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COURT OF APPEALS
DIVISION II

Court of Appeals No. 36748-3-IL
Thurston County Superior Court No. 06-2-01459-3

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STATE OF WASHINGTON
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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

GARY STOWE and DOUGLAS TAYLOR, d/b/a TS DESIGN,

Appellants,

v.

STATE OF WASHINGTON DEPARTMENT OF REVENUE

Respondent.

BRIEF OF APPELLANTS

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I. INTRODUCTION

The State of Washington imposes a tax on all retail sales in the state. It also imposes a tax on the sale of real property. A “speculative builder,” who builds a house on his own property and then puts it on the market, first pays retail sales tax on construction materials and then pays real estate excise tax on the sale of the property. However, the sale is not subject to the business and occupation or retail sales tax.

On the other hand, when a customer hires a contractor to build a “custom home” on the customer’s land, the contractor does not pay retail sales tax for the construction materials; rather, the retail sales tax is applied to the contractor’s sale of the house itself, to the customer.

Here, the plaintiffs are two of the members of a joint venture in which a third member contributed land, and plaintiff builders contributed labor and materials to build a new house on the land. The members of the joint venture orally agreed they would build the house on speculation and split the profits.

When the house was almost finished, it was placed on the market and then sold to Gerard and Lauren Hilterbrant. From the sale proceeds, the joint venture paid the third member for the land, and a loan he made to the joint venture, and the remaining proceeds were divided evenly between the members.

The key issue is whether the joint venture is taxed as a speculative builder selling property which it has improved on a speculative basis, or

whether the plaintiffs acted as custom home builders, or prime contractors, building and selling a new home to a land owner.

The Department of Revenue concluded that because title to the land was not conveyed to the joint venture by deed, the sale to Mr. and Mrs. Hilterbrant should be taxed as the sale of a custom house rather than a sale of property. The plaintiffs appealed this decision to the trial court, which granted summary judgment to the Department of Revenue.

The trial court erred in granting summary judgment for three reasons. First, the ruling ignores Washington case law holding that property may belong to a joint venture or partnership as a result of an oral agreement, without conveying the property into the joint venture by deed. Second, the trial court failed to properly apply state regulations and assess the relevant attributes of ownership for purpose of identifying speculative builders, rather than merely identifying the owner in title. Finally, the trial court erred because at the very least, material issues of fact exist as to whether the plaintiffs were speculative or custom home builders. For these reasons, the plaintiffs request that summary judgment be reversed.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in granting summary judgment to the Department of Revenue on the basis of its holding that as a matter of law, the plaintiffs should be taxed as a prime contractor building a custom home rather than as a speculative builder (conclusion of law 2).

2. The trial court erred in finding that although the land owner “contributed” real property to a joint venture (findings of fact 1, 2), the owner “never transferred ownership” of the land to the joint venture (finding of fact 3).

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred when it held as a matter of law that a land owner may not orally convey property to a joint venture? (Assignments of Error 1, 2)

2. Whether plaintiffs, who formed a joint venture with a land owner to build a house on speculation for subsequent sale to a third party, properly paid sales tax on the construction materials rather than collecting and paying sales tax on the price of the finished home? (Assignment of Error 1)

3. Whether the trial court erred when it ruled as a matter of law that the plaintiffs did not qualify as speculative builders when they contributed labor and materials to a joint venture to build a house on land that was contributed to the joint venture, for the purpose of placing the house on the market when finished? (Assignments of Error 1, 2)

IV. STATEMENT OF THE CASE

A. Stowe and Taylor Go Into Business Together.

Plaintiffs Gary Stowe and Douglas Taylor went into business together in November 2000 to build homes, and called the business “TS Design.” CP 108. When they started TS Design, they did not have the

capital or credit to acquire land and purchase materials. CP 113. In December 2000, they approached Gary Stowe's uncle, Bryan Stowe, who had vacant land near a golf course.¹ CP 114-115. The parties entered into an oral joint venture agreement. They agreed that Bryan Stowe would contribute land and advance Gary Stowe and Douglas Taylor² funds for their contribution of labor and materials to build a house on the land, whereupon the three of them would put the house on the market and share the profit. CP 115, 253.

