

FILED
DEC 19 2014

No. 30096-0-III

IN THE COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

A.M. TODD COMPANY, INC.,

Plaintiff/Respondent

v.

B & G FARMS, INC., a Washington corporation, and MICHAEL B.
BROWN and MAGGIE BROWN, individually and the marital
community composed thereof,

Defendants/Appellants.

BRIEF OF APPELLANTS

Patrick Acres
WSBA 3197
Attorney for Appellants

1022 South Pioneer Way
Moses Lake, WA. 98837
(509) 765-9265

FILED
10/10/06

No. 30096-0-III

IN THE COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

A.M. TODD COMPANY, INC.,

Plaintiff/Respondent

v.

B & G FARMS, INC., a Washington corporation, and MICHAEL B.
BROWN and MAGGIE BROWN, individually and the marital
community composed thereof,

Defendants/Appellants.

BRIEF OF APPELLANTS

Patrick Acres
WSBA 3197
Attorney for Appellants

1022 South Pioneer Way
Moses Lake, WA. 98837
(509) 765-9265

I. TABLE OF CONTENTS

I. TABLE OF CONTENTS..... i

II. TABLE OF AUTHORITIES ii

III. ASSIGNMENTS OF ERROR 2

IV. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 2

V. STATEMENT OF THE CASE..... 4

A. FACTS 4

B. PROCEDURE..... 9

VI. ARGUMENT 10

A. STANDARD OF REVIEW..... 10

B. TRIABLE ISSUES OF MATERIAL FACT REMAIN WHETHER DEFENDANTS EXECUTED THE ALLEGED PROMISSORY NOTE UNDER DURESS FROM PLAINTIFF. 12

C. DEFENDANTS ARE ENTITLED TO AN ACCOUNTING FROM PLAINTIFF OF PROFITS MADE UNDER THE JOINT VENTURE AGREEMENT. 21

D. THE TRIAL COURT ERRED IN AWARDING ATTORNEY FEES AND COSTS TO PLAINTIFF..... 23

VII. CONCLUSION..... 23

VIII. APPENDIX 24

IX. CERTIFICATE OF MAILING..... 25

II. TABLE OF AUTHORITIES

Washington Cases

<i>Adams v. Johnston</i> , 71 Wn. App. 599, 611, 860 P. 2d 423 (1993).....	12
<i>Barker v. Walter Hogan Enterprises, Inc.</i> , 23 Wn. App. 450, 453, 596 P. 2d 1359 (1979).....	9, 14
<i>Donaldson v. Greenwood</i> , 40 Wn. 2d 238, 249, 242 P. 2d 1038 (1952)..	13
<i>Gleason v. Metropolitan Mortgage Co.</i> , 15 Wn. App. 481, 493, 551 P. 2d 147, review denied, 87 Wn. 2d 1011 (1976).....	11, 12, 13, 18
<i>Harstad v. Frol</i> , 41 Wn. App. 294, 301-02, 704 P. 2d 638 (1985).....	14
<i>Kelly v. Powell</i> , 55 Wn. App. 143, 147-48, 776 P. 2d 996 (1989)	19
<i>Lybbert v. Grant County</i> , 141 Wn. 2d 29, 34, 1 P. 3d 1124 (2000).....	6
<i>Nord v. Eastside Association, Ltd.</i> , 34 Wn. App. 796, 664 P. 2d 4 (1983)	17
<i>Rains v. Walby</i> , 13 Wn. App. 712, 717, 537 P. 2d 833, review denied, 86 Wn. 2d 1009 (1976).....	13, 16
<i>Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket, Inc.</i> , 96 Wn. 2d 939, 640 P. 2d 1051 (1982).....	17, 18
<i>Stipcich v. Marinovich</i> , 13 Wn. 2d 155, 161-62, 124 P. 2d 215 (1942) ...	12
<i>Vasquez v. Hawthorne</i> , 145 Wn.2d 103, 106, 33 P.3d 735 (2001).....	7

