

DEC 16 2011  
RAA

NO: 301133

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III

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NUJID R. MURIBY,  
a married man dealing in his separate property,

Appellant,

v.

MIKE ANDERSON AND CARLYE ANDERSON,  
husband and wife and the marital community comprised thereof,

Respondents.

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BRIEF OF RESPONDENTS

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## **I. RESPONSE TO ASSIGNMENTS OF ERROR**

1. The trial court did not err in awarding judgment for the Respondents for statutory attorney's fees, and denying any requested judgment for Appellant, due to equitable considerations per the CRP agreement.

2. The trial court did not err in making the Findings of Fact, as set forth in sections 3.4, 3.5, 3.6, 3.13 and 3.14, specifically that crops were planted every-other-year, so years should be averaged, that any calculation should use Respondents' figures, that waiver applied and no damages under an expired lease should be ordered, and that an equitable set-off was appropriate due to the Respondents' signing over future CRP money.

3. The trial court did not err in ruling that there had been no breach of an expired lease agreement, thereby refusing to use the Appellant's proposed damage calculation.

4. The trial court did not err in denying Appellant's Motion for Reconsideration.

5. The trial court did not err by not awarding pre-judgment interest or attorney's fees under the expired lease.

6. The trial court did not err in refusing to order interest, costs and fees to either party under the expired lease.

## **II. INTRODUCTION**

This was an action by Appellant to enforce the terms of an expired lease agreement. The lease was for the period of November 1995 to September 2000. The lease was between Mike Anderson, a single man, and Nuji Muriby, a married man dealing with his separate property. At expiration of the lease Mike Anderson was married to Carlye Anderson. The Andersons no longer wanted to follow the terms of the existing lease. The parties could not agree on a new agreement, but Respondents made some payments to Appellant at his demand. There was really no agreement post-expiration of the lease.

In July 2003, the parties entered into a new agreement, whereby the CRP program replaced any cash rent previously paid by the Respondents. As a result of the new agreement, the Respondents did expend substantial labor to input buffer-strips for the CRP program on the land at issue. The parties followed the new agreement for less than three years before the Respondents

agreed to give up the CRP contract and future payments, because of continued problems with the Appellant. The Appellant was angry and wrongfully blamed Respondents due to an error by the local FSA agent in marking the buffer-strips, which resulted in a reduction of the total CRP benefit to the parties. The Respondents exited the business arrangement and found a replacement tenant for Mr. Muriby, whom he acquiesced in. Mr. Muriby later filed suit for amounts he claims were owed under the expired lease and under the new (2003) agreement.

### **III. STATEMENT OF THE CASE**

Mike Anderson entered into a lease with the Appellant in November 1995. (CP 1, 5) (Ex. 18). This was prior to his marriage to Carlye Anderson. (CP 5). The terms of the lease provided for a yearly cash rent of \$19,000, with \$3,800 being due by January 15 each year, and \$15,200 being due by October 15 each year, beginning October 1996. (Ex. 18). The lease also provided for lessor to receive 30% of any gross income over \$60,000 per year including ASCS diversion and deficiency payments. (Ex. 18). This did not include CRP payments. (Ex. 18). Nowhere in the lease does it state that the Respondents are required to plant a crop every year. (Ex. 18). (RP 116). In fact the lease stated that the land would be maintained in accordance with the

best standards of farmers in Garfield County, State of Washington. (Ex. 18). (RP 6-10; 92). The lease did not give the lessor/Appellant the power to dictate whether or not there would be a crop every year. (Ex. 18). (RP 91).

The lease also provides that based on the information provided by the lessee, the lessor and lessee will make a determination of the value of the lessor's percentage of all crops and other income. (Ex. 18). The lease did provide for the possibility of 15% interest on payments made under the lease that were 30 days or more late. (Ex. 18). The lease also provided that a reasonable sum may be ordered for the prevailing party in a lawsuit for court costs and attorney's fees. (Ex. 18). The court only ordered \$200 statutory attorney's fees for the Respondents, the prevailing party. (CP 30). There was also a default provision in the lease whereby failure to pay sums owed could result in the landlord giving written notice to remove lessees for failure to pay. (Ex. 18). This method was never used. (RP 1-183).

