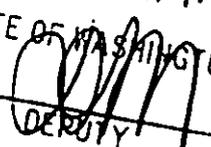


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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

Sam and Odallis Groome,
Appellants,

vs.

Alpacas of America, LLC,
Respondent.

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

In opposition to Alpacas of America's ("AOA") Motion for Summary Judgment to enforce payment on two promissory notes that funded the Groomes' purchase of the two female alpacas, the Groomes produced substantial evidence of AOA's breaches of warranties, including but not limited to:

- Mr. Groome's desperate September 2007 letter to AOA -- on the month before it stopped paying for the two alpacas at issue in the case (CP 139-140, ¶¶5-6; CP 018, ¶¶4, 8), written after AOA had refused to return his calls for the past six months¹ about the Groomes' warranty claims on a very expensive, but infertile, female alpaca AOA had sold them (CP 146);
- Unrebutted evidence that infertile female alpacas have almost no commercial value, and instead are a liability, that has to be cared for and fed (CP 139, ¶ 3; CP 143 ¶ 12);
- AOA's warranty provides that it will take back infertile female alpacas it and attempt to: (i) impregnate it with one of the AOA herd sires; (ii) exchange it for a suitable replacement; (iii) or refund the purchase price (CP 023, "Guarantee;" CP 034, ¶ 3; CP 139, ¶ 3);
- The Groomes' unrebutted testimony that AOA's speaking agent, Randy Snow, in response to the September 2007 letter and subsequent conversations with Mr. Groome, promised to not only honor AOA's warranty obligations as to the alpaca specifically discussed in the letter (Dark Seeqret), but to honor

¹ AOA asserts in an unusually argumentative reply declaration to its Motion for Summary Judgment that Mr. Groome "had nothing to complain about" when he wrote his letter to AOA in September 2007 after not hearing from Mr. Snow for over six months. AOA now apparently takes the position that the Groomes' letter was premature and there were really no fertility issues that legitimately concerned them. CP 168, ¶ 4.

its warranty obligations as to Black Thunder's Midnight (CP 139-140, ¶ 5), another very expensive, but infertile, female alpaca purchased from AOA in early 2007 – one of the two alpacas at issue in this case (CP 139-40, ¶ 4), as soon as it had resolved the fertility issues with Dark Seeqret;

- Unrebutted testimony that the Groomes were some of AOA's largest customers (CP 138-39, ¶ 2), and up until mid-2009, had always dealt with Randy Snow (CP 138-39, ¶ 2), believed Mr. Snow was AOA (CP 146), and until March of 2007 Mr. Snow had always been a responsive and trustworthy in honoring AOA's warranty obligations (CP 138-39, ¶ 2-3; 140, ¶ 5);
- AOA's admission that Randy Snow was the "public face and the driving force behind our annual auctions" of AOA until he suddenly "retired" in July of 2009, without warning and/or an honest² explanation (CP 080-81; 96-97; 167-68, ¶ 3; 142, ¶ 9);
- Dr. Barnett acknowledged that after Mr. Snow's departure in July 2009, he "took a more active role in the day to day management of the ranch," but is silent about his knowledge of what he knew about its operations in the relevant time that Mr. Snow was in charge (CP 167-68, ¶ 3);
- Financial difficulties faced by AOA and the alpaca industry appear to have been a compelling part of the reason that AOA

² AOA was so worried about the free-fall in the alpaca market that it did not want to even announce Mr. Snow's resignation for fear that it would continue to place downward pressure on the already stressed market. Mr. Snow wrote to AOA owner, Dr. William Barnett by email on May 5, 2009:

Bill: I had not heard back from you about sending out the letter I sent you. Mark thought it was well written and concise and provided some answers to the questions that will be arising about the transition that people are going to see – it also lets the industry know you aren't folding up shop and gives Mark a reason to be there.

CP 96-97 (emphasis added). Mr. Snow's letter was *never* sent out to Mr. Groome or others in the alpaca industry, in part, because Dr. Barnett was at the same time – and in the same email exchange -- attempting to sell his entire ranch. Word of such a sale to the marketplace would have created the same panic "folding up shop" would have meant and would have depressed the selling price even further. See also, CP 100, 103, 105-06, 109; 128-129.

and Mr. Snow had difficulty keeping up with and honoring AOA's warranty obligations in 2007 (CP 070-131), and in communicating with its largest customers, like the Groomes, and went from infrequent communication in 2007 to nothing by mid-2009 (CP 141-43, ¶¶ 7, 9);

