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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 321991

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

BURGESS VINEYARDS, LLC,
a Washington Limited Liability Company,

Respondent/Plaintiff,

v.

PAUL BEVERIDGE and JANE DOE BEVERIDGE, husband and
wife, dba WILRIDGE WINERY & VINEYARD,

Appellants/Defendants,

REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

I.	RESPONDENT’S CONTENTION THAT “THE BURGESS CONTRACT WAS THE AGREEMENT REACHED BY THE PARTIES AND THE TRIAL COURT’S FINDINGS OF FACT CANNOT BE SUBVERTED” IS WITHOUT MERIT	1
II.	RESPONDENT FAILS TO EXPLAIN HOW THE \$200.00 MONTHLY LATE FEE WAS A REASONABLE FORECAST OF HIS DAMAGES AT THE TIME THE GRAPES WERE SOLD.....	3
III.	BURGESS DID NOT ACT IN “GOOD FAITH” BY WAITING UNTIL BEVERIDGE SHOWED UP AT HIS FARM TO INSIST THAT BEVERDIGE SIGN HIS CONTRACT	6
IV.	THE PERSONAL GUARANTY IS UNENFORCEABLE	6
V.	CONCLUSION.....	7

TABLE OF AUTHORITIES

CASES

<i>Anfinson v. FedEx Ground Package System, Inc.</i> , 174 Wn.2d 851, 865, 281 P.3d 289 (2012)	1
<i>Gaglidari v. Dennys</i> , 117 Wn.2d, 426, 446, 815 P.2d 1362 (1991).....	5
<i>Wallace Real Estate Inv., Inc., v. Groves</i> , 124 Wn.2d 881, 893, 881 P.2d 1010 (1994).....	4
<i>Zunino v. Rajewski</i> , 140 Wn. App. 215, 220, 165 P.3d 57 (2007).....	1

I. RESPONDENT’S CONTENTION THAT “THE BURGESS CONTRACT WAS THE AGREEMENT REACHED BY THE PARTIES AND THE TRIAL COURT’S FINDINGS OF FACT CANNOT BE SUBVERTED” IS WITHOUT MERIT.

The trial court’s determination that the Burgess contract is a valid and enforceable agreement is properly denominated as a conclusion of law, not a finding of fact. *Anfinson v. FedEx Ground Package System, Inc.*, 174 Wn.2d 851, 865, 281 P.3d 289 (2012) (The validity of a contract is a question of law.) Conclusions of law are reviewed *de novo*. *Zunino v. Rajewski*, 140 Wn. App. 215, 220, 165 P.3d 57 (2007). Appellants agree the issue of whether Paul Beveridge objectively manifested an intention to be bound by the Burgess contract is a question of fact. The facts, as discussed in Appellants’ opening brief, objectively show Paul Beveridge did not intend to be bound by the Burgess contract. Beveridge refused to sign it when Burgess first presented it to him because it was so onerous. He advised Burgess that the contract was not appropriate and offered an alternative agreement. Beveridge would not have rented a truck and

driven to Franklin County had Burgess informed him that signing the Burgess contract was a condition precedent to consummating the transaction. No reasonable person, much less an experienced attorney, would willingly sign a contract that contains severe penalties for failing to pay on time when their ability to timely pay is contingent upon receipt of an IRS refund. (A reasonable person might do so if given assurance that no penalties would be sought, which is exactly what the evidence suggests occurred here.)

Respondent states: "Mr. Beveridge offers no evidence to invalidate the written contract he signed on October 1, 2010..." (Brief of Respondent, pg. 4) This is curious, to say the least. As already discussed, Paul Beveridge did not objectively manifest his intention to be bound by the Burgess contract. To the contrary, the evidence clearly shows he did not want to be bound by the Burgess contract. Assuming for argument's sake there is evidence to support the trial court's finding that Paul Beveridge objectively manifested an intention to be bound by the Burgess contract, which there is not, the validity of the attorney's fees, enhanced interest and \$200 monthly late fee provisions are purely legal issues which still

remain. For the reasons set forth in Appellants' opening brief, those terms are unenforceable as a matter of law.

II. RESPONDENT FAILS TO EXPLAIN HOW THE \$200 MONTHLY LATE FEE WAS A REASONABLE FORECAST OF HIS DAMAGES AT THE TIME THE GRAPES WERE SOLD.

