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No. 63217-5-I

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

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FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
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BELLINGHAM BSC, a Washington limited liability company,

Appellant,

v.

AMBULATORY RESOURCE CENTRES OF WASHINGTON INC;  
ARC OF BELLINGHAM, LP, and SYMBION, INC

Respondents.

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BELLINGHAM BSC'S OPENING BRIEF

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## I. SUMMARY

This is an appeal from a grant of summary judgment by Whatcom County Superior Court Judge Steven J. Mura. The case concerns interpretation of a lease for a medical surgery center in Bellingham, Washington. Appellant, Bellingham BSC (BSC), is the landlord. Respondent Ambulatory Resource Centers of Washington, Inc. (ARC-W) is the current tenant, and Respondent Ambulatory Resource Centers of Bellingham, Inc. (ARC-B) is the former tenant and current subtenant. Respondent Symbion, Inc. is a real party in interest as guarantor of the lease.

The lease at issue was originally executed between a predecessor to BSC, as landlord, and ARC-B, as tenant, back in 1999, and was for a 10-year term. In 2004, ARC-B communicated to Appellant BSC's predecessor in interest that needed the rent to be reduced to help it to successfully market limited partnership units in its surgery center via syndication. The landlord at the time, Ms. Schwindt, was willing to negotiate, and thus Ms. Schwindt and Symbion, Inc. and ARC-B undertook to negotiate a fourth amendment to the Lease.

As of late 2003 and early 2004, during the negotiations for the fourth amendment, the rent being paid by ARC-B, \$20,075 plus

CPI increases, was in fact the fair market value for the center. ARC-B and Symbion, Inc. proposed to buy that down to help it to market partnership units.

The initial fourth amendment agreed upon in principle by the parties in January 2004, required the tenant ARC-B to pay \$500,000 upfront, and in exchange, the rent would be reduced by about \$9,000 per month for the remaining term of the lease, which was to be extended through 2013. The deal was contingent on the tenant paying the \$500,000 upfront. If that sum was not paid, then the rent would remain at its then current level, which was in excess of \$21,000 a month, through 2013.

Subsequent to this agreement in principal, ARC-B came up with an alternative plan with the idea of avoiding the \$500,000 upfront payment to buy down the rent. ARC-B, which wanted to sell the partnership units, would become a subtenant, and a new entity, ARC-W, would become the tenant. ARC-W would pay the normal rent, and the subtenant would pay the lower rate. This would allow easier sale of the syndication partnership units that would be valued by the sublease and not the lease.

On May 12, 2004, Ms. Schwindt's attorney, Dennis Williams, informed ARC's attorney Mr. Rooney that the new tenant – sub-

tenant structure was acceptable, and that without the upfront payment, the new rent for the extended term beginning on May 1, 2009, would be decided between two alternatives: either \$11,040 plus CPI increases from 2004, or fair market value as of 2009. ARC agreed to this either-or method for determining the 2009 rent.

The final version of the fourth amendment, however, mistakenly did not include the either or method for determining the May 1, 2009 rent. Rather, section 4.1 of the amendment said that rent would be \$11,040 plus CPI increases from 2004. Section 4.3 of the amendment, however, said that in no event will the rent on May 1, 2009, be less than the rent on April 30, 2009.

The trial court entered summary judgment, agreeing with ARC-W that, since it appeared that the lease was not ambiguous, it could not therefore consider any extrinsic evidence, even on the questions of mutual or unilateral mistake. The court found that the rent for May 1, 2009 to 2013 was \$11,040 plus CPI increases from 2004. In other words, even though the landlord knew that fair market rent in 2004 was in excess of \$21,000, the court found no disputed facts over whether she agreed to a base rent for the extension term starting in 2009 of almost half of the 2004 fair

market rate under either a mutual mistake or a unilateral mistake entitling BSC to reformation.

The trial court erred because it refused to consider extrinsic evidence of mutual or unilateral mistake, and extrinsic evidence of the parties' intent as to the meaning of section 4.3, which states that the rent will never go down on a rent adjustment date. The extrinsic evidence shows disputed material facts as to whether the parties agreed that the rent would be determined by fair market rent or \$11,040 plus CPI, and that ARC does not get to unilaterally choose the lesser of the two. Indeed, ARC's attorney, after the dispute arose, indicated that fair market value option was the structure that the parties agreed upon.

