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I declare under the penalty of perjury according to the laws of the state of Washington that on the date signed below, I caused the foregoing document to be filed with this Court, and emailed and mailed to the parties identified below:

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Jeff Davis by email contract
Helana Coddington by email contract
Natasha Souder by email contract

Dated this 14th DAY OF NOVEMBER 2017



Pro se plaintiff April Ferguson
6482 ne Fir St, Suquamish WA 98392

No.49723-9-II

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

CHADWICK AND APRIL FERGUSON, ET AL

Appellant (Plaintiff)

vs.

MARTHA STANDLEY, ET AL.

Respondents (Defendants)

APPELLANTS OPENING BRIEF

**April D Ferguson
Pro Se Plaintiff
6482 Ne Fir, st
Suquamish WA, 98392
(360) 621-3405**

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Doerflinger v. New York Life Ins. Co., 88 Wn. 2d 878, 880, 567 P.sd 230
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Newton Ins., 14 Wn. App. at 160, (citing to Allstar Gas, 100 Wn. App. at 74035, 60.

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Tegland and Ende, Washington Handbook on Civil Procedure, 69.16, p. 428 (2004 ed.....24.45.51.57.

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.....47.

Washington. Percival v. Bruun, 28 Wn. App. 291, 293 -94, 622 P. 2d 413 (1991)45.

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STATUES

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I. INTRODUCTION

This matter arises from a civil injury case which was brought against several parties including the Walsh's named for civil conspiracy and their actions they took in connection with their contractual obligations to the Fergusons to aid civil conspiracy were included as additional claims because of Fergusons knowledge of their connection with the other claims or parties. The trial court should have not denied a motion for continuance because the Fergusons presented good cause and reasons through affidavits that discovery could not have been reasonably had and that affidavits to defeat summary Judgment could not be obtained for several legitimate reasons. The Ferguson's after the motion for continuance was denied had reason to believe that the Judge acted with prejudice and before the motion for summary Judgment was heard asked for the Judge to recuse himself from the case so that the Plaintiff could have a fair hearing. The Plaintiff's oral motion was denied, and the Summary Judgment was heard and ultimately ended with a dismissal of the Defendants Marilyn and Jack Walsh without any certification as required in civil rule 54 (b).

The trial court did not provide the court of appeals with untruthful facts used for determination for proper justification per court rule 54 (b). The Judge claimed that no existing claims were being litigated that the Walsh's were party to which was incorrect as civil conspiracy is still being litigated and to this date the Walsh's are even scheduled to be deposed in that action. The Ferguson's presented evidence to the trial court to establish issues of material fact that contract breach, unjust enrichment, constructive eviction, breaking of covenant of quiet enjoyment were all used to aid the Walsh's in civil conspiracy with mainly the Coddington's to force the sale of the Fergusons business or the termination of Fergusons lease with the Walsh's with the

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objective being the Coddingtons and Walsh's entering into a lease together. The trial court made judgments upon issues of material fact which was inappropriate. The trial court determined frivolous per cr 11 while other parties remained in the actions of civil conspiracy. The trial court making such a determination while other parties are still present in the case places prejudice against the remaining claims and creates a conflict that is unjust against the Ferguson's and further litigation of the remaining claims. The trial court erred in sanctions when the lawsuit was both grounded in fact and warranted by existing law, and when all the claims in the lawsuit had potential merit. This court should reverse and remand for trial, where the credibility of witnesses can be examined, and factual evidence may be properly weighed.

II. ASSIGNMENT OF ERROR

1. The Trial Court erred in finding, without conducting any analysis and considering anytime line or facts presented whatsoever, that Appellants somehow had plenty of time to conduct discovery and therefore a continuance should not be granted. The error is determined when weighing the burdens set by precedent per quoted case law that Plaintiff could not through affidavit alone establish facts necessary to defeat summary Judgment and that further discovery was necessary, that such discovery could reasonably lead to issues of material fact, that discovery could not have reasonably been had, and to identify what that discovery was. The Ferguson provided substantial amount of reason required to meet the burdens upon them to establish set by precedent and existing law hence the court erred to not consider them.
2. The trial court erred in assigning court rule 54 (b) certification when it presented false facts to the court of appeals that there was no just reason for delay. An action that

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show's prejudice against the plaintiff as well as places a substantial risk of prejudice against their claims with other parties.

3. The trial court erred in dismissing the claim of Contract breach when denied a continuance even though the Fergusons presented reasons for hardship as well as reasons why the Fergusons could not defeat summary Judgment on affidavits alone.
4. The trial court erred in dismissing the claim of Unjust enrichment when being provided reasons why affidavit alone could not substantiate the issues of material fact known to exist in the knowledge of both the nonmoving party as well as knowledge known to the moving party which requires by precedent set an examination of character and credibility which can only be produced through depositions and other forms of discovery as well as had made judgments on issues of material fact.
5. The trial court erred in concluding that no issues of material fact existed in the claim of Quiet Enjoyment and constructive eviction when being provided reasons why affidavit alone could not substantiate the issues of material fact known to exist in the knowledge of both the nonmoving party as well as knowledge known to the moving party which requires by precedent set an examination of character and credibility which can only be produced through depositions and other forms of discovery. Further this claim provided a good faith argument that established that the actions taken in civil conspiracy between the Walsh's and other defendants constituted an action of violating the covenant of quiet enjoyment of the leased premises and therefore it was necessary to establish those actions through the same discovery sought in Civil conspiracy as well as to establish that the issues of material fact were in the minds of the moving party as well as other defendants requiring an examination of character and credibility as set by precedent. The trial court was wrong to make judgment on issues of material fact.

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6. The trial court erred in dismissing the claim of Civil conspiracy. The Ferguson's had firsthand knowledge of communications, threats, and actions taken between Walsh's, Coddington's, Bell's and Standley all named defendants and therefore precedent set establishes that when issues of material fact necessary to defeat summary Judgment is in the mind of the nonmoving party that an examination of character and credibility should be sought. The trial court errors when not allowing the nonmoving party a continuance to allow for examination of defendants who it is reasonable will not provide affidavits to the Ferguson's to prove their actions causing them liability to the Ferguson's.

7. The Court Erred in awarding CR 11 Sanctions and determination of frivolous.

III. STATEMENT OF THE CASE

The Fergusons leased a building that's sole use was a child daycare per terms of a contract with the Walsh's (CP 201 exh 1 pg 2 paragraph 6.). The building was advertised to the Ferguson's as recently licensed and ready to open CP 201 attached affidavit of April Ferguson pg 2 and referred to exhibits. The Fergusons under such impression entered into agreement that gave them a low rent in order to have time to obtain the Department of Early Learning license and open their doors before taking on larger rent payments an agreement given to prior tenants as well (CP 201 attached affidavit of April Ferguson pg 3 ln 7-17 and its attached exhibit 4. The building at time of the Ferguson's ready to obtain license learned the building was not occupiable for the purpose required per the lease agreement and several months of work had to be performed by the Walsh's all while the Fergusons were being charged rent for a building they could not use for its intended purpose (CP 201 affidavit of April Ferguson pg 4 - 10) . The Fergusons were led to believe that the Walsh's would

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rectify the issue and be fair with the Fergusons but that did not happen and over the years the Walsh's continued to break contractual agreements including electrical, plumbing, parking lot maintenance. Over the years of leasing the building the Fergusons were not evicted or forced to pay the disputed amount due to the contractual agreement violations, but the amount was the amount which was disputed was not deducted from amount owing. In late 2013 early winter 2014 the Coddington's an employee of the Fergusons communicated intentions to lease the building from the Walsh's and in 2014 started to place malicious reports to CPS to force the Fergusons hand in sell of the business for unjust low offer (CP 201 attached affidavit of April Ferguson pg 5-10). The Walsh's and the Coddington's communicated about the termination of the Fergusons lease and in early 2015 the Walshes used the disputed amounts to coerce the Fergusons into paying amounts not justly owed or they would give the building to the Coddington's to lease. The communications with the Coddington's and the threats of the Walsh's along with the refusal to upkeep the parking lot, electrical, plumbing and other disrepair of the building as well as threat of legal action against the Fergusons deprived the Fergusons of their ability to quietly enjoy the premises and caused the termination of the contractual agreement between the parties. Shortly after the Coddington's entered into a lease agreement which in all respect to have the Coddington's lease the building had taken place while the Walsh's had a contractual agreement with the Ferguson's. The communications had taken place between the Coddington's and Standley a Department of Early Learning Licensor. The allegations were false. The Licensor of nearly 20 years had been a friend with the Walsh's for over 30 years and assisted in actions to cause hardship upon the Fergusons Department of Early Learning License CP 201 attached Affidavit of April Ferguson and refer to CP 382 page 6 line 24

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where Walsh denies communications with Standley and department regulators and CP 157 where she admits communications with state regulators after evidence had been presented in Ferguson's responsive pleadings). The actions constituted Civil Conspiracy with use of wrongful actions of the Walsh's to aid in civil conspiracy including Contract Breach, Unjust enrichment, Constructive Eviction, and Covenant of Quiet Enjoyment **CP 438 4.10, 4.11, 4.12, 4.3 5.2 through 5.17,5.19, 5.139, 5.144, 6.2**

FACTS CONCERNING FERGUSON

Ferguson's entered into a written Lease agreement with the Walsh's in March of 2012 for the purpose of a daycare center operation at the building the Walsh's owned . The Fergusons had to close a previously owned childcare to open the new childcare center. The Fergusons went into a lease with a 500.00 a month agreement for 3 months while they obtained Department of Early Learning Licensing and got their first month of open business and established themselves (CP 201). The Fergusons were going to be ready to open early summer of 2012 which would have them completely ready for licensing before the application to Department of Early Learning was placed so that their request to open could be expediated due to meeting all license requirements. Early July of 2012 the Fergusons plans for opening were put halted when they learned through the state fire marshal and the City of Sequim that the building was not currently able to be occupiable for Child daycare or preschool operations due to several factors including sprinkler system and need for updated fire panel CP 201. The Walsh's were responsible to make sure the building was operational for its intended purpose per the contract agreement seen in **CP 201 attached exhibit 1 a 7-page lease contract**. The delays caused disruption in the business plan and the opening of the business until the end of September of 2012 due

to the building not being able to obtain an occupy permit without significant construction completed further impairing the ability of the Fergusons to continue with licensing process and further preventing use of the building for any designated purpose per the lease agreement. Ferguson's hereby **incorporate CP 201** in its entirety to establish these facts as well as the Ferguson's amended complaint **CP 438 pages 4-6**.

During the time of 2012 the Fergusons to be able to rush the process to get their business open due to significant financial strain that had come because the fact the Ferguson's had to give up one license in their successful family childcare to obtain the new license not knowing at that time the building was not suitable for daycare as advertised by the Walsh's and claimed at the time of the signing of the Lease agreement the Ferguson's found themselves having to assist outside of contractual duties in parking lot repair, insulation, hiring of outside staff and working with inspectors and completing work necessary to have the building able to be occupied much which was required due to the fact that the Walsh's left out of the country for an entire month one day after learning the building was not occupiable leaving the work to be performed by the Ferguson's. Ferguson's hereby reference **CP 438 pages 4-6** to verify these were the claimed facts of the case and CP 201.

Fergusons were unjustly enriched when they had to conduct work outside of the contractual agreement and take care of electrical, plumbing and parking lot maintenance, per the lease contract was requirements of the Walsh's CP 201.