Beginning around January 1, 2001, Plaintiffs spent approximately nine months building a single-family residential house on the property. CP 111-12. During construction, they paid retail sales tax on all construction materials. CP 189. When the house was nearly finished, it was placed on the market, and sold shortly thereafter to Mr. and Mrs. Gerard Hilterbrant. CP 151, 238.

B. The Joint Venture Pays Tax Applicable to a Speculative Builder

At the closing of the sale to the Hilterbrants, all of the members of the joint venture were listed as sellers. CP 240-42. Prior to a division of profits, the joint venture paid for the costs of construction and the acquisition of the land, in accordance with their agreement. CP 237-39,

¹ Title to the land was in the name of Staatz Bulb Farm, an entity that was acquired by High-Cedars Golf Club, Inc., a Washington corporation owned and managed by Bryan Stowe. CP 70, 72.

² For convenience, Gary Stowe and Douglas Taylor, doing business as TS Design, are referred to hereafter as "Plaintiffs."

245. Plaintiffs duly reported and paid all taxes due upon the construction and sale of the house. CP 246.

In 2004, the Department of Revenue ("DOR") audited the transaction and assessed an additional \$45,065.00 in tax, interest, and penalties, plus extension interest of \$2,070.83 as of May 1, 2006. CP 13. DOR assessed the additional amounts based on a theory that the house built by Plaintiffs was a custom home because title to the land had not been conveyed to the Plaintiffs or the joint venture by deed. CP 185. DOR did not recognize the oral joint venture agreement that was entered into prior to the commencement of construction, but instead took the position that the house was a custom home built for Bryan Stowe, who in turn sold it to Mr. and Mrs. Hilterbrant.

DOR's decision was based on its determination that Plaintiffs were not engaged in a joint venture to which the members of the joint venture had contributed land and services, but rather that the land owner had hired the Plaintiffs to construct a custom home which it had then sold to Mr. and Mrs. Hinterbrant. Therefore, DOR determined that Plaintiffs are subject to retailing B&O tax, retail sales tax, use tax, penalties and interest.

C. Procedural History

The Plaintiffs paid the tax, penalties and interest and appealed the decision to the Appeals Division of DOR. CP 3-17. On March 31, 2006, the Appeals Division of DOR issued its determination that Plaintiffs had

built a custom home for Bryan Stowe's company. CP 7-14. On July 7, 2006, TS Design appealed this decision to the superior court. CP 3-6.

On July 19, 2007, DOR moved for summary judgment on two issues: (1) whether the Hilterbrant home was a speculative or a custom built home, and (2) whether the taxpayer had demonstrated that the value of the land upon which the home was built was \$90,000 rather than \$75,000. CP 194-227. For purposes of DOR's summary judgment motion, it conceded that a joint venture had been formed between the land owner and the Plaintiffs. CP 196, footnote 1. However, DOR argued that the joint venture could not be taxed as a speculative builder because title to the property had not been conveyed to the joint venture by deed. CP 204.

On August 17, 2007, the court granted summary judgment as to the first issue, and denied summary judgment as to the second issue. CP 287-89. DOR subsequently stipulated to the Plaintiffs' position on the second issue regarding adequate documentation of the \$90,000 land value. *Amended Notice of Appeal to Court of Appeals, Division II*. The taxpayer now appeals the trial court's grant of summary judgment as to the first issue.

V. ARGUMENT

A. The Standard of Review Is De Novo.

The August 17, 2007 Order grants in part Revenue's motion for summary judgment. CP 287-89. The standard of review for a summary

judgment order is de novo. *Berrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.3d 82 (2005).