Federal Cases

<i>Best Buy Co. v. Harlem Irving Companies, Inc.</i> , 51 F. Supp. 2d 889, 898 (N.D. Ill. 1989).....	10
<i>Sauget v. Johnson</i> , 316 F. 2d 816, 818 (9 th Cir. 1963)	19

Other Cases

<i>Blumenthal v. Tener</i> , 642 NYS2d 26 (1996)	14
<i>Intertel, Inc. v. Bank of America, Arizona</i> , 985 P. 2d 596 (Az. App. 1999)	15
<i>Litten v. Jonathan Logan, Inc.</i> , 286 A. 2d 913 (Pa. Super. 1972)	16

Statutes

RCW 25.05.165 (1), (2) (b)	16
RCW 62A.3-305 (a) (3)	9
RCW 62A3-305 (a) (1) (ii), (2).....	8

Rules

CR 54 (c).....	19
CR 56 (a).....	6

Other Authorities

12 Am Jur 2d Bills & Notes § 563.....	8
---------------------------------------	---

III. ASSIGNMENTS OF ERROR

1. The trial court erred in granting summary judgment against Defendants.
2. The trial court erred in awarding attorney fees against Defendants.

IV. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Do triable issues of material fact remain whether the 2007 promissory note was obtained by plaintiff through duress?
2. Do triable issues of material fact remain whether the agreement executed by the parties on March 4, 1999 was a joint venture agreement?
3. Do triable issues of material fact remain whether A. M. Todd owed Defendants a fiduciary duty of loyalty as a joint venturer under the March 4, 1999 agreement?
5. Do triable issues of material fact remain whether A.M. Todd breached a fiduciary duty of loyalty owed to Defendants by failing to account in accordance with paragraph 2d of the March 4, 1999 agreement for profits from the sale by A. M. Todd of mint oil purchased from Defendants?
6. Do triable issues of material fact remain whether A.M. Todd breached a fiduciary duty of loyalty owed to Defendants by advancing its own interests in demanding the promissory note from Defendants over the interests of Defendants in securing the funds needed to continue farming operations?

7. Do triable issues of material fact remain whether A.M. Todd breached a fiduciary duty of loyalty owed to Defendants by demanding that Mike and Margie Brown obligate themselves personally on the 2007 promissory note for the debt incurred by B & G Farms during the term of the joint venture agreement?
8. Are Defendants entitled to an accounting from A.M. Todd of the joint venture agreement as a recoupment against A.M. Todd's action on the 2007 promissory note?
9. Are Defendants entitled to an accounting from A.m. Todd for any benefits obtained from it breaches of fiduciary duty?
10. Are Defendants entitled to an accounting upon dissolution of the joint venture?
11. Do triable issues of fact remain whether Defendants demanded an accounting from A.M. Todd of profits from the sale by A. M. Todd of mint oil purchased from Defendants?
12. Do unresolved triable issues of material fact render premature the trial court's award of attorney fees and costs to A.M. Todd?

V. STATEMENT OF THE CASE

A. FACTS

Plaintiff, A. M. Todd Company, and Defendants, Michael and Maggie Brown and B & G Farms, Inc., have done business together for decades.¹ B & G Farms, Inc. began selling mint oil to A. M. Todd in the late 1970s.² B & G sold mint oil to A.M. Todd every year thereafter until 2005.³ In 1999, however, A. M. Todd approached Defendants with a proposal to enter into a joint venture agreement.⁴ A. M. Todd submitted its proposal in a letter dated March 4, 1999, which was accepted on behalf of B & G Farms by Michael Brown.⁵ Paragraph 1a of that agreement called for B & G Farms to use its best efforts to produce not less than the specified number of pounds of choice oil for crop years 1998 through 2002.⁶ Paragraph 2a of that agreement called for B & G Farms to participate in the revenues generated by A. M. Todd from the sale of choice Peppermint oil purchased by it from B & G.⁷ Paragraph 2a (i) called for A. M. Todd to pay B & G one-half of ' A. M. Todd's "*participation amount*", defined as the excess, if any, of the aggregate revenues generated by A. M. Todd from the sale of such oil, using the base

¹ CP 112.