- AOA never submitted a declaration of Randy Snow refuting the Groomes' account of promises made to them, confirming AOA's resolve to honor its warranty obligations on the expensive female alpacas sold to the Groomes;
- Instead of producing a declaration from Mr. Snow, AOA submitted a Reply Declaration of AOA owner, Dr. William Barnett, that did not deny the promises Mr. Snow had made to Appellants concerning AOA's warranty obligations on Black Thunder's Midnight, but attempted to argue new factual issues and evidence to counter the Groomes' assertions based upon his admittedly "more active role in the day to day management of the ranch" after Mr. Snow's departure (CP 167-192);
- Despite discovery requests to AOA to produce all of its email between AOA and the Groomes (CP 059, RFP Nos. 2-3), or AOA and Mr. Snow (CP 060, RFP No. 7), it is un rebutted that AOA did not produce one email authored by Mr. Snow or sent to him even referencing any issues with respect to collection activity with the Groomes (CP 052-53, ¶¶ 1-2);
- Emails recovered from another Thurston County Superior Court case involving AOA (CP 53-54, ¶¶ 1-2), reveal that Mr. Snow regularly communicated with AOA, before and after his "retirement" on collection matters for other AOA customers (CP 72-73, 78, 83, 87-88, 90-94, 111-112, 114, 116-118, 120);
- Corroborating the Groomes' understanding with Mr. Snow, AOA's "collection log" demonstrates no activity between September 20, 2007 and July 21, 2008.³ Even when the log

³ When AOA submitted its Motion for Summary Judgment to the trial court, it purported to attach relevant portions of "contemporaneous" collection notes kept by AOA, but did not produce for the Court's consideration the September 2007 to July 2008 gap contained in log. Compare CP 21, ¶ 16, CP 50 with CP 150-153, the complete log produced by the Groomes with their Response to Motion for Summary Judgment.

resumed in 2008, it documented problems AOA was having in allocating Mr. Groome's checks (09/15/08), (11/13/08), as well as trouble getting Mr. Snow to return calls (10/29/08) and, in fact, acknowledged that he was now refusing to take calls to even discuss the infertility issues with Black Thunder's Midnight (12/15/08), fourteen months after Mr. Groome raised the roof about AOA's failure to communicate and/or honor its warranty obligations (CP 152);

- After Mr. Snow's departure, AOA provided Mr. Groome with an ARI certificate for the alpaca named Phashion Model, transferring ownership to Mr. Groome. In the industry, the ARI certificate transfers ownership of alpaca's and releases the interest of the animal (CP 143, ¶ 11; CP 157);
- Hotly contested issue of fact between Dr. Barnett, who argues that the Groomes first claimed fertility issues with Black Thunder's Midnight in December of 2008 (CP 020, ¶15), and that of Mr. Groome, who asserts it was discussed with Mr. Snow after Mr. Groome's September 2007 letter and which prompted Mr. Snow's unrebutted promises to honor Black Thunder Midnight's fertility warranty as soon as AOA had honored the one for Dark Seeqret (CP 140-41, ¶ 5);
- AOA's admission that Dark Seeqret's warranty issues were being resolved in 2008 when she was returned to the Groomes impregnated at the end of April 2008, and she gave birth to a live cria on September 8, 2008 (CP 168, ¶ 4, lines 16-21), and Mr. Snow's promise to the Groome's to begin addressing the fertility issues with Black Thunder's Midnight at that time (CP 140-41, ¶ 5);
- Hotly contested issue of Black Thunder Midnight's fertility by the Groomes who possess her and claim she is infertile, never giving birth to a cria (CP 142, ¶8; 142-44, ¶¶12-13) and Dr. Barnett who infers from unauthenticated documents that he has conclusive proof of Black Thunder Midnight's fertility (CP 020, ¶ 15), and argues in his Reply Declaration why Mr.

Groome's assertion of fertility is questionable⁴ (CP 171-172, ¶ 11-13); and

- Dr. Barnett's Reply Declaration in Support of the Motion for Summary Judgment which *argued* for the first time that the Groomes refused to pay because of issues associated with their divorce (CP 168-69, ¶5), even though the Groomes deny this was the reason for withholding of payment on Black Thunder's Midnight and Phashion Model (CP 206, ¶5).

Despite substantial evidence of AOA's breaches of warranty on Dark Seeqret and Black Thunder's Midnight, AOA was granted summary judgment. Instead of considering the evidence in the light most favorable to the Groomes, or allowing them more discovery under Civil Rule 56(f), the trial court weighed the credibility of the evidence, adopting AOA's narrative of what transpired between the parties:

Moving then to Black Thunder's Midnight, in looking at the many exhibits here, and again, there is lots of information back and forth about this is what happened or didn't happened, this is right, this is wrong, and so on and so forth, but what I see is that Mr. Groome never originally claimed that the failure to pay was based on infertility. He didn't make that claim for two years after he stopped paying in 2007. *His claims were that he was going through a nasty divorce, that a court would have to authorize any disbursements and other excuses, such as he really didn't*

⁴ Dr. Barnett argued in his Reply Declaration at Summary Judgment that Mr. Groome produced Cornell University veterinary records to document his breeding efforts with Dark Seeqret, and was remiss for not doing the same with Black Thunder's Midnight. CP 172. First, there is no such requirement in AOA's warranty. CP 034; CP 206-07, ¶2, ¶5. Second, Mr. Snow promised that AOA would take care of this problem once the Dark Seeqret infertility issues had been resolved. CP 140-41, ¶ 5.

have the money to pay. It was only later that he claimed that there was infertility.⁵

CP 301-02 (attaching the August 15, 2014 Report of Proceedings, pp. 15-16 (emphasis added)). The trial Court also denied the Groomes' Motion for Civil Rule 56(f) relief by determining that the request for further discovery "was for issues that aren't strictly before the Court today. *They have to do with what may have gone on between Mr. Snow and them that perhaps goes to intent on some things*, but I don't think that's a seminal issue here." CP 300-01 (attaching August 15, 2014 Report of Proceeding, pp. 14-15 (emphasis added)).

