

COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
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No. 45278-2-II

COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

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FINANCIAL ASSISTANCE, INC., a Washington Corporation,  
Appellant

v.

BYRON SLACK, MICHAEL BUCKNER and MAUREEN BUCKNER,  
and the marital community composed of MICHAEL BUCKNER and  
MAUREEN BUCKNER,  
Respondent

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REPLY OF APPELLANT

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Presented by:  
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## I. APPELLANT’S REPLY ARGUMENTS

### A. Evidence of Judge Gregerson’s Bias Should Be Allowed Under RAP 9.11.

As the Respondent stated in his brief, it is true that the Appellant did not cite to the record for evidence detailing the relationship between Milton Brown (“Brown”), the principal of the Assignor, and Judge Gregerson (“Gregerson”). The reason for this is obvious – the Petitioner neither knew nor should have known that an actual or potential bias existed. There was no advanced notice that Gregerson was to adjudicate the matter at trial. And the disclosure by Gregerson was misleading and impartial. Unfortunately, the discovery of the nature of the relationship occurred after the trial, and is therefore not part of the record. Had it been otherwise, Appellant would have taken steps to obtain evidence and testimony of the Assignor in the matter, and it would have certainly motioned that Gregerson be disqualified.

The Respondent is also correct that the Appellant should have attempted to submit evidence of judicial bias under RAP 9.11. That rule states in part the following:

“The appellate court may direct that additional evidence on the merits of the case be taken before the decision of a case on review if: (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party’s failure to present the evidence to the trial court, (4) the remedy

available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.”

*RAP 9.11(a)*

Generally, an appellate court will not accept additional evidence on appeal unless all six criteria of RAP 9.11(a) are satisfied. *Harbison v. Garden Valley Outfitters, Inc.*, 69 Wn.App. 590, 594, 849 P.2d 669 (1993).

However, requirements of this rule for receiving new evidence on appeal may be waived to serve the ends of justice. *RAP 1.2(c); Wash. Fed'n of State Employees, Council 28 v. State*, 99 Wn.2d 878, 884-85, 665 P.2d 1337 (1983).

If this court allows for additional evidence under RAP 9.11, Petitioner stands ready to present a sworn declaration and/or testimony from Brown detailing the true nature of the relationship between him and Gregerson.

**1. Testimonial evidence of the Assignor should be admitted under RAP 9.11 because all six components required for admission are satisfied.**

Since all six components must be satisfied, Petitioner will address each one individually.

(1) Additional proof of facts needed for fair resolution of the issues

One of the main contentions by the Petitioner in this matter is that the judge was biased against Brown, and that said bias affected the judge's ability to impartially adjudicate the matter or violated the appearance of fairness doctrine. However, due to the nature and timing of the disclosure by Gregerson, there was not time for Petitioner to uncover the facts pertinent to determining that a bias existed. These post-trial, discovered facts of the relationship between Gregerson and Brown are necessary for this court to make a fair determination on this issue.

(2) Additional evidence would probably change the decision being reviewed

The sole reference in the record to Gregerson and Brown's relationship occurred at the beginning of the trial wherein Gregerson mentioned that he represented Brown "10, 12 years ago on a commercial lease situation." RP 4. In isolation, this disclosure did not suggest that a bias towards the Petitioner existed. Similarly, if relying on this statement alone, it does not provide this court with the facts necessary to make an informed decision. In reality, when a Judge minimizes such a relationship, as Judge Gregerson did here, it invites the parties to simply agree and move forward with the trial; nothing Judge Gregerson said

would put any reasonable person on notice that the disclosed relationship ended in disfavor.

Testimony or a declaration from Brown would provide a clearer picture of the true relationship between the parties. Specifically, it would outline the potential incidents of malpractice by Gregerson, the termination of Gregerson's representation by Brown, and the negative feelings possessed by both men towards one another. Had this information been disclosed to the Petitioner by Gregerson, it would have certainly affected the Petitioner's subsequent actions. Logically, it would also likely affect this court's decision.

(3) It is equitable to excuse the party's failure to present the evidence to the trial court

It is equitable to excuse Petitioner's failure to present this evidence to the trial court because it did not know or have reason to know that this evidence existed until after the trial was completed. Gregerson was only assigned the case mere days (if that) before the trial as part of a shuffling by the court of the judges' trial assignments. RP 4. Petitioner was not advised in advance which judge would be hearing the trial of this matter. Gregerson's disclosure did not create a duty in the Petitioner to investigate further. And it was only after a post-trial discussion with Brown that the evidence Petitioner now seeks to admit was uncovered.