² CP 118 lines 2-6.

³ CP 118 lines 12-18.

⁴ CP 119 lines 6-7.

⁵ CP 121 line 18-CP 122 line 14; CP 123-133.

⁶ CP 123.

⁷ CP 125-26.

sale price at which it markets and sells such oil (excluding its overhead or pass-through charges), over the price paid by it to B & G Farms to purchase such oil.⁸ Paragraph 2a (ii) required A. M. Todd to use reasonable commercial efforts to market, sell and distribute such oil on terms likely to maximize its participation amount.⁹ Paragraph 2a (iii) permitted A. M. Todd to offset against its participation amount otherwise payable to B & G Farms to the extent of any indebtedness owing by B & G Farms to it.¹⁰ Paragraph 2b permitted A. M. Todd to participate in revenues generated by B & G Farms from the sale of Pool Oil, consisting of the excess, if any, of the sale of Pool Oil over B & G Farms' cost basis in such oil.¹¹

Under Paragraph 2c, B & G Farms was required, at A. M. Todd's option, to produce an annual report by an independent accounting firm of nationally recognized standing acceptable to it and B & G Farms, of B & G Farms' participation amount.¹² Under Paragraph 2d, A. M. Todd was obligated to deliver to B & G Farms by April 15 of each year a report prepared by Ernst & Young (or other independent accounting firm then serving as A. M. Todd's outside accounting firm) which report was to be

⁸ *Ibid.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² CP 126.

based upon procedures mutually acceptable to A.M. Todd and B & G Farms, which report was to verify A. M. Todd's participation amount for the twelve month period ending on the last day of February immediately preceding such April 15.¹³

Michael Brown signed the joint venture agreement on behalf of B & G Farms in his capacity as president.¹⁴ Neither Michael Brown nor Margie Brown assumed any personal liability under the joint venture agreement.¹⁵

B & G Farms complied with Paragraph 2c.¹⁶ A. M. Todd never complied with Paragraph 2d, despite repeated requests by Michael Brown.¹⁷ The accounting that A. M. Todd did provide did not comply with Paragraph 2d, in that it was not prepared by an independent accounting firm, and the accounting failed to provide any information on the price at which it sold the oil.¹⁸ Michael Brown repeatedly requested to examine A. M. Todd's records, and was repeatedly put off by its representatives.¹⁹ To this day, Defendants still have no idea as to the price

¹³ CP 126-27.

¹⁴ CP 133.

¹⁵ CP 123-133.

¹⁶ CP 111-14.

¹⁷ CP 134 line 15-CP 135 line 25; CP 136 line 20-CP 137 line 5; CP 138 line 20-CP 139 line 21.

¹⁸ CP 140 lines 20-24.

¹⁹ CP 141 lines 8-2.

at which A. M. Todd sold mint oil produced by B & G Farms under the 1999 Joint Venture Agreement.²⁰

Michael Brown understood that the 1999 agreement constituted a joint venture.²¹ Michael Brown understood that the agreement called for an equal sharing of profits and losses.²² The accounting that A. M. Todd did provide reflects its understanding that the 1999 Joint Venture Agreement called for an equal sharing of profits and losses.²³

B & G Farms met its production goals under the 1999 Joint Venture agreement.²⁴ To meet B & G's obligations under that agreement, Defendants invested between 11 and 12 million dollars in new acreage, mint stills, choppers, tractors and other infrastructure.²⁵ As a result, B & G Farms' production went from a few hundred thousand pounds of mint oil to 1.37 million pounds in 2001.²⁶ At the height of production under the Joint Venture Agreement, B & G Farms' production represented 7 to 8 percent of the U.S. market for mint oil.²⁷ B & G Farms sold 100 percent

²⁰ CP 112 lines 23-25.

²¹ CP 120 lines 6-7.

²² CP 142 line 25-CP 143 line 5.

²³ CP 144-53.

²⁴ CP 154 lines 10-12.

²⁵ CP 155 line 13-CP 156 line 3.

²⁶ CP 157 lines 19-25.

