

No. 36414-0

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SOVRAN LLC,
a Washington limited liability company,

Plaintiff/Appellant,

vs.

MICKELSEN DAIRY, INC.,
a Washington corporation;

MICKELSEN PROPERTIES,
a Washington general partnership,
and its general partners,
CLINTON P. MICKELSEN, DENNIS H. MICKELSEN,
WILLIAM W. LINDEMAN and SUSAN J. LINDEMAN,
and their respective marital communities;

MICKELSEN LAND & TIMBER,
a Washington general partnership,
and its general partners,
CLINTON P. MICKELSEN, DENNIS H. MICKELSEN and
SUSAN J. LINDEMAN,
and their respective marital communities,

Defendants/Respondents

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

The content of the Mickelsens'¹ response brief belies their position that summary judgment was appropriate in this case. In their response, the Mickelsens dispute whether the deadline to terminate the purchase and sale agreements pursuant to §18.3 was extended beyond December 31, 2004. They dispute whether the parties intended §18.3 to require that the water right be “transferred” or merely “transferable.” They dispute whether the Mickelsens were satisfied regarding the terms of the water right transfer. They dispute whether §18.4 was intended to benefit Sovran or both Sovran and the Mickelsens. They dispute whether Sovran gave effective notice that it had obtained sufficient government approval. They dispute what “Lewis County approvals” the parties were referring to in §18.4. And, the Mickelsens dispute whether their acceptance of \$180,000 from Sovran, and their subsequent purported termination of the purchase and sale agreements, were in good faith.

The Mickelsens’ brief, in other words, advocates why the these various factual disputes should ultimately be resolved in favor of the Mickelsens. It does not explain how the Mickelsens are entitled to

¹ As in its opening brief, plaintiff and appellant Sovran LLC (“Sovran”) will refer to the defendants and respondents in this case, collectively, as “the Mickelsens.” This includes Mickelsen Dairy, Inc., a Washington corporation; Mickelsen Properties, a Washington general partnership, and its general partners, Clinton P. Mickelsen, Dennis H. Mickelsen, William W. Lindeman, and Susan J. Lindeman, and their respective marital communities; and Mickelsen Land & Timber, a Washington general partnership, and its general partners, Clinton P. Mickelsen, Dennis H. Mickelsen, and Susan J. Lindeman, and their respective marital communities.

judgment as a matter of law if these factual disputes are resolved in favor of Sovran.

Sovran presented to the trial court a proper issue for summary judgment: the legal question of whether an otherwise timely termination notice is still valid if its “effective” date is later than the termination deadline. If a late “effective” date makes such a notice invalid, Sovran is entitled to summary judgment that §18.3 of the purchase and sale agreements, the “Water Rights Transfer,” was satisfied, because that condition is “deemed . . . satisf[ied]” absent a timely termination. The Mickelsens’ summary judgment motions, by comparison, present issues rife with factual disputes—as the Mickelsens now implicitly recognize through the nature of their response.

II. ARGUMENT

A. **As a Matter of Law, a Termination Notice Containing an “Effective” Date Later Than The Deadline to Terminate Is Invalid.**

The following facts are undisputed. The deadline for the Mickelsens to terminate the agreements was, at the latest, December 26, 2005.² The Mickelsens’ purported termination notice was sent on December 14, 2005, but contained an “effective” date of December 31, 2005. The question of law presented by Sovran’s motion for partial

² Sovran maintains that the deadline for the Mickelsens to terminate pursuant to §18.3 actually was December 31, 2004. However, even assuming the Mickelsens are correct that Sovran’s four \$45,000 payments for four ninety-day extensions with respect to §18.4 also extended the Mickelsens’ time to terminate pursuant to §18.3, the deadline was only extended to December 26, 2005, and no later.

summary judgment is whether inclusion of an “effective” termination date falling after the termination deadline makes an otherwise timely termination notice invalid. The federal district court’s opinion in Crowther v. Avis Rent-a-Car System, Inc., 284 F. Supp. 668 (W.D. Wash. 1968), discussed in detail in Sovran’s opening brief, addresses this legal issue directly. That court held that an otherwise timely termination notice is void if it contains an “effective” date which renders it invalid, and granted summary judgment on this ground. Id. at 670.