In 2013 Helana Coddington employee of the Fergusons entered into verbal agreements with the Walsh's to take over the lease of the Fergusons and their business. The Ferguson's were harassed and have firsthand knowledge that Helana Coddington with the aid of a few employees continued to pressure the Fergusons to

give the premises to Helana Coddington. Those employees placed repeated complaints against Fergusons to Child Protective Services and Department of Early Learning to pressure sell of the Fergusons business. Ferguson's hereby incorporate **CP 438 pages 12 -14 AND CP 201.**

Through the months of 2014 from early January to March of 2015 Walsh's used past due rents that were disputed due to the building not being operation in 2012 to pressure the Fergusons to pay or Walsh's would enter into agreement with their employee Coddington. The Coddington's and the Walsh continued communication as if they were Lessor and Lessee throughout the time of 2014 and discussed to the Fergusons what would happen when the complaints being placed against them were valid and the Fergusons ultimately shut down causing significant emotion strain upon the Fergusons and constituting a claim of Quite Enjoyment in connection with their actions of civil conspiracy. The ethical actions in connections with violations of lease, threats made had risen to a level to deprive the Ferguson's of quite enjoyment of the premises they had contracted to lease.

The actions hereby referenced in CP 438 paragraphs 5.2 through 5.17 and 5.139 through 5.143 caused rise to the claims of contract breach. Fergusons hereby reference CP 438 paragraphs 7.1, 7.s, 7,s and paragraphs 5.2 5.17 and 5.139 through 5.143 caused the rise of the claims Constructive eviction and Breach of Covenant of Quit enjoyment as well as Unjust Enrichment.

The Fergusons hereby incorporate **CP 438 16.1** for the rise of claim for civil conspiracy and specifically stated in the claim of civil conspiracy on **438 16.3** "One and all Defendants conspired together to cause the sale of the business and the transfer

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of the building at 191 Sequim Bay rd to Defendant Helana Coddington and Erin Bell and together assisted each other in achieving a common goal to defame the Plaintiffs, commit tortious interference and block Constitutionally protected rights of the Plaintiff with a willful and knowing goal of disqualifying and or forcing the sale of the childcare business, transfer of the lease to Helana Coddington and Erin Bell”

The Fergusons placed their complaint from information and belief and firsthand knowledge of interactions with the defendants as stated in the affidavit of April Ferguson attached to **CP 201** and therefore the Fergusons required the conducting of discovery to substantiate the claims they knew from firsthand knowledge and were merited based upon existing law and good faith argument. Further precedent set justified the claim that when knowledge of issues of material fact on in the minds of the moving party that it is necessary to conduct an examination of character and credibility which cannot be done by affidavit and therefore the Ferguson’s required an appropriate time to conduct depositions.

Ferguson’s hereby incorporate all facts **in CP 201** that are stated, and all supporting affidavits and exhibits attached as supporting the facts concerning the Ferguson’s

Ferguson’s had firsthand knowledge communicated to them by Walsh’s and Standley had worked together from the 1980’s, founded an organization together, worked together at the local college and had a friendship outside of any professional friendship for nearly 3 decades CP 201. Marilyn Walsh in her supporting affidavit’s denied communications with Walsh and did not admit friendship and instead claimed to of known her through daycare center operations in the past but Ferguson knew firsthand knowledge of a friendship dating back several decades before either were

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involved in the daycare business and through deposition and discovery these facts could be established and have been admitted through discovery.

Ferguson's had firsthand knowledge that Walsh's used threats of that friendship with Standley to help Coddington pressure sell of the premises.

Walsh's claimed in affidavits that they did not have communications with Standley about the daycare license or premises of the Fergusons in their supporting affidavit and had to supplement their affidavit after Fergusons mentioned the knowledge of their being an administrative hearing declaration by Martha Standley that said that Marilyn Walsh contacted her the Walsh's provided a supplemental affidavit changing their story. CP 201 attached Affidavit of April Ferguson and refer to CP 382 page 6 line 24 where Walsh denies communications with Standley and department regulators and CP 157 where she admits communications with state regulators after evidence had been presented in Ferguson's responsive pleadings

Walsh's also claimed in their affidavit in support of their motion for summary Judgment that the Fergusons violation of the lease had caused them significant strain and took nearly 8 months to find a new tenant CP 201 attached affidavit of April Ferguson pg 6 line 17 – pg 7 line 9)

Ferguson's had firsthand knowledge of social media that shows Facebook posts by Coddington and Bell acknowledging the building they are renting and their new landlord only a few weeks after the Fergusons no longer had the building of the Walsh's.

IV. SUMMARY OF ARGUMENT

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Fergusons had a lease contract with the Walsh's that contract in the State of Washington gave an implied consent that Ferguson's would be able to have quite enjoyment of the premises without unreasonable interferences from the landlords. The lease agreement assigned responsibilities upon the lessor and the lessee which both equally were to uphold for a mutual interest in the prolonged preservation of that lease contract. The Ferguson's were slighted at the claimed unforeseen reasons why the building was not occupiable for reason they could lease per the lease agreement. The Walsh's had given the Ferguson's a deal to close on a lease agreement which was 500.00 a month until the opening of the daycare center which was predicted to take no more than 3 months because licensing laws which Walsh was familiar with gave up to 90 days to obtain the license at the discretion of the licensor which the Walsh's knew and the Licensor had said that as soon as the building was ready to open she would conduct the inspections and ensure a speedy open for the licensee which was the Fergusons. These communications took place between he Walsh's Ferguson's and Standley giving the Fergusons the impression that 90 days max from the time of the leasing they would open the business around July of 2012. In July of 2012 the Ferguson's learned that without substantial work on the building by the landlord the building was not occupiable setting the Fergusons back several months. The rent per the lease agreement should have been prorated constituting a contract breach. The trial court erred when being trier of fact during the summary Judgment motion and making claim that the first 500.00 for the first 3 months was the prorated amount even though that was disputed fact (cite source in the verbatim report where Judge makes judgment on that). Walsh's even provided an affidavit admitting that the issues with the building were unexpected (CP 382 pg 6 line 3). Also evidence was provided to show this same agreement was given to prior tenants for licensing process with DEL

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and was not for building construction to make the building occupiable which the Fergusons argued such work would actually delay the license process past 90 days in RP volume 1 . The contract was signed at the end of March 2012 the unexpected construction was not known until July of 2012 so it becomes disputed if the 500.00 a month was for those unknown building construction or not. The Ferguson's offered in exhibit email communications that claimed they hoped to be able to open by July so to claim the 500.00 a month was for the first 3 months for unknown building issues is a disputed issue of material fact that should have not been tried by a Judge and not determined in summary Judgment and was contrary to the civil procedure, Court rules, and set precedence

The Fergusons also established that they had conducted several other work on the building to support the claim of unjust enrichment that the knowledge of this was in their statements as well as in the minds of a few defendants as well as a others that had contracts with the Walsh's and that those individuals would not divulge that information for reasons of ethics without a subpoena and therefore no affidavit could be gathered to meet the burden of the nonmoving party that would establish unjust enrichment as well as the significant amount of construction the Walsh's had going on in the building (cite sources of where it was mentioned that Ferguson's had done work and where they said they could not prove that work without further discovery. The Walsh's chose to start taking actions against the Ferguson's on the disputed bill in 2014 after being in civil conspiracy with the Coddington's and with intent to enter a lease agreement with the Coddington's therefore they used disputed bills, and their own violations of the lease that they would not honor with the Ferguson's to aid in their actions of civil conspiracy with the Coddington's to pressure sell and or relinquish the building to the Walsh's so the Walsh's could give to the Coddington's.

These actions in good faith argument constituted unjust enrichment, contract breach, civil conspiracy, constructive eviction and violation of the covenant of quiet enjoyment. The actions that were unethical of the Walsh's including the conspiring with the Ferguson's employee, entering upon the premises to discuss lease with the Coddington's while the Ferguson's business was operating was tormenting towards the Ferguson's, threatening, coercion and constitute a breach of quiet enjoyment therefore as well as it constitutes a claim of constructive eviction because the conditions the Ferguson's were being placed in made the ability to operate the center impossible without being threatened, coerced, threatened of legal actions and other such actions if the Fergusons did not relinquish the building or pay money that was not owing to the Walsh's.

The Walsh's attorney claims that the actions based in contract are not connected to the other claims of civil conspiracy but the Ferguson's argument is that the Walsh's used those actions to aid in civil conspiracy and to force the Fergusons out of the building with the intent to hand the building over to the Coddington's and therefore to separate the claims would make it hard to provide material fact on how the civil conspiracy was carried out against the Ferguson's and therefore for the purpose of Justice the claims connected together was required when filing the complaint.

The trial court dismissed all claims against the Walsh's including Civil conspiracy while the claim itself is still being litigated causing potential prejudice to the Plaintiff because CR 54 (b) required no just reason for delay and the Ferguson's offered that just reason including that dismissal would place prejudice on the Ferguson's in the remaining claim that still exists where Coddington herself is still being sued for civil conspiracy with Walsh and therefore to further carry that action the other party named is required or that claim takes risk of being dismissed on the merit of the fact that civil

conspiracy requires a claim against at least two parties who entered into civil conspiracy together. The Ferguson's cannot maintain the claim against Coddington of civil conspiracy without Walsh remaining in the claim and therefore the summary Judgment on that merit alone was in just and prejudice to the Fergusons.

Further for the trial court to award CR 11 sanctions when the case itself is still yet to be adjudicated on civil conspiracy is another action of prejudice against the claims and against the Plaintiff's because civil conspiracy with the Coddington's is still being adjudicated because the Coddington's are not dismissed and the actions survives to this day against them and therefore the ability to through discovery establish the merits of the claim as substantiated and it is a matter of fact that the Walsh's are being scheduled to be deposed even in the actions still in December of 2017.

The Ferguson's filed this claim claiming a civil conspiracy to cause the Fergusons pressure and to relinquish the building so that Coddington could take possession of. The Ferguson's added contract based claims because the actions of the Walsh's to pressure the Fergusons out used past unresolved actions of contract breach, unjust enrichment, to pressure the Ferguson's and wrongfully threaten them knowing they had liability to the Fergusons and the Fergusons were not owing of all money claimed they were due to the Walsh's own breach of the contract. The Walsh's in 2014 started to threaten the Fergusons with that and used methods that constituted civil conspiracy and therefore their actions to carry out civil conspiracy transferred to also contract breach claims resulting in multiple claims against the Walsh's all which the trial court dismissed. These were not claims and this was not a case that was amenable to summary Judgment, since many of the facts alleged were particularly within the knowledge of the defendants, and it was error for the Trial Court to grant summary Judgment here especially considering that the Ferguson's pointed out the need to

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depose even defendants who had knowledge that no reasonable mind would conclude that Coddington and Bell and Standley who have contractual agreements and friendships with the Walsh's as well as are other defendants in the same causes of action would offer an affidavit to support the claims against the Walsh's and themselves.

Further the trial court ignored disputed facts and even made decisions using discretion on those disputed facts which would require knowledge of intent of emails communications, contract agreements, and other issues only in the minds of the parties and not in writing therefore issues of material fact where s knowledge, intent or motivations are at question requiring examination of character and credibility. These were errors of the trial court and continue to cause prejudice in the existing claims against the existing parties in the action which is apparent by the mere fact that it takes two for a civil conspiracy claim to survive and the claim is that Coddington mainly with Walsh mainly conspired with the assistance of Standley and Bell as secondary conspirers to the actions.

