

No. 391574-II

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

MORCOS BROTHERS, INC., NADER MORCOS,
and **NABIL MORCOS**, Appellants,

and

MERIDIAN PLACE LLC, and
GREG STEIN, Respondents.

BRIEF OF APPELLANT

FILED
COURT OF APPEALS
DIVISION II
09 OCT 29 PM 1:51
STATE OF WASHINGTON
BY DEPUTY

Thomas L. Dickson, WSBA #11802
Kevin T. Steinacker, WSBA #35475
DICKSON STEINACKER PS
1201 Pacific Avenue, Suite 1401
Tacoma, WA 98409
Telephone: (253) 572-1000
Facsimile: (253) 572-1300

Attorneys for Appellants

ORIGINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
ASSIGNMENTS OF ERROR.....	1
ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	2
STATEMENT OF FACTS	4
ARGUMENT.....	10
A. The Judgment Must Be Remanded Because It Is Not Supported by Written Findings of Fact.	10
B. A New Trial Should Have Been Granted.	14
C. The Trial Court Misconstrued the Lease Provisions.....	18
D. Morcos Is Entitled to an Offset against the Judgment.	25
E. Morcos’s Claim for Fraud Should Not Have Been Dismissed.....	29
F. Morcos Is Entitled to an Award of Attorney’s Fees.	31
CONCLUSION.....	32
APPENDIX A.....	33

TABLE OF AUTHORITIES

Cases

<i>Bellevue School Dist. No. 405 v. Bentley</i> , 38 Wn. App. 152, 684 P.2d 793 (1984).....	19
<i>Berg v. Hudesman</i> , 115 Wn.2d 657, 801 P.2d 222 (1990)	19
<i>Bernsen v. Big Bend Elec. Coop., Inc.</i> , 68 Wn. App. 427, 842 P.2d 1047 (1993).....	28
<i>Bowman v. Webster</i> , 42 Wn.2d 129, 253 P.2d 934 (1953).....	13
<i>Buob v. Feenaughty Mach. Co.</i> , 199 Wash. 256, 90 P.2d 1024 (1939)....	11
<i>Carlstrom v. Hanline</i> , 98 Wn. App. 780, 990 P.2d 986 (2000).....	19
<i>Colorado Structures, Inc. v. Ins. Co. of the West</i> , 161 Wn.2d 577, 167 P.3d 1125 (2007).....	19
<i>Crown Plaza Corp. v. Synapse Software Sys., Inc.</i> , 87 Wn. App. 495, 962 P.2d 824 (1997).....	22
<i>Dayton v. Farmers Ins. Group</i> , 124 Wn.2d 277, 876 P.2d 896 (1994)	31
<i>Detrick v. Garretson Packing Co.</i> , 73 Wn.2d 804, 440 P.2d 834 (1968).	14
<i>DGHI, Enters. v. Pacific Cities, Inc.</i> , 137 Wn.2d 933, 977 P.2d 1231 (1999).....	10, 11, 12, 13
<i>Draper Mach. Works, Inc. v. Hagberg</i> , 34 Wn. App. 483, 663 P.2d 141 (1983).....	22, 25
<i>Eastlake Constr. Co. v. Hess</i> , 102 Wn.2d 30, 686 P.2d 465 (1984).....	26
<i>Ferree v. Doric Co.</i> , 62 Wn.2d 561, 383 P.2d 900 (1963)	12
<i>Fisher Properties, Inc. v. Arden-Mayfair, Inc.</i> , 106 Wn.2d 826, 726 P.2d 8 (1986).....	25
<i>Forest Mktg. Enters., Inc. v. Dep't. of Natural Res.</i> , 125 Wn. App. 126, 104 P.3d 40 (2005).....	18
<i>In re Dependency of Schermer</i> , 161 Wn.2d 927, 169 P.3d 452 (2007)....	29
<i>In re Murchison</i> , 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955).....	15

<i>Johnson v. Whitman</i> , 1 Wn. App. 540, 463 P.2d 207 (1969)	11, 33
<i>Lincor Contractors, Ltd. v. Hyskell</i> , 39 Wn. App. 317, 692 P.2d 903 (1984).....	26
<i>McGary v. Westlake Investors</i> , 99 Wn.2d 280, 661 P.2d 971 (1983).....	19
<i>Morris v. Nowotny</i> , 68 Wn.2d 670, 415 P.2d 4 (1966).....	16
<i>Peoples Nat'l Bank of Wash. v. Birney's Enters., Inc.</i> , 54 Wn. App. 668, 775 P.2d 466 (1989).....	10, 11
<i>Platts v. Arney</i> , 50 Wn.2d 42, 309 P.2d 372 (1957)	25, 26, 27
<i>Rogers Potato Service, LLC v. Countrywide Potato, LLC</i> , 152 Wn.2d 387, 97 P.3d 745 (2004).....	30
<i>State v. Helsel</i> , 61 Wn.2d 81, 377 P.2d 408 (1963).....	11
<i>State v. Kingman</i> , 77 Wn.2d 551, 463 P.2d 638 (1970)	11
<i>State v. Madry</i> , 8 Wn. App. 61, 504 P.2d 1156 (1972).....	16
<i>State v. R.J. Reynolds Tobacco Co.</i> , __ Wn. App. __, 211 P.3d 448 (2009).....	18
<i>State v. Ra</i> , 142 Wn. App. 688, 175 P.3d 609 (2008).....	16
<i>WESCO Distribution, Inc. v. M.A. Mortenson Co.</i> , 88 Wn. App. 712, 946 P.2d 413 (1997).....	10, 11, 13
<i>Willis v. Simpson Inv. Co.</i> , 79 Wn. App. 405, 902 P.2d 1263 (1995).....	29
<i>Wm. Dickson Co. v. Pierce County</i> , 128 Wn. App. 488, 116 P.3d 409 (2005).....	19

Rules

CJC, Canon 2	16
CR 52	10, 29
CR 59	15

ASSIGNMENTS OF ERROR

1. The trial court erred by failing to enter written findings of fact and conclusions of law to support either the judgment or the dismissal of Morcos's claim for fraud under CR 41(b)(3).