The Mickelsens misread the Crowther opinion. They argue that Avis “reduce[d] the notice period to less than what is required under the parties’ contract,” and this is why Avis’s termination notice was invalid. Brief of Respondents (“Resp. Br.”) at 46. To the contrary, to terminate on April 1, 1968, as it intended to do, Avis was required to send termination notice no later than January 1, 1968, which would be “at least 90 days prior to the . . . April 1 . . . coinciding with such termination date[.]” Crowther, 284 F. Supp. at 669. Avis gave notice on November 27, 1967, more than a month earlier than it had to do so. Id. Avis’s mistake was not to reduce the notice period, but rather to carelessly describe its termination as “effective as of midnight, March 31” rather than “on April 1.” Id. The Mickelsens made a similar mistake, describing their termination as “effective midnight December 31” rather than “on December 26.”

The Mickelsens emphasize that their purported termination notice was received prior to the termination deadlines. Resp. Br. at 43. This is irrelevant. As a matter of law, the “effective” date governs, not the date

the notice is sent or received. Just as Avis could have made its November 27 notice of termination valid by including an effective date of April 1, the Mickelsens could have made their December 14 notice of termination valid by including an effective date of December 26. But they did not. And, just as Avis lost the right to terminate its license agreement with Crowther because it did not do so within five years, the Mickelsens lost their right to terminate their purchase and sale agreements with Sovran because they did not do so by December 26, 2005.

The Mickelsens also claim that Sovran referred to the extensions as “quarterly” extensions. Resp. Br. at 43. More precisely, that Sovran “first” described the extensions as “quarterly extensions” and “later” as “90-day extensions.” Resp. Br. at 10. The Mickelsens are again mistaken. The document the Mickelsens cite to is the April 26, 2006 declaration of Frank Kirkbride, Co-Manager of Sovran, in the trial court, which casually refers to the extensions as “quarterly payment[s].” CP 334. This declaration was not prepared until long after the Mickelsens’ purported termination, and therefore it cannot be the basis for any alleged misunderstanding as to the termination deadline. More importantly, Sovran’s actual letter sent with the first extension payment refers, accurately, to a “ninety (90) day extension[.]” CP 393 (emphasis added). This is consistent with the language of the purchase and sale agreements themselves. CP 344 (“an additional ninety (90) days will be granted”) (emphasis added). Moreover, even if Sovran had referred to the payments as quarterly, this would not override the contract language.

The Court should reverse the trial court's denial of Sovran's motion for partial summary judgment and remand with instructions to enter partial summary judgment in favor of Sovran that §18.3 was satisfied. Crowther is on point. An invalid "effective" date renders an otherwise timely termination notice void. The Mickelsens have cited no legal authority to the contrary.³

B. The Trial Court's Orders Awarding Summary Judgment To the Mickelsens Should Be Reversed Because Disputed Issues of Material Fact, Or Conflicting Reasonable Interpretations of Undisputed Facts, Precluded Summary Judgment.

Unlike Sovran's motion for summary judgment regarding whether, as a matter of law, a late "effective" date renders a termination notice invalid, the Mickelsens' motions for summary judgment largely presented factual issues. The trial court's orders awarding summary judgment to the Mickelsens violated the basic summary judgment standard, *i.e.*, that summary judgment should not be granted unless "there is no genuine issue as to any material fact," CR 56(c), considering "all facts and reasonable inferences . . . in a light most favorable to the nonmoving party[.]" Cowlitz Stud Co. v. Clevenger, 157 Wn.2d 569, 573, 141 P.3d 1 (2006).

³ Sovran maintains that it also is entitled to partial summary judgment that the §18.4 condition precedent, "Authorization for Property Development," was waived. See Opening Brief at 19-20. At minimum, however, there were disputed issues of material fact regarding this issue which should have precluded summary judgment in favor of the Mickelsens. See discussion *infra* §II.B.4.

1. Disputed Issue of Material Fact No. 1: Whether the Deadline for the Mickelsens to Terminate the Agreements Pursuant to §18.3 Was December 31, 2004 Or December 26, 2005.

Section 18.3 of the purchase and sale agreements provides that “Seller shall provide Buyer with written termination of this Agreement in the event the conditions of the water right transfer to the City of Winlock is not satisfactory to Seller” and that “[f]ailure of Seller to provide written termination shall be deemed a satisfaction of this condition to closing.” CP 343 (emphasis added). Thus, for this Court to determine that §18.3 was not satisfied, as the trial court did, this Court must first determine that the Mickelsens provided timely written notice of termination pursuant to this section. Such a determination is not possible in light of the evidentiary record below and the summary judgment standard to be applied here.