The trial Court's decision to frankly weigh the credibility of the evidence on record, siding with AOA's interpretation of the evidence is an abuse of its discretion. The same is true of the trial court's refusal to grant additional discovery on what it conceded "may have gone on between Mr. Snow and them (the Groomes) that perhaps goes to intent". CP 300-01. Finally, the trial court erred in denying the Groomes' Motion to

⁵Later in the same proceeding, the trial court elaborated on its conclusion: "As I've already noted, as far as Black Thunder's Midnight, *the fact that payments stopped* and the allegation of infertility appears to have been *raised only as an afterthought* is simply not sufficient." CP 302-03 (attaching August 15, 2014 Report of proceedings at pages 16-17 (emphasis added)). The trial court reached this conclusion despite Mr. Groome's testimony that he stopped paying in October 2007 after AOA had suddenly stopped communicating with him about significant warranty issues for six months and after it promised to take care of Black Thunder Midnight's fertility issues once the Dark Seeqret fertility issues had been resolved. CP 140-41; 146. It is undisputed that AOA did not resolve Dark Seeqret's fertility issues until April 2008 at the earliest or September 2008 at the latest. CP 168, ¶ 4, lines 16-21.

Reconsider when it was finally allowed to respond to the new arguments and evidence contained in Dr. Barnett's unusual Reply Declaration in Support of AOA's original Motion for Summary Judgment.

II. ASSIGNMENTS OF ERROR

1. The Superior Court erred when it granted AOA's Motion for Summary Judgment by weighing the credibility of the evidence and/or not giving the Groomes' benefit of the favorable inferences from that evidence, when it entering an Order Granting AOA's Motion for Summary Judgment on August 15, 2014.

2. The Superior Court erred when it denied the Groomes' request for Civil Rule 56(f) relief where the promises made by AOA's admitted speaking agent about resolving warranty issues was a "seminal issue" that required a complete discovery response, thus depriving the Groomes of Mr. Snow's internal and external communications, which in turn forced the Superior Court to rely on Dr. Barnett's interpretation of AOA's records after he took over business operating in late 2009.

3. The Superior Court erred by denying the Groomes' Motion to Reconsider in light of Mr. Groome's Second Declaration which addressed the new factual issues and evidence inappropriately raised and

considered in Dr. Barnett's Reply Declaration, and by entering judgment on September 12, 2014. CP 307-09.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the Superior Court weighed the credibility of the evidence in AOA's favor by *inter alia*, determining that the Groome's "nasty" divorce was the real reason they did not pay on the promissory notes, and/or rejecting Mr. Groome's testimony regarding Mr. Snow's un rebutted promises to have AOA address the fertility issues regarding Black Thunder's Midnight after it resolved the fertility issues AOA was belatedly addressing in 2007 and 2008 regarding another alpaca purchased by the Groomes in January of 2006, Dark Seeqret.

2. Whether the Superior Court erred by denying the Groomes' requested CR 56(f) relief to pursue Mr. Snow's internal/external written communications that would verify the promises made to the Groomes and further document the real reasons Mr. Snow/AOA was suddenly unavailable to address warranty issues, to help explain why AOA refusing to honor warranty claims in response to economic turmoil in the alpaca market.

3. Whether the Superior Court should have reconsidered its August 15, 2014 ruling and Order because of the issues belated raised in

Dr. Barnett's Reply Declaration on the Motion for Summary Judgment, and should have considered Mr. Groome's Second Declaration responding to Dr. Barnett's new facts and argument.

IV. STATEMENT OF CASE

A. **The Groomes' Suspension of Promissory Note Payments Was Directly Related to AOA's Breach of Warranty on Expensive Infertile Alpacas, Dark Seeqret and Black Thunder's Midnight.**

It is undisputed that in early October of 2007, Mr. Groome suspended payments on alpacas Black Thunder's Midnight and Phashion Model. It is also undisputed that immediately before he suspended payments on these two animals, he wrote a strong letter to the admitted "public face" and "driving force" of AOA, Randy Snow (CP 167-68, ¶ 3), about AOA's sudden change in course in how it was dealing with the Groomes. On September 24, 2007, Mr. Groome wrote to Mr. Snow about a tortured year and half of effort to breed Dark Seeqret:

Please be advised that I have been attempting to talk to Randy since the first week of March about our problems with Dark Seeqret D965. You called one time and left a message that you would be there for ten minutes and then gone for three weeks. I purchased her at the Las Vegas Auction on 1/14/2006. She returned with you to AOA to be bred to Gray Legend S587 as per a contract was signed by Tom. **She was not to be transported to me until this breeding had taken place and she was confirmed pregnant.** As you remember, she was shipped to us by mistake without shipping papers. We stopped the

shipment in Ohio and she was rerouted to Florida in February. **She arrived unbred.** After a discussion with you, we took her to NY in the spring and attempted to be her on our farm. She started breeding on 6/6/06 and ended on 8/02/07 without success. Copies of her medical records and breeding records have been faxed to you as per Catherine's request.⁶ AOA made arrangements for her to be returned to you to have the desired breeding take place. *We have requested that our account be credited for her purchase price.* If you are able to secure her pregnancy to Gray Legend in the next few months, we will then buy her back for the same amount we bought her for at auction. . . **Randy, we have bought too many animals between our farm and our customers to be having a problem like this. You told me at the auction that there would be no problem returning her if breeding was unsuccessful, & she is now 3 and unproven. I have attempted on a daily basis to reach and do not know what I must do to settle this with you.** I need