V. ARGUMENT

The Court Erred in not allowing a Continuance of the Summary Judgment

Motion (Assignment of error 1.)

On September 16th after brief argument on the motion for Continuance the Court gave an oral Judgment with opinion denying the motion for Continuance. The Justification given by the Court for the ruling against the motion for Continuance was

RP Page 38 and 39 of volume one

JUDGES ORDER DENYING CONTINUANCE CP 61 PAGE 3

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1. Proper notice of this hearing was provided to Plaintiffs;
2. Plaintiffs have not shown a reasonable basis for not having provided responsive declarations as they suggest they need. There is no showing the witnesses were not available to provide timely affidavits or declaration. Additionally, the information sought by Plaintiffs through their proposed discovery will not raise a material issue of fact in that such information will not establish a breach of the lease, constructive eviction, breach of quit enjoyment, unjust enrichment, abuse of process, civil conspiracy, negligence

CASE LAW AND LEGAL BASIS USED ARGUMENT

RP volume 1 pages 1-40 cover all arguments mentioned in the motion for a continuance. CP 91, 182, 498 CP 83 , 143,

___CR 56 (f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that for reasons stated, the party cannot present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

In the Context of CR 56 (f) continuance request, the trial court does not abuse its discretion if “(1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party does not state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact. “ Turnery Kohler, 54 Wn. App. 688, 693, 775 P.2d 474 (1989)

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CR 56 (F) provides a remedy for a party who knows of the existence of a material witness and shows good reason why he cannot obtain the affidavit of the witness in the time for summary Judgment proceedings.” Molsnessv. City of Walla Walla, 84 Wn. App 393, 400, 928 P2d 1108 (1996) citing Cofer V. Pierce county, 8 Wn. App. 258,262, 505 P.2D 476 (1973) “to mean that it only applies when the witness themselves are not available in time to provide a timely declaration which applies actually means “applicable or relevant.” And it does not mean “Solely” which means “not involving anyone or anything else; only.” The law does not forbid other good causes for delay in discovery. Interpretation of this court rule can be concluded that an order for continuance may be necessary and Just to allow other forms of discovery to be had to fulfill the burden of the none moving party in Summary Judgment. The Judge made claim in his ruling mentioned above “ **There is no showing the witnesses were not available to provide timely affidavits or declaration.** “**Ferguson** met this burden by showing that affidavits cannot be gained by witnesses and people with information because they were defendants in a claim of civil conspiracy with the Defendants Walsh’s and will not freely offer up an affidavit and therefore a deposition would be more appropriate. mentioned in **CP 182 , and 91** as well as mentioned in **RP volume 1 throughout and on many occurrences in the first 39 pages of that report.** Further the Plaintiff mentioned parties had not yet responded to the complaint with their defenses and therefore the Plaintiff had not yet been able to conduct depositions as it would be prejudice to the Plaintiff’s to schedule a deposition before defenses and answers to the pleadings were filed **CP 496, 495.** Plaintiff had pointed out that third-party witnesses were not willing to give affidavits because the parties were former employees of the Plaintiff and now several work with or have ongoing relationships and friendships with the defendants because they live in

a small community and all work in the same field with the defendants being the owners of one of 3 daycare centers in the community 182 attached affidavit. The facts were established that Helana Coddington and Erin Bell owned and operated a daycare center and that many of the former employees had expressed concern at offering any affidavits or statements to the Plaintiff's due to the fact they were worried it would affect their careers in daycare centers in the area CP 182 attached affidavit. The Plaintiff had firsthand knowledge of this and included in her affidavit CP 182 attached affidavit and within several places in RP volume 1 first 40 pages. **CP 83 ,498, 143, 182** which substantiate that this information as offered before Judgment against a continuance. The claim that was in the Judge's order denying the motion for continuance is entirely false as the Plaintiffs did not say they needed more time to gather affidavits or that they had not had time to get affidavits but they provided firsthand knowledge that affidavits could not be provided and that other methods of discovery were needed to provide a defense against a Summary Judgment motion which met the reasoning for bringing a motion under CR 56 (f) . Court erred when it concluded that the Plaintiff had plenty of time to conduct discovery, when applying justification for a continuance in accordance with **CR 56 (f)** the Plaintiff is required to establish not that they had time to conduct discovery or not but that according to **CR 56 (f) that for reasons stated affidavits could not be presented.** Time needed to be permitted to conduct other methods of discovery so that a party opposing the motion may have the ability to present facts essential to justify the party's opposition which is apparent by the concluding of that portion of CR 56 (f) when it then follows the portion just quoted with **“ the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.”**

The Plaintiff established through facts mentioned in affidavit of April Ferguson in support of the motion for continuance seen in the aforementioned CP designations as well as further explained in Oral argument when asked to by the Judge how the obtaining of affidavits was not reasonable as well as made in oral argument seen throughout the oral argument which is attached in portion and can be found within Oral argument in RP volume 1 between pages 12 and 39. Plaintiff stated the issues with obtaining affidavits to support the claims of civil conspiracy as well as also stated that another contact who had conducted business with the Walsh's named as Knight fire a business who installed sprinklers had information that was likely to lead to material fact but they would not be willing to release information without being subpoenaed due to the fact they believed they had an ethical duty not to release information about their client the Walsh's unless asked to do so by deposition. The argument for this can be seen on **page 25 starting on line 22 and ending on page 26 line 23 and also argued on RP from page 31 starting at line 10 through page 34 ending on line 19 of the RP** where the Plaintiff mentioned this contact and was responded to with a biased comment by the Judge that had no rational and point in connection with if this individual could present information that may lead to issues of material fact and instead the comment was said to suggest that the Walsh's had done work on the building and had spent a lot of money and this comment was said to discount and place an opinion upon the potential issue of material fact rather than determine if there was an issue of material fact. This was an issue to be tried by a trier of fact, yet it was used to establish that the information sought would not lead to an issue of material fact.

Judge interfered with argument trying to establish what material fact existed from the discovery sought as he continued to question the case material fact and discuss factual issues and then blocking the Plaintiff from responding how it would offer issues of material fact, seen throughout the oral argument in the RP which can be seen in a few examples RP volume 1 pg 32 line 16 through page 34 line 25

JUDGE COUGHENOUR: While you were trying to get the license in the four months before.

MS. FERGUSON: But I didn't have to try to get the license in the four months. I could have got the license in -- I gave evidence to show that I could have got the license in one month after leasing.

JUDGE COUGHENOUR: Again, we're arguing the case.

MS. FERGUSON: What I'm trying to show is that I have a lot of real issues, genuine issues of material fact that can be depositioned.

Above section demonstrates the Plaintiff tried to offer how discovery could lead to material fact the Judge interfered and would claim it was arguing the case even though the Judge would make comments beforehand about the issues of material fact such as claiming that work to be done could be done while the Plaintiff was working on getting the license for the opening of the daycare. The Judge to make such claims he had to be a trier of fact and make determinations of what could of or could have not been done and had to make decisions of truthfulness of the nonmoving party. Ferguson's also presented that many defendants had not yet responded to the complaint which impeded upon the fair conducting of other discovery. RP volume 1 starting on page 8

JUDGE COUGHENOUR: So you have to have your answer filed -- you might talk to the Coddington's if you want, or the Bells to understand how they

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answered, but they answered fairly easily by getting a form document and admitting what they were willing to admit and denying all the other allegations, and that would be sufficient because it was sufficient to resolve any default in this matter.

The above section was the Judge responding to a motion heard at the same time of the motion for continuance which was the Plaintiff's motion for default against defendants Coddington, Souder and Bell's. Judge gave the Souder's advice in how to answer suggesting how they answer. Even further evidence existed at the time to support the Plaintiff's claim that depositions could not be taken because the Plaintiff in good faith waited for responses to a more definite statement before bringing default against Defendants who had not even responded to the original complaint at the time the motion for Continuance of the motion for summary Judgment had been filed

RP volume 1 starting on page 12 line 14 continuing for three pages

CP 496, 495 shows that Coddington, Souder and Bell had filed their answers to the claim an CP **CP 83, 498, 143, 182** to see that the Plaintiff clearly stated in affidavit and the motion for continuance reasoning that it would of not been reasonable to expect the Plaintiff's to of deposed these individuals without a response. The Plaintiff gave them extra time in good faith so that instead of responding to the first complaint they could just respond to the amended one per court order for more definite statement which was not even due until near the end of May of 2016.

Verbatim report volume 1 starting on page 20 line 10 the Plaintiff explained how waiting for answers was in the best interest of Justice by explaining how not waiting for the answers of the defendants two of whom are accused of civil conspiracy with the Walsh's could affect the outcome of depositions and the Judge showed prejudice

even in discounting that argument “ **I can't imagine that they're going to respond with anything other than, "We deny the allegations"?**” **RP volume 1 pg 20 line 13 through page 21 line 7.**

Moments earlier he had advised another defendant to not make a full answer to the claims and then used then discarded a reasonable reason for delay RP volume 1 pg 7 line 12 -20 and page 8 line 3-9 . The interest of Justice and fairness it is necessary for the court of appeals to take a full examination of the first **39 pages of the RP volume 1** to be able to see the entire argument in its full context as the argument continued very contentious.

It was prejudice and an error to claim that the Defendants did not have 9 months to answer and only needed to answer from the time of the filing the amended complaint and then to later in hearing claim the Plaintiffs had 9 months to conduct discovery. Those answers would be necessary before conducting depositions where the defenses and answers in the defendant responses to the amended complaint could directly impact the questions in depositions of those individuals which were co conspirers in the causes of action now being considered for summary Judgment. This is seen in **Verbatim Report Volume 1 starting on page 37 line 20**

The Ferguson’s demonstrated a Just reason for why delay would be required and a Just reason for why depositions of coconspirators could not be conducted to meet **CR 56 (f)** which states:” It was demonstrated through facts already presented in CP that were affidavits of the Ferguson’s that reasons stated the party cannot be expected to be able to present by affidavit alone facts essential to defend against summary Judgment taking into consideration that multiple parties were defendants themselves and any reasonable mind should conclude that no defendant will offer an affidavit in support of facts incriminating to them and therefore an

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examination of character, credibility, intent, motive was necessary because the facts essential to oppose summary Judgment was in the minds of the moving party and other defendants named as coconspirators.