(4) The remedy available to a party through post-judgment motions in the trial court is inadequate or unnecessarily expensive

There is indeed a post-judgment motion available to the Petitioner. In particular, the Petitioner could have filed a CR 60(b) motion for relief from judgment based on the bias or potential bias in Gregerson. However, the motion would have been heard in front of Gregerson. He has every incentive to maintain his position regarding the disclosure and nature of his relationship with Brown. To decide otherwise would expose him to a potential judicial conduct violation.<sup>1</sup> Given this, the motion would undoubtedly be denied. *See Tatham v. Rogers*, 170 Wn.App. 76, 86, 283 P.3d 583 (2012) (Trial court judge denies Defendant's request for relief from judgment under CR 60(b) based upon Defendant's post-trial discovery of facts indicating a bias in favor of Plaintiff's counsel).

Because granting such a motion would require a judge to invalidate his or her decision, and because such a move would expose said judge to potential judicial conduct violations, this approach is an inadequate remedy in cases of post-trial discovered bias. It is certainly inadequate in

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<sup>1</sup> CJC Rule 2.11, Comment 5, requires that the judge disclose all information that parties or lawyers might reasonably consider relevant to a motion for disqualification. In the present matter, Gregerson's discharge by Brown and the discord of their relationship would be clearly relevant to an attorney's decision to pursue such a motion.

the context of the present matter and would only serve to prolong resolution and increase the litigation expenses of the parties involved.

(5) The appellate court remedy of granting a new trial is inadequate or unnecessarily expensive

Generally, the granting of a new trial by an appellate court would result in the matter being heard again by the same judge. Unfortunately, this course of action would expose the Petitioner to the same issues as before. The facts underlying Gregerson's bias or potential bias are fixed. Accordingly, such a remedy would be entirely inadequate to Petitioner's desire of obtaining a fair and impartial adjudication on the matter. Rather, it would only result in greater legal costs and an inevitable appeal on Gregerson's ruling.

In rare instances, the appellate courts have allowed for a new trial in front of a different judge as a way to avoid judicial bias. *Tatham*, 170 Wn.App at 104. In this case, Petitioner contends that a new trial, in front of an unbiased judge, would provide the imprimatur of fairness and impartiality, regardless of outcome. However, for this court to even consider such an action, evidence of Gregerson's judicial bias must necessarily be admitted and considered.

(6) It would be inequitable to decide the case solely on the evidence already taken in the trial court

Petitioner is not seeking to have new substantive evidence submitted under RAP 9.11 to supplement its position relative to the underlying contract dispute. To that end, the record speaks for itself. Rather, it is trying to supplement the record to allow for evidence relative to Gregerson's bias towards Brown. Currently, the only reference to said relationship is the partial and misleading disclosure made by Gregerson at that beginning of trial.

It would be inequitable for that statement to be the only evidence reviewed by this court for the purpose of Petitioner's claim of bias. The deference afforded to a trial court's decision is based on the fair and impartial adjudication at that level – the absence of which creates a distinct probability that factual determinations and legal conclusions are skewed to obtain a desired outcome. Had a reasonable disclosure been made by Gregerson, then the pertinent details of Gregerson's relationship with Brown, together with any follow-up questions or motions by the Petitioner, would already be a part of the record for review by this court. However, Gregerson failed to do so. Petitioner should not now be disadvantaged as a result.

**2. Even if all six required components are not satisfied, the evidence should still be admitted because doing so would serve the ends of justice.**

RAP 1.2 (c) states that “the appellate court may waive or alter the provisions of any of these rules in order to serve the ends of justice.” This exception has been utilized by appellate courts when deciding on whether to allow new evidence under RAP 9.11. As was mentioned in Petitioner’s brief, one of the foundational principles of our legal system is the impartiality of those adjudicating matters. Regardless of the requirements under RAP 9.11(a), if there is evidence of judicial bias or potential bias, and such evidence was not known before trial, justice demands that it be included into evidence on appeal.

While it is true that a disclosure was made by Gregerson, this disclosure was misleading and insufficient. To now not allow evidence in detailing the true nature of the relationship between Gregerson and Brown would reward Gregerson for his lack of candor. More concerning, it would rob the Petitioner of a fair trial. In a broader view, it would also set a clear pathway for other adjudicators to do the same, should their minds be set on such a course of action.