⁶ AOA's warranty on fertility does not require that a buyer prove the female alpaca's infertility through veterinary records in order to make a warranty claim. The warranty provision simply requires:

A maiden female Alpaca that has never been bred is warranted to be fertile at maturity *when bred to the Seller's herd sire*. If Buyer claims a maiden female Alpaca is not fertile by the age of thirty-six months, Seller will have the right to physically possess such Alpaca for a period of up to six months thereafter at Seller's expense and shall determine the validity of Buyer's claim during this period. Should Buyer's infertility claim be valid, Seller shall elect whether to provide Buyer with another female under the same Contract terms and conditions, or to reimburse Buyer in full amount of such Alpaca's purchase price without interest.

CP 34, ¶ 3 (emphasis added). Instead, Mr. Groome was required to spend time and money proving his infertility claim before AOA would honor its obligations. CP 173-184; CP 206-07, ¶ 2. Mr. Snow knew about the efforts Mr. Groome had undertaken to breed Dark Seeqret for a year and a half. Mr. Snow's assurances that AOA would work with Mr. Groome to resolve the Dark Seeqret breeding issues were an important inducement in Mr. Groome's decision to purchase a second, expensive unproven female alpaca at the AOA auction in January of 2007 – Black Thunder's Midnight. CP 206-07, ¶ 2.

you to call me personally as I expect the respect of dealing with you personally, not a board of directors.

CP 146 (emphasis added).

After years of being one of AOA's largest customers (CP 139, ¶ 2), and after years of successful interactions with Ms. Snow in honoring AOA's warranty obligations (CP 139, ¶ 3), the Groomes' relationship with AOA suddenly and irrevocably changed in early 2007. Not only were they forced through additional hoops to prove the infertility of a prized female alpaca, but they were now being ignored for six months at time. It is undisputed that an infertile female is commercially worthless (CP 139, ¶ 3; CP 143 ¶ 12). Obviously, the longer a female alpaca goes without birthing cria, the longer the rancher has to make payments without cria to sell to fund the original purchase.

At the time of Mr. Groome's September 2007 letter describing his year and a half odyssey to breed Dark Seeqret, he was also experiencing fertility problems with the expensive female alpaca he had purchased at the January 2007 auction, Black Thunder's Midnight.⁷ CP 140-41, ¶ 5.

⁷ By sworn testimony, Mr. Groome informed the Superior Court that Mr. Snow induced him into buying Black Thunder's Midnight at the January 2007 auction even though Mr. Groome had been unsuccessful in breeding Dark Seeqret, which he had purchased a year earlier, at the January 2006 auction. Mr. Snow assured Mr. Groome that AOA would honor its warranty obligations as to Dark Seeqret and that a resolution would be worked out. CP 206-07, ¶ 2. Mr. Groome's September 24, 2007 letter chronicles the problems he continue to experience in having AOA honor its obligations on Dark Seeqret, including the almost comical shipping of Dark Seeqret without papers to Ohio, instead of Florida, where she was eventually rerouted, but arrived unbred. CP 146. Even though

When Mr. Snow called to discuss the issues raised in the letter, it is undisputed that Mr. Groome also discussed with him his growing concern about AOA's ability to honor the fertility warranty on Dark Seeqret, and now Black Thunder's Midnight. CP 140-41, ¶ 5. It is undisputed that Mr. Snow assured him that AOA would honor its warranty obligations on Black Thunder's Midnight, after it had resolved the fertility issues it was having in impregnating Dark Seeqret. Id. According to Dr. Barnett's Declaration, AOA did not ship Dark Seeqret until April of 2008, and she did not deliver her cria until September of 2008. CP 168, ¶ 4.

Once Dark Seeqret's pregnancy was secure, AOA's collection communications, which had been on hold since September 20, 2007, resumed on July 21, 2008. Instead of honoring AOA's commitment to address Black Thunder Midnight's fertility issues, the only communication AOA allowed Mr. Groome was with its collection secretary. All communications between Mr. Groome and Mr. Snow were suddenly, and inexplicably, blocked. CP 151 ("10/29/08, Spoke to Cathy, Sam is in Florida; she said he has been trying to get ahold of Randy; *told her that Randy has turned this matter over to me and that he needs to call me*") (emphasis added); CP 152 ("12/10/08 Sam called me back, told

Mr. Groome and Mr. Snow found these issues concerning and Mr. Groome had to endure six months of being ignored by AOA, Dr. Barnett argued to the Court in his Reply

him the bottom line is that he has to make a payment, we have not received a payment since March . . . *He brought up the fact that he has one animal that he has not been able to get pregnant and wants to send her here to breed . . .*”(emphasis added), (“12/15/08 . . . *Told him Randy would not be doing anything with Black Thunder’s Midnight until he is caught up.*”); CP 153 (“02/18/09 I spoke to Sam . . . *He wants Randy to breed one of his females for free, told him that would not even be considered until he is current on the 2 animals that have not been sold.*”).