²⁷ CP 158 lines 5-11.

of its mint oil production to A. M. Todd under the Joint Venture Agreement.²⁸

A. M. Todd and B & G Farms executed contracts for spearmint and peppermint oil in 2005 and 2006.²⁹ Those contracts did not contain the revenue and loss sharing provisions of the 1999 Joint Venture Agreement.

In 2007, Defendants were facing liquidation, so they sought refinancing of their operation through a lender, Rabo.³⁰ Rabo required that A. M. Todd release mortgages they held on Defendants' real property.³¹ A. M. Todd received \$500,000 from the refinance proceeds in exchange for releasing their mortgages.³²

Mike Brown had extensive dealings with A. M. Todd's representative, Tyler Schilperoort. Tyler visited B & G Farms two or three times per week.³³ Mike Brown and Tyler became friends, and he trusted Tyler.³⁴ Tyler presented Mike Brown with the promissory note.³⁵ Mike Brown was unsure of the number in the promissory note presented by

²⁸ CP 159 lines 1-3.

²⁹ CP 164-70.

³⁰ CP 171 line 19-CP 172 line 20.

³¹ CP 173 lines 21-25.

³² CP 174 lines 21-22.

³³ CP 175 lines 24-25.

³⁴ CP 116 lines 5-15; CP 176 lines 7-15.

³⁵ CP 177 line 6-CP 178 line 5.

Plaintiff, so he talked to Tyler.³⁶ Mike Brown asked Tyler where the number in the promissory note came from; Tyler gave yet another evasive answer.³⁷ Faced with the imminent prospect of losing his farming operation that he had worked 30 years to build, Mike Brown signed the promissory note.³⁸ Mike Brown signed the promissory note in Tyler's presence.³⁹ Mike Brown signed the promissory note contemporaneously with the Rabo refinance.⁴⁰

B. PROCEDURE

A. M. Todd filed this action against Defendants on March 29, 2010.⁴¹ In its complaint, A. M. Todd sought recovery on the 2007 promissory note.⁴² Defendants filed an answer in which they alleged that the 2007 promissory note was procured under duress, and Defendants requested an accounting from A.M. Todd of the joint venture agreement.⁴³

A. M. Todd filed a motion for summary judgment.⁴⁴ Defendants filed a memorandum in opposition to summary judgment.⁴⁵ On June 24,

³⁶ CP 179 lines 7-22.

³⁷ CP 180 line 20-CP 181 line 3.

³⁸ CP 182 line 16-CP 183 line 12.

³⁹ CP 184 lines 6-13.

⁴⁰ CP 185 lines 17-19.

⁴¹ CP 2-8.

⁴² *Ibid.*

⁴³ CP 11-14.

⁴⁴ CP 22-33.

⁴⁵ CP 98-110.

2011, the trial court entered an order granting summary judgment against Defendants.⁴⁶ On July 21, 2011, Defendants filed a notice of appeal.⁴⁷

VI. ARGUMENT

A. STANDARD OF REVIEW.

The trial court's order granting summary judgment is reviewed *de novo* on appeal. *Lybbert v. Grant County*, 141 Wn. 2d 29, 34, 1 P. 3d 1124 (2000).

A. M. Todd's Motion for Summary Judgment invokes CR 56 (a), (c), (e):

(a) For.

(c) Motion and Proceedings. The motion and any supporting affidavits, memoranda of law, or other documentation shall be filed and served not later than 28 calendar days before the hearing. The adverse party may file and serve opposing affidavits, memoranda of law or other documentation not later than 11 calendar days before the hearing. The moving party may file and serve any rebuttal documents not later than 5 calendar days prior to the hearing. If the date for filing either the response or rebuttal falls on a Saturday, Sunday, or legal holiday, then it shall be filed and served not later than the next day nearer the hearing which is neither a Saturday, Sunday, or legal holiday. Summary judgment motions shall be heard more than 14 calendar days before the date set for trial unless leave of court is granted to allow otherwise.

Confirmation of the hearing may be required by local rules. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on

⁴⁶ CP 213-15; APP. 1.