2. The court below erred in denying Morcos's motion for a new trial under CR 59.

3. The trial court erred by entering judgment against Morcos for breach of contract by misconstruing the lease terms and by making findings contrary to substantial evidence.

4. The trial court improperly determined the damages awarded against Morcos for breach of contract by failing to allow an offset to the damages.

5. The trial court erred by dismissing Morcos's claim for fraud under CR 41(b)(3).

6. The trial court's denial of Morcos's motion for reconsideration was in error.

7. The trial court's informal findings of fact are not supported by substantial evidence, as described in Appendix A.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where a judge gives an oral decision after trial but fails to sign formal written findings of fact and conclusions of law despite objection, the resulting judgment cannot be supported on appeal. (Assignment of Error 1)

2. Where a trial judge gives an oral decision on a motion for involuntary dismissal but fails to sign written findings of fact, an order granting involuntary dismissal must be reversed. (Assignment of Error 1)

3. Where a trial judge is under investigation for criminal acts and is distracted during trial such that the parties' right to a fair trial in a fair tribunal is called into question, a new trial should be granted. (Assignment of Error 2)

4. Where a lease agreement defines delivery date as the date the premises are in such condition as reasonably required for commencement of tenant's work, and the lease further requires notice of substantial completion of landlord's work prior to occupancy by the tenant and commencement of tenant's work, the lease provisions must be construed together, and the delivery date cannot occur until after substantial completion of landlord's work. (Assignments of Error 3, 6)

5. Where a lease requires substantial completion of the landlord's work before delivery of the premises to the tenant, and where no witnesses

testified that the landlord's work was substantially complete as of the date specified in the lease, a trial court's determination that the premises were delivered by the date specified in the lease must be reversed. (Assignments of Error 3, 6, 7)

6. Because the measure of damages for breach of contract is intended to put the non-breaching party in the same position it would be in had the contract been performed, any damages awarded must be reduced by expenses the non-breaching party would have incurred had the contract been performed. (Assignments of Error 4, 6)

7. Where a trial court's decision is contrary to substantial testimony and evidence presented, the decision must be reversed. (Assignments of Error 5, 6, 7)

STATEMENT OF FACTS

The Appellant, Morcos Brothers Inc. and its principals Nader Morcos and Nabil Morcos (collectively referred to as Morcos), was the tenant under a commercial lease with the Respondent, Meridian Place LLC and its principal Greg Stein (collectively Meridian Place). The parties' dispute centers on two main issues: Morcos's allegation of misrepresentations by Meridian Place when the lease was executed and when the leased premises was in a condition to trigger delivery of the space to the tenant under the terms of the lease.

Lease Formation

In 2005, Morcos contacted the landlord's agents regarding a potential lease of commercial space in Meridian Place, a shopping center located at 4301 South Meridian in Puyallup. RP I (February 2, 2009) 61. Negotiations broke off for a time, but a letter of intent was signed June 22, 2006. RP I 63, Ex. 6. Subsequently, Phil Davidson, the landlord's real estate agent, met with Morcos at an Olive Garden restaurant and delivered a draft lease to Morcos. RP I 68. Nabil Morcos made handwritten changes to the draft and Nader Morcos wrote on the front page that they would agree to the lease in its current form and that the landlord would have to accept or deny the lease within twenty-four hours. RP I 69-70; RP III (February 4, 2009) 347; Ex. 111. Later, Mr. Davidson called Nader

Morcos to arrange a meeting with the landlord for the next day to execute the lease. RP I 81.

Unknown to Morcos, Mr. Davidson took the original of the Olive Garden draft including Morcos's changes and faxed the altered pages to the landlord. RP VI (February 10, 2009) 682; Ex. 12. The landlord then made additional changes to the faxed pages, altering the provisions submitted by Morcos. RP VI 685. He then copied the faxed pages so his alterations would appear in black, making it harder to distinguish his changes to the Morcos proposal. RP VI 695. The landlord inserted the altered pages into a copy of the full lease and signed and initialed the lease in blue ink. RP VI 684, 687.

The next day, August 1, 2006, the parties met at a Starbucks to execute the lease. Based on their deadline for acceptance of their final offer embodied in the Olive Garden draft, and based on Mr. Davidson's phone call, Nabil and Nader Morcos did not expect to negotiate or discuss the lease in detail. RP I 82. Both Morcoses testified that a few select provisions of the lease were discussed at the Starbucks meeting and some changes were made to the lease in blue ink. RP I 84; RP III 349, 351-5. However, the landlord's black-ink changes to the Olive Garden draft were not discussed at the Starbucks meeting, RP I 85, RP III 348-49, and the parties did not go over the lease page-by-page, RP III 357.

The Morcoses testified that there were two versions of the lease present at the meeting: something that looked like their Olive Garden version, and the version that was actually signed. RP I 86; RP III 356. Nabil Morcos recalled that the landlord made a change on the lease at the Starbucks meeting that was not reflected in blue on either Exhibit 112 or 113. RP III 353. After discussing the lease by referencing the Olive Garden version, Mr. Stein insisted that the other copies be executed, insisting that the leases are exactly the same. RP III 397. Of course, the leases that were executed actually contained many changes that the landlord had made the night before to the Olive Garden version.