When the summary judgment requires application of a revenue-generating statute, a long-standing canon of statutory construction is that "taxing statutes are construed most strongly against the government and in favor of the taxpayer." *Dep't of Revenue v. Hoppe*, 82 Wn.2d 549, 552, 512 P.2d 1094 (1973) (citing *Foremost Dairies, Inc. v. State Tax Comm'n*, 75 Wn.2d 758, 762, 453 P.2d 870 (1969) and *Gould v. Gould*, 245 U.S. 151, 38 S. Ct. 53, 62 L. Ed. 211 (1917)).

When a party disputes the trial court's factual findings, the appellate court's role is to determine whether substantial evidence supports the findings. *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 712, 732 P.2d 974 (1987). "'Substantial evidence' is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise." *Id.* Conclusions of law mislabeled as findings of fact are reviewed as conclusions of law. *E.g., Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986) (citing *Woodruff v. McClellan*, 95 Wn.2d 394, 396, 622 P.2d 1268 (1980)).

Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.*, 123 Wn.2d 891, 897, 874 P.2d 142 (1994); CR 56. The moving party in summary judgment proceedings bears the burden of demonstrating the absence of any genuine issue of material fact. *Magula v. Benton Franklin Title Co.*, 131 Wn.2d

171, 182, 930 P.2d 307 (1997). A “material fact” is one that determines the outcome of the claim. *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993).

The evidence and the reasonable inferences drawn from the evidence must be viewed in a light most favorable to the nonmoving party. *Schaaf v. Highfield*, 127 Wn.2d 17, 21, 896 P.2d 665 (1995). Even if the basic facts are not in dispute, if those facts are reasonably subject to conflicting inferences, summary judgment is improper. *Southside Tabernacle v. Church of God*, 32 Wn. App. 814, 821, 650 P.2d 231 (1982). Summary judgment motions should be granted only if from all the evidence reasonable persons could reach but one conclusion. *Clements*, 121 Wn.2d at 249.

B. The State Taxes Gross Business Income or Sales

The State of Washington taxes the privilege of engaging in business in this state, measured by the value of products, the gross proceeds of sales, or the gross income of the business, as the case may be. RCW 82.04.220. Washington also imposes a retail sales tax upon each “retail sale,” which includes services rendered in the form the construction of homes for consumers. RCW 82.04.050(2).

Thus, when a consumer hires a contractor to build a house on the consumer’s land (a “custom house”), the contractor pays a retail sales tax on the sale of the new house. However, the contractor does not pay retail sales tax on the concrete or lumber that become part of the home. On the

other hand, when a person builds a house on his own property, hoping to make a profit upon the sale of that property (a “speculative house”), the person pays retail sales tax on the building materials, and real property excise tax on the sale of the real property.

C. Members of the Joint Venture Orally Agreed to Build a House for the Mutual Profit of all Members

In its order granting summary judgment, the trial court presumed the existence of a joint venture to which its members contributed labor and land, respectively. CP 288. However, the trial court erroneously held that as a matter of law, Plaintiffs should be “taxed as a prime contractor and not as a speculative builder on the Hilterbrant house because it was constructed on a lot neither the Taxpayer nor the joint venture owned.” *Id.* (citing RCW 82.04, RCW 82.08, *Rigby v. State*, 49 Wn.2d 707 (1957), and *Riley Pleas*, 88 Wn.2d 933 (1977)). The court did not address WAC 458-20-170, the DOR regulation defining ownership for purposes of applying the retail sales tax on sales of personal property, such as newly constructed houses. However, DOR acknowledged the applicability of its regulation to the court’s determination. CP 201-02.

The DOR regulation, WAC 458-20-170, looks to the substance of a transaction in order to identify a speculative builder, rather than simply relying upon the identity of the record title holder. The DOR regulation provides, in pertinent part:

(2) Speculative builders.