Mr. Groome was so exasperated at being cut off from Mr. Snow regarding AOA’s warranty obligations and its refusal to transfer title to Dark Seeqret and her cria, that he traveled from Florida to Washington to meet with Randy. CP 207-08, ¶¶ 3-4. Believing in the integrity Mr. Snow had shown him at the beginning of their business relationship, he hoped to make a personal appeal to have him honor AOA’s obligations. CP 207, ¶ 3. Although he had been promised a meeting, Mr. Snow’s secret retirement plan⁸ had not been communicated to Mr. Groome and he

Declaration that “Mr. Groome had nothing to complain about.” CP 168, ¶ 4, line 21.

⁸ On March 2, 2009, Mr. Snow wrote to Dr. Barnett:

. . . I would really like to wrap up my daily time commitment at the ranch by the beginning of the summer. The does not mean I won’t be available to help out and answer questions and stuff – but I don’t want to be pounding my head against the wall to run the

showed up to find a mostly empty Tenino ranch, and no Randy Snow. Id. Although the AOA receptionist promised that Mr. Snow would call Mr. Groome later that week, the call never came. Instead, shortly after Mr. Snow's AOA departure, Mr. Groome was provided with an ARI Certificate entitling him to ownership of the alpaca named Phashion Model, an apparent concession for all of the headaches he had endured, or a final reconciliation of accounts that he had been requesting. CP 142-43, ¶¶ 10-11; CP 157.

Black Thunder's Midnight has been infertile since the day Mr. Groome purchased her in January of 2007. CP 143-44, ¶¶ 12-13; CP 208, lines 7-9. She is not only commercially worthless, she is a liability that

company. With AOA not participating in the standard alpaca events as we have in the past and me pushing, pushing, pushing to get the next event or project done the staff will have a lot less to do because I will be generating a lot less work for everyone there. I am seeing signs of this now and could probably let at least one person go – possibly two in the next month or so. . .

CP 070. In April 2009, Mr. Snow wrote to Dr. Barnett, asking him what Mr. Snow should tell people in the industry about his relationship with AOA. Dr. Barnett told Mr. Snow to "tell them you will be taking more time off this year and Mark will be covering for you while you are off." CP 80-81. In May 2009, Mr. Snow wrote to Dr. Barnett asking for feedback on an industry letter he had written for Dr. Barnett's approval. Mr. Snow wrote:

I had not heard back from you about sending out the letter I sent you. Mark thought that it was well written and concise and provided some answers to the questions that will be arising about the transition that people are going to see (sic) it also lets the industry know you aren't folding up shop and gives Mark a reason to be there.

CP 96-97.

Mr. Groome has had to feed and care for eight years. CP 142, ¶ 81 CP 143, ¶ 12.

B. Keeping It Simple -- AOA's Selective Production of Discovery Responses and Documents.

Wanting to limit this case to a simple failure to pay two promissory notes, AOA denied the Groomes discovery that would explain the 2007-2008 sea change that occurred in AOA's relationship with the Groomes, including Mr. Snow not returning calls for up to six months and AOA's difficulty in meeting its warranty obligations. In discovery, the Groomes' sought context for Mr. Snow's sudden and silent departure from the top perch at AOA, as well as discovery that would reveal his communications with AOA about promises made to Mr. Groome. CP 59, RFP 2-3; CP 60, RFP 7. Surprisingly, not one of the documents produced by AOA was authored by or sent to Mr. Snow. CP 53, ¶ 2, lines 12-16.

The Groomes asserted at summary judgment that they were entitled to CR 56(f) relief to pursue evidence AOA denied them because the missing evidence tells the tale of *why* AOA failed to live up to its warranty obligations, could not reconcile its own accounts and started treating its customers as adversaries.

C. The Groomes Locate Powerful Emails Demonstrating the Insufficiency of AOA's Discovery Responses.

Despite AOA's position on discovery, the Groomes fortunately unearthed many emails from another Thurston County involving AOA, Randy Snow and Dr. Barnett. The recovered emails discuss the implosion of the alpaca market that put AOA in financial duress and forced the principal with whom Mr. Groome made all of his deals, Randy Snow, into retirement. CP 53-54, ¶¶ 3-4. Although the Groomes were only able to mine emails between 2009 and 2010 emails, they provide a window into why AOA suddenly was unable to return phone calls for six months at a time, reconcile accounts or honor Mr. Groome's warranty requests. The quality and quantity of these emails also calls into question the reasonableness of AOA's refusal to produce any emails authored by Mr. Snow, or sent to him about one of AOA's largest customers, the Groomes.