The lease expired on September 1, 2000. (Ex. 18). (RP 31). Mike Anderson and Mr. Muriby could not reach a new agreement. (RP 32; 108). Mr. Muriby was insisting on cash rent plus 30% of profits over \$60,000, and Mr. Anderson advised he could not agree to that due to low farming numbers. (RP 108). Regardless, Mr. Anderson paid Mr. Muriby some rent and some

additional monies until the parties reached a new agreement in July 2003. (Ex.10; 11; 12). That agreement was never reduced to a written contract despite Appellant's claims and Exhibit 4 offered at trial, which the Andersons denied was their document. (RP 51).

Mike and Carlye Anderson married on April 7, 2000. (CP 5).

Mr. Muriby's lawsuit acknowledges expiration of the lease and the new agreement reached in 2003, but attempts to collect rent and damages under the terms of the expired lease. (CP 1). The Appellant claimed that under the new agreement the parties entered into, the CRP program, the cash rent payment was reduced to 25% of the income and that all other provisions of the lease were to remain the same. (CP 1). That position was not supported by the evidence, nor did the court find it to be true. (RP 179-180; 199-120). (Ex. 12; 19). Respondents denied this and presented evidence to the court to the contrary. (CP 5). (Ex. 12;19). (RP 119-120). Appellant sought sums under his understanding of the new agreement for the years 2004, 2005 and 2006, while also trying to enforce select terms of the expired lease. (CP 1).

At the trial on April 11, 2011, the Superior Court held that Respondents' produced sufficient evidence to support their claim regarding

the every-other-year crop rotation (damage calculation) and determination of proceeds to Appellant. (RP 89; 91; 180; 182). (Ex. 18). The court noted that Appellant did not produce any evidence to counter this method. (RP 180; 182). The court held that Respondents made all payments under their calculation, except \$12,369.40 if the Respondents were to be bound by the lease, which they were not. (RP 180). The court found, based on the evidence and testimony, that the Appellant received late payments historically, accepted the payments and waived any right to ask for late fees. (RP 180). The court also found that there was no strict annual accounting policy either during the lease or after its expiration. (RP 180). The Andersons clearly did not agree to continue to follow the lease, given problems only arose on its expiration. (CP 1).

The court also found that the new agreement, entered into in July 2003 and effective immediately, provided that lessor would now receive 85% of the CRP payments and 25% of crop and deficiency payments. (CP 29). (RP 119-120; 180). (Ex. 12). The court found that no cash rent was owed for 2003 because of the substantial labor of Respondents to replace and repair fencing on the property and to install the CRP buffer-strips per the parties' agreement. (CP 29). (RP 130; 181). The court held this was the new

agreement until the lessees' departure in 2006. (CP 29). (RP 179-180). At that time, the Respondents forewent any additional CRP monies so that they could be released from lessor, even finding a replacement tenant. (CP 29). (RP 119-120; 180-182). (Ex. 10; 15; 19). Mr. Muriby said he didn't agree to this, yet also testified that Mr. Anderson was an honest man. (RP 75). No party testified that Mr. Muriby was an honest man; the testimony revealed Mr. Muriby as being demanding, forceful and confused. (RP 51; 53; 56; 58; 61; 67; 84; 85; 108; 127; 128). A large part of the fracture of the relationship was Mr. Muriby wrongfully blaming the Andersons for the mis-charted buffer strips, i.e. the sectioned area was smaller than originally planned, and as such, the CRP payments were reduced. (RP 33; 101; 137).

This appeal followed. (CP 33).

