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

KEITH ALAN ANDERSON, et al., Respondents,

v.

TERRY OKEN PHILLIPS, Appellant.

RESPONDENTS' BRIEF

Albert F. Schlotfeldt, WSBA #19153
aschlotfeldt@schlotfeldtlaw.com
Rachel J. Goldfarb, WSBA #53180
rgoldfarb@schlotfeldtlaw.com
The Schlotfeldt Law Firm, PLLC
900 Washington Street, Suite 1020
Vancouver, WA 98666-0570
Telephone: (360) 699-1201
Attorneys for Respondents

Table of Contents

I.	Introduction.....	1
II.	Restatement of Issues Pertaining to Assignments of Error.....	3
III.	Statement of the Case.....	3
	A. 1993 Purchase of Property at 1012 Esther Street, Vancouver, WA 98660	3
	B. Sale of Anderson’s Interest in the Property and Amendment to the Agreement.....	4
	C. Filing Suit.....	7
	D. 2017 Court Ordered Partition By Sale Of The Property.....	8
	E. Defendants’ Motion For Dismissal Of Phillips’ Claims...	10
IV.	Argument	11
	A. Legal Standard	11
	1. Summary Judgment	11
	2. Dismissal.....	12
	B. The Trial Court Properly Dismissed Each Of Phillips’ Four Cross-Claims Based On The Evidence Designated	12
	1. Phillips’ First Cross-Claim For Breach of Fiduciary Duty Was Properly Dismissed On Summary Judgment.....	12
	2. Phillips’ Second Cross-Claim For Partition by Sale Was Properly Dismissed On the Pleadings.....	15
	3. Phillips’ Third Cross-Claim For Breach of Contract Against Williams Was Properly Dismissed On Summary Judgment	17

4.	Phillips’ Fourth Cross-Claim For Misrepresentation Was Properly Dismissed On Summary Judgment	20
a.	Defendants Made No Representations Or False Statements	21
b.	Williams’ Encumbrances Proved To Be Immaterial And No Damages Were Suffered	22
c.	Phillips Was Not Ignorant Nor Reliant	23
d.	Defendants Owed No Duty To Phillips Prior To February 3, 2017	24
e.	Without Presenting A Scintilla Of Evidence Beyond Mere Allegations, Phillips Cannot Prove Misrepresentation By Clear, Cogent, And Convincing Evidence	25
f.	Trial Court’s Dismissal Of Phillips’ Fourth Cross-Claim Was Legally Supported	26
C.	Defendants Request Attorney Fees On Appeal	28
V.	Conclusion	29

Table of Authorities

Cases

<i>Baertschi v. Jordan</i> , 68 Wash.2d 478, 482, 413 P.2d 657 (1966)	27
<i>Boonstra v. Stevens-Norton, Inc.</i> , 64 Wn.2d 621, 624-25, 393 P.2d 287 (1964)	24
<i>Chen v. State</i> , 86 Wn. App. 183, 188, 937 P.2d 612, 615 (1997)	21

<i>Clements v. Travelers Indem. Co.</i> , 121 Wash.2d 243, 249, 850 P.2d 1298, 1301 (1993).....	11
<i>Dobbin v. Pac. Coast Coal Co.</i> , 25 Wn.2d 190, 191, 170 P.2d 642, 643 (1946).....	21
<i>Douglas Northwest, Inc. v. Bill O'Brien & Sons Constr., Inc.</i> , 64 Wn. App. 661, 678, 828 P.2d 565 (1992).....	21
<i>Kearney v. Kearney</i> , 95 Wn. App. 405, 417, 974 P.2d 872, 878 (1999).....	28
<i>LaPlante v. State</i> , 85 Wash.2d 154, 158, 531 P.2d 299, 301 (1975).....	11
<i>Larson v. Union Investment & Loan Co.</i> , 168 Wash. 5, 10 P.2d 557 (1932).....	19
<i>Lawyers Title Insurance Corp. v. Baik</i> , 147 Wash 2d. 536, 545, 55 P.3d 619, 623 (2002).....	27
<i>Marion v. Grand Coulee Dam Hotel</i> , 35 Wn.2d 589, 590, 214 P.2d 204, 205 (1950).....	23
<i>Oates v. Taylor</i> , 31 Wn.2d 898, 903-04, 199 P.2d 924 (1948).....	24
<i>P.E. Sys., LLC v. CPI Corp.</i> , 176 Wn.2d 198, 200, 289 P.3d 638, 640 (2012).....	12, 18
<i>Ross v. Kirner</i> , 162 Wn.2d 493, 499, 172 P.3d 701 (2007).....	21
<i>Specialty Asphalt & Constr., LLC v. Lincoln County</i> , 191 Wn.2d 182, 196, 421 P.3d 925, 934 (2018).....	21
<i>White v. State</i> , 131 Wash.2d 1, 9, 929 P.2d 396, 402 (1997).....	12

Rules/Statutes

CR 12 12, 18

CR 56 3

RAP 18.9..... 27, 28, 29

RAP 9.12..... 3

RCW 7.52.010 9

I. Introduction

The trial court's dismissal of Appellant Terry Phillips' ("Phillips") four cross-claims as averred in his June 13, 2017 pleading, based on the Court's review of the documentary evidence before it, and following the application of Washington law, should be affirmed.