Moreover, the extrinsic evidence shows that the parties initially agreed that if the tenant failed to pay the \$500,000 upfront, the rent would remain at its current level, in excess of \$21,000 per month. BSC's interpretation of the fourth amendment is consistent with that preliminary agreement. In contrast, ARC's absurd interpretation is that the landlord gave up over \$9,000 a month in rent in exchange for no concessions from ARC. ARC contends that the landlord, knowing that fair market value for the rent was in excess of \$21,000 per month, agreed to reduce the rent to \$11,040

in exchange for nothing. The trial court accepted that interpretation, despite its absurdity and the existing conflicting extrinsic evidence and conflicting contract provisions.

The case should be remanded for a trier of fact to resolve the disputed material facts. The trial court erred in granting summary judgment.

## **II. ASSIGNMENTS OF ERROR**

1. The Trial Court erred in finding that it could not consider extrinsic evidence.

2. The Trial Court erred in finding that there were no disputed material facts with regard to the issue of mutual mistake.

3. The Trial Court erred in finding that there were no disputed material facts with regard to the issue of unilateral mistake.

4. The Trial Court erred in finding that there were no disputed material facts with regard to the parties' intent as to the meaning of section 4.3 of the Fourth Amendment to the Lease.

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. What is the proper standard for interpreting a contract?

2. Can a court consider extrinsic evidence even when it finds that the contract is not ambiguous?

3. What is the proper standard for summary judgment on the question of interpretation of a contract?

4. Are there disputed issues of material fact as to whether the parties had an identical intent to adjust the rent on May 1, 2009 to either \$11,040 plus CPI, or to fair market value?

5. Are there disputed issues of material fact as to whether one or both parties were mistaken in signing a lease that did not include the provision to adjust the rent on May 1, 2009 to \$11,040 plus CPI, or fair market value?

6. Are there disputed issues of material fact as to whether there was a unilateral mistake by BSC to sign a lease that left out the provision to adjust the rent on May 1, 2009 to \$11,040 plus CPI, or fair market value?

7. Are there disputed issues of material fact as to whether there was inequitable conduct by ARC in not bringing the mistake to BSC's attention when ARC knew of BSC's mistaken belief?

8. Are there disputed issues of material fact as to whether the parties intended for the rent on the adjustment date, May 1, 2009, would not be lower than the rent on the day prior to the adjustment date?

9. Is it reasonable to conclude that a landlord, in 2004, knowing that 2004 fair market rent was over \$21,000 per month, would agree to a base rent for a five year extension starting in 2009 that is almost half of the 2004 market rate?

#### **IV. STATEMENT OF THE CASE**

On May 13, 1999, Northwest Washington Medical Bureau, as landlord, and ARC of Bellingham, LP, (ARC-B) as tenant, entered into a lease for a medical surgery center located in suite 202 at 2980 Squallcum Parkway, in Bellingham Washington (the Lease). The term of the lease was ten years, from May 1, 1999 to April 30, 2009. (CP 316)

Section 4 of the Lease addressed the rent to be paid by the tenant ARC-B. Section 4.1, entitled "Base Monthly Rent," states that ARC-B is to pay \$20,795 per month for May 1, 1999 through April 30, 2001. Section 4.3 addressed changes to the "Base Monthly Rent" starting with May 1, 2001. Section 4.3 reads:

4.3 Base Monthly Rent Adjustment Based on CPI. Commencing May 1, 2001, and thereafter every two (2) years during the term of the Lease, monthly rent exclusive of additional rent shall be adjusted pursuant to the change in the Consumer Price Index for all Urban Consumers (CPI-U) for the Seattle-Tacoma Metropolitan Area ALL ITEMS ... In no event will the new Base Monthly Rent be less than the Base

Monthly Rent in effect immediately prior to the Adjustment Date. (CP 317)

The building was sold to Joan Schwindt in 2003, and thus Ms. Schwindt became ARC-B's landlord. (CP 187) ARC-B was paying \$34.83 per square foot for its surgery center (suite 202), or over \$21,000, in early 2004. This was in line with fair market rent at that time. (CP 187-88, 192) (Although ARC-B claims that they were paying above market rent, this disputed fact must be resolved in favor of BSC, and the Court must assume that ARC was paying market rent).