⁴⁷ CP 216.

file, 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. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages....

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

The rules governing summary judgment were restated in *Vasquez v.*

Hawthorne, 145 Wn.2d 103, 106, 33 P.3d 735 (2001):

A summary judgment motion under CR 56(c) can be granted only if the pleadings, affidavits, depositions, and admissions on file demonstrate no genuine issues of material fact, and that the moving party is entitled to judgment as a matter of law. The court must consider all facts submitted and all reasonable inferences from those facts in the light most favorable to the nonmoving party. The motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion. *Ellis v.*

City of Seattle, 142 Wash.2d 450, 458, 13 P.3d 1065 (2000).

The Court should undertake to consider the order granting summary judgment with the foregoing principles in mind.

B. TRIABLE ISSUES OF MATERIAL FACT REMAIN WHETHER DEFENDANTS EXECUTED THE ALLEGED PROMISSORY NOTE UNDER DURESS FROM PLAINTIFF.

Duress is a defense to an action on a promissory note. RCW

62A3-305 (a) (1) (ii), (2) provides as follows:

(a) Except as stated in subsection (b), the right to enforce the obligation of a party to pay an instrument is subject to the following:

(1) A defense of the obligor based on ... (ii) duress, ... which, under other law, nullifies the obligation of the obligor, ...

(2) A defense of the obligor stated in another section of this Article or a defense of the obligor that would be available if the person entitled to enforce the instrument were enforcing a right to payment under a simple contract...”);

See also 12 Am Jur 2d Bills & Notes § 563 (“*Economic duress or business compulsion is a defense available to the maker against the payee.* (Footnote omitted)”).

Business compulsion is a species of duress. *Barker v. Walter Hogan Enterprises, Inc.*, 23 Wn. App. 450, 453, 596 P. 2d 1359 (1979).

The elements of business compulsion are discussed in *Barker*:

We need not explore all the ramifications of the doctrine of business compulsion. It is a species of duress involving involuntary action in which one is compelled to act in such a manner that either he suffers a serious business loss or he is compelled to make a monetary payment to his detriment. *Starks v. Field*, 198 Wash. 593, 89 P.2d 513 (1939). Nevertheless, it has been said wisely that contracts made under stress are a daily occurrence, and if such urgency is to affect their validity, no one could safely negotiate with a party who finds himself in difficulty by virtue of financial adversities. *Starks v. Field*, supra.

Thus, the key elements to the doctrine revolve around the meaning of the words “involuntary” and “compelled.” Implicit in both words is the concept that the immediacy of the situation renders impractical any court action by which the victim might avoid the burden of either of the detrimental choices. See *Sunset Copper Co. v. Black*, 115 Wash. 132, 196 P. 640 (1921). Accordingly, in this jurisdiction, the doctrine of business compulsion based on the theory of potentially serious business loss imposed by oppressive conduct can be successfully invoked only if the “victim” can prove both that the offending party applied the immediate pressure and also that he caused or contributed to the underlying circumstances which led to the victim's vulnerability. *Puget Sound Power & Light Co. v. Shulman*, 84 Wash.2d 433, 526 P.2d 1210 (1974). See 50 Wash.Law Rev. 960, 973 (1975).

23 Wn. App. 452-53.

The determination whether conduct amounts to business compulsion is a factual inquiry requiring consideration of all the circumstances. *Best Buy Co. v. Harlem Irving Companies, Inc.*, 51 F. Supp. 2d 889, 898 (N.D. Ill. 1989) (“*It is well-established that the issues of duress and compulsory payment ordinarily are factual, to be judged in light of all surrounding circumstances surrounding a given transaction.* (Citations omitted).”).

