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**Division II**  
**State of Washington**  
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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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APPELLANT'S REPLY BRIEF

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## INTRODUCTION

This brief is intended to reply to respondent Chapmans' and Williams' contentions that require further discussion for proper determination of the issues raised on appeal. This reply brief does not respond to issues that appellant believes were adequately discussed in the opening brief, and appellant intends no waiver of these issues by not expressly reiterating them herein.

The trial court treated Chapmans and Williams 12(b) motion to dismiss as a summary judgment motion because respondents submitted declarations and evidence which went beyond the initial pleadings. CP 73. However, respondents brief (on appeal) states that the only document considered by the trial court was the written Joint Venture Agreement (and 2/3/2017 amendment) attached to Phillips' complaint.<sup>1</sup> That is not true. Chapmans' and Williams' motion for summary judgment was based on evidence contained in the declarations filed by Chapmans and Williams – the trial court's review went beyond the initial pleadings. CP 73.

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<sup>1</sup> The 2/3/2017 amendment allowed Phillips to step in the shoes of Keith Anderson under the original Joint Venture Agreement signed by Anderson, Chapmans and Williams on 6/30/1994.

However, in its ruling, the trial court failed to make any reference to its consideration of the facts raised in Phillips' declaration in opposition to Chapmans' and Williams' motion for summary judgment which substantiated Phillips' claims against Chapmans and Williams for breach of fiduciary duty of loyalty and care (failure to disclose material information about the joint venture property) after the Joint Venture Agreement was signed.<sup>2</sup> CP 73. Chapmans and Williams failed to disclose the pending sale of the only asset of the joint venture to Phillips three (3) times, and they prevented Phillips from exercising his first right of refusal to buy the joint venture property three (3) times. And then, Chapmans and Williams sold the joint venture property to a third party for less money than Phillips offered for the property.

In both the summary judgment motion and in respondents' brief filed in this appeal, respondents repeatedly state that the only issue presented by Phillips in his cross-claims against Chapmans and Williams was whether they had a fiduciary duty to disclose the liens that existed against the joint venture property before the joint venture agreement was

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<sup>2</sup> Phillips' cross-claim in the complaint alleged breach of fiduciary duty of loyalty and care by Williams and Chapmans by their failure to share material facts about the joint venture property. In spite of respondents' repeated assertions, this claim was not limited to the liens that existing against Williams' interest in the joint venture property. CR 15 (Ex 1).

signed. And, unfortunately, that is the only issue that the trial court considered when it dismissed Phillips' claims against Chapmans and Williams for breach of the joint venture agreement. CR 73. However, this appeal goes beyond that one issue.

When the trial court failed to consider the facts raised in Phillips' declaration, it erred by not applying the correct standard of proof for summary judgment. The trial court did not consider the evidence contained in the Phillips' declaration and how it related to each of the causes of action in Phillips' cross-claims against Chapmans and Williams in the complaint.<sup>3</sup> The trial court's ruling prevented Phillips from proceeding to trial for a monetary damage claim against Chapmans and Williams under *RCW 7.52.260* of the partition statute and under Section Two of the Joint Venture Agreement. CR 15 (Ex 1).

#### ASSIGNMENTS OF ERROR

The trial court did not apply the correct standard of proof for summary judgment. It did not view the evidence in the light most

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<sup>3</sup> Washington is a notice pleading state. Phillips' complaint contained a breach of fiduciary cause of action that was tied to the written joint venture agreement and related to ongoing actions by Chapmans and Williams – both before and after the Joint Venture Agreement was signed. CR 15 (Ex 1)

favorable to Phillips (opposing party). The trial court's failure to do so prevented Phillips from pursuing his monetary damage claim through a trial against Chapmans and Williams for breach of Section Two of the written Joint Venture Agreement and *RCW 7.52.260* under the partition statute.

### STATEMENT OF THE CASE

The operative and procedural facts contained in Phillips' opening brief on appeal and Chapmans' and Williams' responding brief essentially agree.

### ARGUMENT

#### I. Standard of Review.

Pursuant to *CR 56(c)*, a summary judgment of dismissal may be granted only if the pleadings, affidavits, depositions and admissions on file demonstrate there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Supporting and opposing affidavits made based on personal knowledge setting forth facts which are admissible in evidence are to be considered by the trial court in its decision. *Meadows v. Grant's Auto Brokers*, 71 Wn.2d 874, 880, 431 P.2d 216 (1967).