Based on the landlord's representation, Nabil Morcos initialed the lease where he was told to initial without carefully reviewing the lease terms. RP III 397; RP IV (February 5, 2009) 507. Nader Morcos was uncomfortable with the many handwritten changes and asked that a clean copy incorporating the changes be prepared for signing. RP I 88. When Mr. Stein indicated that would be unnecessary, Nader refused to sign the lease. RP I 88-89.

Soon after the lease was signed, Morcos noticed that the lease as executed was not what they thought they had agreed to. RP I 93-94. Although they did not agree to any of the landlord's black-ink changes, RP III 358-63, the most important changes to Morcos were those

regarding who would pay for relocation of a trash dumpster and determination of the delivery date under the lease. RP I 94. Morcos was unable to resolve these issues with the landlord, and vacated the premises in March 2007. RP II (February 3, 2009) 144.

Delivery of Premises

The lease agreement as signed specified that the space should be delivered to the tenant by October 1, 2006. Ex. 112 at ¶ 5.2. However, Morcos argues that the space was not in sufficient condition as of that date to trigger delivery, because the landlord had not substantially completed its work under the lease. *E.g.* Ex. 163. For example, the parties do not dispute that the following items of landlord's work were not complete as of October 1, 2006: the HVAC units, the sprinkler system, and sheetrock and paint on the interior walls. Exs. 59, 174, 175, 180, 181. Further, Morcos asserts that insulation and installation of the first electric panel, which were not complete by October 1, were also landlord's work. Exs. 175, 180. The landlord did not deliver exclusive possession to Morcos by October 1, and did not provide a key to the tenant until late November 2006. Exs. 42, 47.

In addition to issues with the status of work in the space, Morcos also objected to the landlord's failure to approve any of the tenant's plans or drawings. Mr. Stein sent an email to Boyd Pickrell, the landlord's

project manager, instructing him to “make sure neither you nor Lanldlord are ‘approving’ the dwgs in any way.” Ex. 29. Consistent with this instruction, the landlord did not approve any drawings, including the initial layout submitted by Morcos, even though the landlord’s comments regarding the initial layout were minor and should not have prevented approval, as admitted by the landlord. RP VI 715 (stating “There were no objections to those schematic drawings.”); RP VII (February 11, 2009) 832-34; Ex. 47.

Under the lease as signed, Morcos was obligated to pay rent and CAM charges beginning 90 days after delivery. Ex. 112. However, the landlord was obligated to pay Morcos \$20 per square foot (amounting to \$87,000) as an allowance for tenant improvement work. Ex. 112 at D. The lease does not specify when the payment was due, nor does it condition payment on completion of construction by the tenant. When the landlord’s agent approached Morcos about payment of rent, Morcos countered by suggesting that it be offset against the tenant improvement allowance, which was never paid. RP II 138-9.

Procedural History

Morcos filed suit against Meridian Place in December 2006 seeking a declaratory judgment as to the terms of the lease relating to the delivery date and alleging fraud. CP 1. Meridian Place counterclaimed

for breach of contract. CP 12. Meridian Place also commenced a separate action for unlawful detainer in March 2007, which was resolved when Morcos voluntarily vacated the space on March 15, 2007. Meridian Place then sued the Morcoses individually in King County on the personal guaranties. That action was transferred to Pierce County and then consolidated with Morcos's original suit. CP 100.

The case was tried without a jury before Judge Michael Hecht from February 2 to February 13, 2009. Judge Hecht rendered an oral decision on February 23, 2009, and entered judgment on March 6, 2009, without signing written findings of fact and conclusions of law. CP 214. On March 26, 2009, Morcos's motion for reconsideration was denied. CP 298. Morcos also filed a motion for new trial, which was heard and denied by Judge Bryan Chushcoff on April 17, 2009. CP 410. Morcos timely filed a Notice of Appeal on April 21, 2009. CP 412.

ARGUMENT

The trial court's judgment against Morcos must be reversed. First, the judgment cannot be upheld because it is not supported by written findings of fact and conclusions of law. The order denying Morcos's motion for a new trial should also be reversed because Morcos did not receive a fair trial in a fair tribunal. Alternatively, the judgment should be reversed because the trial court misconstrued critical provisions of the lease, it failed to apply the correct measure of damages for a breach of contract, and its dismissal of Morcos's claim of fraud was not based on substantial evidence.

A. The Judgment Must Be Remanded Because It Is Not Supported by Written Findings of Fact.

The trial court's judgment dated March 6, 2009, must be remanded because written findings of fact were never entered by the trial court. "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law." CR 52(a). This rule contemplates the entry of written findings. *DGHI, Enters. v. Pacific Cities, Inc.*, 137 Wn.2d 933, 977 P.2d 1231 (1999); *WESCO Distribution, Inc. v. M.A. Mortenson Co.*, 88 Wn. App. 712, 946 P.2d 413 (1997); *Peoples Nat'l Bank of Wash. v. Birney's Enters., Inc.*, 54 Wn. App. 668, 775 P.2d 466 (1989); *see also* CR 52(c)

(providing that “the court shall not sign findings of fact or conclusions of law” until after proper notice to the opposing party). Oral findings of fact are not sufficient to support a judgment. *E.g. WESCO Distribution, Inc.*, 88 Wn. App. 712; *see also Johnson v. Whitman*, 1 Wn. App. 540, 541, 463 P.2d 207 (1969) (assignment of error to quoted portions of oral opinion was improper because oral “statements are not rulings which can be appealed or assigned as error”). Merely incorporating a trial judge’s remarks into written findings is also inadequate. *Peoples Nat’l Bank of Wash.*, 54 Wn. App. at 670.

CR 52 requires written findings. This means formal findings on all disputed facts. Absence of findings undermines the conclusions of law. ... We consider it the prevailing party’s duty to procure formal written findings supporting its position. Prevailing parties must fulfill that duty or abide the consequences of their failure to do so.