In December 2003, ARC-B and Ms. Schwindt began discussing an extension and amendment of the Lease, which would ultimately become the Fourth Amendment, which is at issue in this litigation. These discussions were initiated by ARC-B, which wanted to buy down its rent and extend the lease term from 2009 to 2013. ARC-B wanted to buy down the rent because it wanted to sell limited partnership units in the surgery center via "syndication." (CP 280)

On December 5, 2003, Dennis Williams, the attorney for Ms. Schwindt, sent a letter to ARC-B outlining the basics of a lease amendment. As noted in that letter, ARC would pay \$500,000 to

Ms. Schwindt on January 5, 2004, Ms. Schwindt would reduce the Base Monthly Rent, and the lease term would be extended to December 31, 2013. (CP 284-85)

The next communication in the record regarding the Fourth Amendment is a January 16, 2004 email from Dennis Williams to Pat Rooney, the attorney for ARC-B. In bullet point 2 of the email, Mr. Williams wrote that "One of the primary reasons for the insistence on a 10-year term is the issue of financing. If the landlord wishes to use the lease as collateral for a loan, the lender is going to be more receptive to a longer-term lease. ... Also the \$500,000 payment was computed with regard to a 10-year term. A much higher initial amount will be required for a shorter term." (CP 286-87)

On January 22, 2004, Mr. Williams then followed up on his January 16 email with another email sending both a redline and clean version of the Fourth Amendment. In that version, section 2 of the Fourth Amendment extended the term of the lease from the current expiration date of April 30, 1999 to December 31, 2013. (CP 289-92) Section 3 of the draft amendment, entitled: "Base Monthly Rent," reads:

Subject to Tenant's payment to Landlord of the sum of \$500,000 as hereinafter provided, Base Monthly Rent, as set forth in Section 4.1 of the Lease, shall be reduced to \$11,226 per month, commencing January 1, 2004 through and including December 31, 2013.

Section 4.3 of the Lease is hereby amended in its entirety as follows:

4.3 Base Monthly Rent Adjustment Based on CPI. Commencing January 1, 2009, and on January 1 of each year thereafter during the term of the Lease, monthly rent exclusive of additional rent shall be adjusted pursuant to the change in the [CPI-U] ... In no event will the new Base Monthly Rent be less than the Base Monthly Rent in effect immediately prior to the Adjustment Date.

In consideration of the reduction in Base Monthly Rent, and as a condition of such reduction, Tenant agrees to pay to Landlord the sum of \$500,000 on January 5, 2004, representing advance rental payment, discounted to net present value, thereby resulting in a reduction of the Base Monthly Rent over the remaining term of the Lease. In the event Tenant fails to pay the sum of \$500,000 as provided herein, Sections 4.1 and 4.3 of the Lease shall remain unmodified, and Base Monthly Rent shall continue to be paid as provided in the Lease without regard to this Amendment. (CP 291)

In other words, pursuant to this January 22 draft from Mr. Williams, the tenant was to pay \$500,000 upfront to buy down the rent, and the Base Monthly Rent would then be reduced to \$11,226 for the remainder of the term, i.e. 2004 until 2013, though there would be CPI adjustments to that base rent starting on May 1,

2009. Pursuant to the last sentence of 4.3, carried over from the initial lease, the rent on May 1, 2009 could not be less than the rent on April 30, 2009. Significantly, under this proposal if the tenant failed to pay the \$500,000 buy down, the Base Monthly Rent would stay at the Base Monthly Rent under the lease - \$20,795 - as adjusted by CPI-U every two years from 2001 through the remainder of the term in December 2013, as stated by Lease section 4.3 and amended by the proposed Fourth Amendment section 2. In other words, the \$500,000 payment was to buy down the rent for the "remainder of the term," – i.e. until 2013. If the buy down payment was not made, the rent would stay at \$20,795 plus CPI for the remainder of the term through 2013.

On January 27, 2004, Mr. Williams, sent an email to Mr. Rooney, the tenant's attorney stating: "I understand that our clients have agreed to the Lease Agreement and a revised version of the 4<sup>th</sup> Amendment. Accordingly, I am attaching a clean version of the 4<sup>th</sup> Amendment, which reduces the Basic [sic] Monthly Rent to \$11,040." The only change from the January 22 version recited above was that the \$500,000 payment would buy the Base Monthly Rent down to \$11,040 instead of \$11,226 in the earlier version. (CP 300)

At some point between January 27 and May 12, ARC decided it did not want to make the \$500,000 buy down, and thus backed away from the January preliminary agreement. ARC hatched a plan whereby it would put a new party, ARC of Washington Inc., (ARC-W) in as tenant, and have the current tenant, ARC-B, put in as a subtenant. That way, the sublease rent could be lower than the Lease rent, and the subtenant would be able to sell partnership units in the surgery center at prices reflecting the more profitable new sublease rent and not the higher lease rent. (CP 281)

On May 12, 2004, Mr. Williams sent an email to Mr. Rooney stating that Ms. Scwindt agrees to accept ARC-W as the tenant. He went on to state:

The rent payment of \$11,040 was computed as the fair market rental value as of January 1, 2004. When the revised rent schedule begins on May 1, 2009, we can either determine fair rental value at that date, or we can adjust the \$11,040 by the CPI adjustment called for in the lease, from January 1, 2004.