The parties’ amendment of the purchase and sale agreements extended the deadline for the Mickelsens to terminate to December 31, 2004. CP 375. The Mickelsens’ purported termination was sent on December 14, 2005, with an effective date of December 31, 2005. CP 256. Thus, the Mickelsens’ purported termination was a year too late. The Mickelsens’ failure to terminate before the deadline meant that §18.3 was “deemed . . . satisf[ied.]” CP 343.

The Mickelsens contend that Sovran’s purchase of four ninety-day extensions, for \$180,000, to extend the time for Sovran to satisfy the §18.4 requirements, also extended the time for the Mickelsens to terminate the agreements pursuant to §18.3. Resp. Br. at 41-42. The Mickelsens’

contention is nonsensical on its face. There would be no logical reason for Sovran to pay \$180,000 to the Mickelsens to give the Mickelsens additional time to terminate the agreements under a provision which Sovran already believed to be fully satisfied.

The evidentiary record below supports Sovran's contention that the December 31, 2004 deadline for the Mickelsens to terminate the agreements pursuant to §18.3 was not extended. Mr. Kirkbride explained that by the time Sovran exercised its option to extend the deadline to satisfy §18.4, the "Authorization for Property Development" condition precedent, there was no dispute regarding §18.3, the "Water Rights Transfer" condition precedent. The Water Services Area Agreement with the City of Winlock (the "WSA Agreement"), under which the Mickelsens' water rights would be transferred to the City, was in place. CP 333. "[A]s of December 31, 2004, the only condition remaining was Section 18.4." CP 334. Sovran could not have intended to extend the deadline for the Mickelsens to terminate the agreements pursuant to §18.3, because there simply was no outstanding issue regarding §18.3. Mr. Kirkbride's testimony is supported by the cover letter accompanying the first \$45,000 payment to the Mickelsens, which discusses government approval issues at length and contains no reference whatsoever to water rights issues. CP 393.

The salient point is not that Mr. Kirkbride is correct that Sovran's exercise of its option to extend the deadline for Sovran to address the government approval issues was never intended by the parties to extend

the deadline for the Mickelsens to terminate the agreements based on water right transfer issues. Rather, it is that Mr. Kirkbride's testimony, supported by the language of Sovran's letter and the context in which the option was exercised, at minimum creates a dispute as to what the parties' intent was. "When interpreting a contract," such as Sovran's option to extend deadlines to satisfy conditions precedent and its exercise thereof, the court's "primary objective is to discern the parties' intent." W.M. Dickson Co. v. Pierce County, 128 Wn. App. 488, 493, 116 P.3d 409 (2005) (reversing summary judgment on contract claim because more than one reasonable interpretation of contract was possible). "As a general rule," the Court "consider[s] the parties' intentions questions of fact." Id. Moreover, "[i]f a contract has two or more reasonable meanings when viewed in context, a question of fact is presented." Bort v. Parker, 110 Wn. App. 561, 575, 42 P.3d 980 (2002).

If the December 31, 2004 deadline for the Mickelsens to terminate the agreements pursuant to §18.3 was not extended, the Mickelsens' December 2005 notice of termination was untimely, and §18.3 is deemed satisfied. CP 343. Accordingly, the parties' factual dispute over whether Sovran intended to extend this deadline is a material one. The trial court's order "that Sovran, LLC did not satisfy the conditions in paragraph 18.3" must therefore be reversed. CP 169.

2. Disputed Issue of Material Fact No. 2: Whether §18.3 Required a Water Rights Transfer Agreement.

Section 18.3 of the purchase and sale agreements requires that “a bonafide water right exists on the property and that such right is transferable to a municipality for use as domestic, commercial and/or industrial water.” CP 342 (emphasis added). Thus, by its very language, §18.3 does not require that the water right actually be transferred. It only requires that Sovran be satisfied that a bona fide water right exists and “is transferable.”

There can be no reasonable dispute that the water right is transferable, given that the parties entered into the WSA Agreement. CP 383-391. The fact that the WSA Agreement expired in accordance with its terms on April 16, 2005 had nothing to do with whether the water right is transferable. Moreover, following Lewis County’s December 6, 2005 resolution, the City “is now in a position to accept the water rights under the previous agreement entered into by the parties or if necessary, enter into a new agreement.” CP 288.