#### **IV. ARGUMENT**

**A. THE COURT WAS CORRECT IN HOLDING THAT THE RESPONDENTS WERE ENTITLED TO AN EQUITABLE OFFSET FOR FUTURE CRP PAYMENTS THEY WERE TO RECEIVE UNDER THE NEW AGREEMENT DUE TO EQUITABLE CONSIDERATIONS.**

Appellant's counsel is correct that the legal effect of the parties' agreement, a matter of contract construction, is a legal question reviewed *de novo*. However, the evidence at trial showed that the contract expired, and the parties then followed a course of conduct that resulted in significant changes to the expired lease. (RP 78-81; 119-135; 179-180). (Ex. 12). This included absolute eradication of the never-enforced strict accounting method claimed by the Appellant. (RP 180).

Appellant's counsel is also correct that even when the court considers extrinsic evidence, contract interpretation is a question of law when there is only one reasonable interpretation to be drawn from the evidence. Dice v. City of Montesano, 131 Wn. App. 675, 684, 128 P.3d 1253, *rev. denied*, 158 Wn.2d 1017 (2006). However, that doesn't apply here, given the contract expired, the parties couldn't immediately reach a new agreement, and the parties significantly changed their course of conduct. (RP 179-180). The question then became that of a factual determination for the court. (RP 179-180). The standard then is whether there is *substantial evidence* in the record to support the factual findings made by the court.

The Court of Appeals reviews the trial court's findings of fact under the substantial evidence standard. Mitchell v. Washington State Institute of

Public Policy, 153 Wn.App. 803, 814, 225 P.3d 280 (2009). Substantial evidence is evidence that would persuade a fair-minded person of the truth of the statement asserted. Mitchell at 814. A finding of fact is the assertion that a phenomenon has happened or is or will be happening independent of or anterior to any assertion as to its legal effect. Id. An appellate court reviewing an order or judgment of a trial court defers to the finder of fact on issues of fact. Id. Appellate courts consider all the evidence and reasonable inferences in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority. Id. The Appellate court reserves credibility determinations for the fact finder and does not review them on appeal. Id.

The lease was expired. (CP 1). (RP 31). (Ex. 18). The facts at trial showed (and Mr. Anderson testified) that at expiration of the lease, he told Appellant that he was no longer going to agree to pay \$19,000 per year cash rent plus 30% profit on income over \$60,000 per year because he couldn't afford it. (RP 161-162). Appellant tried to push the terms of the expired lease, and the Andersons reluctantly made some payments to him, but by no means was the lease, in its entirety, followed post-expiration or agreed to be followed. (RP 163)

At trial, Mr. Anderson did testify that he did not believe he owed any money to Dr. Muriby because of giving up the CRP payments. (RP 154). (Exhibit 19). He testified that based on the new agreement and giving up the CRP, he understood that no money was owed by Respondents to the Appellant. (RP 155 & 158). In fact, Mr. Anderson discussed with Appellant that he and Carlye would be out, and Mike Hastings would take over since the Andersons and Appellant no longer had a workable relationship. (RP 153-154). Mr. Anderson was also not reimbursed any additional monies for inputting the buffer strips, which added to his belief the parties were square. (RP 157).

Appellant's counsel is correct that the agreement regarding the CRP was not noted in the Respondents' trial brief. The fact is that Mr. Anderson acknowledged that the court could technically order that the amounts listed in Exhibit 11 were owed, but given his discussions with Dr. Muriby, which resulted in him giving up the CRP payments, he understood that nothing more was owed, as Dr. Muriby also wanted out of the arrangement. (RP 138; 154). The evidence showed that the only reason the Anderson's got out of the CRP agreement was to finally sever their relationship with Dr. Muriby and so that they would owe him no more money. (RP 138; 154). Dr. Muriby

was outraged that the FSA had mis-marked the buffer-strips, resulting in a lower payment to him, which he wrongfully blamed on the Andersons. (RP 137.)