With these two modifications, my client is prepared to accept your proposal to continue the current rent schedule through April 30, 2009, with ARC of Washington Inc. as the tenant, and then adjust the monthly rental to fair rental value commencing on May 1, 2009 and continuing through the remainder of the lease term to December 31, 2013. (CP 140)

The next correspondence on the Fourth Amendment in the record is a May 18, 2004 email from Mr. Williams. Mr. Williams email attaches the next version of the Fourth Amendment. His email states that "revisions include adding Ambulatory Resource Centres of Washington Inc., as [new] Tenant and ARC of Bellingham, LP as Subtenant, revising Section 3 to eliminate the lump sum payment and providing for the reduction of rent beginning on 5/1/09." (CP 302)

The attached draft of the Fourth Amendment shows the changes made and reads as follows:

~~Subject to Tenant's payment to Landlord of the sum of \$500,000 as hereinafter provided, Base Monthly Rent, as set forth in Section 4.1 of the Lease, shall be reduced to \$11,040 per month, [as follows] commencing January [May] 1, 2004 [2009], through and including December 31, 2013. [The starting computation for the reduced rent shall be \$11,040. This amount shall then be adjusted in accordance with Section 4.3 below, except that the beginning date for the adjustment shall be January 1, 2004. The amount so determined shall constitute the reduced Monthly Base Rent commencing on May 1, 2009. Thereafter, the Base Monthly Rent shall be adjusted in accordance with Section 4.3. Below.]~~

Section 4.3 of the Lease is hereby amended in its entirety as follows:

4.3 Base Monthly Rent Adjustment Based on CPI. Commencing January 1, 2009, and on January 1 of each year thereafter during the

term of the Lease, monthly rent exclusive of additional rent shall be adjusted pursuant to the change in the [CPI-U] ... In no event will the new Base Monthly Rent be less than the Base Monthly Rent in effect immediately prior to the Adjustment Date.

~~In consideration of the reduction in Base Monthly Rent, and as a condition of such reduction, Tenant agrees to pay to Landlord the sum of \$500,000 on January 5, 2004, representing advance rental payment, discounted to net present value, thereby resulting in a reduction of the Base Monthly Rent over the remaining term of the Lease. In the event Tenant fails to pay the sum of \$500,000 as provided herein, Sections 4.1 and 4.3 of the Lease shall remain unmodified, and Base Monthly Rent shall continue to be paid as provided in the Lease without regard to this Amendment. (CP 304-05)~~

The Fourth Amendment was signed in this form (though without the brackets and strikethroughs). (CP 268)

At about the same general time period as the Fourth Amendment to the lease for Suite 202 was executed, Joan Schwindt entered into a separate lease with the Respondents for Suite 203. This was for a medical office space, not a surgery center. The base rent for that space was \$20 per square foot plus operating expenses and cost of living increases. (CP 188).

Thus ARC contends that Joan Schwindt entered into an agreement. agreeing that Suite 202's rent was far above the

market, while at the same time it freely entered into a lease for a less built out space for nearly double the per square foot rent that it contends for Suite 202.

Both Joan Schwindt and Dennis Williams declared in the Superior Court Summary Judgment that the rent commencing in May, 2009 would not be lower than that in April 2009 and that it was Joan Schwindt's choice with regard to the option of either \$11,040 or fair market value. (CP 137-138, 188)

Appellant Bellingham BSC, LLC (BSC) purchased the building from Ms. Schwindt in 2005. (CP 190) Thus, as of that date, BSC was the landlord, and ARC-W was the tenant, and ARC-B was the subtenant.

In 2007, there arose a dispute over the meaning of the Fourth Amendment. On May 18, 2007, Mr. Rooney, ARC's attorney, wrote to Jeff Lewison of BSC. Mr. Rooney stated:

The reduction of rent in 2009 is a reflection that the sums necessary to "buy down" the lease have been paid and the new rent reflects that "buy down" of rent. See attached email from Dennis Williams, Esq. counsel for Ms. Schwindt to me which explains the structure. Essentially the rent all along has been \$11,040. For May 1, 2009 we would decide what FMV rent was or use the \$11,040, plus CPI increases to establish the new rent. (CP 141 emphasis added)

The email attached to Mr. Rooney's letter is the May 12, 2004 email from Dennis Williams, which states that on May 1, 2009 the parties will either determine fair market rent, or use \$11,040 plus CPI. (CP 140) In sum, Mr. Rooney recounted an agreement that as of May 1, 2009, the rent would be fair market value, or \$11,040 plus CPI. The Lease does not reflect that agreement due to a mutual or unilateral mistake.