The Plaintiff did not just demonstrate that reason existed it also demonstrated that the discovery sought could likely lead to discoverable issue of material fact when the Plaintiff presented exhibits that demonstrated a relationship between the coconspirators existing before the eviction of the Plaintiff's the Fergusons and that the Coddington's discussed going into a contractual agreement together in leasing of the building that currently was being leased by the Fergusons. The Plaintiff's demonstrated this with their own affidavit and firsthand knowledge of the fact with some supporting exhibits showing that the Walsh's and the Coddington's did have communications and that Coddington's who were placing reports to Child Protective Services and Department of Early Learning against the Plaintiffs was requesting that the Plaintiff transfer the lease of the Walsh's building into the Plaintiff's hands CP 182 attached affidavit. The Plaintiff's had firsthand knowledge that after their eviction that the Walsh's and the Coddington's immediately entered into agreement with each other to allow Helana Coddington to take possession of the premises where the Ferguson's had been tenants. The Plaintiff had firsthand knowledge that their agreement originated from discussions and intentions to lease the premises while the Plaintiffs were still in a contractual agreement with the Walsh's and intending on remaining on the premises. The Plaintiff supplied by Affidavit and argument in the motion for continuance why the Plaintiff could not provide proof of these issues of material fact by affidavit alone and included that those needing to give affidavits were hostile witnesses and defendants in the matter therefore requiring requests for productions, subpoenas and depositions. For the trial court to claim that

the further discovery requested would not lead to issues of material fact he would of had to of been a trier of fact and made a determination of truthfulness of the statements of the Ferguson's as the Ferguson's had claimed this was information known by firsthand knowledge and in the mind of theirs and the defendants and therefore without making a Judgment of the character and credibility of the Ferguson's he could of not determined that the information sought would not lead to discoverable material **If Affidavits submitted by the party's conflict on material facts, the court is essentially presented with an issue of credibility, and summary Judgment will be denied.**" Tegland and Ende, *Washington Handbook on Civil Procedure*, 69.16, p. 428 (2004 ed.) **The court should not grant summary Judgment when there is some question on the credibility of a witness whose statements are critical to an important issue in the case.**" See *id* citing to **Powell v. Viking Insurance Col, 44 Wn. App. 495, 722 P. 2d 1343 (1986).**

here is almost never a case in which the actions of a party are so unambiguous that reasonable persons could reach only one conclusion as to that party' s knowledge, intent or motivations. 22 Where intent is the primary issue, summary judgment is generally inappropriate. Drawing inferences favorably to the nonmoving party, summary judgment will be granted only if all reasonable inferences defeat the plaintiffs claims. The moving party's burden is therefore a heavy one. **Admiralty Fund v. Tabor, 677 F. 2d 1297 at 1298 (Ninth Cir. 1982).** Summary judgment is not appropriate " where a trial, with its opportunity for cross - examination and testing the credibility of witnesses, might disclose a picture

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substantially different from that given by the affidavits." **United States v. Perry**, 431 F. 2d 1020 at 1023 (Ninth Cir. 1970). This principle has been thoroughly and articulately explained in a series of cases from the Second Circuit: Summary judgment has been found to be notoriously inappropriate in cases such as this one in which judgment is sought " on the basis of 'the inferences which the parties seek to have drawn [as to] questions of motive, intent, and subjective feelings and reactions. **Litton Industries Credit v. Plaza Super of Malta**, 503 F. Supp. 83 at 86 (N. D. NY 1980). The rationale is that "[d] ealving into the internal workings of the parties' minds and making credibility assessments is within the special province of the trier of fact." **First AMERICAN Title Co. v. Politano**, 932 F. Supp. 631 at 635 (1996). "[I] ntent can rarely be established by direct 23 evidence, and must often be proven circumstantially and by inference. Intent is therefore peculiarly inappropriate to be decided on a motion for summary judgment." **Zilg v. Prentice - Hall**, 515 F. Supp. 716 at 719 (S. D. NY 1981). " Leaving issues of assessing credibility to juries or fact - finders is particularly important when conflicting inferences about a party' s knowledge can be deduced from the evidence." **Politano**, at 635.

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With regard to a party's knowledge or intent, it is usually the case that the nonmoving party need not even file counter affidavits disputing moving party's allegations. Subin, at 759. The other facts of the case, even without restatement in affidavit form, almost always support a wide range of inferences regarding knowledge and intent. This Federal analysis has been specifically cited and adopted in Washington. **Percival v. Bruun, 28 Wn. App. 291, 293 -94, 622 P. 2d 413 (1991)**. In the case before us the non moving party had presented through evidence knowledge of information elsewhere including in the minds of the moving party that would dispute the claims of the moving party requiring an examination of character and credibility upon mentioned witnesses needing to be deposed yet the Judge without knowledge of if the Ferguson's were telling the truth or not claimed the sought after discovery would not lead to issues of material fact even though the Ferguson's made claim that the information would reveal that Coddington and Walsh conspired together to coerce and intimidate the termination of the lease contract and obligations between the Walsh's and the Ferguson's in order to enter into their own contractual agreement and the Ferguson's made claim that these actions constituted breaking of the covenant of quiet enjoyment of the premises and constructive eviction and explained how it could

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substantiate the claims made by the Ferguson's in the affidavit offered in CP 182.

This rule about mental states is an extension of a more general limitation on summary judgments. Courts, at summary judgment hearings, should not resolve issues of credibility, and if such an issue is present the motion should be denied. **Hudeslnan v. Foley**, 73 Wn.2d 880, 887, 441 P. 2d 532 (1968). " We are reluctant to grant summary judgment when " material facts are particularly within the knowledge of the moving party." **Riley v. Andres**, 107 Wn. App. 391, 395, 27 P. 3d 618 (2001). In such cases, the matter should proceed to trial " in order that the opponent may be allowed to disprove such facts by cross - examination and by the demeanor of the moving party while testifying." **Mich. Nat'l Bank v. Olson**, 44 Wn. App. 898, 905, 723 P. 2d 438 (1986). " **Arnold v. Saberhagen Holdings, Inc.**, 157 Wn. App. 649, 661 -62, 240 P. 3d 162 2010) review denied, 171 Wn.2d 1012, 249 P. 3d 1029 (2011).

Throughout the Plaintiffs request for a continuance the Ferguson's offered through affidavit information that the Ferguson's knew firsthand knowledge about conversations, emails, communications that Coddington and Walsh would discuss and conspire to enter into a lease together and therefore the information sought after was in the minds of the moving and

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nonmoving party and required an examination of character and credibility and could not be obtained through affidavits.

The requirement of **CR 56 (f)** does not require evidence or exhibits to back up the firsthand knowledge that is being used as reason for why depositions and other discovery is required. To require the Plaintiff to demonstrate the evidence of the material issue when discovery is still required to demonstrate the firsthand knowledge of the Plaintiff would then make the purpose of **CR 56 (f) moot**. The entire purpose of **CR 56 (f)** is to allow a nonmoving party time to obtain the evidence to support their claims that issues of material fact exist and therefore it is reasonable that the affidavit alone would state firsthand knowledge yet to be proved through the course of discovery. Firsthand knowledge is seen throughout CP 91, 182, 498 CP 83 , 143,

CR 56 (e) (e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits **shall be made on personal knowledge**, shall set forth such facts as would be admissible in evidence,”

The Plaintiff demonstrated in affidavit of facts that supported personal knowledge that facts do exist and that further discovery is just and warranted in order to show a genuine issue of material fact to oppose the moving party. Further **CR 56 (e) also states “The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of a pleading, but a response, by affidavits or as otherwise provided in this rule, must set forth**

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specific facts showing that there is a genuine issue for trial.” The Plaintiff was unable to support any affidavit and firsthand knowledge of any information because the Plaintiff had not yet had the chance or a reasonable opportunity to conduct depositions or do request for productions for many reasons stated in affidavit (cite affidavit and places in verbatim report). CP 485 proves that it was not even until the end of March where the final judge recusing themselves was recused and that means that not until the end of April of 2016 before the Judge assigned to the case could here the CR 12 motions . To expect depositions to be conducted before answers to the complaints is unreasonable for the purpose of fairness in discovery or for the purpose of requesting productions and other information that could be reasonably determined and affected by the answer to the pleadings.

Further this argument is supported by precedent set that establishes that **CR 56 (f)** provides a remedy for parties that know of “KNOW OF” facts that cannot be supported by affidavit alone “ **CR 56 (F) provides a remedy for a party who knows of the existence of a material witness and shows good reason why he cannot obtain the affidavit of the witness in the time for summary Judgment proceedings.”** *Molsnessv. City of Walla Walla*, 84 Wn. App 393, 400, 928 P2d 1108 (1996) **citing Cofer V.**” The Judge erred when part of his conclusion and basis for denying a motion for continuance was that as stated in Oral opinion after hearing the motion for continuance and claiming that the Fergusons should have been able to obtain some affidavits as is implied below in the context of what he said.

Plaintiff had stated reasons for why issues of material fact could not be supported by affidavit alone and why depositions and other methods of discovery would need to be sought to offer a opposition to the moving parties motion for summary Judgment and to supply evidence to support firsthand knowledge of issues of material fact.

Plaintiff offered other reasons for why discovery was needed including the authentication of evidence and the conducting of depositions of those who have knowledge and who are also defendants in the same actions.

Which Was Further Elaborated on in Oral Argument as Seen in the RP volume one throughout the argument and also seen throughout CP **83 ,498, 143, 182.**

The Plaintiff met the requirements of **CR 56 (f)** by stating why affidavits could not be obtained by listing hardships.

The Plaintiff met the requirements of **CR 56 (f)** by stating why facts essential to justify the parties opposition could not be obtained through affidavit by :

Listing subpoenas required and a brief reason for what the Plaintiff has firsthand knowledge of that will be obtainable through subpoena

The Plaintiff met the requirements of **CR 56 (f)** by further establishing hardships that prevented or made discovery unreasonable in the case by demonstrating that the parties were held up in the onset of the litigation by CR 12 motions and recusals when it was demonstrated through affidavits and oral argument that final resolution of CR 12 motions was not even accomplished due to Judge recusals until the end of May of 2016 with yet to have answers to the complaint.

- Parties argued venue change as seen in **CP 523,529** where parties As can be seen by **CP 438** that the required more definite statement not even filed until the end of May which collaborates with the timeframe offered from **CP 485** providing that the court had not even found a Judge until the end of April to hear the case which would of prolonged any CR 12 motions from being heard and therefore placing a form of stay on the action not intended by any party or by the court but just an issue of circumstances which the Ferguson's in Good Faith recognized and took no actions in

discovery or against parties still to answer and therefore in just to disregard these circumstances in the Ferguson's argument that their ability to conduct depositions and discovery was affected by the court for one part.

Court erred when not considering a hardship and considering a hardship that raised the issue of the appearance of fairness. The evidence of this can be seen in (cite Gary's affidavit) that was filed a day prior to the hearing due to the fact that one day prior to the motion for summary Judgment and the motion for continuance was heard the Plaintiffs were tied up still in another matter which evidence was presented to prove by the filing of the supporting affidavit of Gary Preble who represented them in that other matter. Gary made effort to mention his firsthand knowledge of the involvement of Defendant Laura Thompson in the dependency action that caused the removal of the Ferguson's children in May of 2016. The Walsh's made argument that because she had an attorney in that matter she had time to focus on the summary Judgment motion. The Walsh's argument was not based upon fact or knowledge of the hardships the Ferguson's were enduring and was mere assumption made which the Ferguson's provided the affidavit of Gary Preble to counter that assumption.

The Ferguson's provided affidavits under the penalty of perjury that also contributed information to the court of the burden they were placed in trying to defend against the claims brought against them by Defendant in the lawsuit Child Protective Services and Laura Thompson. The Ferguson's and their attorney both expressed in affidavit they felt it was a conflict of interest that the parties named in conspiracy claims could bring an action against them in another claim with the removal of their children while they were also trying to work on the lawsuit they had filed 6 months prior against them far prior to the removal of their children.

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Gary expressed in his declaration **“I have a significant concern that the unusual pressure that has been placed on Mrs. Ferguson in the dependency may in part be based upon the fact that the primary social worker’s supervisor is being sued by Mrs. Ferguson in this case.”**

The Ferguson’s provided proof of hardship by asking their attorney in another matter to discuss the case in enough detail to show the court that the Ferguson’s were barred down by another legal matter that was affecting substantial rights of theirs.