**B. The Terms of the Lease are Clear and Unambiguous.**

Mr. Slack testified at trial that he read it. RP at 14. The plain language of the lease makes him a lessee, not a guarantor, not a co-signor,

and certainly not a surety. There was no testimony that Mr. Slack asserted to anyone (other than perhaps the Buckners) that he was serving as a surety and not as another, co-equal, party to the lease. For the Court to conclude otherwise is contrary to the evidence presented.

Mr. Slack is not an unsophisticated person. He testified to his experience as an industrial appraiser. RP, p. 40, l. 2. He surely knows the difference between being a “lessee” and being a guarantor. If not, he had ample opportunity to object to the terms of the written agreement, or to seek his own, independent or outside counsel. He clearly and unambiguously signed as a party to the lease; he did not sign some extra or separate personal guarantee. Washington courts presume that parties to an agreement have read all parts of the entire contract and intend what is stated in its objective terms. *West Coast Stationary Engineers Welfare Fund v. City of Kennewick*, 39 Wn.App. 466, 469, 694 P.2d 1101 (1985). *See also Hein vs. Family Life Ins.*, 60 Wn.2d 91, 95, 376 P.2d 152 (1962). There is no evidence to the contrary. The trial court has interpreted the contract in a manner completely inconsistent with the plain language of the document.

Respondent’s focus is on the context rule. Unfortunately, the context rule requires exactly that: context. The case is really one of agency. Mr. Slack chose to enter into a lease agreement with the Buckners

as a tenant. He chose them; they chose him. Mr. Steiger's testimony makes clear that he was necessary for appellant to approve the lease. It does not say more than that. In fact, it is the trial court that is interpreting Mr. Slack's testimony to indicate he thought he was just a guarantor. He never actually says as much. Respondents demonstrate no actual "context" of the contract. He suggested no revisions, made no objections to the terms, and gave appellants no reason to believe he was anything other than a legitimate partner in the business. Notably, he fails to even provide a separate address for purposes of notice. If he were acting solely as a surety, and not active at the business, he would have provided his accurate, separate mailing address for purposes of notice, and made certain that his liability was limited, given the clear language of the hold-over provision, as previously cited by appellant.

C. Prevailing Party Should Be Awarded Attorneys Fees.

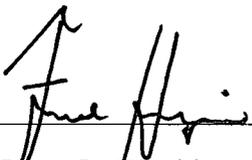
Petitioner agrees with Respondent that the prevailing party in this action is entitled to attorney's fees on appeal, pursuant to the terms of the lease and the laws of Washington State.

**II. CONCLUSION**

Petitioner respectfully requests that this court allow evidence of Gregerson's bias to be presented so that it may make a fair determination on that issue. Petitioner contends that an actual or potential bias exists and

that said bias is sufficient to warrant a reversal of the judgment. If this court agrees, Petitioner requests a new trial in front of a new judge. Additionally, Petitioner contends that the trial court erred in its interpretation of the lease. Respondent entered into the lease as a tenant with full knowledge of his obligations. Accordingly, and if this court does not reverse on the issue of bias, Petitioner requests that the judgment be reversed on these grounds.

Respectfully submitted this 1<sup>st</sup> day of May, 2014

  
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FILED  
COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

COURT OF APPEALS DIVISION II  
STATE OF WASHINGTON

FINANCIAL ASSISTANCE, INC., a  
Washington Corporation,

Plaintiff,

vs.

BRYON SLACK, MICHAEL BUCKNER  
and MAUREEN BUCKNER, and the  
marital community composed of  
MICHAEL BUCKNER and MAUREEN  
BUCKNER,

Defendants.

No. 45278-2-II

**DECLARATION OF MAILING**

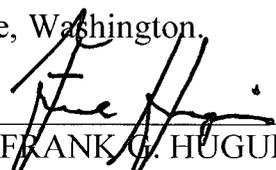
The undersigned declares under penalty of perjury: That he / she is now and at all times herein mentioned was a citizen of the United States and resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above entitled Action, and competent to be a witness herein.

That on May 1, 2014, at the address of 705 Second Avenue, Suite 605, Seattle, King County, Washington State, I duly mailed by United States Mail a copy of Appellant's Reply. Said documents were mailed to the following persons and addresses:

Name: Catherine Wright Smith, WSBA # 9542  
Address: 1619 8<sup>th</sup> Ave N, Seattle, WA 98109-3007

Name: Ian C. Cairns, WSBA # 43210  
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SIGNED this 1 day of May, 2014, at Seattle, Washington.

  
FRANK G. HUGUENIN  
Declarant

DECLARATION OF MAILING - 1

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