One important factor to consider here is the character of the relationship between A. M. Todd and B & G Farms as a joint venture. The elements of a joint venture are (1) a contract, express or implied; (2) a common purpose; a community of interest; and an equal voice accompanied by an equal right to control. *Gleason v. Metropolitan Mortgage Co.*, 15 Wn. App. 481, 493, 551 P. 2d 147, *review denied*, 87 Wn. 2d 1011 (1976). Here, the evidence discloses an express contract between A. M. Todd and B & G Farms. That contract reveals a community of interest in the production of peppermint oil, the participation in revenue sharing of the proceeds of sale of the oil, and the extension of credit to B & G Farms to facilitate production of the oil.⁴⁸ There is abundant evidence that A. M. Todd had and exercised a right of control. Defendants submitted annual budgets to A. M. Todd under the

⁴⁸ CP 123.

joint venture agreement.⁴⁹ A. M. Todd frequently audited B & G Farms' books.⁵⁰ Mike Brown consulted with A. M. Todd's representative, Tyler Schilperoort, regarding matters such as crop rotation.⁵¹ A. M. Todd's Vice-President, Robert Wheeler, visited B & G Farms on inspection tours.⁵²

The joint venture agreement's provision for Defendants to participate in excess revenues is an agreement to share profits and supports the existence of a joint venture. *Adams v. Johnston*, 71 Wn. App. 599, 611, 860 P. 2d 423 (1993).

The fact that the joint venture agreement does not expressly call for a sharing of losses does not negate the existence of a joint venture, as where an agreement calls for a sharing of profits, the law will presume they agreed to share losses also. *Gleason v. Metropolitan Mortgage Co.*, 15 Wn. App. 495; *Stipcich v. Marinovich*, 13 Wn. 2d 155, 161-62, 124 P. 2d 215 (1942).

Nor does the fact that B & G Farms performed the production of mint oil, while A. M. Todd sold the oil produced by B & G, serve to negate the existence of a joint venture. *Gleason*, 15 Wn. App. 494-95. (*"Nor is the fact that each venturer might have performed a different*

⁴⁹ CP 186 lines 16-25.

⁵⁰ CP 187 lines 2-3.

⁵¹ CP 188 lines 17-21.

⁵² CP 189 line 22-CP 190 line 12.

function because of his past training, experience and expertise fatal to a finding of a right to an equal voice and a right to equal control.”).

As a joint venturer, A. M. Todd owed B & G Farms a fiduciary duty of loyalty. *Gleason*, 15 Wn. App. 496; *Rains v. Walby*, 13 Wn. App. 712, 717, 537 P. 2d 833, *review denied*, 86 Wn. 2d 1009 (1976); *Donaldson v. Greenwood*, 40 Wn. 2d 238, 249, 242 P. 2d 1038 (1952). A. M. Todd breached that duty by withholding from Defendants information on the price paid to A. M. Todd for peppermint oil purchased from B & G Farms. A. M. Todd also breached its fiduciary duty by advancing its own interests in demanding the promissory note from Defendants over the interests of Defendants in securing the funds needed to continue farming operations. A. M. Todd further breached its fiduciary duty by demanding that Mike and Margie Brown obligate themselves personally on the 2007 promissory note for the debt incurred by B & G Farms during the term of the joint venture agreement.⁵³

In light of the foregoing, A. M. Todd’s actions in demanding the promissory note at a critical stage in Defendants’ refinance of their farming operations are not duress by a stranger, but rather duress by a fiduciary, one who promoted its own interests over those of Defendants. A. M. Todd is therefore not entitled to summary judgment. *Harstad v.*

⁵³ CP 6, CP 64 line 9-15.

Frol, 41 Wn. App. 294, 301-02, 704 P. 2d 638 (1985); *Blumenthal v. Tener*, 642 NYS2d 26 (1996).

The timing of A. M. Todd's demand for the note in the midst of Defendants' refinancing efforts satisfies *Barker's* requirement of immediacy. Defendants had no recourse but to sign A. M. Todd's note. To do otherwise would have jeopardized Defendants' refinancing efforts.⁵⁴ Defendants had been working for nearly one year to obtain the refinance of its debt.⁵⁵

Barker also requires Defendants to present evidence that A. M. Todd caused or contributed to Defendants' vulnerability. A. M. Todd contributed to Defendants' vulnerability by failing to properly account to B & G Farms for its rightful share of the profit made by A. M. Todd on the peppermint oil that it purchased from B & G Farms and later resold.