First, Phillips has failed to identify reversible error made in the trial court's ruling. Nowhere in Amended Appellant's Brief does he explain to this Court that the trial court separately analyzed and dismissed Phillips' four causes of action against Respondents Patrick Williams ("Williams"), Annette Chapman, and Charles Chapman (collectively, "Defendants"). Likewise, Amended Appellant's Brief fails to identify which of the four dismissed cross-claims he believes should have survived the trial court's ruling and why.

Next, Amended Appellant's Brief discounts the thorough examination conducted by the trial court before dismissing each of his claims. As evidenced by the trial court's May 30, 2018 ruling now on appeal, the trial court did consider the bare assertions made in Phillips' Declaration in Opposition to Summary Judgment where relevant. However, much like this appeal, the majority of "facts" included in Phillips' declarations were either irrelevant to his cross-claims, previously

adjudicated, and/or unsupported by the documentary evidence. Ultimately, the evidence before the trial court could not be overcome, leaving Phillips' without triable issues of fact.

Finally, in reaching its ruling, the trial court properly considered the allegations underlying Phillips' causes of action *as set forth in his pleading*, as it was required to do. It was Phillips who responded to dismissal in the trial court by abandoning the claims set forth in his pleading, and arguing new allegations. The problem here is that the allegations raised by Phillips in opposition to summary judgment occurred in the year *AFTER* his operative pleading was filed and therefore could not logically have been the facts upon which his pleading was based. Additionally, the facts argued by Phillips in opposition to summary judgment were laid to rest in the trial court's prior order compelling partition by sale of the subject property. Yet still, the trial court's evaluation of the evidence led it to determine that Phillips could not prove any issue of material fact on the four cross-claims he asserted.

For the reasons that follow, the trial court's ruling dismissing Phillips' four cross-claims against Defendants should be affirmed.

II. Restatement of Issues Pertaining to Assignments of Error

A. The trial court properly granted Defendants' Motion for Summary Judgment on each of Phillips' four cross-claims after determining that Phillips' bare assertions were either moot, legally untenable, or unsupported by the evidence and unable to be proven.

B. The trial court properly designated the relevant evidence upon which it relied throughout its four-part ruling on Defendants' Motion for Judgment on the Pleadings and Summary Judgment and therefore committed no reversible error under RAP 9.12 or CR 56(h).

III. Statement of the Case

A. 1993 Purchase of Property at 1012 Esther Street, Vancouver, WA 98660

On November 11, 1993, Keith Anderson ("Anderson"), a non-party to this appeal, together with the three Defendants, purchased a parcel of real property located at 1012 Esther St, Vancouver, WA 98660 (the "Property"). CP 10 (Ex. A). Each of the four parties owned a one-quarter interest in the Property, as tenants in common, and together they co-managed the Property as a commercial real estate rental investment.

On June 30, 1994, Anderson and the Defendants entered into a Joint Venture Agreement, a partnership "to purchase, remodel, restore and

convert residential and commercial property for lease or sale...” (the “Agreement”). CP 15 (Ex. !).

For the next twenty-four years, Anderson and the Defendants owned and managed the Property for the stated purpose and without issue. CP 65 (¶ 4).

B. Sale of Anderson’s Interest in the Property and Amendment to the Agreement

In or around January, 2017, Anderson was facing personal crisis and originally unbeknownst to Defendants, sought a cash buyer for his one-quarter ownership interest in the Property. CP 65 (¶ 5). Phillips a real estate professional with 34 years of experience in the commercial real estate industry had learned of Anderson’s intention to sell his interest and made contact with Anderson.

On January 30, 2017, Phillips then corresponded with Defendant Annette Chapman via email and inquired whether he could “buy out a partner.” CP 67 (¶ 2, Ex. A) Annette Chapman’s response email states that she would talk to Anderson and get back to Phillips. *Id.* Prior to receiving a response from Annette Chapman, on February 1, 2017, Phillips contacted Clark County Title via email and ordered a Preliminary Title Report to be rush-delivered to him. CP 67 (¶ 3, Ex. B).

The very next day, on February 2, 2017 at 12:09 p.m., Phillips purchased Anderson's one-quarter interest in the Property via Quit Claim Deed¹. CP 10 (Ex. A).

The discovery produced in this matter revealed that in purchasing Anderson's share, Phillips acted hastily, and without the express approval of the Defendants. Phillips provided no evidence that he inquired of the Defendants as to any encumbrances on the property. Likewise, Phillips produced no evidence that he had permission of the Defendants to purchase Anderson's share on February 2, 2017.

There is also no evidence of external factors creating an urgency leading to Phillips' hasty purchase of Anderson's share in the Property without performing his due diligence. There is, however, evidence that Phillips went directly to the title company and independently ordered a title report on February 1, 2017, and then despite more than three decades of professional experience in real estate, purchased the property without awaiting delivery of the title report.

