Appellant

# VANCOUVER LAND LAW

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**Appellate Court Case Number:** 52065-6  
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