As to course of conduct, in addition to Mr. Rooney's 2007 letter, Ms. Scwindt expressed her belief that the rent would remain in excess of \$21,000 per month through 2013. When she sold the property to BSC, she represented that rent was \$37.71 per square foot through 2013. (CP 143, 164-168). Mr. Williams also informed BSC that section 4.3 prevented the rent from dropping below the amount paid on April 30, 2009 – or below \$20,795 plus CPI. (CP143)

ARC, for its part, represented to BSC at the time of the sale that it had not been pre-paying rent, which in fact is that basis for its entire claim to have the right to a rent rate that is a fraction of the fair market value for Suite 202. (CP 209)

## V. ARGUMENT

### A. STANDARD OF REVIEW

Review of an order granting summary judgment is de novo. “In reviewing a denial or grant of summary judgment, this court applies the same standard as a trial court.”<sup>1</sup>

### B. SUMMARY JUDGMENT STANDARD.

Summary judgment is appropriate where there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law.<sup>2</sup> The court must accept the truth of the non-moving party’s evidence, and all reasonable inferences are drawn in favor of the non-moving party. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are still jury functions, not those of a judge. In construing the evidence in the light most favorable to the nonmoving party, the court asks whether a reasonable juror could find in favor of that party. If the answer is yes, the motion for summary judgment should be denied and the question should go to the jury.<sup>3</sup>

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<sup>1</sup> Herron v. King Broad. Co., 112 Wn.2d 762, 767-68, 776 P.2d 98 (1989).

<sup>2</sup> See Hearst Communications, Inc. v. Seattle Times Co., 154 Wn.2d 493, 501, 115 P.3d 262 (2005) and Civil Rule 56(c).

<sup>3</sup> See Herron v. King Broad. Co., 112 Wn.2d 762, 767-68.

In actions concerning interpretation of a contract, the issue of the parties' intent is one of fact.<sup>4</sup> Summary judgment is appropriate if (1) there is no relevant extrinsic evidence or (2) only one reasonable meaning can be drawn from the extrinsic evidence.<sup>5</sup>

### C. STANDARD FOR CONTRACT INTERPRETATION

This dispute relates to the interpretation of the Lease. In granting summary judgment for defendants, the trial court believed that he could not consider any extrinsic evidence because he believed the lease was not susceptible to two interpretations. The court's first statement to BSC's counsel at oral argument was that "intent comes in only if the court finds the language is ambiguous."<sup>6</sup> On his turn, ARC's counsel was happy to encourage the trial court to use the wrong standard for contract interpretation, arguing that "You were absolutely right in your first statement. Intent is not an issue. Declarations are not an issue. Depositions are not an issue - where the contract is unambiguous."<sup>7</sup> The trial court's

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<sup>4</sup> See Paradise Orchards v. Fearing, 122 Wn. App. 507, 94 P.3d 372 (2004) ("Generally, what the parties intend is a question of fact."); Kenney v. Read, 100 Wn. App. 467, 997 P.2d 455 (2000).

<sup>5</sup> Scott Galvanizing, Inc. v. Northwest EnviroServices, Inc., 120 Wn.2d 573, 582, 844 P.2d 428 (1993); Spectrum Glass v. PUD of Snohomish County, 129 Wn. App. 303, 311, 119 P.3d 854 (2005).

<sup>6</sup> RP at p. 17, ll 19-20, p. 31 ll. 19-22.

<sup>7</sup> RP at p. 28, ll 13-16.

statements, and counsel's arguments, are not the law, have not been the law for contract interpretation in Washington for at least 19 years,<sup>8</sup> and have never been the law when the issue is mutual or unilateral mistake.<sup>9</sup>

In interpreting any contract, it is the duty of our courts to discern the intent of the contracting parties. Courts may consider evidence extrinsic to the contract itself for that purpose, even when the contract terms are not themselves ambiguous. Courts impute an intention corresponding to the reasonable meaning of the words used” and give the words used their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent.<sup>10</sup> In interpreting contracts, “courts may not adopt a contract interpretation that renders a term absurd or meaningless.”<sup>11</sup>

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<sup>8</sup> See Berg v. Hudesman, 115 Wn.2d 657, 667, 801 P.2d 222 (1990).

