

No. 39281-0-II

COURT OF APPEALS OF THE  
STATE OF WASHINGTON, DIVISION TWO

---

KATALIN NYITRAI,

Appellant,

v.

STARLETA OLEA,

Respondent.

FILED  
COURT OF APPEALS  
DIVISION II  
09 SEP 14 PM 1:41  
STATE OF WASHINGTON  
BY  DEPUTY

---

**BRIEF OF APPELLANT**

---

SULLIVAN & THORESON  
Michael T. Schein, WSBA # 21646  
Columbia Center  
701 Fifth Avenue, Suite 4600  
Seattle, WA 98104  
(206) 903-0504

Attorneys for Appellant Nyitrai

ORIGINAL

## TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
I. ASSIGNMENTS OF ERROR AND ISSUES	1
A. Assignments of Error	1
B. Issues Pertaining to Assignments of Error	1
II. STATEMENT OF THE CASE	2
A. Introduction and Overview	2
B. Statement of Facts	3
C. Procedural Facts	8
III. ARGUMENT	9
A. Standard of Review	9
B. The Trial Court Erred by Failing to Weigh the Evidence of Intent of the Parties Prior to Falling Back on the Canon of Construction Against the Drafter	11
1. Construction Against the Drafter is a Rule of Last Resort	11
2. There Was Ample Extrinsic Evidence of Intent Raising an Issue for the Trier of Fact	14
C. A Reasonable Finder of Fact Could Find that Ms. Nyitrai was Not the Drafter of the Term Provision of Either Lease Agreement	16
1. There is Material Credible Evidence that the Parties Jointly Drafted the Term Provision in the Suite A Lease	17
2. There is Material Credible Evidence that Ms. Nyitrai Did Not Participate At All in Drafting the Term Provision of the Suite B Lease	19

D. Attorneys' Fees at Trial Should Abide the Outcome, Except that Ms. Olea's Appeal Fees Should be Held Per Se Unreasonable	20
IV. CONCLUSION	21

## TABLE OF AUTHORITIES

### Case Law

<i>Berg v. Hudesman</i> , 115 Wn.2d 657, 801 P.2d 222 (1990)	12, 14
<i>Crestview Bowl, Inc. v. Womer Construction Co., Inc.</i> , 592 P.2d 74 (Kan. 1979)	18
<i>Drumheller v. Bird</i> , 170 Wash. 14, 15 P.2d 260 (1932)	18
<i>Forest Marketing Enterprises, Inc. v. State DNR</i> , 125 Wn. App. 126, 104 P.3d 40 (Div. 2 2005)	10, 12- 13, 15
<i>Hearst Communications, Inc. v. Seattle Times Co.</i> , 154 Wn.2d 493, 115 P.3d 262 (2005)	12, 15
<i>Joyner v. Adams</i> , 361 S.E.2d 902 (N.C. App. 1987)	18
<i>King v. Rice</i> , 146 Wn. App. 662, 191 P.3d 946 (Div. 1 2008)	11-12
<i>Morris Silverman Mngmnt. Corp. v. Western Union Fin. Svcs., Inc.</i> , 284 F. Supp.2d 964 (ND Ill. 2003)	18
<i>Nelson Construction Co. v. Port of Bremerton</i> , 20 Wn. App. 321, 582 P.2d 511 (1978)	9-10
<i>Randallstown Plaza Assocs. v. United States</i> , 13 Cl. Ct. 703 (US Cl. Ct. 1987)	18, 19
<i>Roberts, Jackson &amp; Assoc. v. Pier 66 Corp.</i> , 41 Wn. App. 64, 702 P.2d 137 (1985)	13
<i>Stender v. Twin City Foods, Inc.</i> , 82 Wn.2d 250, 510 P.2d 221 (1973)	13

### Court Rules

CR 52(a)(5)	10
-------------	----

**Other Authorities**

5 Corbin on Contracts § 24.27 (J. Perillo, ed. rev. 1998)	11, 13, 18
4 Orland & Tegland, Washington Practice – CR 56 § 25 (5 <sup>th</sup> ed. 2006)	10

