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Case No. 49723-9-II

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

CHADWICK and APRIL FERGUSON, Appellants,
vs.

MARTHA STANDLEY and CHUCK STANDLEY, et.al,
Respondents.

BRIEF OF RESPONDENTS WALSH

BELL & DAVIS PLLC

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I. INTRODUCTION

On October 31, 2016, the Clallam County Superior Court entered its order granting Respondent Walsh's motion for summary judgment dismissing them from the case and granting judgment for reasonable attorney's fees and costsⁱ. CP 61-67. The remaining twenty-one (21) defendants were either former employees of the Fergusons or employees of the two defendant state agencies. CP 439-440.

II. ASSIGNMENT OF ERROR

Walsh assigns the following errors by the trial court:

1. The trial court erred in not striking portions of Fergusons' declarations as asserted in Defendant Walsh's Objections and Motion to Strike Portions of Plaintiffs' Affidavits in Support of Opposition to Walsh's Motion for Summary Judgment and Exhibits. CP 547-549.
2. The trial court erred in not striking Supplemental Affidavit of April Ferguson in transcribing the hearings that took place on September 16th, 2016 and the conduct of the Judge in support of motions for reconsideration of motion for continuance of Walsh's motion for summary judgment, motion for venue change, motion for Judge Coughenour to recuse himself. CP 533-535.

III. STATEMENT OF CASE

Marilyn Walsh operated a state licensed pre-school and childcare business for 26 years. CP 382. In 1983 she purchased the property at 191 West Sequim Bay Road, Sequim, Washington, CP 382-383, then built and operated her preschool and childcare business from there between January 1984 to June 2006 when it closed. CP 383. In 2006, Marilyn leased her building to Regan Larsen until February 2012. This was a full rent lease with a \$1,400.00 security deposit. CP 383. Ms. Larsen received her childcare and building licenses within the first two months of her lease term. CP 383.

At no time during either Marilyn's or Larsen's operations did the Clallam County Fire Marshall require a "wet" fire suppression system. CP 383, 385.

After Larsen left the property Marilyn advertised the building for lease. CP 383. In March, 2012, Fergusons' responded, CP 383, and on April 11, 2012, they signed a lease for the building. CP 383, CP 388-394.

Unlike Larsen's lease which required full rent from the start, Marilyn reduced Fergusons monthly rent from \$1500.00 to \$500.00 for the

first four months. CP 383-384, CP 389. This was to allow Appellants time to obtain their childcare and building licenses. CP 383.

In July, 2012, the Clallam County Fire Marshall, unexpectedly, required a wet fire suppression system be installed before the building could be licensed. CP 385. By July 9, 2012, Marilyn had signed a contract to have the system installed at a cost to her of \$25,000.00. CP 385. Before the new fire suppression systems could be installed, the attic needed re-insulation. CP 385. April Ferguson said her husband could install the insulation at a reduced labor rate so long as Marilyn purchased the material. CP 385. This occurred and the building was licensed on or about September 4, 2012. RP 80-81.

On September 19, 2012, Fergusons opened their preschool and daycare, CP 385. They operated until February 5, 2015 at which time the Department of Early Learning suspended Fergusons' childcare license and closed their business. CP 385.

During the two and a half years Fergusons operated their school, they never contacted Marilyn about problems with the parking lot, or problems with the building that Marilyn did not immediately fix, including installing a new hot water heater. CP 158. Except for one email on February 6, 2014 from Marilyn to April Ferguson, CP 366, there were no

emails between the parties regarding any disputed amounts owed on the building from August 13, 2012, CP 351, to February 10, 2015, CP 160-168. See also CP 341-344, 346, 351, 353, 357-358, CP 355, 361-363.

One time in 2014 before Ferguson's license was suspended, one of Ferguson's employees approached Marilyn asking whether she would lease the building to the employee and one other person if they could buy Ferguson's business. Nothing ever came of it. CP 158.

Fergusons were never current with the rent or utility payments. CP 385. The Lease required Fergusons to put the utilities in their name. They never made the change. CP 160, CP 385. Between February and March, 2015, Marilyn and Fergusons renegotiated the Lease to provide for bringing current the past due payments. CP 158-168, CP 361-363, 385-386. However no new lease was signed and no more payments received from Fergusons. CP 159, CP 386.

On March 16, 2015, Marilyn started an unlawful detainer action to evict Fergusons by serving a three-day notice to pay or vacate. CP 386, 398-399. After service of the notice, Fergusons abandoned the building. CP 386.

It took until April, 2016 for Marilyn to re-lease the building. CP 159.

On December 31, 2015, Fergusons brought this action before the Kitsap County Superior Court. CP 193, paragraph B.1. On February 12, 2016, upon Walsh's motion, venue was changed to Clallam County Superior Court. CP 520-523. On May 26, 2016, Fergusons filed their 47 page First Amended Complaint. CP 438-484. On June 10, 2016, Walsh filed their answer and affirmative defenses to that pleading. CP 568-576.