The Mickelsens now contend that §18.3 must be interpreted such that “an agreement was required.” Resp. Br. at 29 (emphasis added); see also Resp. Br. at 27 (“Paragraph 18.3 . . . required Sovran to effect an agreement with the City”) (emphasis added). Although this requirement appears nowhere in the purchase and sale agreements, the Mickelsens argue that it “is necessarily implicit” in §18.3. Resp. Br. at 32 (emphasis added); see also Resp. Br. at 28 (“The requirement of a contract dealing

with and protecting the Mickelsens' water rights is implicit in the terms of paragraph 18.3.”) (emphasis added), 29 (referencing the “implicit requirement of an agreement dealing with the Mickelsens' water rights”) (emphasis added). In other words, the Mickelsens essentially ask the Court to change the word “transferable” to “transferred” in §18.3 to reflect the “implicit” requirement the Mickelsens now seek to add. When the Mickelsens argue for “necessarily implicit” requirements to be read into the purchase and sale agreements, they are arguing that the contract terms are ambiguous and therefore conceding that summary judgment was improper. The Mickelsens then go on to argue that because the WSA Agreement expired, the water right was never “transferred,” even if it was, and remains, “transferable.” Thus, according to the Mickelsens, §18.3 was not satisfied. Resp. Br. at 33-36.

In support of their position, the Mickelsens cite to correspondence between the parties, rather than to the language of the agreement itself. Resp. Br. at 30-32. However, references to transfer of water rights in correspondence, whether sent prior to or following the execution of the purchase and sale agreements, cannot be read to add new terms to those agreements. The agreements contain a merger clause, in §23, precluding exactly this. CP 345 (“This Agreement embodies the entire agreement of the parties with respect to the transaction herein contemplated and supercedes all prior agreements, whether oral or written. Any amendment hereto shall be in writing and executed by the parties hereto.”).

The Mickelsens further contend that Sovran’s contrary interpretation of §18.3—that it requires merely that the water right “transferable,” not that it actually be “transferred”—is “unsupported by the record.” Resp. Br. at 32. To the contrary, Sovran’s interpretation is supported by the most important documents in the record, the purchase and sale agreements themselves, which state that the water right be “transferable,” not that it be “transferred.” CP 342.

The salient point again is not whether Sovran is correct that §18.3 only requires that the water right be “transferable,” or whether the Mickelsens are correct that §18.3 requires that the water right be “transferred.” The point is that interpretation of this term is a disputed issue of material fact which precludes summary judgment in favor of the Mickelsens. See W.M. Dickson Co., 128 Wn. App. at 493. Because the parties dispute what §18.3 required, the trial court’s order “that Sovran, LLC did no satisfy the conditions in paragraph 18.3” must be reversed. CP 169.

3. Disputed Issue of Material Fact No. 3: Whether the Mickelsens Were Satisfied, Or Should Have Been Satisfied, By the Terms Under Which the Water Right Would Be Transferred.

The Mickelsens only had the ability to terminate the purchase and sale agreements based on §18.3 if the terms under which the water right would be transferred were “not satisfactory to” the Mickelsens. CP 356. Whether the Mickelsens were satisfied, or should have been satisfied, is a question of fact. See Omni Group, Inc. v. Seattle First Nat’l Bank, 32 Wn.

App. 22, 25-26, 645 P.2d 727 (1982) (in case involving real estate purchase agreement with condition precedent that feasibility report be “satisfactory to purchaser” the appellate court held that “[w]hether the promisor was actually satisfied or should have been satisfied is a question of fact”).

The Mickelsens appear to argue that because they are the ones who must be “satisfied” regarding the terms of the water right transfer, that Sovran is not entitled to present evidence on this issue. Indeed, Sovran presented substantial evidence to the trial court that the Mickelsens were satisfied regarding the terms under which the water right would be transferred.

First of all, the Mickelsens signed the WSA Agreement. CP 386-88. This alone should be enough to establish that the Mickelsens were satisfied with the terms under which the water rights would be transferred. Additionally, that that the Mickelsens never advised Sovran at any time prior to the purported termination in December 2005 that they were unsatisfied on this point further evidences the Mickelsens’ satisfaction. CP 334-35 (Mr. Kirkbride’s declaration, stating that §18.3 was “long deemed satisfied”).