## **I. ASSIGNMENTS OF ERROR AND ISSUES**

### **A. Assignments of Error**

1. The trial court erred by granting Defendant/Respondent Starleta Olea's Motion to Dismiss at the close of Plaintiff's case. (CP 17; VRP 67).
2. The trial court erred by entering judgment for attorneys' fees and costs against Plaintiff/Appellant Katalin Nyitrai. (CP 159-60)
3. The trial court erred by denying Plaintiff/Appellant Katalin Nyitrai's Motion for Reconsideration. (CP 40-41)

### **B. Issues Pertaining to Assignments of Error**

1. Was it error to rely solely on the canon of construction that contracts are construed against the drafter (*contra proferentem*), and thereby to fail to resolve the credibility issues in an effort to determine the true intent of the parties to the Suite A and Suite B leases based on all the extrinsic evidence?
2. Was it error to find as a matter of law that Katalin Nyitrai was the drafter of the Suite A Lease when the evidence, viewed most favorably to Ms. Nyitrai, showed that the parties filled out the blanks pertaining to the term of the lease together, and that Ms. Nyitrai simply filled in the termination date of November 30, 2007 which was dictated by Ms. Olea?

3. Was it error to find as a matter of law that Katalin Nyitrai was the drafter of the Suite B Lease when the evidence, viewed most favorably to Ms. Nyitrai, showed that she did not fill in the blanks for the term provision on that lease, that she gave the lease with the term provision blank to Ms. Olea, and either Ms. Olea or someone else under her control filled in the termination date of November 30, 2007 on that lease?

4. Should the award of attorneys fees to Ms. Olea be reversed, and Ms. Olea's fees on this appeal be deemed per se unreasonable for purposes of future fee recovery?

## **II. STATEMENT OF THE CASE**

### **A. Introduction and Overview<sup>1</sup>**

This is a relatively straightforward commercial lease case raising material disputed credibility issues, which unfortunately the trial court dismissed at the close of the plaintiff's evidence, thereby committing the reversible error of failing to weigh the evidence to determine the intent of the parties. Instead of doing the difficult but essential work of determining credibility on a conflicting record, the trial court relied entirely on the "construe against the drafter" canon of construction, and

---

<sup>1</sup>Detailed citations to the record are contained in subsequent sections.

granted Ms. Olea's Motion to Dismiss at the close of Ms. Nyitrai's evidence. This was reversible error in two ways: (1) the law requires the Court to determine the intent of the parties based on all the evidence before falling back on the canon of construction against the drafter; and (2) the record does not support the finding that Ms. Nyitrai was the "drafter" of the term provision of the two leases at issue.

**B. Statement of Facts**

On November 12, 2003, Katalin Nyitrai as lessor and Starleta Olea as lessee entered into an agreement to lease Suite A of 1220 Ocean Beach Highway, in Longview, WA. Ex. 1 (the "Suite A Lease"); VRP 8-10. Paragraph 2, "TERM", provides as follows, with handwritten items in separate font:

The term of this Lease shall be for *Three years* commencing the *15* day of *November 2003* and shall terminate on the *30* day of *November 2007*.

Ex. 1. The period from November 15, 2003 to November 30, 2007 is approximately four years and two weeks, and therefore this provision is internally inconsistent.

Ms. Olea opened Star's Wedding Shop in Suite A. Ex. 1 ¶ 27; CP 84/11-14.<sup>2</sup> Later, when she needed room to expand, she leased Suite B in the same premises. Ex. 2 (the "Suite B Lease"); CP 89/4-8, 89/14-21. The Suite B Lease, dated July 20, 2004, provides as follows in Paragraph 2, "TERM", with handwritten items in separate font:

The term of this Lease shall be for *Three years* commencing the *1st* day of *September 2004* and shall terminate on the *30th* day of *November 2007*.

Ex. 2. The period from September 1, 2004 to November 30, 2007 is approximately three years and three months, and therefore this provision is internally inconsistent.