The earliest email located by the Groomes' attorneys was between Mr. Snow and Dr. Barnett in March of 2009. CP 070. This email documents that AOA was intent on selling its herd and ranch to the highest bidder. CP 070 (Mr. Snow wrote: "For now I will still continue to manage AOA and to pursue the sale of the herd which is a pretty big task. If I can make that happen it will be better for all of us."); CP 72-73. Later

in March of 2009, Mr. Snow wrote about how the bad economy impacted AOA's business:

Because of the bad economy, all the cuts in staff and you wanting me to get the cost numbers down, with the outside and inside staff we have not had the manpower to sift through, call and create the leads to follow up on. *It is hard for me to motivate staff when they are wondering if they will be the next one out the door.* After several conversations over the last couple years with you "we" could never come up with a plan. So for me personally, *I had originally thought that I wanted to be done here when I turned 50* (I have pushed long and hard for you during that time) – *that was in September.*

CP 76 (emphasis added). Many of the subsequent emails between Mr. Snow and Dr. Barnett in 2009 discuss the negative impact the economy was having on AOA's business, including AOA's decision to forgo its single largest selling event – the January auction. CP 80. When the sale of the herd did not seem likely, Dr. Barnett floated the idea of selling the Tenino property. Mr. Snow responded with hesitation:

My gut tells me any alpaca person that hears of it will think you are folding up shop and AOA will be less likely to sell any alpacas – no matter what is said about the land and the business. Can I think about it for a few days?

CP 85. Dr. Barnett emailed Mr. Snow about a week later, indicating that he had not decided on the price, but opined "It is a bad time to sell, but

may get even worse. I keep hoping a credible buyer (sic) to contact me but that may turn out to be wishful thinking.” CP 96.

In June of 2009, Dr. Barnett wrote to Mr. Snow to report on the dismal outlook for an internet alpaca auction:

Randy: Your exit timing is (sic) Perfect. Look at the stats on the Auction Alpacas below. None have any bids. Some have as many as 350 hits. Some are decent alpacas. **The market is at a standstill.**

Looks like I will be in the meat business as soon as the accounts receivable are paid or run out. **One year old alpacas in good shape are delicious, like lamb.**

CP 103 (emphasis added). A month later, in early July of 2009, Dr. Barnett wrote to Mr. Snow about AOA’s worsening financial condition:

As I learn more about the financial status of AOA⁹ it is clear the overhead is soon to be way beyond the present revenue. So I will need to start cutting overhead. As bad as I need your help and direction on problems relating to animals, sales, delinquent clients (5 in collections, 7 need to go to collections, and 17 are in arrears), learning things at the office and etc. into infinity, I will have to take you off payroll as of July 1, as part of the cut to just stay afloat for a while. *If the economy doesn’t turn in the next year, I may be at your door, begging for a meal, dog food would be ok.*

CP 109 (emphasis added).

⁹ Dr. Barnett represented to the trial court that his testimonial knowledge of the AOA business came from his role as the “Managing Member” of AOA, but he never informed the court that as of July 2009 – well after the exchanges between Mr. Groome and Mr. Snow -- he was learning about the business, second hand and knew nothing about what had transpired concerning the promises made by Mr. Snow. CP 17-21.

As much as these emails reveal about the declining fortunes of AOA in 2009 and 2010, it is reasonable to conclude that the crisis was already brewing well before the first recovered email in March of 2009. A full production of the 2007 and 2008 emails would provide important context to help explain why a responsive and nimble AOA, suddenly could not return phone calls for six months or handle warranty claims.

Furthermore, AOA's failure to produce even one email sent to/or received by Randy Snow is all the more stunning when considering his 2009 and 2010 emails to Dr. Barnett, documenting his intimate involvement in collection matters. As the exiting "public face" of AOA, Mr. Snow spoon-fed Dr. Barnett with his encyclopedic knowledge of the AOA customers he had served over the years, down to the details of their lives and their businesses. CP 0083 (proposing a compromise of \$9,000 debt by allowing the owner to sell the dam for \$6,000 and pay this amount to AOA, but keep the cria); CP 87-88, 90-94 (outlining the personal crises that had afflicted the Al Abrams family, including a series of family illnesses); CP 114; CP 116-18.

Dr. Barnett freely inquired of Mr. Snow about how to handle collection issues based on the customer and Mr. Snow willingly responded. As to AOA customer Jeff Trammel, Dr. Barnett floated a

proposed resolution and Mr. Snow responded with the advice he used to operate AOA:

3. I have found that it is usually better to be kind and nice to the client. *An unhappy client will not ever buy from AOA again and will spread the bad word at every opportunity.* Being kind and nice will have them telling their friends how good you are – you never know when you might want a favor from them or who they might influence.

CP 111-112 (emphasis added). These emails between Dr. Barnett and Mr. Snow make it highly unlikely that Dr. Barnett suddenly decided to launch a collection lawsuit in 2012 without first addressing the issues with Mr. Snow.

V. LEGAL ARGUMENT

A. **The Standards of Review.**

Upon appellate review, summary judgment orders are considered de novo. *Manary v. Anderson*, 176 Wn.2d 342, 350, 292 P.3d 96 (2013); *Rafael Law Group PLLC v. Defoor*, 176 Wn. App. 210, 308 P.3d 767 (Div. 1, 2013); *see also Amr. Exp. Centurion Bank v. Stratman*, 172 Wn. App. 667, 292 P.3d 128 (Div. 1, 2012) (admissibility of evidence in a summary judgment proceeding is reviewed de novo).

The denial of CR 56(f) relief is reviewed for an abuse of discretion. *Tellevik v. Real Property Known as 31641 W. Rutherford St.*, 120 Wn.2d 68, 90, 838 P.2d 111 (1992).