In fact, less than two hours after Phillips memorialized his purchase of Anderson's share of the Property on February 2, 2017, Ryan

¹ According to the Complaint, Phillips agreed to pay Anderson \$175,000.00, with \$100,000.00 paid at the time the deed was recorded on February 2, 2017, and the remaining balance to be paid in regular installments; this lawsuit arose following Phillips' alleged breach of that agreement with Anderson by Phillips' nonpayment of the remaining balance owed.

Wright, a Title Officer at Clark County Title, notified Phillips via an email sent at 1:42 p.m. of “a decent amount of judgments showing up for Patrick J. Williams” on the working copy of the preliminary title report. CP 67 (¶ 4, Ex. C).

On February 3, 2017 at 10:00 a.m., the day after buying a share in the Property, Phillips received the Preliminary Title Report on the Property through Clark County Title. CP 67 (¶ 5, Ex. D). The Preliminary Title Report identified IRS tax liens and judgments from 2008-2014, all attributed to Defendant Williams (“Williams’ Encumbrances”). *Id.* While the remaining Defendants had no prior knowledge of Williams’ Encumbrances, a March, 2017 telephone conversation with the IRS agent handling Williams’ tax matters confirmed that Williams’ Encumbrances attached only to Williams’ one-quarter interest in the property. CP 65 (¶ 9). The IRS’ assertion held true when the Property later sold on March 2, 2018 and only Williams’ one-quarter interest of the proceeds were collected by the IRS. CP 65 (¶ 10).

After completing his purchase of Anderson’s interest in the Property, and after receiving a copy of the title report, Phillips then informed Annette Chapman of the completed purchase and asked to be added to the Agreement. CP 65 (¶ 7). On February 3, 2017 at or about

8:22 p.m., the Amended Agreement was signed by Defendants Patrick Williams, Charles Chapman and Annette Chapman. CP 15 (Ex. !). As a matter of uncontroverted fact, Phillips was not a party to the Agreement at the time he purchased Anderson's interest in the Property.

C. Filing Suit

On February 24, 2017, Phillips presented a united front with Defendants Chapman and Chapman in drafting and sending correspondence to Defendant Williams regarding Williams' Encumbrances on the Property. CP 67 (¶ 6, Ex. E). At or about this time, a dispute [via text messaging] between Phillips and Anderson was brewing behind the scenes as Phillips stopped paying Anderson on the balance owed, in breach of their agreement, based solely on the existence of Williams' Encumbrances. CP 67 (¶ 7, Ex. F).

On April 20, 2017, Anderson filed suit against Phillips (as Amended on May 4, 2017). CP 3, 10. On June 13, 2017, Phillips answered and filed counter-claims against Anderson. CP 15. Phillips also brought four frivolous, retaliatory cross-claims against Defendants Williams, Chapman and Chapman, allegedly arising out of their common ownership of the Property prior to June 13, 2017 and all revolving around Williams'

Encumbrances on the Property. *Id.* (¶¶ 8-18). Phillips' four cross-claims filed against his new partners included:

1. Breach of Fiduciary Duty against all Defendants;
2. Partition Sale of the Property against all Defendants;
3. Breach of Contract against Defendant Williams; and
4. Misrepresentation against all Defendants.

Id. A plain reading of Phillips' cross-claims against Defendants leaves no doubt that the causes of action arose out of Phillips' February, 2017 *acquisition* of the Property from Anderson. *Id.* (¶¶ 11, 13, 15, 16, 18.) Phillips was looking for someone to blame for a purchase he rushed into and then regretted; the remaining owners of the Property, who played no part in Phillips' purchase and gained nothing from it, were an easy target. Ultimately, Phillips' purchase of Anderson's one-quarter interest in the Property caused the implosion of a partnership that had peacefully existed for twenty-four years.

D. 2017 Court Ordered Partition By Sale Of The Property

Following Phillips' filing of these claims against them, Defendants, amounting to a majority of the partnership, voted to sell the Property. In light of Phillips' second cross-claim seeking partition by sale of the Property, Defendants filed an August 4, 2017 Motion to Compel

Partition by Sale pursuant to RCW 7.52.010 et seq. CP 20-25, 28-30, 34-35. On August 25, 2017, a hearing was held before the trial court during which the partition by sale was ordered. The Court concluded that Washington partnership law controlled the transaction and ordered the sale. CP 38. Phillips' attorney contributed to drafting the terms of the Court's Order, stipulated to its form, and signed the Order in Court alongside opposing counsel prior to presentation of the Order for the Judge's signature; Phillips did not seek appellate review of the Court's Order on Partition. *Id.*

Anderson thereafter settled his dispute with Phillips and moved for Anderson's dismissal from the lawsuit, which was granted on December 18, 2017. CP 52.

In early 2018, a buyer was prepared to move forward with the purchase and sale of the Property, but Phillips refused to comply with the court's August 25, 2017 order compelling the sale. Defendants were again forced to seek the court's intervention. On February 23, 2018, the trial court ordered the parties to complete the sale of the Property, including the appointment of a Referee to handle any further disputes in moving towards closing. CP 38. The Court's Order was drafted by Phillips' counsel, in her handwriting, as she agreed that her client be bound to each

of the terms she drafted. *Id.* Phillips did not thereafter seek review of the trial court's February 23, 2018 Order.