Both Lease Agreements were read and signed by both parties, and were notarized. Exs. 1, 2; VRP 9/15-23, 12/17-22, 14/16-18, 49/21-23, 50/2-7, 50/11-12, 51/5-10, 51/17-18. There is no dispute that the term provisions were filled in on the form leases at the time that the parties signed. VRP 10/9-17, 50/2-10. There is no dispute that both Leases state (in paragraph 2) a term of three years and a termination date of November 30, 2007. Exs. 1 & 2, ¶ 2.

---

<sup>2</sup> Cites to CP 70-115 are to the Deposition of Katalin Nyitrai, which was ordered published at the request of counsel for Olea during the trial, VRP 33, and is therefore part of the trial record.

Katalin Nyitrai testified that she filled in the blanks in the term provision of the Suite A Lease in accordance with Ms. Olea's instructions, but she did not fill in the blanks in the term provision of the Suite B Lease. Here is the central part of her testimony on this subject:

Mr. Ammons: How was that date [November 30, 2007 in both Leases] arrived upon; could you tell the Court?

Ms. Nyitrai: Yes. That the tenant wanted to have it 2007, so that's what I put down for her. And the second one she filled out, so she ended the same time.

\* \* \*

Q: Did she fill out the second lease?

A: Yes.

Q: So, the first lease you filled in 2007?

A: We filled it in together. She [Olea] told me what to put down, and the second one, I just gave her – the top part was typed in by my daughter, and she, or somebody for her, filled it out.

Q: Why were the dates exactly the same? Can you tell the Court that?

A: Because she wanted to end both leases the same time.

VRP 13-14/24-15. This testimony is completely consistent with Nyitrai's testimony in her deposition:

- that Olea wanted 2007 so she (Nyitrai) wrote down 2007 for the Suite A Lease, CP 84/15-18, 85-86/19-4; and

➤ that Paragraph 2 of the Suite B Lease is not in Nyitrai's handwriting and "Star" [Olea] wrote in the term for the Suite B Lease. CP 88/3-14, 88/20-23.

On cross-examination, Ms. Nyitrai again testified that the term provision of the Suite B Lease was not in her handwriting. VRP 28/21-24. She conceded that she doesn't specifically know that Ms. Olea filled it out because she didn't see her do it. VRP 36/18-25. But Ms. Nyitrai did not in any way retract her testimony that: (1) They filled out the Suite A Lease together, with Ms. Nyitrai merely writing in what Ms. Olea wanted; (2) Ms. Nyitrai gave the Suite B Lease to Ms. Olea, and Ms. Olea **or somebody for her** filled out the term provision of the Suite B Lease; and (3) Nyitrai did not fill out the term provision of the Suite B Lease.

Ms. Nyitrai also testified that, in August, 2006, she had a potential lessor for the entire first floor of 1220 Ocean Beach Highway, which would have been more advantageous since Ms. Olea only had a portion of the first floor. At that time, Ms. Nyitrai thought perhaps that the lease was for three years, and that it might therefore be ending soon. Ms. Nyitrai asked Ms. Olea whether she would vacate what Nyitrai then believed was only a few months early, but Ms. Olea refused to vacate early, pointing out that the lease in fact went to November, 2007. As a result, Ms. Nyitrai

recognized that she was bound to the 2007 date, so she had to pass up this other potential tenant. VRP 19-20/15-7, 41-42/21-14; CP 101-104/11-18.

Starleta Olea agrees that both the Suite A and Suite B Leases state that they terminate on November 30, 2007, and that her intent was to have both leases terminate on the same date. VRP 52/14-19. However, she testified that she did not fill in the November 30, 2007 date on the Suite B Lease, that she did not have somebody do it for her, and that she does not know who did it. VRP 51-52/20-1. Furthermore, Ms. Olea denies that she told Ms. Nyitrai to write in a November 30, 2007 date into either one of the two leases. VRP 58/18-24. She further denies ever discussing the 2007 date with Ms. Nyitrai, and denies knowing about the 2007 date until December, 2006, after the premises had been vacated and she received a notice from Ms. Nyitrai demanding payment of rent. VRP 58-59/25-22, 60/2-10. However, Ms. Olea admits that the November 30, 2007 provision was in the leases at the outset, and that she read the two leases before signing them. VRP 50/8-12, 51/11-18.