B. The Groomes' Evidence Presented Material Issues of Fact On Summary Judgment That Were Not Properly Weighed by the Trial Court.

The Court is very familiar with the standards for granting summary judgment. Summary judgment is appropriate only when reasonable persons can reach but one conclusion, considering all of the evidence and reasonable inferences therefrom in the light most favorable to the nonmoving party. *Morris v. Nichol*, 83 Wn.2d 491, 519 P.2d 7 (1974). Evidence must be “construed in the light most favorable to the nonmoving party.” *Braaten v. Saberhagen Holdings*, 165 Wn.2d 373, 383, 198 P.3d 493 (2008); *Mohr v. Grant*; 153 Wn.2d 812, 821, 108 P.3d 768 (2005); *Ravenscroft v. Wash. Water Pwr. Co.*, 136 Wn.2d 911, 919, 969 P.2d 75 (1998).

All facts considered and all inferences made must be in the light most favorable to the nonmoving party. *Brown v. Scott Paper Worldwide Co.*, 143 Wn.2d 349, 20 P.3d 921 (2001). Trial courts must deny a motion for summary judgment if, when viewing the evidence most favorably to the non-moving party, reasonable people might reach different conclusions. *Yerkes v. Rockwood Clinic*, 11 Wn. App. 936, 527 P.2d 689 (1974).

Motions for reconsideration of summary judgment orders are appropriate under CR 59(a)(9), where “substantial justice has not been done” or CR 59 (7-8) where the decision is in error. *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 163 P.3d 283 (2008).

C. Evidence Demonstrated Material Facts Regarding AOA’s Breach of its Fertility Warranty as to Black Thunder’s Midnight.

Viewed in the light most favorable to the Groomes, the trial court erred by determining that the Groomes’ “difficult” or “nasty” divorce was the only reasonable explanation for their non-payment of obligations concerning Black Thunder’s Midnight and Phashion Model. In order to reach this conclusion, the trial court had to reject all of the evidence listed above in the Introduction, including Mr. Groome’s declaration testimony about his September 2007 letter to Randy Snow and his subsequent conversations.

In order to reach its conclusion, the trial court also had to give more weight to a cryptic “collection log” rather than Mr. Groome’s un rebutted testimony. Mr. Snow’s complete absence from these proceedings, whether by declaration, email or memo also means that the trial court must accept Mr. Groome’s sworn testimony about his

interactions with Mr. Snow as unrebutted admissions against AOA's interest.

Dr. Barnett's admission that until July of 2009, he had abdicated the operations of AOA to Mr. Snow should have caused the trial court to pause and reconsider the actual basis for Dr. Barnett's purportedly strong testimony as the "Managing Member" of AOA.

Mr. Groome testified that eight years after he purchased Black Thunder's Midnight, she remains infertile. While Dr. Barnett may raise issues that a jury could ultimately determine undermine Mr. Groome's credibility, these are issues a trial court cannot resolve.

The Groomes are entitled to present their defense to the enforceability of the notes under RCW 62A.3-305(a)(3), for recoupment or setoff. The Groomes need not prove their case by a preponderance of evidence to secure a denial of summary judgment. *In re Estate of Black*, 153 Wn.2d 152, 166-68, 102 P.3d 796 (2004); *Balise v. Underwood*, 62 Wn.2d 195, 200, 381 P.2d 966 (1963) ("When, at the hearing on a motion for summary judgment, there is contradictory evidence, or the movant's evidence is impeached, an issue of credibility is present...The court should not at such hearing resolve a genuine issue of credibility, and if such an issue is present the motion should be denied.") The Groome's

were entitled to develop the evidence further and place it before a jury, rather than have it weighed and meted out by the Court.

A Court may not resolve factual issues in ruling on a motion for summary judgment. *Balise v. Underwood*, 62 Wn.2d 195, 381 P.2d 966(1963). Mere judgment that a party may not prevail at trial is not sufficient basis to grant a motion for summary judgment. *Meadows v. Grant's Auto Brokers, Inc.*, 71 Wn.2d 874, 431 P.2d 216 (1967). A summary judgment should be denied if the reviewing court is required to consider an issue of credibility. *FDIC v. Uribe*, 171 Wn. App. 683, 287 P.3d 694 (2012) (amended). The trial court's role is to determine whether material issues of fact exist, not to resolve existing factual issues. *Jones v. State*, 140 Wn. App. 476, 166 P.3d 1219 (*rev'd on other grounds*, 170 Wn.2d 338, 242 P.3d 825).