(a) As used herein the term 'speculative builder' means one who constructs buildings for sale or rental upon real estate owned by him. The attributes of ownership of real estate for purposes of this rule include but are not limited to the following: (i) The intentions of the parties in the transaction under which the land was acquired; (ii) the person who paid for the land; (iii) the person who paid for improvements to the land; (iv) the manner in which all parties, including financiers, dealt with the land. The terms 'sells' or 'contracts to sell' include any agreement whereby an immediate right to possession or title to the property vests in the purchaser.

WAC 458-20-170(2).

Thus, the rule for applying retail sales tax to home sales identifies four non-inclusive "attributes" of ownership of real estate as guidelines for distinguishing between speculative and custom homes. The common denominator underlying these guidelines is the idea that one who develops his own property is taxed on the sale of the property, whereas one who builds homes for a customer is taxed on the sale of the home.

Applying the four attributes of ownership identified above reveals that the substance of the agreement in the case at bar was for the land to be contributed to a joint venture, for the joint venturers to develop the property on a speculative basis, and then sell the property on the market for the mutual benefit of the joint venture.

1. The Joint Venture Intended to Develop Its Own Property on a Speculative Basis for Mutual Profit.

The first attribute of ownership for purposes of identifying a speculative builder is the "intentions of the parties in the transaction under

which the land was acquired.” WAC 458-20-170(2)(a). Here, the land at issue was acquired by the joint venture for the express purpose of development; in fact the lot had been earmarked for residential development even before it was contributed to the joint venture.

Title to the land was held by Staatz Bulb Farm, Inc., which was part of a golf course owned and managed by Bryan Stowe. CP 70, 72. Bryan Stowe, on behalf of himself and Staatz Bulb Farm, Inc., agreed to contribute a lot to a joint development venture with the Plaintiffs, pursuant to which the Plaintiffs would build a new home, the property would be sold, and the profits would be shared. CP 83. Mr. Stowe also agreed to advance monies for construction costs, on a “handshake” basis. CP 237-38. As one of the plaintiffs described the agreement,

Gary and I went down to the golf course and we met with Bryan and talked to him about what our, you know, goals were and what we wanted to do. And he goes “I’ve got lots.” He goes, “Pick out a lot and go find a house plan. Build the house. I’ll finance it and we’ll split the profits.”

CP 114-15.

Each of the parties then made their contribution, and approximately nine months later, the property was put on the market and sold to the Hilterbrants. CP 238. The closing documents listed “Doug Taylor, Gary Stowe and Staatz Bulb Farms, Inc.” as sellers. CP 240-43.

From this evidence, the trial court found that the land owner had “contributed” land to the joint venture, but concluded that the joint venture did not “own” the land because it had not been transferred by deed. CP

288. In so ruling, the trial court ignored both the rule defining ownership for purposes of applying the retail sales tax as arising out of ownership, as well as the long-established Washington law recognizing oral joint venture agreements.

Washington courts have long held that a joint venturer may contribute real property to a joint venture by oral agreement. *Malnar v. Carlson*, 128 Wn.2d 521, 533, 910 P.2d 455 (1996). In *Malnar*, real property was held in the name of a corporation in which the plaintiff had no legal ownership. *Id.* at 531. The defendant argued that a verbal agreement to sell the land for the mutual benefit of the plaintiff and defendant was unenforceable. *Id.* at 523-24. The Supreme Court rejected that argument, stating

The Defendant relies on RCW 64.04.010 which generally requires conveyances of real estate to be by deed. This statute does not apply to the present case. In Washington an oral agreement of partners for the purpose of buying and selling real estate, whereby lands are purchased and held in the name of one partner for profit and resale, is not within the statute of frauds. Such agreements are not contracts for the sale or transfer of interests in land and need not be in writing.

Malnar, 128 Wn.2d at 533 (citations omitted).