Sovran does not need to prove that the Mickelsens’ alleged non-satisfaction was “abusive or arbitrary,” as the Mickelsens argue. Resp. Br. at 37. The cases cited by the Mickelsens in support of this argument are inapposite. They relate to a trustee’s authority to make decisions relating to a trust. See Occidental Life Ins. Co. of Calif. v. Blume, 65 Wn.2d 643,

647-48, 399 P.2d 76 (1965) (“Though there was no direct evidence that the Washington Trustees had exercised their discretion by formal resolution in accord with the trust agreement, the record shows that they had determined to exclude the employee intervenors from any portion of the refund . . . Such a determination is subject to control by the court only when necessary to prevent an abuse of discretion.”); Old Nat’l Bank & Trust Co. of Spokane v. Hughes, 16 Wn.2d 584, 590, 134 P.2d 63 (1943) (“The rule is well settled that, under such powers as the settlor conferred upon Mr. Wakefield, the trustee’s construction and interpretation of the [trust] instrument will be accepted by the courts in the absence of fraud or arbitrary conduct.”).

Sovran need only prove that the Mickelsens were, in fact, satisfied. More precisely, for purposes of this appeal Sovran need only establish that whether the Mickelsens were satisfied, or should have been satisfied, is a disputed issue of fact. See Omni Group, Inc., 32 Wn. App. at 25-26. Because this is a disputed issue of fact, the trial court’s order “that Sovran, LLC did not satisfy the conditions in paragraph 18.3” must be reversed. CP 169.

4. Disputed Issue of Material Fact No. 4: Whether the Parties Intended §18.4 To Be For the Benefit of Sovran or Both Sovran and the Mickelsens.

The Mickelsens concede that Sovran would be entitled to waive the “Authorization for Property Development” condition of §18.4 if that condition were for Sovran’s sole benefit. Resp. Br. at 15. The language of §18.4 suggests it was for Sovran’s sole benefit. It obligates the

Mickelsens to “cooperate” with Sovran in obtaining government approvals. CP 343. It obligates the Mickelsens to “sign any documents reasonably requested by” Sovran. Id. It provides that the purchase and sale agreements shall be terminated if Sovran is unable to obtain the level of government approval it believes it needs to be satisfied that it will be able to develop the property it is purchasing. Id.

The Mickelsens contend that §18.4 was designed to “protect[] the value of their water rights and therefore could not be waived by Sovran.” Resp. Br. at 16. However, §18.4 says nothing about water rights. The Mickelsens further assert that §18.4 “required the existence of a viable, government approved development plan that would provide consumers of water to generate revenue for the Mickelsens’ water rights[.]” Resp. Br. at 16. This requirement appears nowhere in §18.4. Moreover, the government approvals which are contemplated by §18.4 would be meaningless, and would provide no “protection” for the Mickelsens whatsoever, unless Sovran were to choose to actually develop the property. In short, §18.4 does nothing for the Mickelsens. It was included in the agreements exclusively for the benefit of Sovran.

The “notification” provision in §18.4 does not change this, as the Mickelsens assert. Resp. Br. at 17. The Mickelsens’ reliance on Swenson v. Lowe, 5 Wn. App. 186, 486 P.2d 1120 (1971), is misplaced. In that case, a construction contract provided that there will be no alterations to the scope of work without written consent by the owner. Id. at 187. The contractor made various deviations from the specified scope of work,

without such written consent. Id. This Court determined that the written-consent term was “for the benefit of the owner, and the owner, either expressly or by conduct, may waive such a requirement.” Id. at 188. The Court further determined that substantial evidence supported the trial court’s finding that the owner so waived the written-consent term. Id. at 190. The written-consent term in the construction contract in Swenson clearly was for the benefit of the owner. This is not analogous to the notification provision in §18.4, which merely provides that Sovran will inform the Mickelsens when Sovran has received the necessary government approval to satisfy Sovran that it will be able to develop the property.

That the §18.4 condition was included for the benefit of Sovran is evidenced by the fact that Sovran drafted this provision for inclusion in the agreements. CP 193. The Mickelsens now dispute how §18.4 was negotiated. They claim that it was “negotiated into the PSAs to assure that the Mickelsens received fair compensation for their water rights.” Resp. Br. at 5. But again, the Mickelsens’ argument illustrates Sovran’s point. Because there is, at minimum, a disputed issue of fact whether §18.4 was intended to benefit the Mickelsens as well as Sovran, the trial court’s implicit determination that Sovran was not permitted to waive §18.4 must be reversed. CP 169.