Id. (citations omitted). Without written findings to support the judgment, the judgment must be reversed or remanded for entry of written findings. *State v. Kingman*, 77 Wn.2d 551, 463 P.2d 638 (1970); *State v. Helsel*, 61 Wn.2d 81, 377 P.2d 408 (1963); *Buob v. Feenaughty Mach. Co.*, 199 Wash. 256, 90 P.2d 1024 (1939).

A new trial was required in *DGHI, Enterprises v. Pacific Cities, Inc.* when written findings were not entered prior to the trial judge’s untimely death. 137 Wn.2d 933. The suit involved the breach of a

commercial lease, with a lengthy trial over 12 days. *Id.* at 936. The Honorable James D. McCutcheon, Jr. rendered an oral decision and later reviewed proposed findings and conclusions prepared by the prevailing party. *Id.* at 936-37. After the proposed findings were reviewed by the trial court on the record, but before the findings were signed, Judge McCutcheon passed away unexpectedly. *Id.* at 937. After another judge signed the findings and entered judgment, the nonprevailing party's motion for a new trial was denied, and the matter was appealed to the state Supreme Court.

The Supreme Court held that the successor judge could not enter the trial judge's findings of fact, and the unsigned findings were insufficient to support the entry of judgment. *Id.* at 950-51. Despite the statements on the record by Judge McCutcheon that he intended to adopt the proposed findings, "a trial judge's oral decision is no more than a verbal expression of his informal opinion at that time." *Id.* at 944 (quoting *Ferree v. Doric Co.*, 62 Wn.2d 561, 566-67, 383 P.2d 900 (1963)). The Court noted that it had never held "a mere oral ruling sufficient as formal findings of fact and conclusions of law." *Id.* at 945. Findings of fact must be "signed by the court and filed" before entry of judgment. *Id.* at 948. In the absence of a written opinion from the trial judge including findings and conclusions as described in CR 52(a)(4), "[s]eparate written findings

of facts and conclusions signed by the judge were required.” *Id.* at 951. Accordingly, the case was remanded for a new trial. *Id.*

A separate case was also waiting for entry of findings and conclusions at the time of Judge McCutcheon’s death. *WESCO Distribution, Inc.*, 88 Wn. App. 712. As in *DGHI*, the trial judge announced his oral decision but passed away before written findings and conclusions were signed. *Id.* at 714. A successor judge entered judgment based on the transcript of the trial court’s oral ruling, and the matter was appealed. *Id.* The opinion on appeal described two ways to satisfy the requirement of formal findings and conclusions: presentation of written findings and conclusions prepared by the prevailing party, or the judge’s inclusion of formal findings in a written opinion. *Id.* at 716. The judge’s oral decision did not meet the requirement for formal findings and conclusions, and therefore, the judgment was vacated and a new trial ordered. *Id.* at 719.

Even where written findings of fact are entered, judgment can be remanded if the findings are inadequate to support the court’s conclusions. *E.g. Bowman v. Webster*, 42 Wn.2d 129, 253 P.2d 934 (1953) (findings of fact were insufficient, case remanded). It is not surprising, then, that a remand is necessary when written findings are nonexistent, rather than merely inadequate.

The judgment below must be reversed because it is not supported by findings of fact properly signed by the judge. The trial court gave his oral decision on February 23, 2009, but it was incomplete. *E.g.* RP (February 23, 2009) 26. The court directed the parties to submit additional briefing and return for a “final order.” *Id.* at 29. The parties returned on March 6, 2009, for argument. When Meridian Place asked to enter judgment on March 6, counsel for Morcos objected to entry of judgment without written findings. CP 207; RP (March 6, 2009) 5. The court signed the judgment on March 6 and directed that written findings and conclusions be prepared and presented at a later date. RP (March 6, 2009) 19-20. This was not done. Formal, written findings of fact were never signed by the trial judge, and the judgment cannot be upheld.

B. A New Trial Should Have Been Granted.

The order denying Morcos’s request for a new trial should be reversed due to an irregularity in the proceedings which prevented them from having a fair trial and because substantial justice was not done. When the grounds for granting or denying a motion for new trial are based on questions of law, the order is reviewed de novo. *Detrick v. Garretson Packing Co.*, 73 Wn.2d 804, 812, 440 P.2d 834 (1968).

A new trial may be granted based on

Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial; ...

or

That substantial justice has not been done.

CR 59(a)(1), (9). The pending criminal and professional charges against the trial judge and his resulting distraction during the trial deprived Morcos of the right to due process and justify granting a new trial.

Inherent in the right to due process is the right to a fair trial in front of a judge that is fit to evaluate the evidence and legal arguments and render judgment.

A fair trial in a fair tribunal is a basic requirement of due process.... Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way justice must satisfy the appearance of justice.

In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955) (quotations and citations omitted). The right to a fair trial is undoubtedly a substantial right, and when such right is impaired, a new trial is appropriate under CR 59(a).

“A judicial proceeding is valid only if it has an appearance of impartiality, such that a reasonably prudent and disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing.”

State v. Ra, 142 Wn. App. 688, 705, 175 P.3d 609 (2008). “The appearance of bias or prejudice can be as damaging to public confidence in the administration of justice as would be the actual presence of bias or prejudice. The law goes further than requiring an impartial judge; it also requires that the judge appear to be impartial.” *State v. Madry*, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972). These principles are also reflected in the Code of Judicial Conduct. Due to their position as arbiters of justice, judges are required to avoid impropriety and “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” CJC, Canon 2.

A new trial was ordered in *Morris v. Nowotny*, 68 Wn.2d 670, 415 P.2d 4 (1966), because the parties’ right to a fair trial was infringed. “[T]he trial court, without fault on its part, was unable to evaluate the testimony in the calm and dispassionate manner in which the trier of facts must approach an evaluation of conflicting testimony.” *Id.* at 673. The judge’s emotional involvement in the case and his sympathy for one of the litigants prevented a fair trial, which was sufficient irregularity in the proceedings to justify a new trial before an untainted judge. *Id.* at 673-74.