In ruling on the summary judgment motion, the court's function is to determine whether a genuine issue of material fact exists; it is not to resolve an existing factual issue. *Thoma v. C.J. Montag & Sons, Inc.*, 54 Wn.2d 20, 337 P.2d 1052 (1959). A material fact is one upon which the outcome of the litigation depends, in whole or in part. *Morris v. McNicol*, 83 Wn.2d 491, 494, 519 P.2d 7 (1974).

The object and function of summary judgment procedure is to avoid a useless trial. A trial is not useless, but is absolutely necessary, where there is a genuine issue as to any material fact. A "material fact" is a fact upon which the outcome of the litigation depends, in whole or in part. All reasonable inferences from the evidence must be resolved against the movant and considered in the light most favorable to the non-moving party. The motion should be granted only if, from all the evidence, reasonable men could reach but one conclusion. *Morris v. McNicol*, 83 Wn.2d 491, 494, 519 P.2d 7 (1974).

Phillips declaration in opposition to Chapmans' and Williams' summary judgment was made based on personal knowledge, and attached exhibits which were not objected to (and were also attached to pleadings filed by Chapmans and Williams). CP 69. Phillips' declaration raised issues regarding Chapmans' and Williams' breach of their fiduciary duty of loyalty and care in the management of the joint venture property and

whether Phillips' was entitled to the remedies set forth for breach of that duty under the written Joint Venture Agreement. CR 15, CR 69.

II. Phillips' Cross-Claims Entitled Him to Monetary Damages against Chapmans and Williams under Section Two of the Joint Venture Agreement and RCW 7.52.260.

Phillips declaration in opposition to summary judgment alleged that Chapmans and Williams breached their duty of loyalty and care under Section Two and Section Nine of the written Joint Venture Agreement as follows:

a. Sale of Joint Venture Property without Phillips' Consent: Phillips owned 25% of the joint venture property, and Chapmans' and Williams' signed 3 separate purchase & sale agreements (which included Phillips' 25%) without disclosure or consent by Phillips. CR 69 (Ex 3, 4, 5)<sup>4</sup>

b. Reduction of the Sales Price for the Joint Venture Property. In each of the 3 purchase & sale agreements signed by Chapmans and Williams, they lowered the price of the joint venture property substantially without Phillips knowledge or consent and without substantiation for the discount. The joint venture property was sold for \$249,000 less than it was listed for only 8 months earlier by Chapmans and Williams and for \$135,000 less than when Phillips purchased his interest. CR 69.

c. Failure to Allow Phillips to Exercise First Right of Refusal. Chapmans and Williams entered into the third and final purchase & sale

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<sup>4</sup> Respondent's brief stated that the trial court ruled that a "majority of the partnership would dictate the terms for the sale of the joint venture property". However, that raises an issue of fact because the written Joint Venture Agreement did not provide for a less than unanimous agreement for sale of the sole asset of the joint venture. In fact, Section Two of the Joint Venture Agreement says when there is less than unanimous consent, the members (making the decision without unanimous consent) could be held liable for damages sustained by other members. CR 15 (Ex 1)

agreement about 9 days after Phillips informed Chapmans and Williams that he wanted to buy them out. And, the joint venture property was sold to a third party for about \$100,000 less than Phillips offered to pay. CR 69

Section Two and Section Nine of the Joint Venture Agreement provided Phillips with recourse against Chapmans and Williams for money damages.<sup>5</sup> Section Two of the Joint Venture Agreement stated that if unanimous consent was not obtained by Chapmans and Williams related to the management of the joint venture (and it's sole asset), they were liable to Phillips for decisions that they made without the consent of Phillips (as the other member). If the trial court would have considered Phillips' claims for breach of fiduciary duty against Chapmans and Williams, as alleged in Phillips' declaration, Phillips claims for continuing misconduct by Chapmans and Williams for breach of duty of loyalty and care after the Joint Venture Agreement would have survived summary judgment. But, the trial court did not consider any actions by Chapmans and Williams after the Joint Venture Agreement was signed.

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<sup>5</sup> Section Two of the Joint Venture Agreement provided "...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) CR 15 (Ex 1)

Section Nine of the Joint Venture Agreement allowed Phillips to buy out Chapmans' and Williams' portions of the joint venture property through a first right of refusal. There were no stated terms of how that first right of refusal had to be exercised by Phillips (such as a requirement to meet or beat a third party offer). Each time Chapmans and Williams signed the three (3) purchase & sale agreements, they did so without notifying Phillips – thereby denying Phillips the ability to exercise his first right of refusal. And, when Phillips did give Chapmans and Williams written notice that he wanted to buy them out, 9 days later Chapmans and Williams signed the third and final purchase & sale agreement with a completely different buyer for about \$100,000 less than Phillips had offered. CR 69 (Ex 5, 6)

Chapmans and Williams wanted a quick sale. They had owed the joint venture property for decades and recouped their investment many times over. CR 69. Chapmans and Williams had frozen Phillips out of all decisions relating to the joint venture property right after Phillips purchased his 25% interest. CR 69. So, when Phillips wanted to inspect the joint venture property and wanted information regarding repairs and maintenance to the property prior to his purchase, Chapmans and Williams did not want to deal with any potential claims for loss or liability because they had failed to keep Phillips involved in the management of the

property. CR 69 (Ex 6). It was easier for Chapmans and Williams to sell to a third party than to deal with Phillips as a dissenting member of their joint venture. As argued in Phillips' declaration, the trial court should have let Phillips exercise his first right of refusal or allowed him to pursue his damages claim against Chapmans and Williams for the lost opportunity to own 100% of the joint venture property as was provided for under Section Nine of the Joint Venture Agreement and *RCW 7.52.260*.<sup>6</sup> The Court ordered a referee in its 2/23/2018 Order but a referee was not appointed and critical steps were missed by the trial court in the partition action. CR 38.

Respondents' brief states that the trial court ordered the sale of the joint venture property to a third party on 8/25/2017<sup>7</sup>, and that on

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<sup>6</sup>*RCW 7.52.260* provides: "When the proceeds of sale of any shares or parcel belonging to persons who are parties to the suit and who are known, are paid into court, the suit may be continued as between such parties, for the determination of their respective claims thereto, which shall be ascertained and adjudged by the court. Further testimony may be taken in court, or by a referee at the discretion of the court, and the court may, if necessary, require such parties to present the facts or law in controversy, by pleadings as in an original suit."

<sup>7</sup> At the time respondents filed the motion that was heard on 8/25/2017, they attached the 1<sup>st</sup> purchase & sale agreement to Christy. However, by the time their motion for sale was heard on 8/25/2017, they had already entered into the 2<sup>nd</sup> purchase & sale agreement with Hackett for a lower sales price. And, eventually, Chapmans and Williams entered into a third

2/23/2018, the trial court took judicial notice of that 8/25/2017 ruling.

However, by the time of the hearing on 2/23/2018, Chapmans and Williams had signed a third purchase & sale agreement without Phillips' knowledge or consent.<sup>8</sup>

Phillips did not stipulate to any of the sales terms or price under any of the three (3) separate purchase & sale agreements. Phillips objected to the sale of the joint venture property to any third party, and, Phillips objected to the sales price because it was at least \$135,000 less than he valued the property at. Phillips objected and presented evidence to the trial court that the sale price was too low and presented evidence that he wanted to buy out Chapmans and Williams to preserve his interest in the investment, but that Chapmans and Williams refused to honor Phillips first right of refusal under the Joint Venture Agreement.

Under the cross-claim filed by Phillips for partition (and RCW 7.52.260), Phillips was entitled to pursue his claim for money damages against Chapmans and Williams for actions they took under the Joint

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purchase & sale agreement for the joint venture property and sold to McElevey (a completely different buyer for an even lower sale price.)

<sup>8</sup> On 2/23/2018, when the court took judicial notice of its 8/25/2017 Order and ordered the sale of the joint venture property, it erred because the 8/25/2017 Order was based on a completely different sale than what was being presented to the court on 2/23/2018, and to a completely different party, for a completely different sale price. CR 38.

Venture Agreement without his knowledge and consent. Phillips argued that Chapmans and Williams' share of the proceeds from the sale of the joint venture property should be offset by any damages for loss of value that Phillips had suffered because of Chapmans and Williams breach of fiduciary duty of loyalty and care (when they failed to honor his first right of refusal and undersold the asset). However, the trial court did not rule on any of those claims by Phillips' in his opposition to summary judgment.

Phillips damages claim was based on the loss of the value (lost opportunity to own 100% of the joint venture property) to buy out Chapmans and Williams' interest in the joint venture property and hold onto that asset for an investment as he bargained for when he signed the Joint Venture Agreement. That is what the parties agreed to under the terms of the Joint Venture Agreement, but the trial court did not allow Phillips to pursue those claims against Chapmans and Williams at summary judgment.

### III. RAP 18.9 Sanctions Should Be Denied.

Phillips' appeal is not based on attempts to harass or delay the outcome. The joint venture property was sold and monies from that sale were already disbursed to Chapmans, Williams and Phillips.

Phillips appeal is not frivolous and is based on a good faith argument that the trial court did not apply the proper standard in ruling on summary judgment when it failed to consider evidence presented by Phillips in a light most favorable to Phillips. That evidence gave Phillips the right to pursue monetary damages in a trial against Chapmans and Williams under Section Two of the Joint Venture Agreement and *RCW 7.52.260*<sup>9</sup>.

There were no attorney fees awarded by the trial court because the written Joint Venture Agreement between the parties did not provide for that remedy in the event of a dispute. CR 15 (Ex 1). And, Phillips submits that attorney fees are not appropriate on appeal.

In *Streater v. White*, 26 Wn. App. 430, 435, 613 P.2d 187, rev. denied, 94 Wn.2d 1014 (1980), the Court of Appeals held that a court should consider that: (1) a civil appellant has a right to appeal under *RAP 2.2*; (2) all doubts should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is

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<sup>9</sup> Phillips' cross-claimed for partition against Chapmans and Williams, but the trial court did not enforce its Order for a referee (2/23/2018) or allow Phillips' to pursue monetary damages under the partition cross-claim. CR 15

frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no possibility of reversal. *See also, Johnson v. Mermis, 91 Wn. App. 127, 137 (1998)* ("An appeal is frivolous if, considering the entire record, it has so little merit that there is no reasonable possibility of reversal and reasonable minds could not differ about the issues raised.")

And in *Rhinehart v. Seattle Times, 59 Wn. App. 332, 798 P.2d 1155 (1990)*, the court held that where an appeal presents one arguably meritorious issue, the appeal will not be considered frivolous.

Similarly, the Supreme Court held that sanctions under *RAP 18.9* were not appropriate where three of the plaintiffs four claims were found to be frivolous, but one claim was not, in *Biggs v. Vail, 119 Wn.2d 129, 830 P.2d 350 (1992)*.

### CONCLUSION

Respondents claim that the trial court was correct in its ruling that the only relevant time period in this action was before the Joint Venture Agreement (and amendment) was signed. But that misses everything that happened between Phillips and Chapmans and Williams after the Joint Venture Agreement was signed. Phillips pled breach of fiduciary duty and

breach of the joint Venture Agreement, in his cross-claims, but it was not limited to one act of misconduct by Chapmans and Williams before the Joint Venture Agreement was signed. Chapmans and Williams breach their duty of loyalty and care to Phillips under the Joint Venture Agreement began after the Joint Venture Agreement was signed, within a few months of Phillips joining the joint venture, and continued through the time of summary judgment. CR 69 (Ex 1, 2, 3, 4, 5 & 6).

The listing of the only asset of the joint venture (which occurred without Phillips' knowledge and consent) occurred after the joint venture agreement was signed (2/3/2017) and before the complaint was filed (6/18/2017). After the complaint was filed, Chapmans and Williams froze Phillips out completely from all information and decisions regarding the joint venture, they entered into three (3) separate purchase & sale agreements and prevented Phillips from exercising his first right of refusal to buy out their interest at an agreed and fair price.

Section Nine of the Joint Venture Agreement provided Phillips with the remedy of purchasing Chapmans' and Williams' interest in the only asset of the joint venture if Phillips did not agree with their decision to sell. And, Section Two of the Joint Venture Agreement allowed

Phillips to sue Chapmans and Williams if they made decisions without his knowledge that damaged his interest in the joint venture.

Section Two of the Joint Venture Agreement and *RCW 7.52.260* of the partition statute provided Phillips with a remedy of money damages for any breach under the Joint Venture Agreement. These remedies were available for Phillips if he disputed the price that Chapmans and Williams were selling the joint venture property for. The purpose of the Joint Venture Agreement and partition statute is designed for members sharing an interest in real property to allow for termination of that relationship and division of their monetary interests. But, the trial court's failure to consider Phillips' declaration and exhibits presented in opposition to Chapmans and Williams' summary judgment prevented trial on those issues and Phillips right to damages under the Joint Venture Agreement.

The court should remand this matter for trial on Phillips' damage claim against Chapmans and Williams.

Dated: 5-10-19

Cassie N. Crawford  
CASSIE N. CRAWFORD, WSB#26241  
Attorney for Appellant

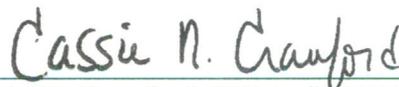
**CERTIFICATE OF SERVICE**

I certify that I caused the foregoing APPELLANT'S REPLY BRIEF  
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by email, a true copy to the foregoing on the 10<sup>th</sup> day of May, 2019

VANCOUVER LAND LAW CORP



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## Transmittal Information

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