Respondent simply ignores the fact that Burgess, *by his own admission*, did not insert the 18% finance charge and \$200.00 monthly late fee charge in his contract in order to cover potential damages should he not get paid on time. Burgess was given an opportunity at trial to explain the basis for the \$200.00 monthly late fee charge, to which he replied: "I feel that's a fair amount to stop people from being deadbeats and not paying." [RP pg. 32, lines 1-19] *Burgess conceded he suffered no financial loss as a result of getting paid late.* [RP pg. 30, lines 23-25] For Burgess to now assert that the late fees and finance charges in his contract are a reasonable estimate of future damages resulting from non-payment is incredulous given that he admitted under oath he suffered no financial loss as a result of getting paid late and the \$200.00 monthly

late fee serves no other purpose other than to “stop deadbeats from not paying.” The enhanced interest and monthly late fee are punitive threats designed to induce payment, and have nothing whatsoever to do with potential damages in the event a payment is late.

Burgess contends that the reasonableness of the enhanced finance charge and monthly late fee must be evaluated at the time the contract was made. However, Burgess fails to offer any estimate, as of the time the grapes were sold, of what his damages might reasonably be if he did not get paid on time. Actual damages “may be considered where they are so disproportionate to the estimate that to enforce the estimate would be unconscionable.” *Wallace Real Estate Inv., Inc., v. Groves*, 124 Wn.2d 881, 893, 881 P.2d 1010 (1994). Here, there is no estimate from Burgess forecasting, as of 10.01.2014, what his damages might be if he did not receive payment on time. The reason for this is simple: Burgess suffered no actual damage as a result of getting paid late, apart from loss of use of the funds for 57 days for which he is entitled to recoup statutory interest. Given that Burgess suffered no actual damages and otherwise failed to even provide a reasonable estimate of potential

damages to justify the monthly late fee, the Court should find as a matter of law that the \$200.00 monthly late fee is so disproportionate to the estimate (zero), that enforcement would be unconscionable.

In short, Burgess is more than fairly compensated by receiving 12% statutory interest on the late payment. This sum far exceeds the rate of return Burgess could expect on any investment. Not surprisingly, Burgess fails to offer any justification whatsoever for entitlement to 18% interest, as opposed to the statutory rate of 12%.

Burgess further ignores that the trial court committed obvious error in concluding the monthly late fee is a reasonable way to account for “the stress and hassle of collecting”. It is well settled that emotional distress damages are not recoverable in a breach of contract action. *Gaglidari v. Dennys*, 117 Wn.2d, 426, 446, 815 P. 2d 1362 (1991).

III. BURGESS DID NOT ACT IN “GOOD FAITH” BY WAITING UNTIL BEVERIDGE SHOWED UP AT HIS FARM TO INSIST THAT BEVERIDGE SIGN HIS CONTRACT.

Burgess contends his contract is a valid modification because “it was made in good faith.” To the contrary, the manner in which the Burgess contract was entered constitutes procedural unconscionability (See *Brief of Appellants*, pp 18-20). After Beveridge advised Burgess that his contract was not appropriate, Burgess had several days to inform Beveridge that the transaction was contingent upon execution of his agreement. Had he done so, the deal would have been off and the grapes would have gone to waste. Burgess was likely aware of this so he chose to simply lay in wait until Beveridge showed up at his farm. In sum, the assertion that the Burgess contract was made in “good faith” is plainly contradicted by the facts.

IV. THE PERSONAL GUARANTY IS UNENFORCEABLE.

As covered above and in the Brief of Appellants at pp. 20-21, Beveridge did not objectively manifest assent to personal liability.

V. CONCLUSION.

Burgess essentially argues that because “the trial court found the credit provision and the entirety of the Burgess contract enforceable”, this Court cannot alter that finding. Burgess incorrectly labels the validity of the contract and the reasonableness of the penalty provisions as issues of fact. These are issues of law which the trial court erred in resolving. The result of these erroneous rulings is a large windfall to Burgess.

As matter of law, this Court should find that the \$200.00 monthly late fee, created by Burgess for no other reason than “to stop deadbeats from not paying”, is an unenforceable penalty. To this day, Burgess has failed to explain how the \$200.00 monthly fee is a reasonable estimate of his damages should he not get paid on time. Nor has he offered any reasoning as to why he should get 18% interest on late payments as opposed to the statutory rate of 12%.

Respondent’s alternative argument, that the Burgess contract is a valid modification of the parties’ original agreement because it was entered in “good faith”, borders on the absurd as the facts

demonstrate a clear case of procedural unconscionability. The Court should find, as a matter of law, that only those terms upon which there was a meeting of the minds are enforceable and thereby reverse and remand to the trial court with instructions to amend the Judgment. Tapenade, Inc., not Paul Beveridge, owes Respondent \$80.37, which is 57 days worth of statutory interest.

DATED this 22^d day of October, 2014.

Respectfully Submitted,

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