The very existence of felony criminal charges against Judge Hecht, filed just after his decision in this trial, calls into question the judge’s ability to act as a credible arbiter of justice. Shortly after entering

judgment in the Morcos trial, the trial judge took a leave of absence, recognizing “that his position as a Superior Court judge is one that requires the highest degree of trust and responsibility.” CP 243. Both the criminal charges and the investigation by the Commission on Judicial Conduct raise severe doubts about the judge’s honesty and regard for the law.¹

Further, the significant distraction of a criminal investigation and potential criminal and professional charges affected Judge Hecht’s ability to evaluate the testimony in a calm and dispassionate manner. The fact that the judge was occupied with the criminal investigation and the associated publicity is evidenced by two separate events. During a recess in the trial, Judge Hecht was observed agitatedly discussing a newspaper article with his court reporter. CP 239-40. At another point during the trial, Judge Hecht spilled some water, and asked that “no one go tell the Tribune about this.” CP 240.

There is at least a reasonable doubt whether Morcos received a fair trial in front of Judge Hecht, and a new trial should have been granted.

¹ The Statement of Charges filed by the Commission on Judicial Conduct also contain an allegation that Judge Hecht used racist language. CP 406. This allegation is particularly upsetting to the Morcoses, who immigrated to this country from Egypt.

C. The Trial Court Misconstrued the Lease Provisions.

Judgment for breach of contract against Morcos must be reversed because the trial judge erred in construing the lease provisions regarding delivery of the premises. It is not clear from the record how the trial judge interpreted the lease provision regarding the delivery date. If the court concluded that substantial completion of the landlord's work was not required for delivery to the tenant, the court improperly construed the lease as a matter of law. If, on the other hand, the court found that the landlord's work was substantially complete as of the target delivery date, then the court's finding was contradicted by substantial evidence in the record.

The trial court had to determine what the lease agreement provided and whether the lease was ambiguous. Where interpretation of contractual terms does not depend on extrinsic evidence, the interpretation is a question of law and is reviewed de novo. *State v. R.J. Reynolds Tobacco Co.*, __ Wn. App. __, 211 P.3d 448, 452 (2009).

The objective in interpreting a contract is to give it a practical and reasonable meaning that fulfills its purpose, rather than a strained or forced meaning that leads to an absurd conclusion, or that renders the contract nonsensical or ineffective. *Forest Mktg. Enters., Inc. v. Dep't. of Natural Res.*, 125 Wn. App. 126, 104 P.3d 40 (2005); *see also Berg v.*

Hudesman, 115 Wn.2d 657, 672, 801 P.2d 222 (1990) (“When a provision is subject to two possible constructions, one of which would make the contract unreasonable and imprudent and the other of which would make it reasonable and just, we will adopt the latter interpretation.”). Similarly, a contract must be read as a whole, and construed in a way that gives effect to each provision if possible. *Colorado Structures, Inc. v. Ins. Co. of the West*, 161 Wn.2d 577, 588, 167 P.3d 1125 (2007); see also *Bellevue School Dist. No. 405 v. Bentley*, 38 Wn. App. 152, 684 P.2d 793 (1984) (word used in different parts of the contract is presumed to have the same meaning throughout the contract.).

Ambiguity exists in a contract provision when, reading the contract as a whole, two or more reasonable and fair interpretations are possible. *Wm. Dickson Co. v. Pierce County*, 128 Wn. App. 488, 493-94, 116 P.3d 409 (2005). “Generally, the question of whether a written instrument is ambiguous is a question of law for the court.” *McGary v. Westlake Investors*, 99 Wn.2d 280, 285, 661 P.2d 971 (1983). If an ambiguity exists in a lease agreement, it must be construed against the party who prepared the lease agreement, and the court will adopt the interpretation that is most favorable to the lessee. *Id.* at 287; *Carlstrom v. Hanline*, 98 Wn. App. 780, 785, 990 P.2d 986 (2000).

The trial court should have interpreted the lease to require the landlord to substantially complete its work prior to the delivery date, either because it is the only reasonable interpretation or because the language should be construed against the landlord. Regarding the delivery date, the lease agreement provides:

5.2 Commencement. Delivery date shall be on 10/1/06. The *Lease Term* shall begin (the “*Commencement Date*”) on the first to occur of (i) ninety (90) days after the Delivery Date, or (ii) the date *Tenant* opens the *Premises* for business to the public. “*Delivery Date*” shall mean the date that the *Premises* will be delivered to *Tenant* in such condition as is reasonably required for the commencement of *Tenant’s Work*, as determined by *Landlord’s* architect, owner’s representative, or contractor, and as such date is set forth in a notice from *Landlord* to *Tenant*.

Ex. 112 at ¶ 5.2.

The lease agreement also provided that “*Tenant’s Work*” could commence only after the landlord substantially completed its work:

(c) Notice of Substantial Completion. When *Landlord* has substantially completed *Landlord’s Work* to such a condition as is reasonably required for the commencement of *Tenant’s Work*, as determined by *Landlord’s* architect, owners representative, or contractor (with the exception of any portion thereof which can only be completed after completion of all or a portion of *Tenant’s Work*, as hereafter defined), *Landlord* shall notify *Tenant* in writing to the effect. This notice shall re-specify the *Delivery Date* as defined in Section 5.2.