The Affidavit of Gary Preble demonstrated to the Judge that just a day prior to the motion for summary Judgment that the Plaintiffs were in court trying to prevent removal of their children again by that same party also named a defendant in the lawsuit. **“Each of of those hearings has demanded additional emotion and time, though we have primarily been successful in each of them. I am dictating this at the Kitsap County Courthouse, having just gone through one such hearing. The Court had given us time to respond to the three declarations of social workers, and the declaration Mrs Ferguson responded with was 27 pages long- after I had significantly edited it to my satisfaction.”** Gary and the Ferguson’s through both their affidavits showed an unreasonable amount of hardship placed on the Ferguson’s during the months between May of 2017 and September of 2017. **CP 83 ,498, 143, 182** presented hardship within the affidavits and declarations offered in support of motion for continuance.

The aforementioned hardship presented an issue of appearance of fairness as well as created a conflict with the Ferguson’s conducting discovery and interacting with

defendants in the lawsuit because the defendant's actions in 2014 were named in the dependency case which was going on in Kitsap county between May of 2016 and October of 2016 making it a conflict for Pro Se Plaintiff April Ferguson to conduct depositions with potential witnesses against her in the ongoing action in Kitsap county. The Ferguson's was represented in the other action and it was not advisable to interact with potential witnesses which included, Martha Standley, Laura Thompson, Helana Coddington, Michael Schmitt, Natasha Souder, Erin Bell. Three of the defendants the plaintiff had firsthand knowledge of interactions, conversations, phone conversations, email conversations, and other relevant facts that would support an issue of material fact concerning the claims against the Walsh's. The Coddington, and Bell's were being sued partially for the reports they placed against the Ferguson's in 2014 to Child Protective Services and those allegations were listed in the recent dependency case against them in Kitsap county. It was not advisable while they were under counsel representation in another action to speak with those individuals and conduct depositions in the civil case when those individuals could have been potentially called as witnesses in the action in Kitsap county. The Plaintiff discussed this in both oral argument on the motion for continuance which is seen in the **RP from pages 10 – 39** where it was mentioned within the argument (cite cp sources also)

In the appearance of fairness, it was just to place a continuance on the motion for summary Judgment **CR 56 (f) or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.** The court erred in Judgment when assuming that the issue of conflict was only with one client when the case itself was an of alleged claims presented in fact statement not yet disproved that the parties committed civil

conspiracy together and therefore the Judge disregarded the entire reasonable concern of the Plaintiff to of not had conducted discovery as is evident in the oral argument in the **RP starting on page 18 lines 1 through 9**

The Judge erred in showing an opinion by suggestion that or implying that the parties were not involved in civil conspiracy. The Judge failed to notice that if the action was civil conspiracy that many of the defendants named and discovery needing to be conducted would involve other defendants including the defendants where a clear conflict of interest had now arise preventing in good Judgment the Ferguson's from having interactions with defendants who may and could be called as witnesses in the other action that was started by one of the defendants Child Protective Services and Laura Thompson.

The Judged showed unfairness when giving advice to the defendants suggesting they don't have to do a "full response" to the claims and then later discounting the claims of the Plaintiff in motion for continuance when the Plaintiff claimed that it was important to wait for responses to the complaint by defendants before conducting discovery. The Judge responded with "**I can't imagine they would of answered with anything besides I deny the allegations**". This was an unfair assumption and exhibited prejudice to the plaintiff to expect that the Plaintiff would have known that the Defendants would not given full answers when she waited for answers from defendants before doing discovery.

When considering the weight of all the justifications for a continuance in full the judgment is unfair, unjust and provides no rational for the reasons of denial

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I. Assignment of Error No 2: The trial court erred in assigning CR 54

(B) certification

In January of 2016 the court of appeals scheduled a motion to determine if the appeal filed by the Ferguson's was appealable or if it was a matter of discretionary review. Several parties were, and claims were still being litigated including claims that the Walsh's were named in. To be specific the issues the Walsh's have been dismissed on are still being litigated and Helana Coddington and Martha Standley are being sued for civil conspiracy with the Walsh's creating a significant conflict and potential risk against the Plaintiff's remaining claims with the other defendants if the Walsh's were to be given final judgment and dismissed from the action because the action remaining is that Coddington and Walsh and Standley conspired together but the claims main claim is that Coddington and Walsh conspired to force Ferguson out of lease and to lease to Coddington with Standley only aiding them. If Walsh is dismissed and the claim ruled frivolous as the Trial court has done then the Judge has used the summary Judgment and dismissal of one defendant to place a predetermined Judgment upon the remaining claim causing a prejudice against the Ferguson's. Walsh's dismissal and final Judgment is inappropriate when it causes prejudice upon the remaining claims and therefore such prejudice would created a just reason for delay of final Judgment and would make CR 54 (cb) certification not appropriate and a clear error on the part of the trial court. Further the error is also apparent when considering that the claim of civil conspiracy is a claim that requires two and that the claim itself is that Walsh and Coddington conspired together with the aid of Standley and that without Walsh the claim against Coddington on its face cannot survive causing further reason to determine that Just reason existed for final Judgment and dismissal of the Walsh's.

Civil conspiracy requires proof that (1) two or more people combined to accomplish an unlawful purpose or to accomplish an unlawful purpose by lawful means and (conspirators entered into an agreement to accomplish the conspiracy. Newton Ins., 14 Wn. App. at 160, (citing to Allstar Gas, 100 Wn. App. at 740. A claim for civil conspiracy would provide for joint and several liability among all defendants. Sterling Bus., 82 Wn. App. at 454.

Further the fact the Ferguson's claim that the Walsh's used actions in regards to their lease contract obligations to aid them in carrying out the actions of civil conspiracy it would now be necessary to also determine that just reason for delay exists in the claims of Contract Breach, Unjust Enrichment, Constructive Eviction, and Quite enjoyment because those claims were used to carry out the act of civil conspiracy and without the actions and those claims the claim of civil conspiracy on its face would not survive **two or more people combined to accomplish an unlawful purpose or to accomplish an unlawful purpose by lawful means and (conspirators entered into an agreement to accomplish the conspiracy.** In the Ferguson's case the two-people entered into an agreement being Coddington and Walsh and that constituted the lack of quite enjoyment of the premises and the eventual constructive eviction of the Ferguson's. Just reason for delay did exist.

The Ferguson's explained and argued these points that dismissal would could cause prejudice against them **CP 17, 21,45 and RP volume 2 pages 7-12, 16 line 15 through page 26 line 12 and page 30 line 23 through page 31 and page 38 line 14 through page 39 line 9 and page 39 line 18 through page 44 line 19 and page 46 through 49 line 6)**

On February 21st of 2017 Judge Brian Coughenour showed prejudice against the Ferguson's when signing a Findings of Fact Supporting **CR 54 (B)** that he had prior knowledge and affidavits to conclude that the facts were false. The Ferguson's in a lengthy oral argument laid out how the facts were incorrect. The Ferguson's argued in length of their concerns about the false facts and their newly obtained knowledge after research that would be in their best interest to not allowed final Judgment while the rest of the claims were still being litigated. The Findings of fact on Respondents **CP 03** stated several incorrect facts that the Ferguson's have knowledge that the Judge knew were incorrect and they are **"Based upon the record before the Court, including the Declarations of Marilyn Walsh and April Ferguson, the remaining issues before the Court do not involve Walsh. The questions remaining before the trial court do not involve the issues on appeal;"** This is incorrect because the issues still remaining are that the Coddingtons, and Standley conspired with the Walsh's to cause the termination of the lease and to allow the Coddingtons to sign into an agreement with the Walsh's and take over the building and reopen the center that the Coddington's and Standley through other actions involved with other claims caused the shutdown of the Ferguson's business (**RP volume 2 pages 7-12, 16 line 15 through page 26 line 12 and page 30 line 23 through page 31 and page 38 line 14 through page 39 line 9 and page 39 line 18 through page 44 line 19 and page 46 through 49 line 6**)

The purpose of the rule is to avoid the possible injustices of a delay in entering judgment on a distinctly separate claim or as to fewer than all of the parties until the final adjudication of the entire case by making an immediate appeal available. The rule strikes a balance between the undesirability of more

than one appeal in a single action and the need for making review available in multiple-party or multiple claim situations at a time that best serves the needs of the litigants. Doerflinger v. New York Life Ins. Co., 88 Wn. 2d 878, 880, 567 P.2d 230 (1977).

The Fergusons argued in oral argument as seen in RP volume 2 that the purpose of **CR 54 (b)** was not that the Judge did not find reason to believe in Summary Judgment that the Walsh's were involved in civil conspiracy but rather the purpose of certification was prevent injustices including the injustices that may arise by dismissing a litigant in a claim still being adjudicated with other parties still named.

RP VOLUME 2 pg 6 line 4-13 **JUDGE COUGHENOUR: Right.**

MR. DAVIS: And I gather now from her response that the only issue that she claims combines the Walshes with all of the other Defendants is the civil-conspiracy theory, which there was absolutely no evidence presented to establish any such action; and so I believe the Walshes' claims are distinct from all of the others, and the civil-conspiracy theory should not bootstrap them back into the case because there just has not been any evidence shown that can amount to that."

Above the court of appeals is presented an example of misinterpretation of the purpose of **CR 54 (b)** interpretation where the Judge and Mr Davis agree that because they concluded that no evidence was presented in the summary Judgment motion that this would justify certification but if that was the case then the purpose of **CR 54 (b)** would be moot with no possible weight over summary Judgments because it is a given in any case that the court did not conclude there is evidence when dismissing a party in summary Judgment. The court rule prevents final Judgment due to possible

potential conflicts that may arise causing prejudice to both Plaintiff's and remaining defendants in a case where there is more than one defendant. The issue is that the Fergusons still have a claim of civil conspiracy including between Coddington, Walsh and Standley and if the court was to uphold the Judgment and continue with the appeal it would place the Plaintiff in substantial risk of prejudice of the remaining claim of civil conspiracy with the remaining parties.

Facts presented in **CP 03** claimed that based upon the record including April Ferguson's declaration that the remaining issues before the Court do not involve Walsh and that the questions remaining before the trial court do not involve the issues on appeal. The truthfulness of this statement and the bias of the Judge is put to question when referring to April Ferguson's affidavit **CP 17** specifically throughout the very short affidavit claimed that the Plaintiff did not support the certification and mentioned the prejudice it would make against her as well as the fact it is untrue and that there are claims existing that Walsh was named in and those claims are not yet adjudicated.

Throughout RP volume 2 Ferguson's argue so profoundly against the findings of fact and they argue that dismissal could cause prejudice and that remaining claims do involve the Walsh's and to refer to any specific line or page only would not be substantial enough and in the fairness of this appeal to limit examination of only a portion of the RP volume 2 and therefore in the interest of Justice the appellants hereby reference the court of appeals to review the entire **RP volume 2** to further examine the persistent attempt of the Ferguson's to argue against the certification that has caused prejudice to the Ferguson's in the continued claims still existing.

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Further if there is Just reason for delay of final Judgment then the Walsh's do not have a right to final Judgment by law and therefore if this court finds that final Judgment causes prejudice or a predetermined bias against the existing claims then final Judgment is not Just and Just reason for delay exists therefore the Walsh's do not by law have a right to final Judgment and final Judgment is premature and on this basis alone the trial courts final Judgment should be remanded

CR 54 (b) (b) Judgment Upon Multiple Claims or Involving Multiple Parties.