<sup>9</sup> See Berg, 115 Wn.2d 657 (extrinsic evidence that contradicts the language of the agreement is not admissible except when the issue is mistake); St. Regis Paper Co. v. Wicklund, 93 Wn.2d 497, 501-502, 610 P.2d 903 (1980) (parol evidence rule does not apply in case of mistake).

<sup>10</sup> See Hearst Communications, 154 Wn.2d 493, 501-504.

<sup>11</sup> Spectrum Glass, 129 Wn. App. 303, 313. See also Fardig v. Reynolds, 55 Wn.2d 540, 544, 348 P.2d 661 (1960) (Courts must give effect to words used and not render them “redundant and meaningless”).

D. THERE ARE DISPUTED FACTS ON THE ISSUE OF MUTUAL MISTAKE

A party to a contract is entitled to reformation of the contract if there has been a mutual mistake.<sup>12</sup> A mistake is a belief not in accord with the facts. A mutual mistake exists “when the parties, although sharing an identical intent when they formed a written document, did not express that intent in the document.”<sup>13</sup>

Mutual mistake turns on the intent of the parties.<sup>14</sup> The issue of the parties’ intent is one of fact.<sup>15</sup> Interpretation of the parties’ intent is a question of law and ripe for summary judgment only when (1) there is no relevant extrinsic evidence, or (2) only one reasonable inference can be drawn from the extrinsic evidence.<sup>16</sup>

In determining the intent of the parties, the Court must examine the lease amendment, as well as all of the extrinsic evidence, including the circumstances surrounding the deal,

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<sup>12</sup> See Washington Mut. v. Hedreen, 125 Wn.2d 521, 525, 886 P.2d 1121 (1994).

<sup>13</sup> Rigos v. Cheney School Dist. 106 Wn.App. 888, 892 26 P.3d 304 (2001).

<sup>14</sup> See Snyder v. Peterson, 62 Wn. App. 522, 814 P.2d 1204 (1991). (“Where both parties have an identical intention . . . and a writing executed by them is materially at variance with such intention, a court of equity will reform the writing so that it shall express their intention”).

<sup>15</sup> See Paradise Orchards v. Fearing, 122 Wn. App. 507, 94 P.3d 372 (2004) (“Generally, what the parties intend is a question of fact.”); Kenney v. Read, 100 Wn. App. 467, 997 P.2d 455 (2000).

<sup>16</sup> See Scott Galvanizing, 120 Wn.2d 573, 582; Spectrum Glass v. PUD of Snohomish County, 119 P.3d 854 (Wn. App. 2005).

statements of intent at the time of the deal, the subsequent acts and conduct of the parties, and the reasonableness of respective interpretations advocated by the parties.<sup>17</sup> Extrinsic evidence is admissible to show mistake, even if it contradicts the language of the lease.<sup>18</sup>

The mutual mistake in this case is that both parties intended that the rent on May 1, 2009, would be \$11,040 plus CPI, or fair market value. This is reflected in Mr. Williams' May 12, 2004 email, which includes the condition that the landlord will agree to the revised fourth amendment only if the landlord has the right to determine the 2009 rent will be \$11,040 plus CPI from 2004, or fair market value. (CP 137, 140)

The tenant's identical intent is evidenced by Mr. Rooney's 2007 letter, which states that ARC agreed that rent would be determined in accordance with Mr. Williams' May 12, 2004 email, and reiterated the parties agreement that "[f]or May 1, 2009 we would decide what FMV rent was or use the \$11,040, plus CPI increases to establish the new rent." (CP 141) As the Washington Supreme Court has held, in "discerning the parties' intent, subsequent conduct of the contracting parties may be of aid, and

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<sup>17</sup> See Berg, 115 Wn.2d 657, 667.

<sup>18</sup> See Berg, 115 Wn.2d at 669, St. Regis, 93 Wn.2d 497, 501-502.

the reasonableness of the parties' respective interpretations may also be a factor in interpreting a written contract."<sup>19</sup> Since there is evidence that both sides agreed that this was the deal, and since the final Lease does not reflect that deal, there are disputed material facts as to mutual mistake.

A mistake is when both parties share "an identical intent when they formed a written document, [but] did not express that intent in the document."<sup>20</sup> Given Mr. Rooney's 2007 admission that the May 12 email from Mr. Williams set out the deal structure, and that in 2007 he was still intending that "on May 1 [2009] we would decide what FMV rent was or use the \$11,040 plus CPI increases to establish the new rent, there is a disputed material fact as to mutual mistake, and summary judgment was not appropriate.