Star's Wedding Shop vacated the premises on or about November 30, 2006, and no rent was paid for the year from December 2006 through November 2007. VRP 13/14-19. This action to recover money due for breach of lease was therefore brought by Ms. Nyitrai against Ms. Olea.

### C. Procedural Facts

Plaintiff rested after the testimony of Ms. Nyitrai and Ms. Olea, as outlined above.<sup>3</sup> Defendant moved to dismiss, principally on the ground that the “contract” – *i.e.*, the two leases – were drafted by Ms. Nyitrai and should be construed most strictly against her. VRP 64/5-9. The Court determined to treat the Motion to Dismiss as one for Summary Judgment. VRP 66/4-6. The Court in its oral ruling and in (superfluous on summary judgment) findings of fact / conclusions of law, found:

- Both the Suite A and Suite B lease were internally inconsistent, CP 16-17 (FF 2.1-2.2); VRP 66/12-13.
- The leases were intended to end at the same time, CP 17 (FF 2.3); VRP 14-15.
- The Court treated this agreed fact as a stipulation that the Leases were not independent, but were part of the same agreement, VRP 66/18-22.
- The Court found that Ms. Nyitrai drafted the Suite A Lease, and that she was the “drafter” of the contract, CP 17 (FF 2.4, CL 3.1, 3.2); VRP 66-67/23-8 (“She drew them up.”).
- The Court concluded that “[t]he rule of law in the State of Washington is without weighing credibility, if there are inconsistencies in a written agreement, the agreement is construed against the drafter, and in this case that is the Plaintiff.” CP 17 (CL 3.1); VRP 66-67/23-8.

---

<sup>3</sup> A few other issues were covered – most notably a sale of Star’s Wedding Shop and reference to other leases involving Ms. Nyitrai, but these proved not to be material to the Superior Court’s decision, and will not be further addressed here. Ms. Nyitrai reserves all objections to these matters in the ongoing proceedings in the event of remand.

- Accordingly, without resolving any of the credibility issues or attempting to ascertain the true intent of the parties, the Court granted Ms. Olea's Motion to Dismiss, and awarded attorneys' fees to her as the prevailing party. CP 17 (CL 3.3, 3.4); VRP 67/9.

Ms. Nyitrai moved for reconsideration, arguing *inter alia* that there were unresolved issues of fact as to whether she was the drafter of the Suite B Lease, and that the one consistent term that made any sense was the November 30, 2007 date, so that should control. CP 23-25. The Court denied the Motion for Reconsideration on April 16, 2009, and this timely appeal followed on May 11, 2009. CP 40-44. Ms. Nyitrai has fully satisfied the \$6,958.25 judgment for attorneys fees and costs which was entered against her. CP 159-62.

### **III. ARGUMENT**

#### **A. Standard of Review**

On appeal from the grant of a motion to dismiss at the close of the plaintiff's evidence the standard of review is as follows:

If the court viewed the evidence most favorably to the plaintiff, we are limited to a determination of whether there is any evidence or reasonable inference therefrom to establish a prima facie case as a matter of law; if, however, the court in deciding the motion weighed the evidence and entered findings of fact, we will accept the findings if they are supported by substantial evidence.

*Nelson Construction Co. v. Port of Bremerton*, 20 Wn. App. 321, 326-27, 582 P.2d 511 (1978).

The trial court in this case made it clear that it was **not** weighing the evidence, but that it was instead treating the motion as akin to summary judgment, and ruling as a matter of law. It stated outright that it was treating the motion as one for summary judgment. VRP 66/4-6. It repeatedly stated that it was ruling “without weighing credibility” and “as a matter of law.” CP 17 (CL 3.1, 3.2); VRP 66-67/23-8. Accordingly, the court’s purported “findings” are as superfluous as findings on summary judgment, and entitled to no deference. 4 Orland & Tegland, Washington Practice – CR 56 § 25 at 393 (5<sup>th</sup> ed. 2006) (“Findings of fact and conclusions of law are unnecessary upon the granting or denial of summary judgment. CR 52(a)(5). If findings are entered, they will be disregarded by an appellate court.”). The question on review is limited solely to “whether there is any evidence or reasonable inference therefrom to establish a prima facie case as a matter of law,” *Nelson Construction, supra*, 20 Wn. App. at 326-27 – in other words whether, taking the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party (Nyitrai), a reasonable juror could find in Nyitrai’s favor. *See, Forest Marketing Enterprises, Inc. v. State DNR*, 125 Wn. App. 126, 130-31, 104 P.3d 40 (Div. 2 2005). Since the answer