Ex. 112 at ¶ 12.1(c). The tenant’s right of occupancy is also tied to substantial completion:

Tenant, without the payment of any additional rent hereunder, but subject to all of the other terms and conditions of this *Lease*, shall have the right to early occupancy of the *Premises* after the date of *Landlord's* notice of substantial completion in order to perform *Tenant's Work*, so far as its occupancy thereof is not inconsistent with any work that must be done in the *Premises* by *Landlord*, as determined by *Landlord*.

Ex. 112 at ¶ 12.2.

The delivery date is not fixed, despite the language stating that it was intended to occur on October 1, 2006. Rather, the delivery date is tied to the condition of the premises. Establishing when the delivery date occurred is significant because it determines the commencement date (“90 days after the Delivery Date”) and when the tenant was obligated to begin paying rent. Ex. 112 at ¶ 5.2.

Paragraphs 5.2, 12.1, and 12.2 must be read together. The Landlord must substantially complete its work and provide notice of such completion to Tenant. Upon such notice, the Tenant has the right to occupy the premises and begin Tenant’s Work. The Delivery Date could not occur prior to substantial completion, because the Tenant’s right of occupancy and right to begin performing tenant’s Work is tied to substantial completion. Where the lease provides that “delivery date shall be 10/1,” the fixed date did not supersede the requirement of substantial

completion, but rather set a deadline for the landlord's obligation to substantially complete its work and deliver the premises.

Contrary to well-established principles of contract interpretation, the landlord argued below that the court should ignore the provisions of paragraphs 12.1 and 12.2 and focus solely on paragraph 5.2. *E.g.* RP (March 26, 2009) 12. But of course the court must consider the paragraphs of section 12 in order to properly construe the lease as a whole.

In addition, case law ties delivery of leased premises to possession by the tenant. "Implied in every lease is a covenant to deliver possession to the tenant.... [P]reventing a tenant from gaining possession to land to which he is entitled under an agreement breaches an implied covenant and excuses any obligation to pay rent." *Draper Mach. Works, Inc. v. Hagberg*, 34 Wn. App. 483, 486, 663 P.2d 141 (1983); *see also Crown Plaza Corp. v. Synapse Software Sys., Inc.*, 87 Wn. App. 495, 503, 962 P.2d 824 (1997) ("A landlord's act preventing a tenant from gaining possession of leased property constitutes constructive eviction and excuses the tenant's obligation to pay rent.").

The delivery date under the lease was "the date that the Premises will be **delivered** to Tenant," and delivery cannot occur without possession by the tenant. Ex. 112 at ¶ 5.2 (emphasis added). Merely providing Morcos with a method to access the space is not equivalent to

possession. The landlord retained control of the space until at least November 10, RP 863, and did not provide a key to Morcos until November 21, RP 862, Exs. 42, 47.

By ruling that the delivery date was October 1, 2006, without considering whether the landlord's work was substantially complete on that date or the fact that the tenant did not have possession of the premises, the trial court improperly construed the lease as a matter of law. The judgment must be reversed.

Even if the trial court considered the status of the landlord's work, the judgment must be reversed because there was substantial evidence that the landlord's work was not substantially complete as of October 1. The landlord's project manager, a licensed architect and the individual responsible for coordinating the landlord's work, testified that the landlord's work was not substantially complete until November 8 or 9, 2006. RP VII 826. In addition, neither the landlord's expert nor any other witness ever testified that the landlord's work was substantially complete on October 1.²

More importantly, the landlord admitted that several elements of the landlord's work remained to be complete as of October 1, including: the HVAC units (installed November 21, Ex. 180), the sprinkler system

² In a prior deposition, the landlord's expert, Mr. Croonquist, testified that the landlord's work was substantially complete in early November. CP 229-30.

(inspected November 20, Ex. 181; *see also* Ex. 174), sheetrock on the interior walls (finished around November 8-10, Ex. 59 (pictures show painting of sheetrock and equipment for drying sheetrock still in the space)), and the first coat of paint (completed November 15, Ex. 175). Additional items that Morcos asserted were landlord's work were also incomplete, including some insulation (installed after November 10, Ex. 175), and the first electric panel (never installed by the landlord, Ex. 180). As mentioned above, keys were not given to Morcos until late November. Exs. 42, 47.

Any finding that the landlord's work was substantially complete on October 1, 2006, was contrary to substantial evidence. Without substantial completion, the premises were not delivered to the tenant by October 1 as required by the lease. Because the delivery date was after October 1, Morcos was not obligated to begin paying rent on January 1, 2007. Judgment against Morcos must be reversed.

In addition to failing to deliver the premises as required under the lease, the landlord also breached the lease by failing to approve Morcos's drawings. Under the lease, Morcos was required to obtain approval of its plans from the landlord. Ex. 112 at D. However, Mr. Stein instructed his project manager not to approve any drawings submitted by Morcos. Ex. 29. Although none of the landlord's comments in response to the initial

layout would have required rejection of the drawing, RP VII 832-34, the landlord continued to demand a response and refused to approve even the initial layout, Ex. 47 (“The Landlord is waiting for a response on the outstanding items in that email prior to approval of your layout.”).

The landlord’s breaches in failing to timely deliver the space, approve drawings, or pay the tenant improvement allowance implicate the handwritten language at the bottom of page 8 in the lease: “Should the term not commence on or before Mar. 31, 2007, this Lease shall be deemed canceled as of such date without further action of the parties.” Ex. 112. At a minimum, these breaches relieved Morcos of the obligation to pay rent and require reversal of the damage award in favor of Meridian Place. *See Draper*, 34 Wn. App. at 486.

D. Morcos Is Entitled to an Offset against the Judgment.

The judgment must also be reversed because the trial court erred in refusing to grant Morcos an offset for the tenant improvement allowance due to Morcos. The appropriate measure of damages in a contract action is a question of law, which is reviewed de novo. *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 106 Wn.2d 826, 843, 726 P.2d 8 (1986); *Platts v. Arney*, 50 Wn.2d 42, 43, 309 P.2d 372 (1957).