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination in the judgment, supported by written findings, that there is no just reason for delay and upon an express direction for the entry of judgment. The findings may be made at the time of entry of judgment or thereafter on the courts own motion or on motion of any party. In the absence of such findings, determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

RP volume 2 pg 30 line 25 – pg 31 line 14

“JUDGE COUGHENOUR: Okay. Here's what -- I looked at these Findings, and I actually wrote up something myself, and I haven't even shown this to Mr. Davis yet, but I wanted to put something in writing that would be added to these

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findings that might address your issue. And here's what I wrote, because I recognize that when it says that the "Walshes' action was not connected with the alleged conduct of the other defendants and was separate and distinct," that's a little problematic; because in regard to the civil-conspiracy action, yes, the Walshes, if that was provable, would be connected to the other defendants. So, I was worried about that language myself, so I would want to substitute, for that language, the following:"

The above comments by the Judge show ignorance to the purpose of **CR 54 (b)** and disregard for the court rule and how his predetermined opinion of if the Walsh's were involved in civil conspiracy affect the existing claim that Coddington committed civil conspiracy with Walsh's. Ferguson's hereby also incorporate **CP 21, CP 45,0 CP 17 and CP 03** so the court can see the risk of prejudice a final judgment could have and the error of the Judge to create additional findings of fact for **CR 54 (b)** that were misleading in order to justify no delay in final Judgment.

Assignment of error 3 The trial court erred in concluding that no issues of material fact existed in the claim of Contract breach

The Ferguson's despite being denied a continuance continued to assert in their defense against summary Judgment that no opportunity had been had to conduct depositions or other discovery and therefore was inadequate in their defense yet still offered up issues of material fact.

When deciding a Summary Judgment, the trial court has a duty to not make Judgment when an issue of material fact exists. The Judge also has the duty to look in the light most favorable to the nonmoving party.

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Cherberg v. Peoples Nat'l Bank, [15 Wn.App. 336](#), 347 n. 2, [549 P.2d 46](#) (1976). In considering such a motion for directed verdict the court must view the evidence in the light most favorable to the nonmoving party and the motion should be granted, or the denial thereof reversed, only if it can be determined no evidence or reasonable inferences therefrom exist which would be sufficiently substantial to sustain a verdict for the nonmoving party. *Shelby v. Keck*, [85 Wn.2d 911](#), [541 P.2d 365](#) (1975); *Hemmen v. Clark's Restaurant Enterprises*, [72 Wn.2d 690](#), [434 P.2d 729](#) (1967); *Browning v. Ward*, [70 Wn.2d 45](#), [422 P.2d 12](#) (1966).

In the case before us the Ferguson's presented issues of material fact that were disputed. First such case was in the Defendants memorandum in support of its motion for summary judgment is a glib blend of omission or misstatement of critical fact and misleading recitations of the law presented by the defendant Walsh's attorney for the purpose of justifying the bringing of a summary judgment motion before any discovery of the merits of the claims could be had. Defendants make claims to facts that the 500.00 a month initial rent period was the set pro rate amount for the construction that rendered the building unusable for several months in 2012 that the Plaintiff's claim was a contract breach and yet they also acknowledge that the construction was "unexpectedly required" in July of 2012 even though the 500.00 a month was decided upon in April of 2012. These facts show that the 500.00 a month was entered into without any knowledge of the construction that was to come and therefore could not have been the amount after the rent was prorated per the lease contract requirement to reflect when the building was usable creating an issue of material fact in regard to the claim "Contract Breach". These facts are supported by CP 201 both in the opposition brief and the attached affidavit referencing attached documents and CP 125 and 410. The court kept interfering with the argument

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making suggestions that all parties already knows that Marilyn Walsh spent thousands to make the building usable as well as the trial court kept making claim that these were not issues of material fact which was incorrect because both parties disputed if the 500.00 a month was the prorated amount for construction and the lease was signed in April of 2012 and the construction that made the building unusable was not aware to both parties until July and even in the admissions of the Walsh's it was an "unexpectedly required" so how was it possible to conclude that the 500.00 a month was prorated for an unexpected requirement. This is evidence that the Fergusons were unaware of any construction needed to be done and that rent should be prorated per the contract which is attached as exhibit to **CR 201**. Further **CR 201** and the attached exhibit to **CR 201** named exhibit 1 is evidence of an issue of material fact because the Walsh's claimed that the 500.00 was to allow for necessary building accommodations when that 500.00 a month in the initial term was for not building accommodations as claimed by the Walsh's but was in all fact for purpose of obtaining a department of Early Learning license which could take up to 90 days per law. The building was advertised in condition to be reopened and was communicated to the Fergusons as is corroborated by the supporting evidence that the Fergusons provided attached to the affidavit of April Ferguson **exhibit 3 and 4 of CP 201**.

Even with all the claims or how the evidence the Walshes may of portrayed or construed the issue was a clear issue of material fact to be decided by a trier and was inappropriate to decide in Summary Judgment because the matters and claims were so conflicting and no evidence presented by the Walsh's to provide that the 500.00 a month was the prorated amount of rent required by lease contract.

All disputed facts are considered in the light most favorable to the nonmoving party, and summary judgment is appropriate only if reasonable minds could

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reach but one conclusion. *Sentinel3, Inc. v Hunt*, 181 Wn.2d 127, 331 P.3d 40, 46 (2014); *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011).

The rationale is that "[d]eal[ing] into the internal workings of the parties' minds and making credibility assessments is within the special province of the trier of fact." *First American Title Co. v. Politano*, 932 F. Supp. 631 at 635 (1996). "[I]ntent can rarely be established by direct evidence, and must often be proven circumstantially and by inference. Intent is therefore peculiarly inappropriate to be decided on a motion for summary judgment." *Zilg v. Prentice-Hall*, 515 F. Supp. 716 at 719 (S. D. NY 1981). "Leaving issues of assessing credibility to juries or fact-finders is particularly important when conflicting inferences about a party's knowledge can be deduced from the evidence." *Politano*, at 635. It is obvious that this evidence must come largely from the defendants. This case illustrates the danger of founding a judgment in favor of one party upon his own version of the facts within his sole knowledge as set forth in affidavits. Cross-examination of the party and a reasonable examination of his records by the other party frequently bring forth further facts which place a very different light upon the picture. This is not the kind of case that can be settled on summary judgment. It is peculiarly the kind of case where the triers of fact whose business is not only to hear what men say but to search for and find the roots from which the sayings spring, should be afforded full opportunity to determine the truth and integrity of the case. *Subin v. Goldsmith*, 224 F. 2d 753 (Second Cir. 1955) (citations omitted). With regard to a party's knowledge or intent, it is

usually the case that the nonmoving party need not even file counter affidavits disputing moving party's allegations. **Subin, at 759**. The other facts of the case, even without restatement in affidavit form, almost always support a wide range of inferences regarding knowledge and intent. This Federal analysis has been specifically cited and adopted in **Washington. Percival v. Bruun, 28 Wn. App. 291, 293 -94, 622 P. 2d 413 (1991)**. In this case before us facts were disputed and intent of purpose of the original 500.00 a month and what it was for was disputed and such dispute if determined to be as the Ferguson's claimed would of concluded that the period of time the building was unusable was indeed not prorated which would of substantiated a claim of contract breach. The trier of fact only could decide this yet in this motion for summary Judgment hearing the Judge dismissed this issue of material fact and made a ruling.

If affidavits and counter - affidavits submitted by the parties conflict on material facts, the court is essentially presented with an issue of credibility, and summary judgment will be denied." **Tegland and Ende, Washington Handbook on Civil Procedure, § 69. 16, p. 428 (2004 ed.)**. T] he court should not grant summary judgment when there is some question on the credibility of a witness whose statements are critical to an important issue in the case." **See Id citing to Powell v. Viking Insurance Col, 44 Wn. App. 495, 722 P. 2d 1343 (1986)**. There is almost never a case in which the actions of a party are so unambiguous that reasonable persons could reach only one conclusion as to that party' s knowledge, intent or motivations. 22

Where intent is the primary issue, summary judgment is generally inappropriate. Drawing inferences favorably to the nonmoving party, summary judgment will be granted only if all reasonable inferences defeat the plaintiffs claims. The moving party's burden is therefore a heavy one.

Admiralty Fund v. Tabor, 677 F. 2d 1297 at 1298 (Ninth Cir. 1982).

The Ferguson's offered affidavit to dispute the facts presented by the Walsh's and therefore a genuine issue of material fact existed within the minds of the parties to be examined by further testimony, depositions and discovery methods making summary Judgment not appropriate. As established in Admiralty Fund v. Tabor above the Judge is to draw inferences favorably to the nonmoving party and the nonmoving party in this case disputed the facts in their affidavits that were stated in the Walsh's affidavit on several issues especially the 500.00 a month beginning rent and what its intended upon purpose was.

Facts were disputed, and no reasonable mind could conclude that a prorated rent was determined for building construction when it was a "unexpectedly required" in July of 2012 even though the 500.00 a month was decided upon in April of 2012. The Fergusons and Walsh's have a disputed issue of material fact where the Ferguson's claimed the 500.00 a month was so they could secure their Department of Early Learning License and cover opening of the Daycare center something they could not do because the Daycare license had to be put on hold while the building was undergoing construction causing significant delays and the Fergusons to pay full rent before was reasonable to the terms the Walsh's and the Ferguson's had agreed on

when determining the agreements and terms of the lease which was tailored to meet the agreement of both parties far before the building was determined not occupiable for the intended upon purpose as well as the required purpose per the lease contract. If to decide the issue in the most favorable light to the nonmoving party it is clear that an issue of material fact exists on this one incident of contract breach alone not even including the several other incidents of contract breach listed above in section **V (b)**. **Only submitted "facts" are considered. Bare assertions that a genuine material issue exists do not constitute facts sufficient to defeat summary Judgment.**

Trimble v. Wash. State Univ., 140 Wn.2d 406, 412, 553 P.2d 107 (1976) .

Fergusons provided an affidavit seen in **CP 201** with attached **exhibit's 7** the lease contract **and exhibit 2** an email communication where Marilyn Walsh even says on March 29th of 2017 "I got out my original lease that we drew up when Regan opened her center, and with just a little tweaking, I think we could make it work for us. I was thinking about a rent of 500.00/ mo until you became licensed, at which point it would then be 1,500.00. I will contact Regan and find out when she will be done. And get the keys from her. I would expect by April 9t we could start the transition. I would not be able to have all the little repairs done by the date either. That is something we could talk about if you preferred to have it move-in ready before you assumed "possession" that date would have to be postponed until late April.". The Fergusons also referred to the arrangement the lease terms about the prorated rent of 500.00 and showed that it had nothing to do with letting the building go through construction and that it was entirely about allowing enough time to obtain a Department of Early Learning License and be reopened as well as the building was advertised as recently licensed and ready to reopen as is apparent in the email communications offered when the former tenat had not even handed over the key back to the Walsh's as of that point

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in March of 2017. Email communications on April 23rd of 2017 seen in **CP 201 exhibit 3a** Marilyn Walsh claims the building rooms remaining will be ready for the Fergusons by the following week. **CP 201 exhibit 6** an email where Fergusons even discuss of the hopeful ready time for the license of May of 2012 which is several months before they find out the building is not even occupiable for the agreed upon use of the building. **CP 201 attached exhibit 16** showed emails proving that the building all the way into August was still being hit by city and fire department with required work and construction and installations before a permit for occupancy could even be issued for child daycare. The Fergusons then referred to the argument from the Walsh's that even included their own admission that the "unexpectedly required" in July of 2012 even though the 500.00 a month was decided upon in April of 2012. The Ferguson's by affidavit and exhibits clearly showed an issue of material fact existed

Therefore the court erred in issuing Judgment when an genuine issue of material fact existed and even in the most favorable light for the nonmoving party could be reasonably seen as issue of material fact to be decided by a trier of fact not a summary Judgment motion

Assignment of Error No 4: The trial court erred in concluding that no issues of material fact existed in the claim of Unjust enrichment

Fergusons hereby incorporate and reference for argument in Civil Conspiracy **CP 201 pages 7 through 17 as well as all exhibits and affidavits referenced in that section of CP 201** to collaborate their claim that issues of material fact did indeed exist. Fergusons also notify the court in this brief that they intend to bring a motion to

permit further argument on this section as page allotment does not permit space to further argue the issues of material fact that were presented in the **RP volume 1** of the proceeding along with the issues presented in **CP 201** to be able to adequately appeal the matter of summary Judgment.