is unquestionably YES, the trial court dismissed this case prematurely, and this Court must reverse and remand for a new trial.

**B. The Trial Court Erred by Failing to Weigh the Evidence of Intent of the Parties Prior to Falling Back on the Canon of Construction Against the Drafter**

**1. Construction Against the Drafter is a Rule of Last Resort**

Leaving aside for the moment the fact that Ms. Nyitrai was not the drafter of the two leases in issue, the trial court committed reversible error by failing to do the necessary work of attempting to determine the intent of the parties based on all the extrinsic evidence before it, prior to falling back on the canon of construction against the drafter known as *contra proferentum*. 5 Corbin on Contracts § 24.27 at 282-83 (J. Perillo, ed. rev. 1998). A good summary of the proper order of analysis was recently stated by Division One:

Under the “context rule” of contract interpretation, the parties' intent is determined by viewing the contract as a whole, the objective of the contract, the contracting parties' conduct, and the reasonableness of the parties' respective interpretations. Extrinsic evidence may be considered regardless of whether the contract terms are ambiguous. While extrinsic evidence may not modify or contradict a written contract in the absence of fraud, accident, or mistake, we may use it to clarify the meaning of words employed in the contract. . . . **If extrinsic evidence does not resolve the ambiguity, the contract will be construed against the drafter.**

*King v. Rice*, 146 Wn. App. 662, 670-71, 191 P.3d 946 (Div. 1 2008) (emphasis added); see, e.g., *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 502-03, 115 P.3d 262 (2005); *Berg v. Hudesman*, 115 Wn.2d 657, 667-69, 801 P.2d 222 (1990). It is obvious that the trial court in this case skipped right over the entire process of weighing the extrinsic evidence to determine the intent of the parties, and instead jumped to the “shortcut” of applying a canon of construction that is supposed to be a last resort.

This Court rejected just such a stunted approach to contract analysis in *Forest Marketing v. DNR*, *supra*, 125 Wn. App. 126. The issue in *Forest Marketing* was whether DNR had properly offset Formark’s deposit when calculating Formark’s liquidated damages arising out of failure to harvest timber under a timber purchase agreement. *Id.* at 128.

As stated by this Court:

Formark suggests that we should construe this contract against DNR as the drafting party. . . . But we do not always construe ambiguous contracts against the drafter:

‘[d]etermination of the intent of the contracting parties is to be accomplished by viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.

**'If, after viewing the contract in this manner, the intent of the parties can be determined, there is no need to resort to the rule that ambiguity be resolved against the drafter.'**

*Roberts, Jackson & Assoc. v. Pier 66 Corp.*, 41 Wn. App. 64, 69, 702 P.2d 137 (1985) (quoting *Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250, 254, 510 P.2d 221 (1973)). Here, viewing the contract as a whole and in context, we can determine the parties' intent. Thus, we need not construe the contract against DNR.

*Forest Marketing v. DNR*, *supra*, 125 Wn. App. at 132-33 (emphasis added); *accord*, 5 Corbin on Contracts, *supra* § 24.27 at 282-83 (court will “adopt the meaning that is less favorable in its legal effect to the party who chose the words” only “[a]fter the court has examined all of the other factors that affect the search for the parties' intended meaning, including general, local, technical and trade usages and custom, and including the evidence of relevant circumstances which must be admitted and weighed . . .”). Thus, under *Forest Marketing* and *Roberts, Jackson*, *supra*, it is clear that before resorting to the rule of construction against the drafter, the court must weigh all extrinsic evidence in an attempt to determine the actual intent of the parties to the contract.