Equitable Estoppel is the effect of voluntary conduct of a party whereby he is absolutely precluded both at law and in equity from asserting rights which might have otherwise existed, either of property, of contract, or of remedy, as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part requires some corresponding right, either of property, of contract, or of remedy. Markley v. Markley, 31 Wn.2d 605, 613, 198 P.2d 486 (1948). The elements are: (1) an admission, statement or act inconsistent with the claim afterwards asserted; (2) action by the other party on the faith of such admission, statement or act; and (3) injury to such other party from allowing the first party to contradict or repudiate such admission, statement or act. Rel v. Civil Service Commission, 20 Wn.App. 764, 766, 581 P.2d 1090 (1978). Equitable estoppel forbids one to speak the truth in his own behalf or to deny his own expressed or *implied admission*, which has in good faith, and in pursuance of its purpose, been accepted and acted upon by another. Thomas v. Harlan, 27 Wn.2d 512, 518, 178 P.2d 965 (1947)

*(emphasis added)*. While at common law, estoppel was founded on deeds and records of courts, equitable estoppel arises out of the facts and circumstances. Carruthers v. Whitney, 56 Wash. 327, 333, 105 P.831 (1909).

In the present case, Appellant's prior implied agreement to allow the Andersons out of the business relationship if they would sign off of the CRP agreement and find a new tenant (which they did) is inconsistent with his afterwards asserted claim in his lawsuit. (RP 75; 154). (Exhibit 12; 19). The Andersons' action was a release of the CRP contract and finding a replacement tenant. (RP 153; 154). The injury to the Andersons is great if Appellant is allowed to contradict his act of signing off on the CRP with the Andersons. (Ex. 19). If they had then been found to owe additional sums of money to Appellant based on his one-sided contradictory view of the evidence, none of which was presented at trial, that would be inequitable. (RP 51; 53; 56; 58; 61; 67; 84; 85; 127; 128).

There was an abundance of miscommunication between the parties, but substantial evidence to support the Respondents' position that they gave up the CRP funds to exonerate themselves from owing Appellant any more money. (RP 75; 85; 136; 137; 138). (Ex. 19). If Mr. Muriby did not agree to this, he offered no reason as to why then the Andersens would sign off on

the CRP contract, essentially giving up over \$21,000 in future payments. (RP 138). Given the principle of estoppel, the court's findings that neither party owed the other money was appropriate.

**B. THE TRIAL COURT PROPERLY FOUND THAT  
EQUITABLE CONSIDERATIONS ESTOPPED APPELLANT FROM  
SEEKING FURTHER OBLIGATIONS UNDER THE EXPIRED  
LEASE AND THAT THERE WAS NO BREACH OF THE EXPIRED  
LEASE.**

Appellant is correct that the court is to determine the legal effect of the parties' agreement as a matter of law. Those portions of the agreement are not in dispute. The court made its ruling based on equitable considerations, which require a factual determination about what the parties actually agreed to at the conclusion of their business affairs. (RP 182). The court specifically noted the testimony of Jim Baker and Carlye Anderson stating that it would be unusual to calculate the payments to Appellant as Appellant proposes, for he'd then own 45% of the profits, which was not customary. (CP 29). (RP 89; 124; 179). The court found that equity required the court to give the Andersons the offsets. (RP180; 181; 182).

Estoppel is not favored and a party asserting estoppel must prove each of its elements by clear, cogent, and convincing evidence. Cotton v. City of Elma, 100 Wn.App. 685, 696, 998 P.2d 339 (2000).

The aforementioned evidence produced at trial by the Respondents satisfies that burden. The fact that the court commented there was no meeting of the minds about the agreement is not detrimental to the equitable finding, which resulted in no damages being awarded to Appellant. The fact is, at trial and through the evidence, the Andersons understanding of the agreement was more credible. (RP 33; 75; 89; 91; 93; 101; 102; 127; 128; 138; 157; 161; 162; 173). (Ex. 19). It was shown that Mr. Muriby usually was confused, didn't know what was going on, etc. (RP 51; 53; 56; 58; 61; 67; 84; 85; 127; 128). The credible evidence from the Andersons showed that they followed through on the agreement, whereas (in the presence of an expired lease and emails confirming a new agreement) Dr. Muriby agreed to the new terms and then tried to impute terms of the expired lease. (CP 1). (Ex. 19). And even at trial, Mr. Muriby couldn't even verify (which the Andersons did) that he paid the Andersons \$9,000 regarding the cost-share. (RP 85). He simply was a far less credible factual witness than the Andersons. (RP 51; 53; 56; 58; 61; 67; 84; 85; 127; 128). The court was

able to observe the witnesses testimony, demeanor, body language, etc., and the court found the testimony of the Andersons (regarding what the agreement was) to be more credible. (RP 179-183). The Appellate court reserves credibility determinations for the fact finder and does not review them on appeal. Mitchell, *supra* at 814.