Generally, damages for a breach of contract are calculated in order that the damaged party is returned to “as good a pecuniary position as he

would have had if the contract had been performed.” *Eastlake Constr. Co. v. Hess*, 102 Wn.2d 30, 39, 686 P.2d 465 (1984). Contract damages are not based on penalties or punishment, but only on the amount necessary to compensate for the breach:

The purpose of awarding damages for breach of contract is neither to penalize the defendant nor merely to return to the plaintiff that which he has expended in reliance on the contract. It is, rather, to place the plaintiff, as nearly as possible, in the position he would be in had the contract been performed. He is entitled to the benefit of his bargain, *i.e.*, whatever net gain he would have made under the contract. **The plaintiff is not, however, entitled to recover more than he would have received had the contract been performed. If the defendant, by his breach, relieves the plaintiff of duties under the contract which would have required him to spend money, **an amount equal to such expenditures must be deducted from his recovery.****

Platts, 50 Wn.2d at 46 (citations omitted) (emphasis added). In other words, the proper measure of damages is the amount of compensation under the contract, “reduced by any expenses [the plaintiff] saved as a result of [the defendant’s] wrongful acts.” *Lincor Contractors, Ltd. v. Hyskell*, 39 Wn. App. 317, 324, 692 P.2d 903 (1984) (affirming trial court’s award because there was no evidence that the defendant’s tortious interference reduced any of the plaintiff’s expenses).

Platts awarded damages for breach of contract based upon the net amount the prevailing party would have received had the contract been

performed, after payment of all expenses required by or related to performance of his own obligations under the contract. 50 Wn.2d 42. The prevailing party argued that damages should be measured only by the benefit he was entitled to receive from the other party to the contract, and the benefit he was obligated to confer should be ignored. *Id.* at 46. However, this calculation was rejected because it “would have awarded him more than he would have received had the contract been performed.” *Id.* Further, the broker’s commission the prevailing party would have incurred was properly deducted from the damages because it would have been “a cost of his own performance” under the contract. *Id.* at 47. Finally, the expenses he incurred in preparing to perform were not recoverable because they were expenses “he would have had to make in any event to carry out his own promises under the contract.” *Id.*

The trial court’s award of damages on the landlord’s counterclaim was too high because it failed to subtract expenses the landlord saved when it did not perform. The lease provided for a monthly rental to the landlord, which formed the basis of the damages award, but if the contract had been performed, the landlord would have been obligated to pay \$87,000 to Morcos for tenant improvements. Ex. 112 at D. The lease does not condition payment on completion of construction by the tenant, providing lien releases, or anything else. The payment is not described as

a reimbursement for the tenant work, but simply an obligation that “Landlord will pay tenant \$20.00/sq. ft.” *Id.* The landlord’s lease with the new tenant did not require an outright payment to the tenant for tenant improvements. Ex. 57. If the contract had been performed, the landlord would have received rent, but would have paid \$87,000 to Morcos. By failing to subtract the tenant improvement allowance, the trial court incorrectly awarded the landlord more than it would have received had the contract been performed.

The suggestion that the landlord should benefit from its good fortune in negotiating a better lease with the replacement tenant ignores both the purpose of contract damages and the landlord’s legal duty to mitigate damages. The duty to mitigate “prevents recovery for those damages the injured party could have avoided by reasonable efforts taken after the wrong was committed.” *Bernsen v. Big Bend Elec. Coop., Inc.*, 68 Wn. App. 427, 433, 842 P.2d 1047 (1993). In other words, the prevailing party can only recover those damages that it could not have reasonably avoided. It follows, then, that were the landlord successfully mitigated damages and avoided having to pay the tenant improvement allowance, Morcos is entitled to the benefit of that effort to mitigate. The damage award must be reduced by \$87,000 and interest on that amount from the date of the lease to the date of judgment.

E. Morcos's Claim for Fraud Should Not Have Been Dismissed.

The trial court's dismissal of Morcos's claim for fraud must also be reversed. Involuntary dismissal under CR 41 is proper only "if there is no evidence, or reasonable inferences therefrom, that would support a verdict for the plaintiff." *Willis v. Simpson Inv. Co.*, 79 Wn. App. 405, 410, 902 P.2d 1263 (1995). If, in reviewing a motion under CR 41, the trial court acts as a fact-finder, the decision may be overturned if substantial evidence does not support the findings of fact or if the findings do not support the conclusions of law. *In re Dependency of Schermer*, 161 Wn.2d 927, 940, 169 P.3d 452 (2007). Findings and conclusions must be entered if the court weighs the evidence. *Id.* at 939; *see also* CR 52(a)(5)(B).

Again, although the trial court stated findings on the record when it considered the motion to dismiss, written findings and conclusions were not entered as required. *See* Part A, *supra*. Thus, the decision should be remanded for entry of written findings.

Even considering the findings stated on the record, however, Morcos argues that the findings were not supported by substantial evidence. Generally, a trial court's factual determinations may be overturned if not supported by substantial evidence. *E.g. Rogers Potato Service, LLC v. Countrywide Potato, LLC*, 152 Wn.2d 387, 391, 97 P.3d

745 (2004). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person. *Id.*

Morcos testified that when the parties were discussing the lease at the Starbucks meeting, they were looking at a version of the Olive Garden lease. RP I 86; RP III 356. When it was time to execute the lease, Mr. Stein insisted on signing what became Exhibits 112 and 113. RP III 397. Mr. Stein misrepresented that the leases were the same as what they had been reviewing. RP III 397. Based on that misrepresentation, Nabil Morcos initialed and executed Exhibits 112 and 113. RP III 397; RP IV 507. The parties had just gone over the lease provisions in the Olive Garden version, which Morcos agreed to, and Mr. Stein specifically represented that the copy he was asked to sign was exactly the same, so Nabil Morcos was justified in relying on that misrepresentation.