At no time from December 31, 2015 to June 30, 2016 did Fergusons submit written discovery requests or attempt to depose the Walsh's. CP 177.

On June 30, 2016, Walsh filed their summary judgment, with supporting declarations, seeking dismissal from the case. CP 410-434, CP 382-404, CP 405-409. The hearing was initially set for August 5, 2016. CP 435-437. At Fergusons' request, Walsh re-set the hearing to August 26, 2016. CP 565-567. Again, at Fergusons' request, Walsh continued the hearing a second time to September 16, 2016. CP 562-564.

On September 9, 2016, Fergusons filed their motion to continue the summary judgment hearing. CP 182-191, CP 192-200. They allege

the need to depose all of the State witnesses and the Walshes to verify their allegations against the Defendants. CP 187, paragraph 14. They claim the several continuances granted them were not for discovery purposes but to deal with other legal matters. They wanted Walsh's motion "put on hold" indefinitely. CP 144, lines 7-11, CP 155, CP 186, paragraph 8. RP 18, lines 21-24.

After the summary judgment motion was filed, and before any hearing, Appellant April Ferguson filed to become a candidate for a State Representative position representing Kitsap County. CP 141, lines 19-20, RP 29-31.

Fergusons' complaint asserts sixteen (16) causes of action. CP 471-484. These include claims for breach of contract, constructive eviction, breach of covenant of quiet enjoyment, unjust enrichment, abuse of process, negligence and gross negligence, false light/invasion of privacy, invasion of privacy/false light disclosure, defamation, tortious interference with contract expectancy, tortious interference with contract expectancy, civil conspiracy, violation of fourth and fourteenth amendments (42 USC § 1983), first amendment free speech, first amendment right to redress grievances, and public record act. However, in response to Walsh's summary judgment motion, Fergusons limited their

claims against Walsh to contract breach, constructive eviction, quiet enjoyment, unjust enrichment, civil conspiracy and abuse of process. CP 247 – 248. Although the trial court’s memorandum opinion, and final judgment, address all sixteen claims, CP 125-137, Fergusons only assign error to five claims, those being contract breach, constructive eviction, quiet enjoyment, unjust enrichment and civil conspiracy. *Brief of Appellant* at 3-4.

IV. ARGUMENT

A. Standard of Review.

Appellate Courts review the trial court’s grant of summary judgment de novo, performing the same inquiry as the trial court. *Ski Acres, Inc. v. Kittitas County*, 118 Wn.2d 852, 854, 827 P.2d 1000 (1992). Only evidence and issues called to the attention of the trial court will be considered. RAP 9.12. Summary Judgment is appropriate where there is no genuine question of material fact and the moving party is entitled to judgment as a matter of law. *Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995) (citing CR 56(c)).

In a summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact. If the moving party is a defendant and meets this initial showing, then the inquiry shifts to the plaintiff with the burden of proof at trial. If the plaintiff fails to

make a showing sufficient to establish the existence of an element essential to their case, and on which it bears the burden of proof at trial, the motion should be granted. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989)(citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Evidence is viewed in favor of the non-moving party. *Keck v. Collins*, 184 Wn.2d 358, 368, 357 P.3d 1080 (2015).

A “material fact” is one that affects the outcome of the litigation. *Eicon Constr., Inc. v. E. Wash. Univ.*, 174 Wn.2d 157, 164, 273 P.3d 965 (2012). In response to summary judgment “The nonmoving party may not rely on speculation, argumentative assertions that unresolved factual issues remain, or on having its affidavits considered at face value.” *Wash. Fed Sav. v. Klein*, 177 Wn. App. 22, 311 P.3d 53 (2013); *Little v. Countrywood Homes, Inc.*, 132 Wn. App. 777, 780, 133 P.3d 944 (2006). Unsupported conclusory statements alone “are insufficient to prove the existence or nonexistence of issues of fact.” *Hash v. Children’s Orthopedic Hosp.*, 49 Wn. App. 130, 133, 741 P.2d 584 (1987). The nonmoving party must set forth specific facts rebutting the moving party’s contentions and disclose that a genuine issue as to a material fact exists. *Seven Gables Corp. v. MGM/UA Entm’t Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

Affidavits or declarations filed in support or opposition of summary judgment shall be made on personal knowledge, set forth facts as would be admissible in evidence, and affirmatively show the affiant is competent to testify to the matters stated in the pleading. CR 56(e). A trial court cannot consider inadmissible hearsay statements contained in the affidavit or declaration. *Dunlap v. Wayne*, 105 Wn.2d 529, 535, 716 P.2d 842 (1986).

An Appellate Court can decide a case on any legal theory established by the pleadings and supported by the proof, regardless of the theory applied below. *Deep Water Brewing v. Fairway Resources Ltd*, 152 Wn. App. 229, 215 P.3d 990, 1005 (2009); *Barber v. Peringer*, 75 Wn. App. 248, 254, 877 P.2d 223 (1994).

Pro se litigants are bound by the same rules as attorneys. *Holder v. City of Vancouver*, 136 Wn. App. 104-106, 147 P.3d 641 (2006); *Westberg v. All-Purpose Structures, Inc.*, 86 Wn. App. 405, 411, 936 P.2d 1175 (1997)(citing *Patterson v. Superintendent of Pub. Instruction*, 76 Wn. App. 666, 671, 887 P.2d 411 (1994), *review denied*, 126 Wn.2d 1018 (1995).

B. Walsh's Assignment of Errors.

i. Walsh objected, and continues to object, to Fergusons' declarations and their exhibits. CP 547-549. The trial court ruled that Walsh's attorney did not argue the objections regarding the exhibits during the summary judgment hearing so the court admitted the exhibits over the written objection. RP 59-60. However, the court never ruled on the objections to the declarations themselves. Those portions objected to should not be considered in this appeal.

ii. Walsh objected, and continues to object, to Fergusons' Supplemental affidavit of April Ferguson in Transcribing that took place on September 16th, 2016 and the conduct of the judge in support of motions for Reconsideration of motion for continuance of Walsh's Motion for Summary Judgment, Motion for Venue Change, Motion for Judge Coughenour to recuse himself. This document, CP 70-82, should be stricken because it is an improper transcript. RP 31-32 (Hearing of October, 28, 2016) (Ms. Ferguson's even agrees it should be stricken on page 32). Although the trial court agreed to sign the order striking this document, RP 32 (Hearing on October 28, 2016), it was never signed. Fergusons' then included this document in their record on appeal.

As the objections, if sustained, will not preclude hearing the case on the merits, separate motions will be filed pursuant to RAP 17.1-17.8.

C. Trial Court Properly Denied Motion to Continue Summary Judgment.

A trial court's denial of a motion to continue a summary judgment is reviewed for abuse of discretion. *Colwell v. Holy Family Hosp.*, 104 Wn. App. 606, 615, 15 P.3d 210 (2010). A trial court abuses its discretion if it bases its decision on untenable grounds or unreasonable grounds. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971); *Coggle v. Snow*, 56 Wn. App. 499, 784 P.2d 554 (1990).

A trial court may continue a summary judgment hearing if the nonmoving party shows a need for additional time to obtain additional affidavits, take depositions, or conduct discovery. CR 56(f). The trial court may deny a motion for a continuance when (1) the requesting party does not have a good reason for the delay in obtaining the evidence, (2) the requesting party does not indicate what evidence would be established by further discovery, or (3) the new evidence would not raise a genuine issue of fact. *Butler v. Joy*, 116 Wn. App. 291, 299, 65 P.3d 671 (2003)(citing *Tellevik v. Real Prop. Known as 31641 W. Rutherford St.*, 120 Wn.2d 68, 838 P.2d 111, 845 P.2d 1325 (1992)).

The trial court ruled Fergusons failed to meet any of the three tests for continuance. CP 63-64, paragraph 2, RP 32-34. Their contract breach, constructive eviction, quiet enjoyment, and unjust enrichment claims only involve Fergusons and Walsh. Their response to summary judgment on those claims should have been detailed facts from them outlining specific material facts left for resolution, i.e. how the delay was caused by Walsh, or how it damaged them, and what parking and facility repairs Walsh failed to do. They do not show how deposing Marilyn Walsh, Jack Walsh, the fire Marshall, or the other defendants will provide any evidence creating a material issue of fact.

Further they fail to show how deposing any of the State employees and other defendants will lead to a civil conspiracy. Marilyn clearly stated what contact she had with Fergusons' and their employees, CP 158, paragraph 4, CP 159, paragraph 7, CP 366, CP 386-387, paragraphs 22-24, and the fact she had no contact with the State Defendants concerning Fergusons' business license other than to provide a declaration after Fergusons had abandoned the building. CP 386-387, paragraphs 22, 25. Even if Fergusons found their former employees and/or the State conspired to take away their business, nothing points to the Walshes as being part of the scheme. Fergusons' "vague, wishful thinking" of what they might get from additional discovery is not enough to justify a

continuance under CR 56(f). *Molsness v. City of Walla Walla*, 84 Wn. App. 393, 401, 928 P.2d 1108 (1996).

The Fergusons failed to do any pre-litigation investigation before filing suit. CP 503, paragraph 14. They did no discovery before Walsh filed summary judgment. Walsh provided not only more notice than required of the initial hearing for summary judgment, but also granted two continuances. The trial court properly denied Appellants' motion to continue.

Fergusons' argument they were too busy with other litigation to obtain responsive declarations or discovery is without merit. Everyone involved in litigation must adjust their schedules to meet deadlines. Walshes were always available to be deposed. In the over six months after Fergusons filed their case, there is no showing they could not have taken Walsh's depositions.

Further, Fergusons have no right to call an indefinite "time out" of this case so they can deal with other matters. They started this lawsuit. Walshes have a right to a speedy and inexpensive resolution of the action. CR 1. The Walshes granted Fergusons two continuances. If Fergusons' other matters prevented them from prosecuting this case, they should have voluntarily dismissed the claims against Walsh. There was no statute of

limitation issue. If, later, after proper investigation, they could have refiled the case. The court properly denied Fergusons a third continuance.

D. CR 54(b) Certification Accepted by Court of Appeals.

Issue is Moot.

This court remanded to the trial court for entry of additional findings of fact supporting a CR 54(b) certification. CP 43-44. This was intended to allow Fergusons to pursue their appeal of the summary judgment order dismissing Walsh from the case. Fergusons admit wanting this appeal to go forward. CP 22, lines 1-6, CP 37, yet later tried to recant at least as to the conspiracy theory. CP 17-18.

Fergusons misconstrue the effect of the additional findings. They were to assist in the CR 54(b) certification. Fergusons appear to argue it was improper for the trial judge to make findings that there was no evidence the Walshes were involved in a civil conspiracy with the other Defendants. However, as will be argued below, that is what the court found in its summary judgment ruling. That ruling however has no effect on this appeal or Fergusons' conspiracy theory against the other defendants. This Court could remand any or all of the issues for trial. If Fergusons ongoing discovery uncovers evidence of a conspiracy as to the remaining defendants, Fergusons can prove their case against them. If

evidence is discovered implicating the Walshes, Fergusons can seek relief under CR 60(b)(3) and RAP 7.2(e).

As this court accepted review as requested by Fergusons the issues raised by this assignment of error are moot. As a general rule, Appellate Court cannot pass on moot questions. “A case is technically moot if the court cannot provide the basic relief originally sought or can no longer provide effective relief.” *Dioxin/Organochlorine Ctr. V. Pollution Control Hr’gs Bd.*, 131 Wn.2d 345, 350, 932 P.2d 158 (1997)(quoting *Snohomish County v. State*, 69 Wn. App. 655, 660, 850 P.2d 546 (1993).

The court should disregard Fergusons’ argument.

E. The Trial Court Correctly Rules There Was No Breach of Contract.

The trial court correctly cut through Fergusons’ convoluted fantasy tale to conclude there was no issue of material fact supporting a breach of contract claim against Walsh. A breach of contract claim requires the plaintiff to prove (1) a duty imposed by the contract that (2) was breached, with (3) damages proximately caused by the breach. *Nw. Indep. Forest Mfrs. V. Dep’t of Labor & Indus.*, 78 Wn. App. 707, 712, 899 P.2d 6 (1995).

The known facts are that between 2006 and 2012, Walsh leased the building to Larsen who operated a daycare/preschool. CP 383. At no time during Larsen's occupancy was a wet fire suppression system required. CP 383, 385. In 2012, after Larsen vacated the building, Walsh advertised the building as ready for a new daycare/preschool. Fergusons responded to the email and on April 11, 2012, signed a written lease with Walsh to operate a daycare/preschool. The full monthly rent is \$1,500.00. However, here, the monthly rent for the first four months of the lease term was reduced to \$500.00. This was to allow time for Fergusons to license both their business and the building. CP 344-345, CP 383. Both parties were surprised when, in July, 2012, the Clallam County Fire Marshall required the building be equipped with a wet fire suppression system. CP 127, lines 16-19, CP 385. Marilyn quickly contracted for the systems installation which cost her approximately \$25,000.00. CP 385.

Once the fire suppression system was installed, the building was licensed on or about September 4, 2012, and Fergusons opened for business on September 19, 2012. CP 385. Fergusons operated their business for over two and a half years until their license was suspended. CP 385.

Fergusons claim four types of breach of contract. However, none of their claims were supported by any evidence in their declarations.

First, they wanted to open around September 3, 2012 but were delayed for approximately two weeks. However, the lease does not specify when they planned on opening and Walsh had no duty to make the building ready by that date. RP 51. Even if there was a duty to have the building ready by September 3, 2012, there was no showing that Walsh did something that caused it to open late. Once the suppression system was required in July, 2012, Walsh immediately contracted for the installation. She did not breach any duty

The Fergusons further fail to explain why they did not open on September 5, 2012 the day after they presumably received their license. They admit signing up clients in August, 2012 and taking money. RP 82. They completely failed to prove damages by a later opening.

The Fergusons also had the right to terminate the lease after learning the Fire Marshall required installation of the fire suppression system. The lease provided an initial term of one month, May 1, 2012, for a reduced rent of \$500 renewable for three additional one-month periods at the same rate. CP 388, paragraph 1, "Initial Term." This initial term allowed Fergusons to walk away and terminate the agreement if

either the building or their business could not be licensed. Fergusons could have terminated either at the end of July or August, 2012. However, they exercised each renewal during the licensing period which allowed the Fergusons to obtain their building and business licenses and Marilyn to bring the building up to current code requirements. Both parties performed; the building was licensed and Plaintiffs opened their school. There was no breach.

Second, Fergusons claim a reduced rent, or no rent should have been charged until they opened for business. Brief of Appellants, pages 42-48, CP 158-159, paragraph 5, CP 160-161. However, the lease clearly spells out the rent during the first four months with the full \$1500.00 due September 10, 2012. CP 389, paragraph 3, "Lease Payments." Rent can only be reduced if the building is damaged. Paragraph 15 of the Lease reads in part:

Partial Destruction of Premises. Partial destruction of the leased premises shall not render this lease void or voidable, nor terminate it except as herein provided. If the premises are partially destroyed during the term of this lease, Lessor shall repair them when such repairs can be made in conformity with governmental laws and regulations, within 60 days of the partial destruction. Written notice of the intention of Lessor to repair shall be given to lessee within 10 days after any partial destruction. **Rent will be reduced proportionately to the extent to which the repair operations interfere with the business conducted on the premises by lessee. . . (emphasis added)**

CP 390-391. This building had not been damaged but was being improved by installation of the fire suppression system. Fergusons fail to show how the fire suppression system interfered with their occupancy of the building during the summer of 2012. Although work in the attic was required for the new system, nothing in Fergusons' declarations say they were prevented from working on the rooms they would use once opened for business.

The Fergusons failed to provide any evidence as to what damages they suffered by the alleged delay in opening. The first full month rent was due September 10, 2012. Fergusons opened on September 19, 2012. There was no evidence how many or how much, if any, customers or revenue, respectively, were lost because of the delay in opening and therefore no reason for any reduction in rent. Fergusons admit signing up clients in August, 2012.

Third, Fergusons claim that Walsh breached the lease when they failed to maintain the building and parking lot while they operated. Yet, Fergusons failed to give specific examples of how Walsh failed to maintain the parking lot or building. CP 129, lines 7-12. Nothing in their declarations gives specifics of when and how Walsh failed to maintain these areas. To the contrary, Walsh established that they always responded

to any problem with the building and that Fergusons never called about problems with the parking lot. CP 158, lines 9-13, CP 384-385, paragraphs 11-12.

As argued, and noted by the court below, Fergusons are quick to communicate especially by email. However, between the time they opened in 2012 and the parties renegotiating the lease in 2015, there were no emails from Fergusons complaining of either a failure to maintain the premises or parking lot, or the need to reduce the early rent. CP 129, lines 7-14, CP 158-159, paragraph 5.

Finally, the facts necessary to establish a breach of contract claim are solely within Ferguson's knowledge. They did not need to depose anyone in order to outline the evidence supporting their allegations. Yet in reviewing their declarations you get argumentative assertions and conclusory statements without factual proof. They are spinning a story to create what they say are facts to fit the law.

The breach of contract claim was correctly dismissed.

F. The Trial Court Properly Dismissed the Claim for Unjust Enrichment.

“Unjust enrichment is the method of recovery for the value of the benefit retained absent any contractual relationship

because notions of fairness and justice require it.”

Young v. Young, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008). It requires proof and establishment of all three elements, namely: (1) the defendant receives a benefit, (2) the received benefit is at the plaintiff’s expense, and (3) the circumstances make it unjust for the defendant to retain the benefit without any payments. *Id.* 484 – 485.

Further, a person is unjustly enriched when he profits or enriches himself at the expense of another contrary to equity. *Farwest Steel Corp. v. Mainline Metal Works, Inc.*, 48 Wn. App. 719, 731-732, 741 P.2d 58 (1987). Enrichment alone will not suffice to invoke the remedial powers of a court of equity. It is critical that the enrichment be unjust both under the circumstances and as between the two parties to the transaction. *Id.* at 732. The mere fact that a defendant received a benefit from the plaintiff is insufficient alone to justify recovery. The doctrine of unjust enrichment applies only if the circumstances of the benefits received or retained make it unjust for the defendant to keep the benefit without paying. *Chandler v. Wash. Toll Bridge Auth.*, 17 Wn.2d 591, 601, 137 P.2d 97, (1943).

Fergusons do not quantify what “benefit” Walsh retained or unjustly received, nor allege the circumstance why Walsh should pay for

anything. The Fergusons signed a written lease for Walsh's building. Paragraph 12 of the Lease entitled "Repairs and Maintenance" outlines Fergusons' and Walsh's responsibilities to repair and maintain the building.ⁱⁱ Fergusons possessed and controlled the leased property for over two and a half years during which they operated their school. When they abandoned the property, they removed all of their personal property and part of the outside fence leaving the building in disrepair in violation of paragraph 13 of the Lease. CP 386, lines 1-10. They also owed Walsh over \$7,000.00 in past due rent and utility charges. CP 161. Whatever they might have done to "improve" the property was not unjustly kept.

Further, Walsh paid for the work done by Fergusons on the attic. CP 385, paragraph 14, RP 54-55. The Fergusons fail to outline what other work Walsh should have been responsible for and its value. Fergusons should have produced bills they paid for parking lot maintenance or repair of major appliances. If there were any they are within the Fergusons sole control. They presented nothing.

This information did not require Fergusons to depose anyone to obtain.

G. The Trial Court Properly Dismissed the Claims for Breach of Implied Covenant of Quiet Enjoyment and Constructive Eviction.ⁱⁱⁱ

Fergusons initially argue, incoherently and confusingly, that Walsh's actions together with Defendant Coddington somehow constructively evicted Fergusons. Brief of Appellants, page 53. There is no citation to the record, nor can one be found, supporting this claim.

Fergusons then assert that Walsh violated their implied covenant of quiet enjoyment in, and constructively evicted them from, the building by attempting to collect past due rent and unpaid utility bills. Brief of Appellant 53-58, CP 233-236.

By the time Walsh served Fergusons with a three-day notice to pay rent or vacate, they had already attempted to renegotiate the lease, and thought they had agreed on new lease terms with Fergusons. CP 158-159, CP 385-386, paragraph 18. The new lease would have incorporated the past due sums and allowed the Fergusons to stay in the building. CP 158-159, paragraphs 5 and 6. However, Fergusons failed to show up when they said they would to sign the new lease and make the first rent payment. CP 159, paragraph 6.

It is interesting to note, that in the emails from April Ferguson regarding the new lease, she never once mentions alleged breaches for failure to maintain the building or parking lot. CP 160-161, CP 165, CP 167-168.

When the three-day notice was served, Fergusons were behind \$7,842.86 in rent and unpaid utility bills. CP 161-164. This is the first time Fergusons raised the issue of lower or no rent for the first three months of the lease term. CP 158-159, paragraph 5.

The implied covenant of quiet enjoyment protects a tenant from any wrongful act by the lessor which impairs the character and value of the leased premises or otherwise interferes with the tenant's quiet and peaceable use and enjoyment thereof. *Cherberg v. People Nat. Bank of Washington*, 15 Wn. App. 336, 343, 549 P.2d 46 (1976). Constructive eviction involves an unlawful intentional or injurious interference by the landlord that deprives the tenant of the means or power of beneficial enjoyment of all or part of the leased premises or materially impairs such beneficial enjoyment. *See, Old City Hall LLC v. Pierce County Aids Foundation*, 181 Wn. App. 1, 329 P.3d 83 (2014)(citing *Aro Glass & Upholstery Co., v. Munson-Smith Motors, Inc.*, 12 Wn. App. 6, 528 P.2d 502 (1974) and *Myers v. W. Farmers Ass'n*, 75 Wn.2d 133, 449

P.2d 104). Generally, such claims involve physical problems with the premises that the landlord refuses to fix or the landlord's own conduct directly interferes with the tenant's business.

No Washington case has been found stating that such implied covenant is violated, and constructive eviction occurred, if a lessor attempts to collect back due rent and other charges. Other than the Fergusons claim to reduced or no rent for the first three months of the lease term, they do not dispute the remaining unpaid rent and utility charges are due. Even if you reduce the back due rent \$1500.00, other past due rent and unpaid utility charges are still owed justifying Walsh's action.

The case cited by Fergusons, *Tenn-Tex Properties v. Brownell-Electro, Inc.*, 778 S.W.2d 423 (Tenn. 1989), does not help them. In that case, the Landlord unreasonably demanded payment for rent and other charges not yet due after the tenant indicated it would not renew the lease when the current term ended. Up until that point the tenant had been current in its rent payments. Based on those facts the court concluded there had been a constructive eviction by the Landlord's conduct that amounted to a breach of the covenant for quiet enjoyment. *Id.* at 428.

That is not the case here. The Walshes only sought to recover past due rent and utilities charges. They pursued recovery only after the State of Washington had suspended Fergusons license and closed their business and Fergusons breached their agreement to modify the lease and failed to make the initial modified rent payment. The Walshes did nothing to interfere with Fergusons' business operation or use of the building.

These claims were properly dismissed.

H. The Trial Court Correctly Dismissed the Civil Conspiracy Claim.

A civil conspiracy requires clear, cogent, and convincing proof that (1) two or more people combined to accomplish an unlawful purpose, or combined to accomplish a lawful purpose by unlawful means; and (2) the conspirators entered into an agreement to accomplish the object of the conspiracy. *Wilson v. State*, 84 Wn. App. 332, 350-51, 929 P.2d 448 (1996)(citing *Corbit v. J.I. Case Co.*, 70 Wn.2d 522, 528-29, 424 P.2d 290 (1967)). A suspicion or commonality of interests is insufficient to prove a conspiracy. *Wilson v. State* at 351 (citing *Corbit v. J.I. Case Co.*, at 529). If the facts and circumstances on which the plaintiff bases his claim of conspiracy are "as consistent with a lawful purpose as with an unlawful undertaking" the facts are insufficient to establish a conspiracy.

All Star Gas. Inc. of Wash. v. Bechard, 100 Wn. App. 732, 740, 998 P.2d 367 (2000).

Fergusons have no proof of a civil conspiracy between anyone let alone Defendant Walsh and any other party. Fergusons provide no evidence as to why their license was suspended, or what was revealed at the suspension administrative hearing that would implicate the Walshes in any conspiracy.

Marilyn sought Fergusons' removal from the building because of non-payment of rent and utility bills; a lawful purpose. Months after Fergusons left the building, Marilyn negotiated with several people to either buy or lease the building; a lawful purpose. Walsh needed funds to repay the debt secured by the building. CP 165, CP 168.

The fact Marilyn supplied one declaration to the administrative hearing involving Fergusons and the Department of Early Learning does not prove anything and certainly not a conspiracy. The declaration was supplied after Fergusons abandoned the building. CP 387, paragraph 25.

The fact Marilyn knew some of the licensing people do not show a conspiracy. Marilyn was not involved in Fergusons' day to day business; she had her own full-time job. CP 386-387, paragraphs 22, 23. She was

not involved in the licensing issue other than the declaration she was asked to provide. She did not talk with the regulators regarding the Fergusons. CP 386, paragraph 22.

Marilyn wished the Fergusons to succeed and let them fall months behind in rent and utility bills hoping they would turn their business around. If Marilyn was really trying to pull one over on Fergusons she would have pursued eviction the first month the rent was late.

I. The Trial Court Properly Granted CR 11 Sanctions.

CR 11 applies to those signing pleadings who are certifying after reasonable inquiry: (1) it is well ground in fact, (2) warranted by exiting law or a good faith argument for the laws extension, modification or reversal, (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief. Filings that violate this rule allow the court to sanction the person signing the pleading. CR 11(a).

The purpose of this rule is to curb baseless filings and curb abuses of the judicial system. *Skimming v. Boxer*, 119 Wn. App. 748, 754, 82

p.3d 707 (2004)(citing *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994). Because of their chilling effect, a trial court should impose them only when it is patently clear that a claim has absolutely no chance of success. *Skimming v. Boxer*, 119 Wn. App. at 755. In imposing rule 11 sanctions the trial court must make a finding that either the claim is not grounded in fact or law and the party failed to make a reasonable inquiry into the law or facts, or the paper was filed for an improper purpose.

Ferguson admitted doing no pre-trial investigation and relied solely on discovery to find facts supporting their claims. CP 503, paragraph 14. There were no facts from which a good faith argument could be made to sue Walsh. This was a witch hunt designed to harass and punish Walsh. The sanctions were properly awarded.

The trial court also found the entire case frivolous under RCW 4.84.185.^{iv} CP 135-136. The same should be found of this appeal. Fergusons have no reasonable basis for suing Walsh. Fergusons operated their business for over two years without complaining to Walsh about the building or rent. For some unexplained reason Fergusons lost their license to run their preschool. However, it had nothing to do with the building. Fergusons, in their anger, sued Walsh for no other reason but to harass and punish them for presumably serving them the three-day notice

to pay rent or vacate, and filing the declaration in the licensing administrative hearing. Their alleged conspiracy theory is based solely on the fact Marilyn knew some of the State regulators who revoked Fergusons' license; no facts were alleged that Marilyn actively participated in the revocation process. It would make no sense as Marilyn wanted and needed to Fergusons to succeed. CP 387, paragraph, paragraph 24.

In spite of no facts against Walsh, Fergusons filed two complaints, the first containing over 200 pages, the second 47 pages. They are extremely difficult to read; do not clearly set forth facts supporting any action against Walsh and base their claims on only conclusory statements. CP 136-137. Fergusons admit they did no pre-trial investigation before filing suit, but were relying on discovery to prove their speculative assertions. CP 503, paragraph 14. Their responses to Walsh' summary judgment does not support material facts justifying their claims.

The court should affirm the trial court's imposition of sanctions based on both CR 11 and RCW 4.84.185.

J. Respondents Entitled to Award of Attorney's Fees and Costs on Appeal.

Walsh requests an award of attorney's fees and costs for this appeal. RAP 18.1(a) provides:

“If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either of the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specified that the request is to be directed to the trial court.”

Washington courts follow the “American Rule,” where each party pays its own attorney fees unless an award is authorized by contract, statute, or a recognized ground in equity. *Dave Johnson Ons. Inc. v. Wright*, 167 Wn. App. 758, 783, 275 P.3d 339, *review denied*, 175 Wn.2d 1008 (2012). The Court of Appeals reviews de novo whether a legal basis exists for awarding attorney fees by statute, under contract, or in equity, and reviews the reasonableness of the award for an abuse of discretion. *Cook v. Brateng*, 180 Wn. App. 368, 375, 321 P.3d 1255 (2014). A trial court abuses its discretion when its decision is unreasonable, based on untenable grounds, or made for untenable reasons. *Id.* at 375.

Fergusons' claims against Walsh are based on the lease agreement between the parties. Paragraph 25.1 states:

Attorney's Fees. If either party retains an attorney to enforce any provisions, covenants or conditions of this lease, whether or not suit is brought, the defaulting party agrees to pay reasonable attorney's fees.