Contrary to Appellant's assertions, Mike Anderson and Carlye Anderson did testify that Appellant agreed to let them out of the business relationship in exchange for the CRP contract and them finding him a new tenant. (RP 136; 137; 138; 153; 154; 163; 164). (Ex. 19). There would otherwise be no reason for the Andersons to give up over \$21,000 just to continue to owe Appellant money. (RP 163; 164). Objectively, that does not make sense. *See Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005), wherein the court discusses the objective manifestations as the standard versus the subjective manifestations, when interpreting factual issues.

**C. THE TRIAL COURT'S CALCULATION OF DAMAGES IS SUPPORTED BY THE EVIDENCE AND SHOULD BE UPHELD, INCLUDING STATUTORY ATTORNEY'S FEES FOR THE PREVAILING PARTY.**

As noted in Sections A and B herein, contract interpretation is a question of law. However, as also noted above in sections A and B, the lease had expired, and the parties had substantially deviated from the terms of the lease. The questions for this court were factual, and thus the question is one of substantial evidence. The figures provided by the Andersons at trial were based on information given to them by Appellant. (Ex. 10; 11). They produced the checks for the payments that they made and offered explanations as to why they believed the agreement was what they said it was, while Appellant seemed confused most of the time and produced unsigned and unauthored-documents purporting to show agreements between the parties. (RP 51; 53; 56; 58; 61; 67; 84; 85; 127; 128). (Ex. 4). Credibility therefore became a large factor in the court's decision.

The Respondents provided testimony to the court regarding the alleged monies owed to Appellant. (RP 108; 109; 11-118; 124-129; 131-136). They prepared a chart using Appellant's own figures from his discovery answers. (Ex. 11). They testified as to how they traditionally split the profits, e.g. reducing the profit by \$60,000 per year or \$120,000 every two years, to come up with what figure of which a percentage was owed to Appellant. (RP 116; 124; 163). Jim Baker, who had no stake in the case,

testified to that being the common practice in Garfield County. (RP 89; 91; 92; 93). All testimony aside, Mr. Muriby attempts to enforce an expired lease between only himself and Mr. Anderson onto both Andersons, who didn't agree to an extension and without regard to the inequity involved, given the Andersons had given up the CRP contract. (RP 108; 161; 162).

The lease was expired. The testimony showed the Respondents were trying to get out of any tenancy, but Appellant was telling them they could not. (RP 108; 161; 162). There was clearly no solid agreement regarding rent after expiration of the lease, or Mr. Muriby wouldn't have sued for alleged amounts owed only post-expiration. (CP 1). (RP 108; 161; 162). The Andersons reluctantly paid the cash rent and farming had gone south, so they were rotating the crops and paying the portions Appellant claimed were owed to him under an expired lease. (RP 108; 109; 111-118; 124-129; 131-136). They then came up with the new agreement and it was agreed by all that no more monies were owed for 2003. (RP 76; 79-82; 130; 156; 158). (Ex. 12). There was also an issue whereby Appellant was incorrectly adding CRP payments into the equation, which equation was only to include deficiency payments and profits. (RP 127; 128; 131-135).

The court found the Anderson's evidence more credible, as it was testified to by themselves and Jim Baker, that to carry out the agreement on Mr. Muriby's terms would be to give him 45% of the income of the farm, which was unheard of. (RP 89; 91-93; 124).