The Superior Court clearly did not do that here. As stated by the trial judge:

My understanding of the rule of law is without weighing credibility, if there are inconsistencies in a written

agreement, they're construed against the drafter, and in this case, that's the Plaintiff. She drew them up. They're inconsistent, and she's the drafter, and that gives the option to interpret to the Defendant, as a matter of law.

So, I'm going to grant the Motion to Dismiss.

VRP 67/1-9. This was reversible error.

**2. There Was Ample Extrinsic Evidence of Intent Raising an Issue for the Trier of Fact**

One of the key pieces of extrinsic evidence which a court must consider in attempting to determine the intention of the parties is the "subsequent conduct of the contracting parties." *Berg v. Hudesman, supra*, 115 Wn.2d at 668, 677-78. In this case, there are two important pieces of evidence of conduct subsequent to the making of the Suite A Lease which tend to support a finding that the November 30, 2007 termination date matches the true intent of the parties. The first, of course, is the Suite B Lease, which both parties agreed was intended to terminate at the same time as the Suite A Lease, and which again stated the November 30, 2007 termination date. Ex. 2. The second is the evidence that Ms. Nyitrai asked Ms. Olea to vacate in August, 2006, to make room for a new tenant for the entire first floor of the building, but was told by Ms. Olea that she had until November 2007 under the Lease, and would therefore not vacate. VRP 19-20/15-7, 41-42/21-14; CP 101-104/11-18. Both of these constitute powerful evidence which would permit a

reasonable finder of fact to find in favor of Ms. Nyitrai's contention that the parties intended both leases to terminate in November of 2007, not November of 2006.

In addition, the reasonableness of the respective parties' interpretations of the agreements is an essential element that the Court must consider in determining intent. *Hearst Communications v. Seattle Times*, *supra*, 154 Wn.2d at 502; *Forest Marketing*, *supra*, 146 Wn. App. at 133. Ms. Olea's position is that both leases terminated in November, 2006. VRP 56/14-17. Yet if one relies upon the "three years" language in the term clauses – which is what Ms. Olea rests her entire case upon – **one cannot get to November 30, 2006, and cannot even derive the same termination date for each lease, as Ms. Olea testified was the intent of the parties!** VRP 52/17-19. The Suite A Lease by its terms commenced "the 15 day of November 2003," which would mean that if it was a three-year lease it would have terminated November 14, 2006. Ex. 1 ¶ 2. The Suite B Lease by its terms commenced "the 1<sup>st</sup> day of September 2004," which would mean that if it was a three-year lease it would have terminated August 31, 2007. Only Ms. Nyitrai's position that the governing termination date is the November 30, 2007 date specifically written into both Leases, constitutes a reasonable interpretation which vindicates the mutually-agreed upon intent of the parties to have the two

leases for the two Suites occupied by this single business end on the same date – and thereby avoid disruption to the business.

The actual intent of the parties to these Leases is hotly disputed by credible evidence – indeed, it may even be that choice of Ms. Olea’s unreasonable interpretation is impermissible as a matter of law (a point to be raised on remand). By entirely skipping the step of weighing the extrinsic evidence of intent, the trial court committed reversible error. Reversal and remand is necessary.

**C. A Reasonable Finder of Fact Could Find that Ms. Nyitrai was Not the Drafter of the Term Provision of Either Lease Agreement**

Not only did the trial court impermissibly skip the major step of weighing the evidence of the intent of the parties, but it totally misapplied the rule of construction against the drafter because it was error to find as a matter of law that Ms. Nyitrai was the drafter of either the Suite A or the Suite B Lease. It is important to remember that *the trial court never weighed the evidence*, and therefore its “finding” that Ms. Nyitrai was the drafter is not subject to “substantial evidence” review. Instead, the question before this Court is just like on summary judgment: whether there was sufficient material disputed evidence in the record to raise a question for the finder of fact on who was the drafter of each lease.