Pursuant to the trial court's Order compelling partition by sale, and subsequent order outlining the terms in moving towards closing, the Property sold on March 2, 2018 to a cash buyer in excess of fair market value. The proceeds were split in four even shares, with Phillips and the Chapman Defendants each receiving their one-quarter interest of the net proceeds and the IRS taking Williams' one-quarter interest in partial satisfaction of his personal tax debts. These facts are not in dispute.

E. Defendants' Motion For Dismissal Of Phillips' Claims

Following the sale of the Property, Counsel for Defendants reviewed Phillips' pleading and determined that Phillips' cross-claims against Defendants had been fully resolved by the sale of the Property and proper distribution of proceeds. CP 67 (§ 8, Ex G). Through counsel, Phillips was asked to voluntarily dismiss his claims; Phillips refused. *Id.* Defendants were forced to incur the costs of seeking dismissal of Phillips' claims via dispositive motion. CP 66.

In Response to Defendants' Motion, Phillips abandoned his cross-claims, as pled, and instead attempted to re-litigate the issues underlying the court-ordered partition by sale. CP 68.

The trial court properly issued its ruling based on Phillips' operative pleading. Based on the evidence, and pursuant to Washington law, the trial court found that each of Phillips' four cross-claims had either been resolved by the sale of the Property, or was legally untenable, and therefore could not survive. CP 73. It is from the trial court's May 30, 2018 ruling that Phillips' frivolous appeal derives.

IV. Argument

A. Legal Standard

1. Summary Judgment

On review of summary judgment, an appellate court engages in the same inquiry as the trial court. Summary judgment is appropriate "if the pleadings, depositions, . . . together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Clements v. Travelers Indem. Co.*, 121 Wash.2d 243, 249, 850 P.2d 1298, 1301 (1993).

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, 531 P.2d 299, 301 (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, 929 P.2d 396, 402 (1997).

2. Dismissal

An appellate court treats a CR 12(c) motion for judgment on the pleadings identically to a CR (b)(6) motion to dismiss for failure to state a claim. *P.E. Sys., LLC v. CPI Corp.*, 176 Wn.2d 198, 200, 289 P.3d 638, 640 (2012). Like a CR 12(b)(6) motion, the purpose is to determine if a plaintiff can prove any set of facts that would justify relief *on the claim*. *Id.* (emphasis added).

B. The Trial Court Properly Dismissed Each Of Phillips' Four Cross-Claims Based On The Evidence Designated

1. Phillips' First Cross-Claim For Breach of Fiduciary Duty Was Properly Dismissed On Summary Judgment

Phillips' first cross-claim for breach of a fiduciary duty arose out of Defendants' alleged failure to inform Phillips of Defendant Williams' Encumbrances prior to Phillips' [February 2, 2017] purchase of the Property. CP 15 (¶ 8-11). Phillips averred that the [June 30, 1994] Agreement, as Amended [on February 3, 2017] created a fiduciary duty to Phillips that Defendants breached. *Id.*

In seeking summary judgment, Defendants argued that at the time of Phillips' purchase, no fiduciary duty was owed to him by Defendants.

CP 66. Phillips was not an original party to the June 30, 1994 Joint Venture Agreement and made his February 2, 2017 purchase of Anderson's interest in the Property *PRIOR* to seeking the Defendants' written authorization. The Agreement was later amended on the evening of February 3, 2017 when Defendants learned of Phillips' prior purchase and had little option but to amend the Agreement to include him.

Defendants also argued in the trial court that the Property had already sold on the open market, pursuant to the trial court's orders, and Williams' Encumbrances had, in fact, impacted only Williams' one-quarter interest of the proceeds leaving Phillips without damages. As stated in the trial court's ruling, it is uncontested that Phillips and the Chapman Defendants each received their full share of the sale proceeds, unaffected by Williams' Encumbrances. CP 73 (5:8-13).

Phillips' Opposition to summary judgment made not one reference to the first cross-claim facing disposition, as if conceding to Defendants' motion. CP 68. Phillips abandoned his pleading, and in fact, made arguments contrary to his pleading in attempting to re-litigate decisions made in the trial court's August 25, 2017 order compelling partition sale of the Property. In a bizarre request, Phillips' opposition to summary judgment concluded by urging the trial court to hold a trial on the facts

surrounding the court ordered sale of the property. *Id.* (10:1-3). Phillips had filed neither a pleading nor a motion seeking the relief it suddenly requested in response to summary judgment.

Following oral argument, the trial court issued its written ruling dismissing Phillips' first cross-claim for want of evidentiary support. CP 73 (3:16-4:26). The court's order designates the documents and other evidence reviewed, which included: (1) Phillips' August 18, 2017 Declaration; (2) Annette Chapman's August 4, 2017 Declaration; (3) the February 2, 2017 quit claim deed from Anderson to Phillips, (4) the February 3, 2017 Amended Agreement, (5) Attorney Rachel Goldfarb's March 30, 2018 Declaration, (6) e-mail correspondence between Phillips and Annette Chapman, and (7) e-mail correspondence from Phillips to the title company prior to Phillips' purchase of an interest in the Property. *Id.*

The trial court's order directly quotes Phillips' misstatement of the date upon which he purchased the Property, which misstatement was contradicted by the documentary evidence. CP 73 (4:3-4). The court then applied Washington common law in reaching the proper determination that:

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 subject property.

Phillips has failed to set forth specific facts showing that there is a genuine issue for trial. Summary judgment is appropriate on this claim.

CP 73 (4:22-26). Phillips' failure to provide any evidence in support of his first cross-claim made summary judgment appropriate and should be affirmed. *Id.* Likewise, the extraneous arguments improperly raised by Phillips on summary judgment were either outside the pleadings, or had been previously adjudicated, and therefore were not properly before the trial court, nor this Court of Appeals.

2. Phillips' Second Cross-Claim For Partition by Sale Was Properly Dismissed On the Pleadings

Phillips' Second Cross-Claim sought a court ordered sale of the Property and distribution of the proceeds to the parties. CP 15 (¶¶ 12-13). On August 25, 2017 and February 23, 2018, the trial court ordered the sale of the Property and on March 2, 2018, the Property sold to a cash buyer in excess of fair market value. CP 38 and 63. It is an uncontested fact that Phillips, Annette Chapman and Charles Chapman each received their share of the proceeds, unaffected by Williams' Encumbrances; the IRS collected only Williams' share of the proceeds in partial satisfaction of his debts. Despite these facts, Phillips refused to voluntarily dismiss his claim.

Defendants moved for judgment on the pleadings under 12(c), arguing that Phillips' second cross-claim was rendered moot by the March

2, 2018 sale of the Property. CP 66 (4:13-18). Phillips' Second Cross-Claim sought partition of the Property and the trial court's August 25, 2017 Order granted the relief sought. CP 38. Pursuant to paragraph 4 of the Order, this Court ordered the sale of the Property, and ruled that a majority vote of the partnership would dictate the sale of the Property. *Id.* (¶ 4). Defendants comprise 3/4 of the partnership, and it was with a 3/4 majority vote that the partition sale was completed, following the trial court's February 23, 2018 Order appointing a Referee. Phillips raised no disputes or objections before the Referee prior to closing on the sale of the Property.

Phillips' opposition to disposition of his second cross-claim failed to address the mootness of his claim, as pleaded. CP 68. Newly raised arguments falling under the trial court's August 25, 2017 and February 23, 2018 orders, which comprised the entirety of Phillips' opposition in the lower court, and the majority of the appeal herein, are foreclosed from being heard.

In issuing its ruling, the trial court took judicial notice of its August 25, 2017 Order in which "it granted Williams' and the Chapmans' motion and ordered the property in question be sold and the proceeds disbursed be disbursed to the parties." *Id.* (5:9-10). The trial court did not

consider any evidence outside the pleadings in determining that “the action being requested by Phillips has already occurred” and therefore no set of facts would entitle him to relief. *Id.* Phillips’ second cross-claim against Defendants was therefore properly dismissed under CR 12(c). *Id.* at 5:14-19.

Phillips’ failure to prove any set of facts that would justify relief on his second cross-claim made judgment on the pleadings appropriate; the trial court’s order should be affirmed.

3. Phillips’ Third Cross-Claim For Breach of Contract Against Williams Was Properly Dismissed On Summary Judgment

Phillips’ Third Cross-Claim alleged that Defendant Williams breached the Agreement by allowing his personal tax liens and judgments to attach to the Property [between 2008 and 2014]. CP 14 (¶¶ 15). Phillips’ pleading further avers that Williams’ share of the proceeds should be treated subject to the terms of the Agreement. CP 14 (¶¶ 16).

In support of dismissal or summary judgment on Phillips’ third cross-claim, Defendants argued that: (1) Phillips bought an interest in the Property in 2017, subject to Williams’ Encumbrances and years after the encumbrances attached to the Property; (2) Phillips lacked standing to bring claims for violation of the Agreement occurring in 2008-2014

because he held no legal interest in the Property at that time and only became a member to the Agreement upon its February 3, 2017 Amendment; and (3) Phillips' hypothetical damages were never realized because the Property sold and Williams' Encumbrances impacted only Williams' share of the proceeds. CP 66 (4:25-5:9).

Phillips' opposition to summary judgment did not address the Defendants' dispositive argument on this third cross-claim, as pleaded². CP 68.

In determining whether an issue of fact would prevent dismissal of Phillips' third cross-claim, the trial court considered only the attachments to Phillips' pleading, the original Joint Venture Agreement, as Amended on February 3, 2017³. In applying Washington Supreme Court jurisprudence on breach of contract actions, the trial reasoned that because Williams' Encumbrances attached to the Property [years] before the Agreement was signed to include Phillips, Williams' prior acts could not

² Likewise, not one of the arguments set forth in § III, A, B, or C of Amended Appellant's Brief arises out of Phillips' cross-claims, as pled. Moreover, these arguments do not address the four cross-claims that were before the trial court on Defendants' Motion for Judgment of Law and Motion for Summary Judgment, making these improperly raised issues on appeal.

³ Although the Court converted Defendant's Motion to Dismiss Phillips' third cross-claim from CR 12(c) to a CR 56 motion for summary judgment, the trial court's designation of evidence reveals that the only documents considered by the trial court nothing more than the contracts attached to Phillips' pleading were needed to make a legal determination. CP 15. As a matter of procedure, the court's conversion was unnecessary and the ruling was actually made consistent with CR 12(c). *See, i.e., P.E. Sys., LLC v. CPI Corp.*, 176 Wn.2d 198, 205, 289 P.3d 638, 642 (2012).

have breached a later-arising duty to Phillips under the Agreement. CP 73 (6:5-16), citing *Larson v. Union Investment & Loan Co.*, 168 Wash. 5, 10 P.2d 557 (1932).

In the same confusing manner as exhibited in the lower court, Phillips' attorney dedicates eight pages of Amended Appellant's Brief (16-24) to arguing that the trial court made an error in dismissing the breach of contract claim against the Chapman Defendants for acts they allegedly took in selling the property a year after Phillips' complaint was filed. *Phillips never sued the Chapman Defendants for breach of contract.* See Amended Appellant's Brief at Argument § III; see also CP 14 (¶¶ 14-16). Further, Phillips' third cross-claim does not include allegations against Williams for events occurring in the year after the cross-claims were filed. *Id.*

The trial court committed no error in disregarding Phillips' irrelevant assertions regarding matters outside his pleading before granting summary judgment. Phillips' failure to provide any evidence in support of his third cross-claim made summary judgment appropriate and should be affirmed.

4. Phillips' Fourth Cross-Claim For Misrepresentation Was Properly Dismissed On Summary Judgment

Phillips' fourth cross-claim alleged that Defendants misrepresented the title matters to Phillips knowing that Phillips would rely on the misrepresentations in purchasing Anderson's interest in the Property. CP 15 (¶¶ 17-18). Phillips' pleading did not indicate whether he intended to bring his claims for negligence or for fraud, so Defendants' Motion on Summary Judgment addressed both torts.

In seeking dismissal of Phillips' fourth cross-claim, Defendants provided the trial court with substantial evidence on which to base its ruling. In contrast, Phillips failed to offer even a scintilla of evidence supporting his bare allegations that: (1) Defendants knew of Williams' title encumbrances on the Property, which Defendants deny, or that (2) Defendants made representations or false statements to him regarding title to the Property, which Defendants also deny.

In substance, a plaintiff claiming negligent misrepresentation must prove, by clear, cogent, and convincing evidence, that: (1) the defendant supplied false information to another in his business transaction; (2) the defendant knew or should have known that he or she supplied the information to guide the plaintiff in a business transaction; (3) the

defendant negligently communicated the false information; (4) the plaintiff justifiably relied on the false information; and (5) the false information proximately caused the plaintiff's damages. *Specialty Asphalt & Constr., LLC v. Lincoln County*, 191 Wn.2d 182, 196, 421 P.3d 925, 934 (2018), citing *Ross v. Kirner*, 162 Wn.2d 493, 499, 172 P.3d 701 (2007).

Similarly, to establish fraud, the plaintiff must demonstrate: (1) representation of an existing fact; (2) materiality; (3) falsity; (4) speaker's knowledge of its falsity; (5) speaker's intention that it shall be acted upon by the plaintiff; (6) plaintiff's ignorance of falsity; (7) reliance; (8) right to rely; and (9) damages. *Chen v. State*, 86 Wn. App. 183, 188, 937 P.2d 612, 615 (1997). Fraud is never presumed, but must be proved. *Dobbin v. Pac. Coast Coal Co.*, 25 Wn.2d 190, 191, 170 P.2d 642, 643 (1946). To that end, each element of fraud must be proven by clear, cogent, and convincing evidence. *Id.*, citing *Douglas Northwest, Inc. v. Bill O'Brien & Sons Constr., Inc.*, 64 Wn. App. 661, 678, 828 P.2d 565 (1992).

a. Defendants Made No Representations Or False Statements

Defendants denied knowledge of the attachment of Williams' Encumbrances to the Property. CP 65 (§ 9). The Property had been owned and operated under the Agreement and without issue for nearly 24 years

prior to Phillips' ruinous entrance. Following the 1993 purchase of the Property, the partners never again had reason to order a title report on their own land. *Id.* at ¶ 4. Phillips failed to offer a scintilla of evidence supporting his allegation that Defendants knew of the Williams' Encumbrances on the Property.