**D. THE TRIAL COURT DID NOT ERR IN NOT AWARDING PRE-JUDGMENT INTEREST AND ATTORNEY'S FEES FOR AMOUNTS FOUND NOT TO BE OWED, GIVEN EQUITABLE CONSIDERATIONS AND GIVEN THE LEASE HAD EXPIRED.**

Appellant tries to rely on an expired lease that the parties were no longer following as a basis for pre-judgment interest and attorney's fees. (RP 108; 161; 162). There is no basis for such claim. As noted above, the court found that the parties substantially deviated from the terms of the written lease both during the lease and after it expired, e.g. no strict annual accounting. (RP 179-180). If the lease provisions applied as Mr. Muriby contends, then why didn't he utilize the default provisions in the lease? (Ex. 18).

Pre-judgment interest is only allowed where the claim is for a liquidated sum. Colonial Imports v. Carlton N.W., 83 Wn.App. 229, 242,

921 P.2d 575 (1996). The present case does not involve a liquidated sum. Appellant's claimed amount is based on a lease, which the court found had expired or had been substantially modified by the parties. (RP 179-180). Pre-judgment interest is not absolute in any event.

“Pre-judgment interest is a make-whole remedy, which itself is grounded on equitable principles, i.e. the ‘sense of justice in the business community... that he who retains money which he ought to pay to another should be charged interest on it.’”  
5 A. Corbin, Contracts Sec. 1046 n.69 (1964). Colonial Imports, *supra* at 242.

In the present case, the trial court found that the expired agreement had not been followed. (RP 179-180). There should be no pre-judgment interest, even if an amount of money should have been awarded for rent. A trial court's award of pre-judgment interest is reviewed for abuse of discretion. Pannel v. Food Servs. of Am., 61 Wn.App. 418, 449, 810 P.2d 952 (1991).

There is also no merit to Appellant's claim for attorney's fees. In Washington, parties may not recover attorney's fees except under a statute, contract, or some well recognized principle of equity. Torgerson v. One Lincoln Tower, 166 Wn.2d 510, 525, 210 P.3d 318 (2009). Appellant's claim is based upon a lease. RCW 4.84.330 does provide for an award of attorney's fees where there is such a provision in a lease. However, the court

found that the lease had expired, and the parties were no longer operating under its terms. (RP 170-180).

**E. THE TRIAL COURT WAS CORRECT IN ITS FINDING THAT APPELLANT WAIVED HIS CLAIM TO INTEREST OR LATE FEES, AND EVEN IF HE HAD NOT WAIVED, THE LEASE HAD EXPIRED, SO THE PROVISIONS DID NOT APPLY.**

Waiver, either express or implied, is defined as the voluntary and intentional relinquishment or abandonment of a known right; it is unilateral in that it arises out of either action or nonaction on the part of the insurer or its duly authorized agents and rests upon circumstances indicating or implying that the relinquishment of that right was voluntarily intended by the insurer with full knowledge of the facts pertaining thereto. Time Oil Co. v. Cigna Property & Cas. Ins. Co., 743 F.Supp. 1400 (1990). An implied waiver may arise where a party's course of conduct evidences an intention to waive a right or is inconsistent with any other intention. Kessinger v. Anderson, 31 Wn.2d 157, 168, 196 P.2d 289 (1948). Waiver is unilateral and rises by intentional relinquishment of right or by neglect to insist upon it. Kessinger, supra at 169.

To be successful in this argument, the court would have to find that the Appellant is entitled to enforce expired lease provisions, such as a strict accounting, a default remedy against Respondents, and requiring late fees for late payments, when Mr. Muriby did not do so throughout the 11 year relationship with Mr. Anderson. His waiver was unilateral and arose by neglect to insist upon it. It would be disingenuous to assert that the Appellant, a retired surgeon, didn't know his rights. The Andersons testified how when he thought money was owed to him, he would scream at them. (RP 108). Mr. Muriby led the Andersons to believe that they were even when Mr. Anderson pursued getting out of the business relationship and secured a new tenant. (RP 136-138; 153-154). (Ex. 19).

Appellant cannot rely on Andersons failure for an accounting that Appellant never required under an expired lease. The Andersons didn't agree to continue to follow the old lease. The court found Appellant never insisted on a strict accounting. (RP 108; 161-162; 180). Additionally, even if the court were to find there was no intentional waiver by Appellant regarding the provisions of an expired lease, the court can still decline to award the damages due to the expiration of the lease and due to equitable considerations as set forth in sections A, B, C and D herein.

**F. THE TRIAL COURT DID NOT ERR IN DENYING THE APPELLANT'S MOTION FOR RECONSIDERATION, AS ITS FINDINGS WERE SUPPORTED BY THE EVIDENCE.**

Superior Court Civil Rule 59 governs Motions for Reconsideration.

It provides:

(a) Grounds for New Trial or Reconsideration. On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial.

(2) Misconduct of prevailing party or jury; and whenever any one or more of the jurors shall have been induced to assent to any general or special verdict or to a finding on any question or questions submitted to the jury by the court, other and different from his own conclusions, and arrived at by a resort to the determination of chance or lot, such misconduct may be proved by the affidavits of one or more of the jurors;

(3) Accident or surprise which ordinary prudence could not have guarded against;

(4) Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial;

(5) Damages so excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice;

(6) Error in the assessment of the amount of recovery whether too large or too small, when the action is upon a contract, or for the injury or detention of property;

(7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law;

(8) Error in law occurring at the trial and objected to at the time by the party making the application; or

(9) That substantial justice has not been done.

None of these were present. Mr. Muriby argued section (1), (2), (6) and (9). (CP 27). The court found that none of those grounds were present. (RP Reconsideration Hearing 5;7;9). The court found that essentially Mr. Muriby just didn't like the court's ruling. (RP Reconsideration Hearing 5; 7; 9).

The standard for reversing a trial court's denial of a motion for reconsideration is a manifest abuse of discretion. An abuse of discretion is present only if there is a clear showing that the exercise of discretion was manifestly unreasonable, based on untenable grounds, or based on untenable reasons. Mitchell, *supra* at 821. A decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record or

was reached by applying the wrong legal standard. Mitchell at 821-822. A decision is manifestly unreasonable if the court, despite applying the correct legal standard of the supported facts, adopts a view that no reasonable person would take and arrives at a decision outside the range of acceptable choices. Id. at 822. Where the trial court's orders are supported by substantial evidence, there was no abuse of discretion by the trial court.

**G. THE COURT OF APPEALS SHOULD NOT AWARD FEES ON APPEAL.**

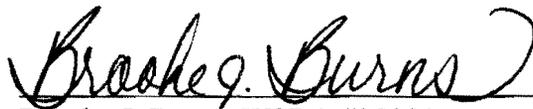
RAP 18.1 allows for attorney's fees on appeal if there is a basis in the law. As set forth in section D herein, there is no basis to award attorney's fees to Mr. Muriby. As such, the court should not grant attorney's fees to him. If fees are granted, they should be on behalf of the Andersons. They hired counsel to represent them in trial, which cost them a fair amount, and they prevailed. Mr. Muriby chose not to hire counsel, did not like the outcome, and now essentially now wants a "do over."

**V. CONCLUSION**

The decision of the trial court must be upheld. The trial court did not err as a matter of law by finding that equity dictated that the court offset amounts purportedly owed by Respondents to Appellant under an expired

lease where Respondents forfeited the ability to collect over \$21,000 in CRP payments. Those future payments were given up by Andersons in exchange for the agreement that all parties would walk away from the business relationship. The testimony did not show that the Respondents rights to CRP funds had anything to do with the expired lease. Entry into the CRP agreement was a whole departure from Mr. Muriby's attempt to force the Andersons into continuing the lease under its old terms. Mr. Muriby is not entitled to judgment in this action for unpaid rent, pre-judgment interest or attorney's fees. The Andersons respectfully request that the trial court decision be upheld.

Respectfully submitted this 15<sup>th</sup> day of December, 2011.

A handwritten signature in cursive script that reads "Brooke J. Burns". The signature is written in black ink and is positioned above a horizontal line.

Brooke J. Burns, WSBA #38000

Attorney for Respondents Mike and Carlye Anderson