The Court should not allow A. M. Todd to maneuver Defendants into financial difficulty, and then exploit that difficulty by extracting an unfair advantage. *In Intertel, Inc. v. Bank of America, Arizona*, 985 P. 2d 596 (Az. App. 1999), the Arizona appellate court reversed summary judgment for the defendant bank, concluding that triable issues of material fact whether the plaintiff's execution of a release in favor of the defendant bank was void for duress, where defendant placed plaintiff, a solvent

⁵⁴ CP 172 lines 5-6.

⁵⁵ CP 192 lines 18-21.

corporation, into defendant's collection department in order to pressure plaintiff's chairman of board, whose personal debt to defendant was also in collection. The placement of plaintiff into defendant's collection department had the effect of depriving plaintiff of alternate financing. The court reviewed cases from other jurisdictions that found duress where one party's wrongful actions undermined the economic condition of the other party. 985 P. 2d 602-03.

Here, as in *Intertel*, A. M. Todd undermined Defendants' economic condition by failing to properly account for Defendants' rightful share of the peppermint oil profits. Therefore, as in *Intertel*, triable issues of material fact regarding duress prevent summary judgment for A. M. Todd on its promissory note.

A. M. Todd cannot argue that because they signed the 2007 promissory note with the advice of their accountant, Defendants cannot recover for duress. Given the precarious financial situation facing them in November, 2007, no amount of advice from their accountant could have assisted Defendants. At that point, Defendants had only one choice to avoid liquidation, and that was to sign the note. This is a circumstance that warrants relief from duress. *Litten v. Jonathan Logan, Inc.*, 286 A. 2d 913 (Pa. Super. 1972).

Joint ventures are governed by the same rules applicable to partnerships. *Rains v. Walby*, 13 Wn. App. 720. A. M. Todd's fiduciary duty of loyalty as joint venturer extends to dissolution and winding up of the joint venture. RCW 25.05.165 (1), (2) (b) provide as follows:

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

(2) A partner's duty of loyalty to the partnership and the other partners is limited to the following:

(b) To refrain from dealing with the partnership in the conduct or winding up of the partnership business as or on behalf of a party having an interest adverse to the partnership...

The parties execution of the promissory note in November 2007 was an event in the winding up of the joint venture, as it is undisputed that the amount of the note included Defendants' share of the losses incurred in the joint venture.⁵⁶

The facts of this case are distinguishable from *Nord v. Eastside Association, Ltd.*, 34 Wn. App. 796, 664 P. 2d 4 (1983). *Nord* did not involve a joint venturer's breach of fiduciary duty by failing to account for profits, such as A.M. Todd's failure to account for Defendants' share of

⁵⁶ CP 64 line 9-15.

the participation amount. Further, Defendants were in a far more precarious financial position than was the corporation in *Nord*.

Also distinguishable here is *Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket, Inc.*, 96 Wn. 2d 939, 640 P. 2d 1051 (1982). In *Retail Clerks*, the handwritten notation of the defendant's president on a 1974 agreement to pay employee pension health and welfare contributions to union trust funds, that the agreements were signed under coercion, was insufficient to prove the defense of business compulsion. 96 Wn. 2d 944-45. The facts in *Retail Clerks* do not remotely resemble the facts of this case, as *Retail Clerks* did not involve a breach of fiduciary duty by a party to the agreement, nor was there evidence of immediate pressure. Further, in *Retail Clerks*, the court noted the defendant's failure to file an unfair labor practice to challenge the agreements. 96 Wn. 2d 945. Here, in contrast, no similar legal remedy was available to Defendants. *Retail Clerks* is therefore not controlling here.

C. DEFENDANTS ARE ENTITLED TO AN ACCOUNTING FROM PLAINTIFF OF PROFITS MADE UNDER THE JOINT VENTURE AGREEMENT.

Defendants are entitled to an accounting as a recoupment against

A.M. Todd's claim on the promissory note. Note RCW 62A.3-305 (a) (3):

Except as stated in subsection (b), the right to enforce the obligation of a party to pay an instrument is subject to the following:..
...A claim in recoupment of the obligor against the original payee of the instrument if the claim arose from the transaction that gave rise to the instrument...