5. Disputed Issue of Material Fact No. 5: Whether Sovran Gave Notice That §18.4 Was Satisfied.

Section 18.4 provides that Sovran will provide the Mickelsens with notification when §18.4 has been satisfied. CP 343. In the trial court, the Mickelsens stated that they gave Sovran five “additional days to satisfy” §18.4, from December 26, 2005 to December 31, 2005. CP 317; see also CP 256 (stating that “it does not appear there will be an acceptable agreement in place . . . prior to December 31, 2005”) (emphasis added). It is undisputed that Mr. Kirkbride sent a written notice to the Mickelsens on December 28, 2005 that §18.4 had been satisfied. CP 273-74. This would be timely in light of the “additional days” granted by the Mickelsens. Now, however, the Mickelsens contend that the deadline for Sovran to satisfy §18.4 was, in fact, December 26. Resp. Br. at 24. The inconsistency between the Mickelsens’ own statements is enough to create a factual dispute regarding whether Mr. Kirkbride’s December 28 letter constituted timely notice.

Moreover, it also appears from the record below that Sovran may have given the Mickelsens earlier notification that §18.4 was satisfied. CP 273 (“On December 6, 2005, the approvals from Lewis County were obtained and Sellers were so notified.”) (emphasis added); see also CP 188.

“Conditions precedent are not favored by the courts and will be excused if enforcement would involve extreme forfeiture or penalty and if the condition does not form an essential part of the bargain.” Ashburn v. Safeco Ins. Co. of Amer., 42 Wn. App. 692, 698, 713 P.2d 742 (1986). It

would be grossly unfair if the Mickelsens were permitted to send a letter stating that the purchase and sale agreement would be terminated “effective . . . December 31” and then argue that Sovran’s December 28 notice that §18.4 had been satisfied was untimely. CP 256 (emphasis added); CP 273.

Whether the Mickelsens gave Sovran five “additional days to satisfy” §18.4, as they have stated, is at least a disputed issue of fact. So is the issue of whether the Mickelsens gave other effective notice following the December 6 Lewis County resolution. Whether the notification provision of §18.4 “forms an essential part of the bargain” is also a disputed issue of fact that must be tried. The trial court’s summary judgment determination that “Sovran, LLC did not satisfy the conditions in . . . paragraph 18.4” must therefore be reversed. CP 169.

6. Disputed Issue of Material Fact No. 6: What the Parties Intended “Lewis County Approvals” to Mean.

The parties also dispute what the language “Lewis County approvals” in §18.4 means. The Mickelsens erroneously claim that this issue was not raised in the trial court. To the contrary, Mr. Kirkbride stated in both his declaration and his supplemental declaration that, according to his understanding of §18.4, this condition was satisfied following Lewis County’s December 6, 2005 resolution. CP 334 (“In early December, 2005, positive governmental action was taken which . . . allowed Sovran to go forward and purchase the Mickelsen property.”); CP 188 (“After that hearing, I informed the Mickelsens of Sovran’s intent to

close . . .”). In its opposition to the Mickelsens’ summary judgment motion, Sovran argued that “[t]he Mickelsens’ position in the litigation that these other ‘levels’ of approval were contemplated by Sovran and the Mickelsens and provided for in Section 18.4” is inconsistent with “the very language in Section 18.4, which is addressed solely to Lewis County.” CP 153.

The Mickelsens dispute Sovran’s understanding of what “Lewis County approvals” means. They argue that this language refers to “all government approvals necessary for its planned development[.]” Resp. Br. at 13 (emphasis added). These include, according to the Mickelsens, approvals by governmental bodies other than Lewis County, even though this is the entity actually specified in §18.4. The Mickelsens also identify various actions by the City of Winlock which they would define “Lewis County approvals” to include. Resp. Br. at 21-22.

The Mickelsens concede that Sovran “obtained . . . one government approval”—Lewis County’s critical approval of the expanded Urban Growth Area—but argue that this was not enough to satisfy §18.4, because, according to the Mickelsens, “plural” approvals are required. Resp. Br. at 22. The Mickelsens base their argument on various factual assertions about what the Mickelsens’ intent was, what they “wanted,” and what they were “willing” to do. Resp. Br. at 3, 22. The Mickelsens again rely on correspondence between the parties, rather than the contract language itself, to make their argument. Resp. Br. at 26.