**1. There is Material Credible Evidence that the Parties Jointly Drafted the Term Provision in the Suite A Lease**

With respect to the Suite A Lease, Ms. Nyitrai repeatedly testified that “the tenant wanted to have it 2007, so that’s what I put down for her.” VRP 14/1-2; *accord*, VRP 14/9 (“We filled it in together. She [Olea] told me what to put down . . .”); VRP 35/20-23 (“I put down what the tenant wanted me to put down, so I didn’t count anything out myself, I just made note of what she wanted me to put down, so that is what I put down, 2007.”); VRP 36/1-2 (“So she said 2007, so I put down 2007, so I followed exactly what she instructed me to do.”); VRP 36/8 (“[S]he wanted me to put down 2007.”). Ms. Olea also instructed Ms. Nyitrai to put down three years. VRP 36/3-8. This is evidence sufficient to persuade a reasonable finder of fact that Ms. Nyitrai acted purely as a scrivener for Ms. Olea with respect to the Suite A lease term provisions, and was therefore not the drafter of these provisions. Indeed, under this evidence a reasonable fact-finder could find that Ms. Olea was the drafter, just as a party who dictates to a stenographer – and not the stenographer him or herself – is the drafter.

But even if the fact-finder does not go so far, the case law is clear: when the parties jointly draft a contract or contract provision, then neither one is the “drafter” and the rule of construction against the drafter is not

applicable. *Drumheller v. Bird*, 170 Wash. 14, 23, 15 P.2d 260 (1932) (rule of construction against the party whose language is adopted does not apply where contract was drafted by attorney representing both parties); *Randallstown Plaza Assocs. v. United States*, 13 Cl. Ct. 703, 709 (US Cl. Ct. 1987) (where both parties contributed language to ambiguous lease, rule of *contra proferentem* is not applicable); *Morris Silverman Mngmnt. Corp. v. Western Union Fin. Svcs., Inc.*, 284 F. Supp.2d 964, 973 n.3 (ND Ill. 2003) (mutually negotiated contract term cannot be construed most strictly against the party that initially proposed boilerplate language); *Crestview Bowl, Inc. v. Womer Construction Co., Inc.*, 592 P.2d 74, 79 (Kan. 1979) (lease prepared jointly by both parties cannot be strictly construed against either party); *Joyner v. Adams*, 361 S.E.2d 902, 906 (N.C. App. 1987) (“[I]t appears that the language was assented to by parties who had both the knowledge to understand its import and the bargaining power to alter it. Therefore, the policy behind the rule [of *contra proferentems*] is not served in its application here and the trial court erred in using the rule.”); 5 Corbin on Contracts, *supra* § 24.27 at 291 (citing “cases in which the parties’ mutual participation in drafting their contract made the ‘contra proferentem’ rule inapplicable.”).

It follows that it was reversible error to find as a matter of law that Ms. Nyitrai was the drafter of the Suite A Lease. Instead, the Court must

weigh Ms. Nyitrai's testimony against the testimony of Ms. Olea on this point prior to applying the rule of *contra proferentem*. "To apply the rule of *contra proferentem*, it is necessary to be able to identify the drafter of the ambiguous provision." *Randallstown Plaza Assocs. v. U.S.*, *supra*, 13 Cl. Ct. at 709. Having failed to do so, reversal is required.

**2. There is Material Credible Evidence that Ms. Nyitrai Did Not Participate At All in Drafting the Term Provision of the Suite B Lease**

The evidence is even stronger against a finding that Ms. Nyitrai is the drafter of the Suite B Lease's term provision, because she did not even write on this provision of the Lease. Ms. Nyitrai testified very clearly that she gave the Suite B Lease to Ms. Olea, and that "she, or somebody for her, filled it out." VRP 13-14/24-15. She further testified that the Suite B Lease term provision is not in her handwriting. VRP 28/21-24. While Ms. Olea denied that she or somebody on her behalf filled out the Suite B Lease term provision (though she didn't know who **did** fill it out), VRP 51-52/20-1, that denial does not permit the trial court to find, **as a matter of law without weighing credibility**, that Ms. Nyitrai was the drafter of the Suite B Lease. Yet that is exactly what the trial court did. CP 17 (CL 3.1). This was reversible error.