Phillips has failed to offer evidence supporting the allegation that the Defendants made representations or false statements to him regarding title to the property. To the contrary, the evidence proved that Phillips, a real estate professional, ordered his own title report on the Property and then purchased the Property without awaiting the title report's delivery a day later. The record also reflects that Phillips quickly purchased the Property from Anderson before Defendants permitted the purchase under the terms of the Agreement. CP 15 (Ex. !).

b. Williams' Encumbrances Proved To Be Immaterial And No Damages Were Suffered

Again, the hypothetical impact of Williams' Encumbrances on the remaining partners' share of the proceeds was never felt. The Property sold to a cash buyer on March 2, 2018, in excess of fair market value, and Phillips received his one-quarter share of the proceeds.

c. Phillips Was Not Ignorant Nor Reliant

If a Plaintiff investigates for himself and nothing is done to prevent his investigation from being as full as he chooses, he cannot say that he has relied on Defendant's representations. *See Marion v. Grand Coulee Dam Hotel*, 35 Wn.2d 589, 590, 214 P.2d 204, 205 (1950).

To prevail on a claim for misrepresentation, Phillips was required to prove his ignorance to the representations he claims are false. Beyond the fact that there is no evidence of any representation made by Defendants, Phillips cannot hide behind the shield of ignorance in his field of expertise.

Phillips ordered a title report on the Property on February 1, 2017 CP 67 (¶ 3, Ex. B). On February 2, 2017, Phillips received notice of potential liens and judgments from Clark County Title. *Id.* (¶ 4, Ex. C). On February 3, 2017, Phillips received a Preliminary Title Report from Clark County Title identifying all of the immaterial title encumbrances herein complained of. *Id.* (¶ 5, Ex. D). Phillips' professionally informed decision to rush into the purchase of Anderson's share of the Property, without first conducting due diligence, and without the Defendants' written consent does not equate to ignorance under the common law. Phillips must bear responsibility for this choice.

**d. Defendants Owed No Duty To Phillips
Prior To February 3, 2017**

In order to prove misrepresentation, Phillips was required to show that misrepresentations were made, and that he had a right to rely on the alleged representations made to him by the Defendants. *Boonstra v. Stevens-Norton, Inc.*, 64 Wn.2d 621, 624-25, 393 P.2d 287 (1964); *Oates v. Taylor*, 31 Wn.2d 898, 903-04, 199 P.2d 924 (1948).

Defendants were not in contract negotiations with Phillips and never entered into a contract with him. As stated in the Anderson's Complaint, Phillips negotiated the purchase of Andersons' interest in the Property with Anderson. CP 10. Defendants had nothing to gain from allegedly misleading Phillips- they received no consideration from the Phillips/Anderson contract and were not parties thereto. Defendants were notified of the sale and amended their partnership Agreement to include Phillips purchase of Anderson's interest in the Property. CP 65 (¶ 8).

Prior to February 3, 2017, Defendants owed no independent duty to Phillips. This leads back to Phillips's first cross-claim for breach of a fiduciary duty and Defendants' arguments in response thereto. Defendants owed no fiduciary duty to Phillips prior to the evening of February 3, 2017, when Phillips became a member of the partnership under the Amended Agreement.

e. Without Presenting A Scintilla Of Evidence Beyond Mere Allegations, Phillips Cannot Prove Misrepresentation By Clear, Cogent, And Convincing Evidence.

In sum, Phillips negotiated with Anderson for Anderson's one-quarter share in the Property. Phillips' extensive experience in commercial real estate led him to order a title report prior to purchasing a share in this commercial real estate. Phillips decision not to await delivery of the title report prior to entering into a contract with Anderson was his alone to make. Phillips decision to purchase Anderson's interest in the Property prior to gaining partnership under the Agreement was his alone to make. And in the end, the hypothetical damages Phillips asserted in his cross-claims against the Defendants as a result of Williams' Encumbrances never came to be. The Property sold and only Williams' share of the damages were collected on by the IRS; Phillips and the Chapman Defendants each collected their share of the proceeds.

Phillips failed in his duty to provide evidence showing Defendants' misrepresentations or false statement regarding title to the Property; Phillips failed to provide evidence that Defendants had any knowledge regarding Williams' Encumbrances; Phillips ordered a title report on the Property prior to executing his contract with Anderson, whereby negating

his claim of ignorance to any title-related issues; and most importantly, Phillips failed to show any damages suffered. As such, Phillips Fourth Cross-Claim must be dismissed.

f. Trial Court's Dismissal Of Phillips' Fourth Cross-Claim Was Legally Supported

Yet again, Phillips response in opposition to summary judgment failed to address Defendants' dispositive argument on this fourth cross-claim, as pleaded. CP 68.

In issuing its ruling, the trial court properly designated the evidence upon which it relied, including Phillips' August 18, 2017 Declaration filed in opposition to Defendants' Motion to Compel Partition by Sale, and Phillips' April 16, 2018 Declaration filed in opposition to summary judgment. CP 30, 69, 73 (6:22-28). The trial court also designated the Declarations of Williams and the Chapmans. CP 20-22, 73 (7:3-4).

In a light most favorable to Phillips, the trial court then analyzed Phillips' fourth cross-claim, based on the evidence, and pursuant to Washington common law on both fraud and negligent misrepresentation. CP 73 (7:5-8:12). The trial court's inquiry made it no further than the first prong of each alleged tort, which required Defendants to have made an

affirmative representation of material fact in order to be held legally liable to Phillips. *Id.* (7:5-26), citing *Lawyers Title Insurance Corp. v. Baik*, 147 Wash.2d. 536, 545, 55 P.3d 619, 623 (2002), and *Baertschi v. Jordan*, 68 Wash.2d 478, 482, 413 P.2d 657 (1966).