Moreover, BSC is entitled to all reasonable inferences from the evidence. Ms. Schwindt knew that the fair market rent for the surgery center in 2004 was in excess of \$21,000 per month. (CP 187-88). It is thus a reasonable inference that she did not intend to extend the lease five years later, to start in 2009 at \$11,040 plus CPI, a rate that was almost half the 2004 fair market rental rate. It is rather a reasonable inference that she was willing to do what Mr.

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<sup>19</sup> Berg, 115 Wn.2d 657, 668.

<sup>20</sup> Rigos, 106 Wn.App. 888, 892.

Williams stated in his email, and what Mr. Rooney later admitted to, i.e. a rental rate of \$11,040 plus CPI, or fair market value.

E. DISPUTED FACTS AS TO UNILATERAL MISTAKE

Alternatively, there are also disputed material facts as to unilateral mistake. A party to a contract is entitled to reformation of the contract if one party is mistaken and the other party engaged in fraud or inequitable conduct. A party has engaged in fraud or inequitable conduct if it conceals a material fact from the other party, including where the parties reach a preliminary agreement during arms length negotiations, and the party knows of the other party's mistake and fails to inform the other party.<sup>21</sup> The other party's negligence in failing to read the final agreement is not a bar to reformation.<sup>22</sup>

As noted above, BSC was mistaken about the contents of the Fourth Amendment. If, as ARC now claims, ARC was not mistaken, and it intended to only pay \$11,040 plus CPI and not fair market value, then there are disputed facts as to unilateral mistake by BSC.

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<sup>21</sup> See Wash. Mutual v Hedreen, 125 Wn.2d 521, 526.

<sup>22</sup> See Wash. Mutual, 125 Wn.2d 521, 529-31. (holding that reformation allowed even though "the bank was negligent in not carefully reading the lease to discover the discrepancy before signing").

A preliminary agreement in this case is evidenced by the May 12, 2004 email from Williams, and the 2007 email from Mr. Rooney admitting that ARC agreed to Mr. Williams' email.<sup>23</sup> If someone else at ARC discovered that the final draft was not consistent with this preliminary agreement, there is a reasonable inference that it knew (Mr. Rooney certainly knew, based on his 2007 letter) that BSC was operating under a mistake as to the contents of the final draft, and did not disclose its understanding to BSC.<sup>24</sup>

F. DISPUTED FACTS AS TO THE MEANING OF SECTION 4.3

The parties agree that the initial proposal, agreed upon in principal by both parties as of January 27, 2004, , was for ARC to pay \$500,000 up front, and in exchange the Base Monthly Rent would be reduced to \$11,040 starting on May 1, 2004. The Base Monthly Rent would have stayed at that level until May 1, 2009, when it would then increase in accordance with the CPI index. Under this agreement in principal, if ARC failed to pay the \$500,000, its Base Monthly Rent would have stayed at the amount

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<sup>23</sup> See Pioneer Resources v. D.R. Johnson, 187 Ore. App. 341, 367-68, 68 P.3d 233 (2003) (no requirement that preliminary agreement be an enforceable contract, or even signed by either party).

<sup>24</sup> See Basin Paving v. Port of Moses Lake, 48 Wash. App. 180, 737 P.2d 1312 (1987); Simonson v. Fendel, 101 Wn.2d 88, 675 P.2d 1218 (1984).

stated in the lease, \$20,795, plus CPI increases from 2001. That Base Rent of \$20,795 plus CPI increases would have applied all the way through December 31, 2013. (CP 291, 298, 300)

The parties also agree that the reason this agreement in principal was changed, was to re-structure the deal so that there would be no need for the upfront \$500,000 payment. (CP 280-81) Thus, one would expect the final deal to reflect that portion of the initial agreement in principal that addressed what would happen if the \$500,000 payment was not made.

So the question is between two competing interpretations. ARC's interpretation is that it avoided the \$500,000 upfront payment, and in exchange it paid the existing rent through April 30, 2009, and then its rent dropped to \$11,040 plus CPI increases (calculated from 2004). This interpretation is drastically different from the initial agreement in principal, which, if the \$500,000 was not paid, had ARC paying the existing base rent (\$20,795) plus CPI all the way through 2013. Under ARC's interpretation, the landlord, which had an agreement in principal, subsequently agreed to reduce the rent for the final five years of the lease by over \$9,000 a month, in exchange for no concessions from the tenant. That is absurd.