Thus, where joint venturers agree to hold property in the name of one member for the ultimate sale to a third party for their mutual profit, as opposed to conveying real property from one member to another, the agreement is not a conveyance of real estate and is not subject to the real estate statute of frauds, RCW 64.04.010. *Malnar*, 128 Wn.2d at 533

Moreover, the ruling in *Malnar* is consistent with the Supreme Court's subsequent admonition that RCW 64.04.010 "must be narrowly construed and not applied to agreements that are not 'strictly within its terms.'" *Firth v. Lu*, 146 Wn.2d 608, 614, 49 P.3d 117 (2002) (holding that transfer of shares in a corporation that operates a housing cooperative is not subject to the real estate statute of frauds). The *Malnar* ruling is also consistent with the DOR regulation defining speculative builders, which looks at factors such as the intent of the parties to a transaction rather than relying on its technical form.

The trial court, however, ignored *Malnar* and agreed with DOR that the joint venture could not "own" real property unless it had been conveyed by deed. DOR's position in this case is not even consistent with its prior position. In a 2001 brief to the Board of Tax Appeals, DOR acknowledged that a joint venture may own land with holding legal title.

In its own words:

Because the taxpayer ... did not hold legal title, it must be treated as a custom builder, *unless* (1) there was a joint venture between it and the holders of title to the land, it performed the construction in its capacity as a member of the joint venture, and it was not necessary that title to the property be held in the name of the joint venture as opposed to other members of the joint venture.

White-Leasure Development Company v. Department of Revenue, Docket No. 55226, Board of Tax Appeals (2001) (quoting the Department's brief). In *White-Leasure Development*, unlike the present case, the Board of Tax Appeals found that the parties did not have a joint venture

agreement. In this case, at the very least, there are material issues of fact as to the terms of the joint venture agreement between the Plaintiffs and Bryan Stowe, including whether Plaintiffs performed the construction in their capacity as members of a joint venture.

Rather than granting summary judgment as a matter of law, the trial court should have applied WAC 458-20-170(2), the DOR regulation that defines speculative builders by assessing various attributes of ownership rather than merely who holds title. The first guideline listed is “the intentions of the parties in the transaction under which the land was acquired.” If the relevant parties are the members of the joint venture who “acquired” the lot when it was contributed to the joint venture, then the parties to the transaction clearly intended that the joint venture would build a speculative home for sale on the open market. Even if the relevant intention is that of the owner prior to the joint venture agreement, Bryan Stowe intended to develop the lots into residential homes for speculative sale. Thus, the first element supports a finding that plaintiffs should be taxed as a speculative builder.

2. The Members of the Joint Venture Shared the Costs as Well as the Profit.

The second and third guidelines for identifying an owner who is improving his property on a speculative basis are “who paid for the land” and “who paid for the improvements.” WAC 458-20-170(2).

Here, the joint venturers paid for both the land and the improvements; the house was not placed on the market until it was

substantially finished. CP 151, 178-79. Before any profit was distributed from the sale to Mr. and Mrs. Hilterbrant, the joint venture deducted the cost of acquiring the land as well as the cost of construction. From the sale proceeds, the joint venture, acting through Douglas Taylor, paid Staatz Bulb Farm, Inc. for the lot and repaid Bryan Stowe for money he had loaned, and only then distributed profits among the partners. CP 238-39. Had the joint venture failed to make a profit, it still would have been obligated to pay for the land and to repay funds advanced during construction.

In addition, during construction of the house, the joint venture “paid tax at source to subcontractors and material vendors ...,” as a speculative builder is required to do under WAC 458-20-170(2)(e) (speculative builders must pay retail sales tax upon all materials purchased by them and all charges made by their subcontractors). Had this been a custom home, Plaintiffs would not have paid retail sales tax as they purchased building materials; instead, the Hilterbrants would have paid retail sales tax when they purchased the finished house.