What the parties intended “Lewis County approvals” to require plainly is a disputed issue of material fact. Until it is resolved, as a factual matter, what level of approval Sovran was to obtain, it would be premature to determine that Sovran failed to obtain these approvals. The trial court’s summary judgment determination that “Sovran, LLC did not satisfy the conditions in . . . paragraph 18.4” must therefore be reversed on this ground. CP 169.

7. Disputed Issue of Material Fact No. 7: Whether the Mickelsens Acted In Good Faith.

The trial court awarded summary judgment to the Mickelsens on Sovran’s claim that the Mickelsens breached their contractual duty of good faith and fair dealing. CP 27. “Good faith is wholly a question of fact.” Yuille v. State, 111 Wn. App. 527, 533, 45 P.3d 1107 (2002). Sovran presented substantial evidence below that the Mickelsens did not act in good faith, which, at minimum, creates a disputed issue of material fact precluding summary judgment on this claim.

The documentary evidence below amply demonstrates that the Mickelsens were not attempting to terminate the agreements for any legitimate reason. To the contrary, they were simply trying to get out of the agreements so that they could negotiate a more favorable deal. See, e.g., CP 255 (“the Mickelsens are happy to discuss alternative proposals with Sovran independent of the existing Purchase and Sale Agreements”).

In addition, if the Mickelsens really were not satisfied with the terms under which the water right would be transferred, and intended to

terminate under §18.3, as they now claim, they acted in bad faith by accepting \$180,000 in payments to extend the time for Sovran to obtain Lewis County approval pursuant to §18.4. Similarly, if the Mickelsens really believed “Lewis County approvals” meant “all government approvals,” as they now claim, including the eight different County and City approvals identified in their response brief, see Resp. Br. at 22, the Mickelsens acted in bad faith in accepting \$180,000 in payments when it was obvious that Sovran was operating under a different understanding of what “Lewis County approvals” meant. If Sovran “certainly knew the difference between securing approval of the expanded Urban Growth Area . . . and the multitude of other steps necessary,” as the Mickelsens claim, then the Mickelsens also “certainly knew” this difference while accepting these payments. Resp. Br. at 26.

Whether the Mickelsens acted in good faith is a disputed issue of fact. Accordingly, the trial court’s dismissal of Sovran’s claim on summary judgment also must be reversed. CP 27.⁴

III. CONCLUSION

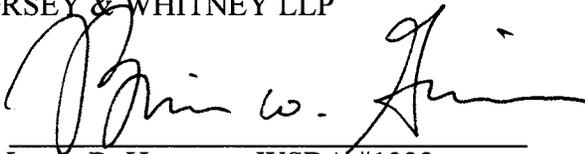
The Mickelsens devote virtually their entire response brief to their interpretations of the purchase and sale agreements. These interpretations are based on parol evidence and vague assertions as to what the

⁴ At minimum, the Mickelsens’ summary judgment motion should have been continued, pursuant to CR 56(f), so that Sovran could take further discovery on these issues. The limited discovery Sovran had been able to take had already uncovered Clinton Mickelsen’s handwritten notes demonstrating the Mickelsens’ bad faith. CP 162 (“Avoid any mention of land prices until after 12-31-05”); CP 161 (discussing project with Winlock’s mayor immediately following the purported termination). Discovery was “far from complete.” CP 149.

Mickelsens “wanted” and were “willing” to do. The Mickelsens’ response confirms Sovran’s point. The parties’ material factual disputes should have precluded summary judgment in favor of the Mickelsens. These issues must be tried.

Respectfully submitted this 28th day of January 2008.

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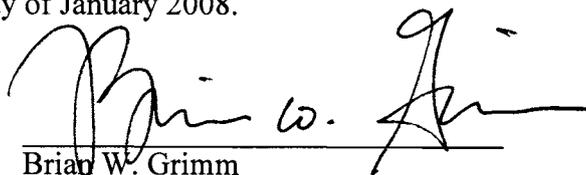
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PROOF OF SERVICE

I caused copies of the foregoing Appellant's Reply Brief to be served today, by legal messenger, on:

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DATED this 28th day of January 2008.



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