When weighing the issues of material fact presented in **CP 201** it is apparent that the Fergusons had firsthand knowledge of issues of material fact that could not be obtained by summary Judgment and rested in the minds of the defendants who could not reasonably be expected to offer affidavits in support of the Ferguson's claim of unjust enrichment besides that the Ferguson's themselves would offer due to the fact that the Fergusons were the ones conducting services outside of any contractual agreement that was unjust upon them to not receive a benefit. The Fergusons supplied affidavit as well as supplied other witnesses that could recall their labor and work placed into the building including that work that was done in insulation.

The knowledge of the Fergusons labor was in the minds of the moving party the Walsh's and therefore affidavit alone could not support their claims. The Fergusons supplied even an email communication where the Walsh's acknowledged the work conducted and the Fergusons recollection of that work differed from the recollection of the Walsh's creating a genuine issue of material fact which was inappropriate for the Court to play trier of fact in a summary Judgment motion and to determine the impressions of the parties interpretations of those emails and communications offered and what their intent was as the trial court did when in the case of the Fergusons when it made conclusions based upon what the Walsh's claimed the intent of the emails and exhibits were that were offered by the Nonmoving party CP 201 attached affidavit of April and Chad Ferguson and the attached exhibit's 11,15 16 which all showed that Chad Ferguson had put significant amount of work and that

the Judge should not be a trier of fact considering the evidence presented that presented that Chad Ferguson had conducted work on the premises outside of his contractual duties if looking at the lease agreement which was also offered and comparing to the emails and the communications between the Walsh's and the Ferguson it is apparent that a genuine issue of material fact existed and that the details of the work, motive, intent of parties and intent of the content of the emails and the communications apparent in the affidavits was in disagreement about the arrangements of reimbursement and agreements of that time. The Trial court although acted as a trier of fact and erred when not drawing inferences favorably to the nonmoving party to defeat summary judgment).

When a trial court rules as a matter of law, it must accept the [non moving party's] evidence as true, and determine whether or not the [nonmoving party] has a prima facie case." Spring v. Department of Labor and Industries, 96 Wn.2d 914, 918, 640 P. 2d 1 (1982). The trial court should not make factual determinations or evaluate the non - moving party's evidence, except as may be necessary to favorably resolve conflicts appearing therein. See Spring v. Dept. L &I, 96 Wn.2d at 918.

If affidavits and counter - affidavits submitted by the parties conflict on material facts, the court is essentially presented with an issue of credibility, and summary judgment will be denied." **Tegland and Ende, Washington Handbook on Civil Procedure, § 69. 16, p. 428 (2004 ed.).** T] he court should not grant summary judgment when there is some question on the credibility of a witness whose statements are critical to an important issue in

the case." See **Id citing to Powell v. Viking Insurance Col, 44 Wn. App. 495, 722 P. 2d 1343 (1986)**. There is almost never a case in which the actions of a party are so unambiguous that reasonable persons could reach only one conclusion as to that party' s knowledge, intent or motivations. 22 Where intent is the primary issue, summary judgment is generally inappropriate. Drawing inferences favorably to the nonmoving party, summary judgment will be granted only if all reasonable inferences defeat the plaintiffs claims. The moving party's burden is therefore a heavy one. **Admiralty Fund v. Tabor, 677 F. 2d 1297 at 1298 (Ninth Cir. 1982)**. Summary judgment is not appropriate " where a trial, with its opportunity for cross - examination and testing the credibility of witnesses, might disclose a picture substantially different from that given by the affidavits." **United States v. Perry, 431 F. 2d 1020 at 1023 (Ninth Cir. 1970)**.

The Fergusons hereby incorporate **PC 201 attached exhibit 15** that demonstrates even admission from the Walsh's of substantial amount of work the Ferguson's had placed into the premises of the Walsh's which was outside of any contractual agreement. **PC 201** and its attached affidavit and exhibit's listed that work presenting an issue of material fact that work had been done by the Fergusons and the Walsh's presented no contract or offered up no evidence to support that all the work mentioned was work that the Fergusons were paid for and therefore if taking the evidence in the most favorable light of the nonmoving party an issue of material fact did exist, and summary Judgment is inappropriate, and Judgment of the court is in error.

Ferguson's in their argument used precedent set in **Chandler v. WASH. Toll bridge Auth., 17 Wn. 2d 591,601,137 p. 2d 97, (1943) The doctrine of unjust**

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enrichment applies only if the circumstances of the benefits received or retained make it unjust for the defendant to keep the benefit without paying.

The benefit in this case was excessive amount of work to make a building usable that was already advertised as usable when the Ferguson's entered into a lease agreement. The contractual agreement with the Fergusons was covering leasing of the building not construction and electrical work on the part of the Fergusons and therefore the work was performed outside of the lease agreement with the Walsh's and was not part of any contractual obligation Fergusons had to the Walsh's in regards to their lease. The issues provided in the summary Judgment motion hearing required a trier of fact to determine motive, intent, and disagreements between the parties on the contractual obligations of the parties and the work performed.

Assignment of error 5,6,7 all claims relied upon examination of characters and credibility of the defendants because the knowledge of was in the minds of the moving party

Fergusons hereby incorporate and reference for argument in Civil Conspiracy **CP 201 pages 41 through 48** as well as all exhibits and affidavits referenced in that section of **CP 201** to collaborate their claim that issues of material fact did indeed exist. Fergusons also notify the court in this brief that they intend to bring a motion to permit further argument on this section as page allotment does not permit space to further argue the issues of material fact that were presented in the **RP volume 1** of the proceeding along with the issues presented in **CP 201** in order to be able to adequately appeal the matter of summary Judgment.

When weighing the issues of material fact presented in CP 201 it is apparent that the Fergusons had firsthand knowledge of issues of material fact that could not be obtained by summary Judgment and rested in the minds of the defendants who could not reasonably be expected to offer affidavits in support of the Ferguson's claim of conspiracy with whom they were being accused of conspiracy with and therefore a motion for continuance was reasonable so that discovery could be conducted.

Further the claims of Constructive eviction and Unjust enrichment relied upon the actions taken in civil conspiracy between Marilyn Walsh and Helana Coddington which were that the two parties were harassing and conducting pre lease communications on the Ferguson's premises while the Walsh's had a contractual obligation to the Ferguson's and that these harassing and intimidating actions constituted an action of preventing quite enjoyment of the premises and constituting constructive eviction of the premises. The Ferguson's applied case law to their more novel argument that provides an action of unjust enrichment when the landlord behaves or acts with conduct that could prevent quite enjoyment of the premises. A typical constructive eviction would be when premises are not maintained preventing the quite enjoyment of the property and ending the lease contract but the remedy of constructive eviction and quite enjoyment is offered as well when the conduct of the landlord is erroneous to the point of preventing the lease contract to continue as seen in

“Similar to the economic interferences with the tenant’s enjoyment of the leased premises is outright harassment of the tenant by a “jilted” landlord. In a case where the landlords retaliation backfired, the Supreme Court of Tennessee

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held that a constructive eviction occurred where the harassment culminated in the landlord's wrongful declaration of default. In *Tenn- Tex Properties v. Brownell- Electro*, [39] 778 s.w 2d 423 (Tenn. 1989). A longtime office tenant moved out instead of renewing its lease as the landlord desired. Upon being notified of the tenant's intent to relocate, the landlord began making demands which became more and more strident and assertive, culminating in the wrongful declation of default for having moved out of the building before the lease expired, there being no continuous occupancy covenant in the lease. The court decided that this led to the inevitable conclusion that there was a constructive eviction of the the tenant by the landlord's conduct, which amounted to a breach of the covenant for quite enjoyment. [40] *Id.* At 428. The Court held that unreasonable demands, threats, insults, or assaults can form the basis for a constructive eviction claim. [41] The court also made a point of indicating that all of the communications that constituted the wrongful eviction in the *Tenn- Tex* case were don by the landlord's legal counsel. *Id.* At. *Id.* At 428. 778 S.W. 2d 423 (Tenn. 1989)."

In the Ferguson's case they made claim that they had firsthand knowledge of the landlord harassing, intimidating and threatening them to cause their removal from the premises and to enter into a contract with their employee while the contractual agreement still was between the Walsh's and the Ferguson's. The Ferguson's wrote in their facts that Walsh's would use money disputed and not originally collected upon which they had a long dispute about to coerce the Ferguson's and that the Walsh's and the Coddington's had been on the premises communicating the intentions to take the

building from the Ferguson's while the Ferguson's still had a contractual agreement with the Walsh's. Even if the Ferguson's had a past debt existing to the Walsh's that would not excuse the Walsh's actions of civil conspiracy, intimidation, coercion and threats. The actions of the Walsh's are similar in conduct to the case mentioned in the precedent set in Tenn- Tex and therefore the Ferguson's did not just bring a warranted claim based on existing precedent and good faith argument they presented that they had firsthand knowledge of the alleged actions of the Walsh's and the Coddington's and therefore it was inappropriate to dismiss the claim when the knowledge of issue of material fact rested in the minds of the moving and nonmoving party and required further examination of character and credibility as mentioned in existing case law used and referenced above within other argument of other claims. The actions of civil conspiracy, unjust enrichment, and constructive eviction relied upon an examination of character and credibility as the information was based off of firsthand knowledge of the Ferguson's of actions that were in the minds of both the moving party and the nonmoving party from interactions that mounted up to harassment and intimidation (cite the case laws about this)

Further issues of material fact exist and credibility is at question when the Walsh's state in their declaration that it was 8 month before the building was leased and give impression that it took 8 months to find a tenant yet the Coddington's and Bell's were posting Facebook post which was provided in **exhibit in CP 201** that showed that they entered an agreement to lease the building with the Walsh's almost immediately after the Fergusons were out of the building as well as the Facebook post imply that the building was being fixed up for them by the Walsh's showing that the Walshes had even obtained a tenant and was making fixes and modifications for those new tenants during those 8 months. This raises an issue of material fact and the

Fergusons supported firsthand knowledge to the best of their ability without conducting depositions and discovery which no time had reasonably allowed to do.

When weighing these issues with the case made and applying the precedent already set and established in the section above it becomes apparent that the trial court erred when making judgment upon issues of material fact and conclusions and determinations of the truthfulness of knowledge and facts obtained by the Fergusons and the Walsh's. If seen in the most favorable light of the nonmoving party it was inappropriate for the trial court to be the trier of issues of material fact and to prevent the examination of character and credibility before making a ruling on these claims and especially when the ruling would conclude frivolous.