Thus, the first three “attributes of ownership” used to define speculative builders under DOR’s regulation – the intent of the parties, who paid for the land, and who paid for the improvements -- indicate that Plaintiffs properly paid tax as speculative builders of the home sold to the Hilterbrants.

3. The Manner in Which All Parties Dealt with the Land is Consistent with a Speculative House rather than a Custom House.

The final guideline identified by DOR is “the manner in which all parties, including financiers, dealt with the land.” WAC 458-20-170(2)(a). Here, all parties dealt with the land as though it had been contributed to the joint venture, regardless of their ability to articulate the concept in legal terms.

For example, although Bryan Stowe described the contribution of the land as a “sale without charge” to his fellow joint venturers, he clearly intended for the property to be sold to a home buyer for mutual profit, with no intervening “sale” to another member of the venture. In Mr. Stowe’s words,

The reason that we did this is that he seemed like a capable builder and everything and he wanted to build houses. I needed somebody to build houses and so we actually sold him – we actually were selling him the lot without charging him for the lot and getting him going so that he could build some credit so he could go to the bank and borrow his own money, which is exactly what happened in the end.

CP 83. After the lot was contributed to the venture, all of its members had the right of possession. Again, even if the parties could not articulate the legal theory, the Plaintiffs believed that the joint venture “owned” the property. In Plaintiff’s words,

[TS Design and Staatz Bulb Farm] were members of the joint venture, which means the joint venture owned the whole thing as a land/home package, which turned around and sold it to Lauren and Gerard Hilterbrant when it went for sale and they made an offer on it.

CP 131 (Deposition of Douglas D. Taylor).

Thus, “manner in which all parties dealt with the land” supports the fact that for purposes of identifying the substance of the transaction, the joint venture built a speculative house on its own property, pursuant to an oral agreement, and then sold the developed property to Mr. and Mrs. Hinterbrant and split the profits, also pursuant to the joint venture agreement.

Under these circumstances, the trial court’s grant of summary judgment should be reversed. Particularly with respect to oral agreements, summary judgment is inappropriate where the terms of the agreement is disputed.

Oral contracts are often, by their very nature, dependent upon an understanding of the surrounding circumstances, the intent of the parties, and the credibility of witnesses. If a dispute exists with respect to the terms of the oral contract, then summary judgment is not appropriate. Instead, the trier of fact in a trial setting should make the final determination with respect to the existence of the contractual agreement.

Duckworth v. Langland, 95 Wn. App. 1, 6-7, 988 P.2d 967 (1998) (citations omitted). Moreover, DOR, as nonmoving party, has the burden of proving the absence of genuine issues of material fact. *Magula*, 131 Wn.2d at 182.

DOR cites *Rigby v. State* to support its argument that the joint venture could not be attributed with ownership of the property because Staatz Bulb Farm held the title, and thus the right to possession. CP 202

(citing *Rigby v. State*, 49 Wn.2d 707, 710-11, 306 P.2d 216 (1957)). In *Rigby*, homeowners signed earnest money agreements to buy homes from a contractor before the contractor built the homes, and DOR sought to collect retail sales tax from the homeowners for the sale of custom homes. *Rigby*, 49 Wn.2d at 709. However, the earnest money agreements gave no right to possession until the sales closed, by which times the homes were complete, so the Supreme Court held that the homeowners owed only real estate excise tax for the purchase of the properties. *Id.* at 710-11.

Similarly, DOR relies on *Riley Pleas, Inc. v. State*, in which a construction company agreed to sell property with “turnkey” housing to a public housing authority. CP 202 (citing *Riley Pleas, Inc. v. State*, 88 Wn.2d 933, 568 P.2d 780 (1977)). In *Riley Pleas*, DOR sought to assess retail sales tax on the contractor’s construction purchases. Again, the Supreme Court observed that although the housing authority signed purchase agreements prior to construction, it did not obtain a right to possession until construction was complete. *Riley Pleas*, 88 Wn.2d at 934-35.