A.M. Todd's breaches of fiduciary duty entitle Defendants to an accounting from A. M. Todd of any benefit thereby obtained. *Gleason*, 15 Wn. App. 496. Further, if a joint venture is found by the court to exist, an accounting is appropriate. *Gleason*, 15 Wn. App. 497. A joint venturer has a right to an accounting upon dissolution. *Sauget v. Johnson*, 316 F. 2d 816, 818 (9th Cir. 1963). The Court should therefore order A. M. Todd to account for B & G Farms' rightful share of any profit made under the joint venture agreement.

Defendants adequately preserved in their answer their claim for an accounting from A.M. Todd.⁵⁷ Further, under CR 54 (c), "[e]xcept as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if

⁵⁷ CP 12-14.

the party has not demanded such relief in his pleadings.” See also, Kelly v. Powell, 55 Wn. App. 143, 147-48, 776 P. 2d 996 (1989).

A. M. Todd steadfastly maintains that it provided Defendants with adequate accounting statements.⁵⁸ A.M. Todd fails to address the language of paragraph 2d, which required the report prepared by A.M. Todd to be “*based upon procedures mutually acceptable to A.M. Todd and B & G Farms*”⁵⁹ The reports submitted by A.M. Todd were not acceptable to Defendants because they lacked any detail as to the price at which A.M. Todd sold the oil.⁶⁰ Mike Brown repeatedly made requests to A. M. Todd’s field representative, Tyler Schilperoort, for access to A.M. Todd’s records.⁶¹ Mr. Schilperoort responded to Mike Brown’s requests by stating that he would have to check with his superiors.⁶² Mr. Schilperoort did not deny that he had such conversations with Mike Brown.⁶³ Mike Brown was never allowed access to A.M. Todd’s records.⁶⁴ The record thus contains unresolved issues of material fact whether A. M. Todd complied with paragraph 2d of the joint venture agreement.

⁵⁸ CP 26, 64, 79-93.

⁵⁹ CP 127.

⁶⁰ CP 138-39.

⁶¹ CP 139.

⁶² *Ibid.*

⁶³ CP 200-02.

⁶⁴ CP 139.

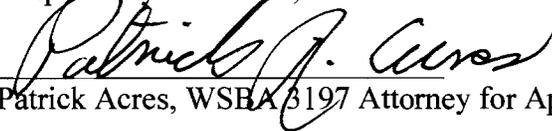
D. THE TRIAL COURT ERRED IN AWARDING ATTORNEY FEES AND COSTS TO PLAINTIFF.

Defendants assign error to the trial court's award to A. M. Todd of \$20,300.00 in attorney fees and \$2,235.87 in costs.⁶⁵ Because unresolved triable issues of material fact remain in this case, the trial court's award of attorney fees and costs to A.M. Todd was premature. Defendants incorporate herein the arguments and authorities in Paragraphs IV A, B, above. The trial court's award of attorney fees and costs should therefore be reversed.

VII. CONCLUSION

The trial court erred in granting A. M. Todd's motion for summary judgment. The trial court's order granting summary judgment should therefore be reversed, and the case remanded for trial on the merits.

Respectfully submitted,


Patrick Acres, WSBA 3197 Attorney for Appellants

⁶⁵ CP 213; APP. 1.

VIII. APPENDIX

1. Order Granting Summary Judgment and Judgment Against Defendants B&G Farms, Michael Brown and Margie Brown

IX. CERTIFICATE OF MAILING

The undersigned does hereby certify that on December 12, 2011, she served a copy of the Brief of Appellants upon Respondent, by depositing the same in the United States mail, first class postage prepaid, addressed to the following:

JOHN W. O'LEARY
HAMES, ANDERSON & WHITLOW, P.S.
P. O. Box 5498
Kennewick, WA 99336-0498

Dated this 12 day of December, 2011, at Moses Lake, WA.

Rebecca Bayley