If there is a dispute as to any material fact, summary judgment is improper. Id. The evidence presented, whether direct or indirect, should be considered cumulatively, Raad v. Fairbanks North Star Borough, 323 F. 3d 1185, 1194 (9th cir. 2003)."

The trial court erred when making judgment upon character, credibility in the information presented that was conflicting in the affidavits of Walsh's and Ferguson's where Walsh's and Ferguson's offered a variety of contradicting facts of their first hand knowledge of communications and events that Ferguson's claimed rose to the level of Constructive eviction, civil conspiracy, and breaking of the covenant of quiet enjoyment. Walsh and Ferguson both required an examination of character and credibility in front of a trier of fact and summary Judgment was inappropriate on this bases alone..

The trial court should not make factual determinations or evaluate the non-moving party's evidence, except as may be necessary to favorably resolve conflicts appearing therein. **See Spring v. Dept. L &I, 96 Wn.2d at 918.** Ferguson offered exhibit's that showed contrary information to what was offered by Walsh including Facebook posts from Coddington showing Coddington taking the building within the same month of Ferguson losing it which is seen on CP 201 and its attached exhibit 5 which contradicts the claim of Walsh's in their affidavit where they claimed that the Ferguson's put them in a hard spot that took them 8 months to get a new tenant. The Ferguson's claim was that this was due to the fact they had firsthand knowledge that before the Ferguson's left the building that the Walsh's and Coddington's had been committing civil conspiracy to force the sale of or relinquish the building so that the Coddington's could take possession of. The exhibit and the contradictions of the Walsh's statements in their affidavits gave collaborating evidence of this claim and created an issue of material fact with the facts in the minds of the moving and nonmoving party requiring further examination of character and credibility. If affidavits and counter - affidavits submitted by the parties' conflict on material facts, the court is essentially presented with an issue of credibility, and summary judgment will be denied." Tegland and Ende, Washington Handbook on Civil Procedure, § 69. 16, p. 428 (2004 ed.). T] he court should not grant summary judgment when there is some question on the credibility of a witness whose statements are critical to an important issue in the case." **See Id citing to Powell v. Viking Insurance Col, 44 Wn. App. 495, 722 P. 2d 1343 (1986).** Ferguson's presented evidence that questioned the credibility of Walsh and

created a genuine issue of material fact and it was inappropriate to allow Summary Judgment. "When a trial court rules as a matter of law, it must accept the [non moving party's] evidence as true, and determine whether or not the [nonmoving party] has a prima facie case." **Spring v. Department of Labor and Industries, 96 Wn.2d 914, 918, 640 P. 2d 1 (1982).** It was appropriate to accept the Ferguson's evidence as true yet the trial court did not consider any evidence presented by the Ferguson's as true and questioned its credibility throughout the RP Volume 1 from page 40 throughout the rest of the hearing.

Assignment of Error 8 The Court Erred in CR 11 Sanctions

The Court erred in awarding fees. The signature (on a pleading or other filed document) of a party or of an attorney constitutes a certificate by the party or attorney has read the pleading motion, or legal memorandum; that to the best of the party's or attorney's knowledge, information and belief, formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that is is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needles increase in the cost of litigation. If a pleading, motion or legal memorandum is signed in violation of this rule, the court upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading motion, or legal memorandum, including a reasonable attorney fee.

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CR 11, In any civil action the court having jurisdiction may upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense. Rcw 4.84.185.

The basic standard under both these rules is substantially identical. The legal action is frivolous if a reasonable inquiry would show that the action is it is not "well grounded in fact" and is not warranted by existing law or good faith argument and interposed for improper purpose.

The purpose behind CR 11 is to deter baseless filings and curb abuses of the judicial system." Bryant v. Joseph Tree, Inc., 119 Wn. 2d 210, 219, 829 P. 2d 1099 (1992.) " Complaints which are ` grounded in fact' and ` warranted by existing law of a good faith argument for the extension, modification, or reversal of existing law' are not ' baseless' claim, and are therefore not the proper subject of CR 11 sanctions." Joseph Tree at 219 -220. CR 11 " is not intended to chill an attorney' s enthusiasm or creativity in pursuing factual or legal theories." Joseph Tree at 219. Indeed, an imposition of CR 11 sanctions is " not a judgment on the merits of the action," but rather " the determination of a collateral issue: whether the attorney has abused the judicial process." Biggs v. Vail, 124 Wn2d 193, 197, 876 P. 2d 448 (1994) (Biggs II), quoting Cooter Gell v. Hartmax Corp., 496 U. S. 384 at 396, 110 S. Ct. 2447, 110 L.Ed.2d 359 (1990). Washington courts reserve CR 11 sanctions " for egregious conduct" and prohibit sanctions from being used " as simply another weapon in a litigator' s arsenal." Biggs II, 124 Wn.2d 193 at 198, n. 2.

RCW 4.84. 185 operates similarly to CR 11, but with an additional limitation. The Washington Supreme Court has held that "[t] he lawsuit in its entirety, must be determined to be frivolous and to be advanced without a reasonable cause before an award of attorney' s fees may be made pursuant to the frivolous lawsuit statute, RCW 4. 84. 185." Biggs v. Vail, 119 Wn.2d 129, 133, 830 P. 2d 350 (1992) (Biggs 1). If any claim in a lawsuit has potential merit, the action may not be deemed frivolous. Tiger Oil Corp v. Dept of Licensing, 88 Wn. App. 925, 938, 946 P. 2d 1235 (1997).

Civil Conspiracy are recognized causes in the State of Washington. Civil conspiracy requires proof that (1) two of more people combined to accomplish an unlawful purpose or to accomplish an unlawful purpose by lawful means and (conspirators entered into an agreement to accomplish the conspiracy. Newton Ins., 1 14 Wn. App. at 160, (citing to Allstar Gas, 100 Wn. App. at 740. A claim for civil conspiracy would provide for joint and several liability among all defendants. Sterling Bus., 82 Wn. App. at 454.

The Plaintiff based upon knowledge in belief brought a claim against the Walsh's for firsthand knowledge she had that the Walsh's were in agreement to end the contract with the Ferguson's and to enter into a contract with the Coddingtons which would be a violation of the contract with the Fergusons as well as the communications breached the covenant of quite enjoyment. The Fergusons had knowledge and due to a continuance not being granted were not allowed the time to conduct depositions and discovery to substantiate the claims which they had firsthand knowledge of.

The Walsh's did not prove that the claims were brought for improper purpose or that that they are without merit they only established that the Fergusons at the time

of summary Judgment did not have evidence to substantiate the claims that the Fergusons made with firsthand knowledge and belief which the claims were based upon. The grounded in fact portion of **CR 11** does not say grounded in fact that is established by substantiating evidence it merely says, "grounded in fact".

The Ferguson's were not proven to of told any falsehoods in the summary Judgment motion merely because they could not substantiate adequately their facts established by firsthand knowledge and therefore with discovery the claims had potential merit and the actions should not be deemed frivolous.

The actions of contract breach, unjust enrichment, quite enjoyment, constructive eviction were brought because the Fergusons had belief and knowledge that actions throughout the course of the lease taken against the Fergusons were being used to terminate the contractual relationship in order to allow the Coddington's to take possession of the building. The mere fact that shortly after the Fergusons no longer had possession of the premises the Coddington's entered into the building and obtained a contract with the Walsh's shows the claims have merit and that the Ferguson's had facts to believe that the Coddington's and the Walshes acted in civil conspiracy to terminate the lease contract with the Fergusons and the business and license the Fergusons were in possession of.

The mere fact that the Fergusons continued to claim in the motion for continuance that facts exist elsewhere then what is obtainable by affidavit contributes to the fact that the Fergusons believed of information and discovery that would substantiate the facts they knew to be true by firsthand knowledge and therefore they did not bring a claim for improper purpose or without any merit.

Further precedent set concludes as seen:

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RCW 4.84. 185 operates similarly to CR 11, but with an additional limitation. The Washington Supreme Court has held that "[t] he lawsuit in its entirety, must be determined to be frivolous and to be advanced without a reasonable cause before an award of attorney' s fees may be made pursuant to the frivolous lawsuit statute, RCW 4. 84. 185." Biggs v. Vail, 119 Wn.2d 129, 133, 830 P. 2d 350 (1992) (Biggs 1). In any claim in a lawsuit has potential merit, the action may not be deemed frivolous. Tiger Oil Corp v. Dept of Licensing, 88 Wn. App. 925, 938, 946 P. 2d 1235 (1997). The fact that the action of civil conspiracy is still being litigated amongst the other parties named and that there is no adjudication yet on that claim or the rest of the lawsuit would give grounds to conclude that frivolous was not warranted by existing law or precedent set and the mere claim of frivolous now creates even more complication in the Judgment of the Trial court because by dismissing one defendant in the action of civil conspiracy without that action yet being adjudicated and then ruling frivolous the Judge is now showing prejudice with a predetermined disposition of the case and opinion of that existing claim of civil conspiracy that Coddington is still named in and still yet to be adjudicated therefore trial court making an opinion in summary Judgment of frivolous is bias and prejudice against the remaining and existing claim of civil conspiracy. This is yet another example of how the moving of the final Judgment was improper upon this action.

VI. CONCLUSION

This is a case where the Ferguson's deserved to have its claims tried by the trier of fact, not dismissed on summary judgment. The facts that were undisputed supported the Ferguson's claims; the facts that were disputed were particularly within the knowledge of the various defendants, requiring that an assessment of credibility

and demeanor be made. The Ferguson's could have not obtained affidavits to support their claims when facts they based their claim upon was firsthand knowledge and knowledge that was in the defendant's minds requiring discovery that would be required to be conducted through depositions and request for productions and also subpoenas. The Ferguson's additionally presented a substantial hardship that even proved that the day prior to the hearing of summary Judgment that the Ferguson's were still being held up by another demanding matter where their rights were affected in a legal matter that defendants in the action had brought against them in another court causing a concern of conflicts and interest of fairness. This Court should reverse and remand the case for trial and should discourage the false facts that were placed in the CR 54 (b) certification to allow an appeal on a matter that even this court questioned if it should be appealable when it requested additional findings of facts. Further this court should conclude that the determination of Frivolous now creates even more complication in the Judgment of the Trial court because by dismissing one defendant in the action of civil conspiracy without that action yet being adjudicated and then ruling frivolous the Judge is now showing prejudice with a predetermined disposition of the case and opinion of that existing claim of civil conspiracy that Coddington is still named in and still yet to be adjudicated therefore placing with his opinion in the summary Judgment a bias and prejudice against the remaining and existing claim of civil conspiracy. This is yet another example of how the moving of the final Judgment was improper upon this action. To further prevent prejudice these arguments made both on precedent set in case law, existing law, Court rules, and good faith arguments that are reasonable about the major conflicts that exist with dismissal of the Walsh's should overturn the ruling of the trial court to avoid any further prejudice, complications in the adjudication of the rest of the remaining claims as well

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as present the Ferguson's with a fair opportunity to substantiate their claims through further discovery.

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Pro Se Appellant/Plaintif

April Ferguson

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APRIL FERGUSON - FILING PRO SE

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Sender Name: April Ferguson - Email: aprilforthewin@gmail.com
Address:
6482 NE Fir St
Suquamish, WA, 98392
Phone: (360) 621-3405

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