ARC's interpretation also cannot be squared with the last sentence of section 4.3, which specifically states that the rent on May 1, 2009 cannot be less than the rent on April 30, 2009. "In no event will the new Base Monthly Rent be less than the Base Monthly Rent in effect immediately prior to the Adjustment Date." (CP 268)

In other words, for 2004 to April 2009, the tenant was to pay the base rent of \$20,795 plus CPI increases. To calculate the new rent on May 1, 2009, the parties would start with the "Base Monthly Rent" of \$11,040. The parties would then add CPI-U increases for each year from 2004 to 2009, but ultimately, the rent would not be any less on May 1, 2009 than it was on April 30, 2009. It is absurd to conclude that the landlord, knowing that fair market rent was in excess of \$21,000 per month, would agree to an extension term starting in 2009 at almost half the 2004 market rental rate.

The amendment is admittedly poorly drafted. Carrying over the concept of a "reduced" base monthly rent from the earlier deal that involved the \$500,000 upfront payment created a conflict between section 4.1 and 4.3. But BSC's interpretation is the only interpretation that gives effect to the last sentence of section 4.3. And BSC's interpretation is the only interpretation that is consistent

with the parties' initial agreement in principal in January 2004, under which, if the \$500,000 was not paid, the rent in May 2009 would be \$20,795 plus CPI increases. Under the final deal, the \$500,000 was not paid, and under BSC's interpretation, the rent for May 2009 is effectively \$20,795, plus CPI, i.e. consistent with the preliminary agreement.

ARC's interpretation cannot be accepted on summary judgment. First, it reads the last sentence of section 4.3 out of the Fourth Amendment, and allows the rent on May 1, 2009 to be almost half of what it was on April 30, 2009. Moreover, it is an absurd interpretation because it requires a conclusion that a landlord, having secured an lease extension in principal in January 2004 which provided either (a) \$500,000 in exchange for lower rent for 2004 - 2013, or (b) the existing higher rent for 2004 - 2013, would abandon that deal in favor of one in which the landlord did not receive \$500,000 but still received the lower rent for 2009 - 2013. And as noted above, it is also absurd because it requires a conclusion that the landlord, in 2004, despite knowing that 2004 fair market rent was over \$21,000 per month, agreed to a four year extension for 2009-2013 at almost half the 2004 market rate.

In sum, there is a conflict between two sections of the Lease, and the extrinsic evidence to interpret those sections is disputed. Summary judgment on interpretation of a contract is only allowed if there is no relevant extrinsic evidence, or if the extrinsic evidence is not disputed.<sup>25</sup> Summary judgment was not appropriate in this case.

#### G. ATTORNEY'S FEES

The Lease, section 10, provides that the prevailing party in litigation is entitled to its attorneys' fees. (CP 324) The trial court awarded fees to ARC. (CP 69-71) BSC paid those fees. The award should be reversed along with the grant of summary judgment.

Pursuant to RAP 18.1, if BSC prevails on this appeal, BSC requests an award of its attorneys' fees incurred during this appeal based on the lease and RCW 4.84.330. This Court should remand to the trial court to determine the fee award, and to determine, pursuant to RAP 12.8, the appropriate amount to be repaid to BSC.

### VI. CONCLUSION

Appellant BSC requests that this Court reverse the trial court and remand for a trial. There were disputed material facts

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<sup>25</sup> See Scott Galvanizing, 120 Wn.2d 573, 582, Spectrum Glass, 129 Wn. App. 303, 311.

regarding mutual and/or unilateral mistake, as well as the proper interpretation of the section 4.3, which states that the rent shall not be reduced on a rent adjustment date.

DATED this 15<sup>th</sup> day of June, 2009.

JAMESON BABBITT STITES  
& LOMBARD, P.L.L.C.

By 

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THE STATE OF WASHINGTON  
DIVISION I

BELLINGHAM BSC, a Washington )  
limited liability company, )

Appellant, )

v. )

AMBULATORY RESOURCE )  
CENTRES OF WASHINGTON )  
INC.; ARC OF BELLINGHAM, LP, )  
and SYMBION, INC., )

Respondents. )

No. 63217-5-I

CERTIFICATE OF SERVICE

**ORIGINAL**

I, Valerie Cheetham, declare as follows:

1. I am a secretary with the law firm of Jameson Babbitt Stites & Lombard, P.L.L.C., over the age of 18 years, a resident of the State of Washington, and not a party to this matter.

CERTIFICATE OF SERVICE - 1

2. On June 15, 2009, I deposited with ABC Legal Messenger Service a copy of Bellingham BSC's Opening Brief to be served upon counsel for respondents at the following address:

James H. Jordan, Jr.  
Miller Nash, LLP  
4400 Two Union Square  
601 Union Street  
Seattle, WA 98101-3352

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 15th day of June, 2009, at Seattle, Washington.

*Valerie Cheetham*  
Valerie Cheetham