Phillips' bare assertions that Defendants *failed* to provide him with information prior to his hasty, February 2, 2017 purchase of Anderson's interest in the Property, without their written authorization, does not create an issue of fact under negligent misrepresentation or fraud. In making it no further than the first element of the alleged torts, the trial court properly held:

both negligent misrepresentation and fraud require an affirmative representation of some information, not the withholding of it. Phillips has failed to show how this alleged failure to provide him with information satisfies the elements of either negligent misrepresentation or fraud. Summary judgment is appropriate on this cross claim.

CP 73 (8:9-13).

Phillips' failure to provide evidence of an affirmative misrepresentation allegedly made to him by Defendants amounts to a lack of support for his fourth cross-claim; summary judgment was therefore appropriate and should be affirmed.

C. Defendants Request Attorney Fees On Appeal

RAP 18.9 allows the appellate court to award compensatory damages when a party files a frivolous appeal. *Kearney v. Kearney*, 95 Wn. App. 405, 417, 974 P.2d 872, 878 (1999). An appeal is frivolous when there are no debatable issues over which reasonable minds could differ, and there is so little merit that the chance of reversal is slim. *Id.* at 418 (internal citations omitted).

Defendants request an award of fees under RAP 18.9 in this case because Phillips presented no debatable issues over which reasonable minds could differ; this appeal has no merit as it fails to cite to a specific reversible error in any of the trial court's four separate rulings and therefore, the chances for reversal are slim.

Phillips' Opposition to Defendants' Motion for Judgment on the Pleadings/Summary Judgment was entirely nonresponsive to the legal issues before the trial court. The trial court's decision was inarguably supported by the law and the evidence, where applicable, and there was no error in the trial court's decision based on Phillips' cross-claims, as filed. Despite these facts, Phillips again presented the same off-topic, chaotic, and irrelevant issues to this Court, forcing Defendants to incur additional costs, far in excess of those already suffered. Phillips' arguments reveal an

utter lack of familiarity with the causes of action set forth in his pleading; he filed this appeal as if another set of claims had been pled and was before the trial court.

For example, eight pages of Phillips' Amended Appellant's Brief (16-24) are dedicated to arguing that the trial court made an error in dismissing the breach of contract claim against the Chapman Defendants for acts they allegedly took in selling the property a year after Phillips' complaint was filed. *Phillips never sued the Chapman Defendants for breach of contract.* CP 15. Equally confusing is that the sale of the Property was conducted pursuant to two trial court orders which are not the subject of this appeal; the orders were stipulated to by Phillips' attorney; and the prior court orders were not contested.

Defendants respectfully urge they are entitled to fees and costs under RAP 18.9 for defending this meritless and frivolous appeal.

V. Conclusion

Phillips' opposition to summary judgment in the trial was court a last-ditch effort to resurrect the moot, issue precluded or otherwise legally untenable claims set forth in his June 13, 2017 pleading. In the same fashion, the arguments set forth in Amended Appellant's Brief neither address nor object to the rulings made by the trial court on summary

judgment or dismissal. Phillips has failed to allege specific error in any of the four decisions made in the lower court's dispositive ruling and therefore his appeal must fail.

Amended Appellant's Brief mirrors his trial court opposition to disposition of his cross-claims by moving beyond the facts pleaded and causes of action sought in his operative pleading, and improperly focuses on events previously adjudicated by the trial court in the years prior to its dispositive ruling.

The trial court properly analyzed the claims, applicable laws, and designated evidence before it in reaching its well-reasoned dispositive rulings. Following review, Defendants urge this Court to affirm the trial court's May 30, 2018 Ruling and Order on Defendants' Motion for Partial Judgment on the Pleadings and Motion for Summary Judgment.

Respectfully submitted this 11th day of March, 2019.

THE SCHLOTFELDT LAW FIRM, PLLC

s/ Rachel J. Goldfarb
ALBERT F. SCHOTFELDT, WSBA# 19153
RACHEL J. GOLDFARB, WSBA# 53180
Attorneys for Respondents

DECLARATION OF SERVICE

I hereby declare under the penalty of perjury under the laws of the State of Washington that I caused a true and correct copy of the **RESPONDENTS' BRIEF** to be served upon the following by the method(s) indicated below, addressed as follows:

Cassie N. Crawford	<input type="checkbox"/>	U.S. Mail
Vancouver Land Law		
PO Box 61488	<input checked="" type="checkbox"/>	E-Service
Vancouver, WA 98666-1488		
Email: cassie@vancouverlandlaw.com	<input type="checkbox"/>	Hand Delivery

DATED: March 11, 2019.

Brenton J. Wochnick
Brenton J. Wochnick
Executed at Vancouver, WA

THE SCHLOTFELDT LAW FIRM, PLLC

March 11, 2019 - 11:26 AM

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