The trial court apparently believed that the fact that the parties agreed that both Leases were intended to terminate on the same date

constituted a stipulation that they were a single, indivisible contract, and that therefore the “fact” (as found by the court) that Ms. Nyitrai drafted the Suite A Lease termination provision was sufficient to make her the drafter of both leases. VRP 66/18-22. The first problem with this reasoning, of course, is that Ms. Nyitrai was not the drafter of the Suite A Lease termination provision – it was, at most, jointly drafted by the parties, and in actuality, dictated by Ms. Olea and transcribed by Ms. Nyitrai. Second, nothing about the mutual intent to have the two leases end on the same date operates to make one party the drafter – indeed, it tends to show that **both parties jointly drafted** the provisions which clearly state a termination date of November 30, 2007.

On this record, it cannot be held as a matter of law that Ms. Nyitrai was the drafter of the Suite B Lease. Accordingly, it was reversible error to grant the Motion to Dismiss based solely on the rule of construction against the drafter, without weighing the credibility of the respective parties’ evidence.

**D. Attorneys’ Fees at Trial Should Abide the Outcome, Except that Ms. Olea’s Appeal Fees Should be Held Per Se Unreasonable**

The Leases between the parties provide that the “losing party” shall pay “all reasonable costs and attorney’s fees in connection” with any legal action resulting from breach of the Lease. Ex. 1 & Ex. 2, ¶ 21.

If the judgment below is reversed, Ms. Nyitrai will no longer be the “losing party” and therefore the contractual attorney’s fee award should be reversed, with all costs and fees to abide the outcome – with one exception.

If Ms. Nyitrai prevails on appeal, this Court should hold that Ms. Olea’s fees in connection with this appeal are per se “unreasonable”, and therefore not recoverable under ¶ 21 even if Ms. Olea ultimately prevails. Ms. Olea’s meritless Motion to Dismiss caused a lengthy and expensive detour to the Court of Appeals. It would not accord with fairness and justice – in short, would not be “reasonable costs and attorneys’ fees” – to require Ms. Nyitrai to bear Ms. Olea’s costs and fees for the portion of the case in which she was the prevailing party.

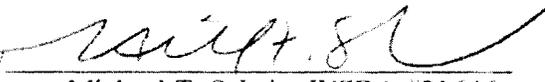
#### **IV. CONCLUSION**

The trial court erred by (1) failing to weigh the extrinsic evidence of the intent of the parties to the two leases; (2) relying upon the canon of construction against the drafter for a lease termination provision which the parties drafted together; and (3) finding as a matter of law that Ms. Nyitrai was the drafter of the Suite B Lease termination provision, when the evidence viewed most favorably to Ms. Nyitrai shows that she had nothing to do with filling out this term.

For all the foregoing reasons, the judgment should be REVERSED AND REMANDED, with an award of costs to Ms. Nyitrai. Attorneys' fees should abide the final outcome, except that Ms. Olea should recover no fees for this appeal.

DATED this 11<sup>th</sup> day of September, 2009.

SULLIVAN & THORESON

by   
Michael T. Schein, WSBA #21646

Columbia Center  
701 Fifth Avenue, Suite 4600  
Seattle, WA. 98104  
(206) 903-0504

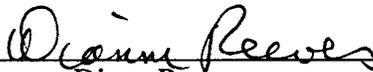
Attorneys for Appellant Katalin Nyitrai

**CERTIFICATE OF SERVICE**

I, Diane Reeves, legal assistant to Sullivan & Thoreson, hereby certify that on the date set forth below I caused a copy of the within BRIEF OF APPELLANT to be delivered by U.S. Mail, first class postage prepaid, to counsel of record for the Respondent at the following address:

Dennis P. Maher  
Attorney at Law  
950 12<sup>th</sup> Avenue, Suite 150  
Longview, WA 98632

DATED this 11 day of September, 2009.

  
\_\_\_\_\_  
Diane Reeves

FILED  
COURT OF APPEALS  
DIVISION II  
09 SEP 14 PM 1:41  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY