

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 REPLY BRIEF TO RESPONDENTS BRIEF

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I ARGUMENT

A. Rebuttal to respondent's brief "Statement of Case"

Walsh's claim they leased their building to Regan Larsen until February 2012 and that this was a full rent lease and that Ms Larsen received her childcare and building licenses within the first two months of her lease term. The Appellant hereby inserts that this information is misleading and was presented to the trial court as an issue of material fact because Ms Larsen was also offered a similar arrangement as was given to the Ferguson's and that arrangement was not to seek building licenses but to acquire a department of Early Learning License. The Fergusons asserted in their affidavits at time of trial and within oral argument that the Walsh's did not give a discount that was prorated to account for building licenses but that the discount was part of the deal to receive the department of Early Learning license and that that license was unable to be gotten due to the building not being suitable for the intended and agreed upon use of a daycare license. This is an issue of material fact and the Walsh's would like to lead the court to believe that the 500.00 a month was already prorated to take building licensing into account rather than the court to learn that that was a discount offered to ensure the Fergusons off to a good start with their business during the license process which takes up to 90 days and even can be acquired much sooner as long as no delays such as building issues. In this case the Fergusons were unaware at the time of signing the lease that the building was not occupiable for its agreed upon use which was to only be a daycare center per lease agreement **CP 382 attached EX A and CP 201 and attached affidavit of April Ferguson with EX 28, EX 2, EX 4, EX 6,7,8,9,10,11,13,15 and CP 143** . If this court acquires into the facts presented by the Ferguson's to the trial court they will learn that the purpose of the 500.00 a month until licensed by Department of Early Learning was an issue of material fact for many factors including the fact that the Ferguson's argued that the building license issues blocked their ability to timely obtain their DEL license and therefore the Ferguson's were unable to open by

their projected date or acquire money to make the full month rent and down as the lease required and matter of fact the Ferguson's were so delayed due to the building not being able to be used as agreed upon per lease agreement that the Ferguson's had to withdraw their license request and resubmit it **CP 201 and its attached affidavit of April Ferguson EX 10**

Paragraph 3 of page 2 the Respondent claims that after Larsen left the property Marilyn advertised the building for lease. This information leaves out important facts that were issues of material fact in summary Judgment and that was that the building was not advertised for lease solely but that it was advertised as a business opportunity and recently licensed. This advertisement was placed on craigslist and the Ferguson's responded which is attached **CP 201 and its attached affidavit and EX 13**. Within verbal communications the Walsh's further advertised the building as ready to be relicensed and communicated such to the Ferguson's offering them a 500.00 a month until the DEL license was issued as part of the arrangement. At no time Ferguson's were notified that the building would not be occupiable for its intended upon and required purpose which was only to be a daycare preschool which is mentioned in the lease agreement **CP 382 attached EX A**. This created an issue of material fact as the Walsh's continued to argue that the contract was not violated because the 500.00 accounted for prorated rent to receive building licensing. Ferguson's in both their affidavit and argument both in brief and in oral continued to assert that the 500.00 a month was not for building licensing and that the building was advertised as ready to be licensed **CP 201 and its attached affidavit and EX 13**. Ferguson's further refer the court back to their opening brief in this appeal where they argue this in more length. Ferguson's also presented in affidavit that further discovery would likely lead to issues of material fact if they could obtain a subpoena to craigslist for the advertisement, depose Helana Coddington who helped open the building and was witness to the building licensing issues, Nicole Goettling who was witness to the licensing issues created by the building not being ready and city building department staff and records as well as state and local fire marshal records and witnesses to verify these issues of material fact **CP 143, 182**. Ferguson's mentioned

good cause for not deposing Coddington who was a key witness to these facts because Coddington was also a defendant in the same suit and Coddington had not yet answered to the complaint. Ferguson's explained that it was not in the best interest of their discovery to depose an individual before they answered the complaint as well as Coddington could have been called as a witness against the Ferguson's in a recently opened pending action with Child Protective Services and therefore a conflict of interest had arisen preventing discovery at that time. **CP 143, 182**

The Walsh's provided no exhibits or evidence to back up their claim that the 500.00 a month was for building licenses. The Ferguson's although in summary Judgment provided email communications that supported them that this same arrangement of 500.00 a month was offered to Regan Larsen as well as well as it was only for the Department of Early Learning license. The Ferguson's also provided an email in response to the craigslist add that showed a title on the email in response to the add that said "CHILDCARE BUSINESS OPPORTUNITY" and that this substantiated the fact that not just the building was for lease but it was being advertised as a daycare childcare opportunity which substantiates the facts presented by the Ferguson's that it was being advertised as ready to reopen and recently licensed. The Ferguson's were misled to believe the building itself was already licensed and equipped to be used for a daycare license. The Ferguson's were led to believe they merely had to relicense with the Department of Early Learning and that they had a ready to reopen daycare center and this is further seen in the content of the communications from the Ferguson's in **CP 201 attached affidavit of April Ferguson and its exhibit 4** where Ferguson says in email "like you said the place was just licensed" which referenced in person conversations where Walsh advertised the premises as ready to relicense with Department of Early Learning.

The final paragraph of page 3 the Walsh's claims they were never contacted about building issues exception of one February 6th 2014 but the respondent failed to mention that most communications were in person with the Walsh's as the Walsh's lived on the

same street only a block down the road from the daycare center and most all interactions took place at the Walsh's address and in person. The Ferguson's to verify these facts required the ability to depose both the Walsh's and the Coddington's once the Coddington's responded to the complaint. The time of taking a deposition and order of discovery is entirely up to the parties. The Ferguson's had a right to act in the best strategical sense for their claims and the Ferguson's believed it was unwise to depose a person before having their response to the complaint. With the motion for a more definite statement put on hold while the court went through every Judge finding a Judge who would hear the case the Plaintiff held off on requiring defendants to respond in the interest of fairness for all parties. The Plaintiff explained this to the Judge as seen in the **RP**.

In dispute of the facts presented on page 4 of the Respondents brief the Appellants presented in affidavit that the Walsh's and the Coddington's communicated at their daycare center as well as spoke of their communications with each other and even used those communications in threats and acted as if the Coddington's would obtain the building as soon as the complaints being put in by Coddington and Bell caused the Ferguson's to be shut down. The Ferguson's offered issues of material fact because these were of personal knowledge to the Fergusons and were contrary to that being stated of the Walsh's where they claimed that the employees inquired only once in 2014. Ferguson's also offered another issue of material fact showing collaborating evidence of their communications and intentions when the Ferguson's entered in as exhibit a Facebook image that showed that shortly after the Ferguson's lost the building that the Coddington's and Bell's were advertising their opening of a daycare center as well as they discuss it in a newspaper article for spring of 2016 and claim in that article that they had spent 7 months saving for opening the center when the building became available in spring of 2015 which was also offered as exhibit **CP 201 and its supporting affidavit of April Ferguson and its exhibits 27 and 26**. This contradicts the Walsh's claim that they made in their affidavit in support of summary Judgment that it took them 8 months to find a new tenant and they paint themselves as the victims of the

Ferguson's actions **CP 382 paragraph 21**. This is misleading to the court as well as possible perjury because the Walsh's had agreed to enter into a lease with the Coddington's almost immediately after the Ferguson's lost the building even though they would not be required to enter into an actual lease and pay rent for nearly 8 months later all while the Walsh's spent thousands into renovations to improve the quality of the building including knocking out walls, new heaters and air conditioning units and several other changes. The Walsh's claimed in the affidavit they had to spend a lot of money due to the conditions the Ferguson's left the building in order to make it able to be rented again but they fail to give amounts, as well as what exactly the Ferguson's left in poor condition exception of some common rare in tear of carpets and paint.

Paragraph three of page 4 of the Respondents brief they claim that in March of 2015 Marilyn and Ferguson's renegotiated the Lease to provide for bringing current the past due payments however no new lease was signed. The Ferguson's presented in affidavit that the Ferguson's were being coerced to pay amounts they did not agree upon or be evicted so the Walsh's could allow Coddington and Bell to lease the premises. The Fergusons were being threatened to have this used against them to help terminate their daycare license which was being disputed on appeal. The Ferguson's claimed this in their affidavit and that it was these threats and actions that led to what they believed was constructive eviction due to the actions of the landlord who was trying to force their hand under threat and coercion with Coddington **CP 201 and its attached affidavit of April Ferguson and its exhibit 15 and 20** where mention is made about the work that the Fergusons put into the building at the beginning and substantiates the claims the Ferguson's were in disagreement about the amount being now sought after. When the Ferguson's were construct evicted Walsh contacted the daycare licensor and assisted the licensor in bringing facts to the administrative courts to allow for a moot motion claiming that Ferguson should not get an appeal of the suspension of their license because they had lost the building . Also, within the respondents brief they claim Department of Early Learning suspended their license and closed their business. The

Ferguson's business was not closed the license was suspended and they were deciding to pursue a stay of the action in order to stay open pending appeal. The Walsh's actions were in collaboration with the licensor Marilyn Walsh to pre-vent that appeal from happening. The Ferguson's claimed they knew this from threats and comments said and that if given opportunity to conduct discovery they believed they could substantiate the facts they knew as firsthand knowledge. Fergusons also pointed out that Marilyn Walsh lied in affidavit saying she had not been in contact with Martha Standley and after the Fergusons in their responsive brief for summary Judgment mentioned that Martha Standley affidavit in support of the moot motion for the administrative hearing discussed the landlord calling her to let her know the Ferguson's were out of the building it was at that time that Walsh made a new updated affidavit to supplement and acknowledged she had been in communication **CP 157,382**

Paragraph one of page 5 of respondents brief they claim it took until April of 2016 to release the building. Please refer to affidavit of Marilyn Walsh where she claims 8 month Then to the exhibits presented by the Ferguson's and their affidavit in summary Judgment to see the obvious conflicting timelines being given and presented within this argument **CP 201 and its supporting affidavit of April Ferguson and its exhibits 27 and 26 and CP 382 paragraph 21.**

Paragraph 2 and3 of page 5 is disputed by facts presented in the appellants opening brief where the justifications for why not depositions or discovery was conducted is described as was it also given in response to summary judgment and in attempt to seek a continuance.

Page 6 of the respondents brief they discuss that the request for continuances was to put the case on hold indefinitely and that the continuances were requested so the appellant can deal with other legal matters. This is correct the appellant did not want to

address the motion until the other legal matter was resolved in trial which was set and the Ferguson's had given a timeframe and therefore at no time did the Walsh's present any evidence in any of their exhibits or facts that substantiated the fact the they claim the Ferguson's wanted the motion put on hold indefinitely. The Ferguson's agreed to have the motion hearing date in September where at that time they would decide how they wanted to go about it **CP 201 and attached exhibit 29** (CITE SECTION OF VERBATIME REPORT WHERE ARGUED WITH Judge about this).

Paragraph 2 of page 6 the respondents attempt to distract this court with a not relevant matter to this hearing and Appellant believes a misleading misconstrued fact. The respondent claims "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," Its important for the court to see how this has no relevance but to mislead the court to believe the Ferguson's had time to deal with the summary Judgment and to discredit the Ferguson's claim about the burden upon their time and ability to properly defend due to another conflicting matter of a legal action taken against them by other defendants in the the same case at that time. It is also important to understand that filing period for House of Representatives takes place in the first part of May and is ended within 5 days and that the primaries were far over before the summary Judgment was even heard. The Walsh's mislead the court to believe the Ferguson's filed for office after the summary Judgment motion was brought but this is not true because in their own statements earlier on page 5 paragraph 3 of the respondents brief they claim they filed for summary Judgment on June 30th. The Ferguson's in May could of not known the dependency action against them brought by defendants in this case would of continued and barred them down as long as it did and neither could they have predicted that summary Judgment would be brought either. The Walsh's do not provide the court with any information of how Ferguson spent her time or if she even prevailed at running for office or if her campaign was adversely affected by the very actions barring her from pursuit of her case. There is simply no purpose but to discredit the appellant with this comment about her running for office.

Page 12 the Respondents claim, "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." This comment is contrary to the fact as the Ferguson's presented lengthy amount of issues of material fact in their affidavit it alone and within their own personal knowledge and the issues of material fact necessary to defeat summary Judgment was in the minds of the moving party and therefore required an examination of character and credibility to establish those issues of material fact. The affidavits of the Walsh's and the Ferguson's outlining the issues were conflicting and require an examination of character and credibility as well as the Ferguson's listed others who had knowledge of the events including Coddington a codefendant in the claim of civil conspiracy and a witness to the other claims against the Walsh's. The Ferguson's presented to the court and this court as well in their opening brief that it would of not been realistic to expect the Ferguson's to be able to be able to obtain supporting declarations from defendants in the case in order to provide the issues of material fact required to defeat summary Judgment and therefore an examination of character in credibility needed to be conducted which was a deposition. If affidavits and counter - 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.). 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' . 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).

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).

Paragraph 2 of page 12 of the respondents brief they "Marilyn clearly stated what contact she had with the Ferguson's employees" Ferguson's recall many other times of contact as well as Marilyn threatening to give Coddington the business as well as Coddington and Bell discussing with Ferguson Marilyn and their communications with Marilyn when threatening the Ferguson's. This was information that was first hand knowledge again requiring an examination of character and credibility to determine the credibility of the parties who have conflicting stories of fact within their affidavit's which would create an issue of material fact. At the very least the Ferguson's stating these issues without being tested for credibility under the penalty of perjury presented cause for a suit and therefore at the least would of defeated claims of frivolous upon the claim of civil conspiracy, constructive eviction, abuse of process, and quite enjoyment. The court should refer back to the arguments in the Appellants opening brief to examine the cause for bringing suit and the reason the Ferguson's placed contract-based claims with Civil Conspiracy and how they connected together. Further the Respondent refers to the desired discovery as "wishful thinking of what they may get". Ferguson's insert that they had first hand knowledge and therefore it was not wishful thinking that when examining witnesses under the penalty of perjury that it would lead to truthful statements or statements that would expose the credibility of the defendants.

Paragraph 2 of page 13 of respondents brief state "The Ferguson's failed to do any pre litigation investigation before filing suit" The Walsh's provide no communication with the Ferguson's where the Ferguson's told them they did no prelitigation discovery and further the Ferguson's are self-represented and therefore their first hand knowledge of the events that took place that led to the filing of suit was cause to file the suit. There is no civil rules or case law that require a person who has firsthand knowledge of facts to rediscover those facts. The Ferguson's never in any place make any notion they did not do any pre-discovery or that they did not know of facts before filing suit. Fergusons only claimed in argument that they needed to conduct discovery like depositions to help substantiate those facts they had knowledge of and therefore the Ferguson's refer back to their original argument iin their opening brief to defeat this notion.

Paragraph 3 of page 13 respondents claim, "Ferguson's were too busy with other litigation to obtain responsive declarations or discovery is without merit." Ferguson's outlined several reasons why discovery could not be had in their opening brief and referring to their affidavit at the time of summary Judgment. The Ferguson's did not claim that they did not have time to obtain responsive declarations they claimed that responsive declarations could not be obtained due to other reasons including that the issues of material fact were in the minds of hostile witnesses and defendants requiring a deposition to examine character and credibility as is appropriate per case law and precedent set in If affidavits and counter - 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.). 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'. 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).

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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 Ainercan 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 . The Ferguson's even explained a conflict of interest due to the fact that the current action against them at that time for the removal of their children directly involved defendants and potentially could of involved defendant Coddington and Bell as a few of their allegations were on the dependency petition to remove the Ferguson children.

Ferguson further outlined that Ferguson's could not in a strategical sense taken the deposition of Walsh's or Coddington when Coddington's answers to the complaint were still not received and taking a deposition before hand could of affected the answers Coddington would of given in response to the complaint (cp affadavit of April Ferguson).

B. REBUTTAL TO RESPONDENT BRIEF SECTION D.

The issues are not moot because the finding of fact is part of the determination justifying summary Judgment and part of the ruling and on summary Judgment the Appellant can challenge that finding of facts if they are in error. The issue of the trial court placing incorrect information in a finding of fact is not made moot. For the respondent to claim that the appellant court cannot provide relief for false information to justify a finding of facts to justify a judgment is flawed. The Court of appeals can rule still that the finding of facts was based on incorrect information given to them that was an error on the part of the trial court and that there was not justification based upon the correct facts that warranted a final Judgment. Is the respondent really claiming the Appellant can not challenge the finding of facts giving justification to final Judgment. All matters and issues raised in summary Judgment can be argued in appeal and the facts given to justify final judgment is facts related to final Judgment and therefore those facts are able to be argued upon appeal.

This court should not disregard the Ferguson's argument concerning CR 54 (b) certification as those facts are part of the Judgment that permitted this appeal and are the grounds used to allow final Judgment. Those facts were misleading to this court and when tested against the facts the Ferguson's present in their argument they are untrue.

C. REBUTTAL TO RESPONDENTS BREIF SECTION E.

There was issue of material fact presented and seen in the argument upon the fact that the lease contract required that the Ferguson's receive prorated rent to account for when the building was not usable. Between July and September the building was not usable for the Ferguson's intended upon purpose as is substantiated within (cite all sources). The Walsh's then to mislead the court claimed the 500.00 a month was the prorated amount yet that 500.00 was determined before the Walsh's claim they knew the building was not able to be used for its intended upon purpose a child daycare center. The Walsh's claim the 500.00 was to receive the building licenses and Department of Early Learning License yet the Ferguson's offered an issue of material fact when they presented that the building was already advertised as ready to reopen. A Department of Early Learning License could not be obtained if the building itself was not ready and with its local licenses such as occupant license. The Walsh's advertised it as recently opened and even in their own brief in section E they contradict themselves when they state "In 2012 after Larsen vacated the building, Walsh advertised the building as ready for a new daycare preschool". The Ferguson's offered in affidavit a similar statement that the Walsh's had advertised the building as ready to reopen and this would substantiate the fact the rent due and owing of 500.00 a month was not to take into consideration the fact the Ferguson needed to obtain building licenses which has previously been presented in the above arguments email communications that substantiate the fact the Fergusons claim that they were led to believe the building was already able to be licensed for a daycare center. There were no building licenses to obtain if the Walsh's had been truthful and made mention that the buildings current licenses was no longer going to sustain a daycare license. If this court considers that fact alone an issue of material fact is provided that all rent due and owing for the summer of 2012 should have been prorated to zero dollars which even included a full month rent as well as several 500.00 a month rent as well. It was this issue in affidavit the Ferguson's claimed set them off behind in rent and would have constituted a breach of the contract as well on the part of the Walsh's.

The respondents claim that Ferguson's wanted to open in September of 2012 and that they obtained their license in September of 2012. This information is being provided we believe to confuse this court of the actual details of the case presented at time of summary Judgment. The Ferguson's presented exhibits that showed they were trying to open no later than July of 2012 **CP 201 its attached affidavit of April Ferguson and exhibits** paint an entirely different picture that the Ferguson's originally wanted to be opened in July and register people at a barbeque event in early July and obtain licenses that month and that they prepared to have building entirely ready to be licensed before they placed the application in and by the end of May of 2012. Any date of September was a date figured for opening after the Ferguson's learned the building was not suitable for daycare childcare licensing without repairs. Ferguson's presented evidence to establish that the Department of Early Learning Licensor had to actually require them to withdraw their application and resubmit it due to the length of time it was taking to license the building which was presented in an email exhibit earlier in this rebuttal. The exhibits presented substantiated the fact also that the Ferguson's believed the Walsh's were working with them and that they were all in the issue together. Ferguson's explained in their affidavit that they decided to continue with the lease under the false misleading information that the Walsh's would work with them after opening which was originally the case when the Walsh's brought no actions against the Ferguson's for over two years over the disputed amount and both parties continued to work together until 2014 when pressure was beginning to be applied upon the Ferguson's for disputed amount due to Walsh's involvement with Coddington and the threat of Coddington taking over the building. This was explained in affidavit as well as the Ferguson's explained that they were harmed by the delays because they were trying to open during peak enrollment time which was summer break from school and that this delay caused very few to register before the open date starting the Ferguson's new business off to a poor start detrimenting their ability to pay their bills with the Walsh's which is seen and substantiated by exhibits attached to CP 201 which is email communications where the

delays are discussed by the Fergusons and how they are impacting their ability to pay their bills and start off good with their business.

The Respondents claim partial destruction of premises per lease contract does not apply because the building was not destroyed but renovated. This is an issue of material fact because Ferguson's presented exhibits and testimony in their affidavit's that during construction the building could not be used for its intended upon purpose which was a daycare preschool and that the lease contract forbid any other use of the building. Partial destruction of a building being done intentionally is not specified within the terms of the lease only "partial destruction" when renovations take place destruction of premises take place such as happened in the Walsh's building when sidewalks and handicapped accessible entrances were ripped up from the ground to put pipes for sprinklers, attics being insulated making conditions unsafe for children and construction ongoing hindering the building unusable. The issue of material fact presented was is it destruction of the premises to have construction going on that makes a building not inhabitable during that destruction. Is it destruction of a building to intentionally destroy demolish portions of the premises to make way for required renovations to make the building usable. Refer to lease agreement "partial destruction of premises".

D. REBUTTAL TO SECTION F, G,H

The Ferguson's rely upon their argument in their opening brief due to limitation on pages that can be submitted.

D. REBUTTAL TO SECTION I OF RESPONDENTS BRIEF

The purpose of CR11 as stated in the respondents brief by case law *Skimming v. Boxer* is to curb baseless fillings and curb abuses of the judicial system. **Further in *Skimming v***

Boxer 119 Wn. App. At 7554. 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.

The trial court provided no information or evidence to establish the Ferguson's filed with an improper purpose and only did the trial court establish that they did not have the evidence to back up their claims. This was an error on the trial courts part because facts to back up the claims the Ferguson's did provide some substantiated facts and issues of material fact as well as stated on several occasions for every claim that they had first hand knowledge and therefore they were the witnesses to the actions of the Walsh's requiring a deposition of several parties mainly hostile parties to examine character and credibility. f affidavits and counter - 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.). 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).

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 Ainercan 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

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 reference back to their opening brief and rely upon that argument to argue Section I of the respondent's brief exception of the notion in section I of the Respondents brief that the Fergusons did no pre-discovery.

Fergusons are self-represented, and the necessity of re-discovery is redundant when the Ferguson's knowledge of the facts already exist due to their own personal first hand knowledge as witnesses to communications, threats, and interactions with the Walsh's and other defendants leading to and justifying their filing of a complaint. The facts presented by the Ferguson's have not been proven to be false in any examination of their testimony and therefore it is alleged only that the Ferguson's brought the claim for improper purpose because the Walsh's cannot substantiate that allegation against the Ferguson's without prior establishing that the facts the Ferguson's insert in their own testimony are untrue. It was not necessary for the Ferguson's to examine their own statements and knowledge of interactions with individuals that have information of events that transpired which the Ferguson's were witnesses too. Ferguson's already know who has information and who was a witness to the actions they claim happened in their presence. The trial court could not determine the truthfulness of the Ferguson's facts and Eye witness testimonies stated in their affidavits unless the trial court was in obvious error as that would be inappropriate to do on summary judgment. If affidavits and counter - 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.). 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 Co.*, 44 Wn. App. 495, 722 P. 2d 1343 (1986).

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

E. REBUTTAL TO SECTION J OF THE RESPONDENTS BRIEF

"Attorney Fees" under the lease contract paragraph 25.1 which states "the defaulting party agrees to pay reasonable attorney fees". The matter heard in front of the court was summary Judgment of the Ferguson's claims and no counter claims were brought against the Ferguson's and therefore no avenue to have adjudicated the Ferguson's as a defaulting party. The Ferguson's to have this section of the lease used to justify attorney fees would have needed to be provided an opportunity through due process to establish if they are a defaulting party or not. The issues in question in front of this court and the trial court were not if the Ferguson's were a defaulting party but if the Ferguson's had issues of material fact or not to support their claims against the Walsh's. The section that says "whether or not suit is brought" is likely to mean if the the

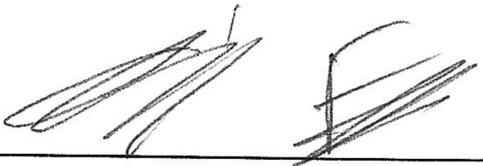
Walsh's had to obtain an attorney to pursue the Ferguson's in such actions as collections' unlawful retainer or other actions where no suit is brought and in those cases it would not be the jurisdiction of this court to give Judgment for those fees unless the Walsh's gave this court jurisdiction by bringing counter suit. The Walsh's would have to obtain those through their own legal actions which they chose not to do in this case when they failed to file any counter claim against the Ferguson's. Summary Judgment on the claims the Ferguson's bring does not adjudicate if the Ferguson's are in default because this court would be in error to adjudicate an issue which was never filed with the court and never sought after by the Walsh's and Ferguson's given no due process to dispute. The argument of Attorney Fees based upon the lease contract fails entirely because there is no adjudication to the fault of the Ferguson's in default on the lease contract and that was never a formal claim before the trial court.

II CONCLUSION

In Conclusion the Fergusons encourage this court to review the appellants opening brief and evidence presented in the case due to the fact the Walsh's already have made claim in their respondent brief information contrary to fact and even contrary to their arguments and affidavit's in summary Judgment such as stating the premises was not rented again until April of 2016 even though in affidavit the Walsh's claimed it took 8 months to acquire a new tenant which contradicted the exhibits provided by the Ferguson's that showed the Coddington's and the Bell's taking the building as early as April of 2015 shortly after the Walsh's through their actions disposed of the Ferguson's. If the Walsh's needed the Fergusons to succeed as is stated in their affidavits in support of summary Judgment and in the respondents brief then this court should question why they would sit on a building collecting no lease from Coddington or Bell from April of 2015 until Fall of 2015 and they should see that this evidence substantiates the claim that Walsh was assisting Coddington at opening her own daycare center which required the removal of the Ferguson's from the premises to do such. The fact that the affidavits

of Walsh have information that is disproved by facts the Ferguson's presented creates issues of material fact as well as created an issue of credibility of Walsh in her facts presented in affidavit. Credibility of witnesses were at question and it was not appropriate for the Judge to rule on summary Judgment when issues of credibility were at question. This court should discard the Walsh's argument as it has been proven to be unreliable to the truthfulness of the events as the Ferguson's have pointed out in rebuttal and this court should rule in favor of the appellant and remand this case back to the trial court.

DATED THIS 14TH DAY OF MARCH 2018



PRO SE APPELLANT APRIL FERGUSON

APRIL FERGUSON - FILING PRO SE

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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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Eunice Rose Johnston by service to home address
Joseph Diaz by email contract
Lane Wolfley by email contract
Jeff Davis by email contract
Helana Coddington by email contract
Natasha Souder by email contract

Dated this 16TH DAY OF MARCH 2018



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