The trial court's decision was inconsistent. The judge ruled that Exhibit 108 (the Olive Garden version) was present at the Starbucks meeting, as the Morcoses testified. RP VI 745. However, the court ignored the significance of that fact. If the Olive Garden lease was present and reviewed by the parties, then Nabil's failure to carefully compare the changes was reasonable in light of Mr. Stein's statement that the copies were exactly the same. Mr. Stein knew that the Olive Garden version was Morcos's final offer, but he made several changes and signed the lease

before he knew whether Morcos would agree to his changes. RP VI 687; Ex. 108. The trial court's dismissal of the misrepresentation claim should be reversed.

F. Morcos Is Entitled to an Award of Attorney's Fees.

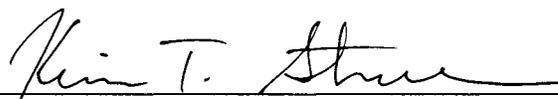
If the judgment below is reversed as requested by Morcos, Morcos is entitled to an award of attorney's fees pursuant to the lease. A party is entitled to attorney's fees on appeal if a contract permits recovery of fees and the party is the substantially prevailing party. *E.g. Dayton v. Farmers Ins. Group*, 124 Wn.2d 277, 280, 876 P.2d 896 (1994). The lease agreement contains an attorney's fee provision. Ex. 112 at ¶ 48. To the extent Morcos prevails on this appeal, attorney's fees should be awarded pursuant to contract.

CONCLUSION

The trial court's judgment in this matter cannot be upheld. Without formal written findings of fact and conclusions of law in support of the judgment, the matter should be remanded for entry of such findings and conclusions or for a new trial. Alternatively, because a reasonable doubt exists as to whether the parties received a fair trial in front of an untainted judge, the order denying Morcos's motion for a new trial should be reversed and the matter remanded on those grounds. Further, the judgment should be reversed because the trial court misconstrued critical lease provisions, it applied an incorrect measure of damages, and it improperly dismissed Morcos's claim of fraud. For the foregoing reasons, Morcos respectfully requests that the judgment be reversed or remanded.

Respectfully submitted this 28th day of October, 2009.

DICKSON STEINACKER PS



KEVIN T. STEINACKER, WSBA No. 35475
Attorneys for Appellants Morcos Brothers, Inc.,
Nabil Morcos, and Nader Morcos

APPENDIX A

RAP 10.3(g) provides: “A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number.” As mentioned in the brief, written findings of fact, separately numbered, were never entered by the trial court. Further, an assignment of error to a “quoted portion of the trial court’s oral opinion” is ineffective, because “[s]uch statements are not rulings which can be appealed or assigned as error.” *Johnson v. Whitman*, 1 Wn. App. 540, 541, 463 P.2d 207 (1969). Accordingly, Morcos cannot fully comply with RAP 10.3(g).

However, without waiving the assignment of error to the trial court’s failure to enter written findings of fact and conclusions of law, Morcos submits that the following oral statements by the trial judge were in error. It is not clear whether some of the errors were intended as findings of fact or conclusions of law. Further, much of the court’s “decision” was simply a summary of the testimony. All references below are to the court’s oral ruling on February 23, 2009.

1. The commencement date was on or about January 1, 2007, and the delivery date was October 1, 2006. RP 2, 5, 13.
2. The lease is not ambiguous. RP 5.

3. The initials and changes indicated a bargained-for exchange, and the lease was drafted by both parties. RP 6.

4. The Starbucks meeting lasted three hours. RP 6.

5. Morcos's expert was not credible, lacked relevant experience, and was not thorough in his review and preparation for his opinion. RP 10.

6. The landlord worked in good faith to keep the tenant on track and made every effort to move Morcos along. RP 10, 11, 13.

7. The landlord cooperated with the tenant's request to provide plans. RP 11.

8. Morcos had all of the drawings and plans needed to make plans for the City of Puyallup permit. RP 11, 12.

9. The landlord was waiting for tenant plans and specifications from September 25, 2009. RP 12.

10. Morcos did not work on or proceed on the space in a timely manner. RP 13, 14.

11. All of the things Morcos had trouble with could have been resolved had they hired BCRA in the first place. RP 14.

12. Morcos was going to spend \$600,000 for tenant improvements. RP 15.

13. Morcos did not take advantage of necessary funding. RP 15.

14. The Pita Pit is not a Greek restaurant. RP 16.
15. Morcos materially breached the lease. RP 18.
16. Landlord work was substantially done on October 1, 2006. RP 19.
17. Delays in completing tenant improvements were caused by Morcos. RP 19.
18. The work done by Juni Electric was of no value to the landlord. RP 19.
19. Nader and Nabil Morcos are each personally liable for the damages awarded to Meridian Place. RP 19.

Certificate of Service

I, the undersigned, hereby certify under penalty of perjury of the laws of the State of Washington that I caused the foregoing Brief of Appellant to be served upon:

Jerry N. Stehlik
2003 Western Avenue, Suite 400
Seattle, Washington 98121-2142

Howard M. Goodfriend
Law Offices of Edwards, Sieh, Smith & Goodfriend, P.S.
500 Watermark Tower
1109 First Avenue
Seattle, Washington 98101-2988

FILED
COURT OF APPEALS
DIVISION II
09 OCT 29 PM 1:51
STATE OF WASHINGTON
S.B.Y.
DEPUTY

Service was accomplished by:

- Hand delivery via ABC Legal Messenger
- First class mail
- Facsimile
- Electronic mail

DATED this 29th day of October, 2009 at Tacoma, Washington.

Desirae Jones
Desirae Jones, Paralegal