Decisions by a trial court to dismiss or discount sworn testimony when it fails to square with documentary evidence submitted by the opposing side are improper. In *Jolly*, a party could not produce written documentation that he had received consent to use city property for personal use. *Jolly v. Fossum*, 59 Wn.2d 20, 365 P.2d 780 (1961). However, he testified under oath that he had received permission to do so from the city council. *Id.* at 24-25. The opposing party called the credibility of this testimony into question, arguing that council consent

could only be given by resolution, and without the resolution, the party could not have received consent. *Id.* The Supreme Court noted that the party's sworn statement that he received consent was "sufficient to raise an issue to go to the jury, whose function it is to determine his credibility and the weight given to his testimony." *Id.* at 26. By the trial court's weighing the credibility for itself, the summary judgment was "erroneously granted". *Id.*

This finding could not have been made without rejecting Mr. Groome's Declaration testimony,¹⁰ in favor of Dr. Barnett's. CP 140-41, ¶ 5. Instead of recognizing a conflict between Mr. Groome's testimony and Dr. Barnett's, the Superior Court adopted the reasoning of Dr. Barnett's Declaration:

Mr. Groome claims that the reason he stopped making payments on his notes (in fall 2007, about the time we were breeding Dark Seeqret) was to force AOA to deal honestly with our warranty obligations...AOA's records do not show that he ever communicated this reason to AOA. He did communicate other reasons,

¹⁰ Nor can AOA credibly assert that because Mr. Groome's testimony was contained in a Declaration, it is without evidentiary value. While sworn affidavits may not be used in contradiction to a prior deposition to defeat a summary judgment motion, AOA cannot cite law that a declaration which asserts specific articulable facts as compared to conclusory legal statements is not entitled to consideration. Indeed, affidavits are necessarily entitled to consideration in summary judgment motions and the trial court "may indulge with leniency with respect to affidavits presented by the nonmoving party." *Pub. Utility Dis. No. 1 v. Wash. Pub. Pwr. Supp. Sys.*, 104 Wn.2d 353, 705 P.2d 1195 (1985). Furthermore, by failing to move to strike an affidavit for noncompliance with 56(e), a party waives its right to assert deficiencies regarding the same on appeal. *Simons v. Tri-State Constr. Co.*, 33 Wn. App. 315, 321, 655 P.2d 703 (1982).

such as a “difficult divorce”...Mr. Groome used the divorce excuse, claiming he couldn’t make payments without court approval long after the divorce was final. When AOA staff pointed out that we knew the divorce had been finalized in November 2009, Mr. Groome changed his story and said he had to pay “a large attorney’s bill” before he could pay AOA.

CP 168-69, ¶ 5.

Like the court in *Jolly*, the trial court here engaging in what is reserved exclusively for the jury: weighing the evidence and determining the facts. The two statements quoted above are in direct contradiction. Determining to credibility of one over the other because of a lack of documentation supporting the other statement is not appropriate in a summary judgment ruling.

The trial court erred in not reconsidering its ruling once it had a clearer understanding of the facts after reviewing Mr. Groome’s Second Declaration.

D. Denial of the Groomes’ 56(f) Motion Was Error Where the Trial Court Weighed the Credibility of Dr. Barnett Without Understanding the Demonstrated Context Into AOA’s Actions Fit.

Denial of a CR 56(f) request is proper only where the party requesting the continuance fails to offer justification for the delay in obtaining the evidence, fails to identify what evidence it seeks to obtain from additional discovery, or if the desired evidence will not raise a

genuine issue of material fact. *Stanberg v. Lasz*, 115 Wn.App. 396, 63 P.3d 809 (2003).

Here, the Court ruled that a 56(f) continuance was unwarranted because it would only net evidence of “intent” between Mr. Snow and the Groomes. Yet, at the same time, the Court ruled that the summary judgment as to Black Thunder’s Midnight would be granted because there was no evidence of an earlier discussion regarding breach of fertility as to Black Thunder’s Midnight. As argued above, there was considerable evidence unearthed in another Thurston County case that helped explain the context of Mr. Groome’s documented (CP 141) changed relationship with AOA in September of 2007. AOA was in financial stress and was having difficulty paying its bills, keeping employees and satisfying warranty obligations. The only emails that could be recovered in 2009 and 2010 were focused on either selling AOA’s herd, its property or trying to stay afloat – not how to finance and/or care for its clients warranty claims. Multiple emails uncovered from other AOA cases in 2009 and 2010 demonstrate that Mr. Snow was intimately involved in collection activities. Where the Groomes were some of AOA’s largest customers, it is hard to understand how AOA could credibly take the position that it does not have to produce any of Mr. Snow’s emails applicable to the Groomes.

VI. CONCLUSION

Respectfully, the Superior Court erred by granting summary judgment as to the Black Thunder's Midnight because there was sufficient evidence supporting Mr. Groome's claim of recoupment on account of AOA's breach of warranty. Production of an ARI certificate transferring Phashion Model's ownership from AOA to the Groomes prevented the trial court from granting AOA's Motion for Summary Judgment. Why Mr. Snow authorized this is unknown, but the fact it was provided to the Groomes is recognition that its debt on this animal has been satisfied.

Finally, the Court erred by denying the Groomes' request for CR 56 (f) relief where Mr. Snow's written communication were withheld in discovery even though he was acknowledged to have been the "public face" and "driving force" behind AOA and where his emails explain the sudden manner of AOA's altered operations and his intimate role in deciding whether or not to initiate collection actions.

Dated this 27th day of January, 2015.

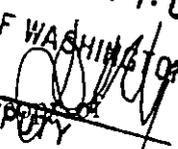
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DECLARATION OF MAILING

On this day I placed in the U.S. mail, a true and accurate copy of
the Appellants' Opening Brief, to the following:

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DATED this 28th day of January, 2015.

By:


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