These decisions differ significantly from the facts presented here. Here, the issue before the trial court was whether a reasonable person could find, from the facts and circumstances, that the parties orally agreed to form a joint venture to build a house on the lot owned by one of them for resale and profit, or whether the facts and circumstances show, as a matter of law, that the Plaintiffs agreed to build a custom house for Bryan Stowe. If the former is true, then the joint venture is entitled to establish at

trial that it is a speculative builder under the tax rules. WAC 458-20-170(2)(a). If the latter is true, then the joint venture is a prime contractor under the tax rules and must pay B&O tax and retail sales tax on the gross contract price of the home. WAC 458-20-170(1)(a), (3) and (4).

The law and the facts presented here, particularly when the facts are viewed in the light most favorable to the plaintiffs, and in light of the law governing joint ventures and the assessment of the retail sales tax, show that DOR cannot satisfy its burden of proving that as a matter of law the joint venture is not a speculative builder. Once the property was orally contributed to the joint venture, the parties treated it as the property of the joint venture, as is apparent from the escrow documents prepared at the time of the sale of the property to the Hinterbrants, which list all of the joint venturers, and not only Staatz Bulb Farm, as "sellers." CP 240-42. Moreover, had Staatz Bulb Farm, Inc. been the true "seller" of the property to the Hilterbrants, rather than the joint venture, either it or its owner, Bryan Stowe, would have received and had control over all the sale proceeds. Instead, Douglas Taylor received and allocated the sale proceeds to payment for the property, repayment of loans to the joint venture, and the sharing of the profits among the partners. CP 124-25. None of these facts presented by Plaintiffs were controverted by DOR.

Thus, the facts and circumstances show that after the partners entered into the oral joint venture agreement they at all times treated the property as joint venture property. At the very least, material issues of fact exist as to whether Bryan Stowe "sold" the property to the joint venture

with a hope for future, speculative, mutual profit, or whether he “hired” the plaintiffs as prime contractors to build a house for him. In either case, summary judgment was inappropriate.

VI. CONCLUSION

The Department of Revenue based its motion for summary judgment on a mistaken and convoluted theory that the lot upon which the house was built was not part of a joint venture, but was in fact retained by one of the joint venturers who had the other two joint venturers construct a custom home for him. In doing so, they ask the Court to look at the form of the transaction rather than its substance, contrary to Washington law (and the common sense “duck test”³). This is clearly a disputed material fact, as the Plaintiffs presented uncontroverted evidence that the property was, in fact, included in a joint venture. Consistent with the house being a speculative rather than a custom house, the intent of the parties was to sell the real property, with the new house, for their mutual benefit. Consistent with building on speculation, Plaintiffs paid sales tax on all of the materials that went into the house as they purchased them. And all three joint venturers sold the house and lot and distributed the sales proceeds.

Because the trial court relied upon material disputed facts, and failed to identify the attributes of ownership based on the substance of the transaction rather than the form when it granted summary judgment to the Department of Revenue, the appellants respectfully ask this court to

³ If a bird looks like a duck, swims like a duck, and quacks like a duck, then it’s probably a duck.

reverse the trial court's order granting summary judgment and allow this case to proceed to trial, where the facts may properly be determined.

DATED this 21st day of December, 2007.

VANDEBERG JOHNSON & GANDARA, LLP

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Attorneys for Appellants

COURT OF APPEALS
DIVISION II
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CERTIFICATE OF SERVICE

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

That on December 21, 2007, I caused to be delivered a true and correct copy of BRIEF OF APPELLANTS

to: Charles E. Zalesky
Assistant Attorney General
Washington State Attorney General
Revenue Division
7141 Cleanwater Dr SW
Olympia, WA 98504

by personally delivering a copy to the person(s) identified above.

DATED this 21st day of December, 2007, at Tacoma, Washington.


LUCY R. CLIFTHORNE