Assuming Walsh prevails on this appeal, the Court of Appeals should award Walsh attorney's fees for having to defend this appeal based on the contract paragraph 25.1 of the Lease. When a contract provision authorizes attorney fees at trial, they are also available to the prevailing party on appeal. *Thompson v. Lennox*, 151 Wn. App. 479, 491, 212 P.3d 597 (2009).

Fergusons waited for over two and a half years after opening their business in Walsh' building to claim a breach of contract based on pre-opening events and the failure to maintain the parking lot and building. However, Appellants have no specific events supporting the later claims and provide no basis for damages for all of their claims. These damages are contract based and the Fergusons should have been able to calculate them with certainty, whether lost revenue between the time of September 3, 2012^v to September 19, 2012 when they opened as well as actual damages for payments to maintain the parking lot and those items in the building that were Walsh's responsibility. They produced nothing.

The court could also award fees on appeal under CR 11 or RCW 4.84.185. As set out in Section I above, CR 11 is designed to curb baseless filings and curb abuses of the judicial system. Fergusons filed their case without doing reasonable investigation; filed lengthy and

confusing complaints that make baseless allegations against Walsh. The Walshes have had to spend substantial time defending against these claims.

Similarly, this court can award attorney's fees under RCW 4.84.185. The trial court found the entire case frivolous under RCW 4.84.185.^{vi} CP 135-136. The same should be found of this appeal. Fergusons have no reasonable basis for suing Walsh and therefore no basis for the appeal.

Walsh has had to defend against these baseless claims and they should be awarded reasonable attorney's fees on appeal.

V. CONCLUSION

Fergusons filed a baseless suit against Walsh. Their affidavits filed in opposition to Walsh's summary judgment in support of their other motions contain no facts that would defeat Walsh's motion. This Court should affirm the trial court's rulings and award Respondent Walsh reasonable attorney's fees and costs for defending this appeal.

DATED this 9th day of January, 2018.

BELL & DAVIS PLLC

By: 

W. JEFF DAVIS, WSBA#12246
Attorney for Jack & Marilyn Walsh,
Respondents

ⁱ The summary judgment order also denied Appellants motion for continuance. CP 66, line 26. On November 1, 2016 the court filed his memorandum opinion denying Appellants' motions for venue change, for Judge Brian Coughenour to recuse himself, and for reconsideration of their motion to continue Walsh's' summary judgment. CP 68-69

ⁱⁱ **12. Repairs and Maintenance.** Lessee shall maintain the premises in good repair at its expense. Lessee's obligation to make necessary repairs shall not extend to any repairs to the roof structure, or to any bearing columns or bearing walls, or to any exterior walls of the building or structure that may be necessary to maintain the structural soundness of those columns and walls, or repairs to the electrical or plumbing.

12.1. Lessee shall be responsible for mowing and maintaining the existing landscaping.

12.2. Lessee shall be responsible for providing adequate depth of cushioning material under any outdoor equipment as per licensing requirements.

12.3 Lessor shall be responsible for keeping and maintaining the parking lot in good repair.

12.4 Lessor shall be responsible for the good repair of the major appliances including the refrigerator, freezer, stove, dishwasher, wall heaters, light fixtures.

12.5 Lessee shall be responsible for shampooing the carpets yearly, at minimum.

ⁱⁱⁱ Appellants fifth assignment of error, contained on page three of their Brief of Appellants, challenges the trial court's dismissal of both their claim of breach of the implied covenant of quiet enjoyment and constructive eviction.

^{iv} RCW 4.84.185.

Prevailing party to receive expenses for opposing frivolous action or defense.

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. This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether he position of the nonprevailing party was frivolous and advanced without reasonable cause. In no event may such motion be filed more than thirty after entry of the order.

The provisions of this section apply unless otherwise specifically provided by statute.

^v The court can take judicial notice that in calendar year 2012, September 1 and 2 were a Saturday and Sunday. Monday, September 3rd would have been the first business day of the month.

Case No. 49723-9-II

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

**CHADWICK and APRIL FERGUSON, Appellants,
vs.**

MARTHA STANDLEY and CHUCK STANDLEY, et.al, Respondents.

PROOF OF SERVICE

BELL & DAVIS PLLC

**By: W. JEFF DAVIS, WSBA#12246
Attorney for Respondents**

I, Mindy Davis, certify under the penalty of perjury under the laws of the State of Washington that the following is true and correct:

I am a legal assistant to W. Jeff Davis, attorney for Respondents Walsh, over the age of 18 and not a party to this action. My business address is 433 N. 5th Ave., Suite A, PO Box 510 Sequim, WA 98382.

On January 10, 2018, I caused to serve true and correct copies of the following documents: (1) Brief of Respondent Walsh; and (2) Proof of Service via first class US Mail to the following:

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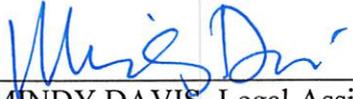
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DATED this 9th day of January, 2018.


MINDY DAVIS, Legal Assistant

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