

FILED

AUG 22 2014

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,

vs.

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

Appellant

BRIEF OF RESPONDENT

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I. INTRODUCTION

Paul Burgess (“Mr. Burgess”) and Paul Beveridge (“Mr. Beveridge”) entered into a signed, written agreement for the sale of grapes on October 1, 2010. Mr. Burgess sold seven tons of Pinot Gris grapes for \$6,300. Mr. Beveridge made a down payment of \$2,000, leaving \$4,300 unpaid. Mr. Burgess gave Mr. Beveridge until December 15, 2010 to complete payment, but the \$4,300 balance remained unpaid until February 10, 2011. The agreement provided for a monthly late fee and a finance charge. The February payment from Mr. Beveridge only included the \$4,300 principal amount – it did not include the \$606.59 in late fees and finance charges that had accrued since the December 15, 2010 due date. Mr. Beveridge refused to pay the late fees and finance charges that he had agreed to pay. Because of Mr. Beveridge’s refusal to pay the late fees and finance charges in violation of his agreement with Mr. Burgess, additional late fees and finance charges continued to accrue until this case went to trial on October 24, 2013. After adding the attorney fees needed to resolve this dispute, a \$606.59 debt ballooned into a \$10,253.52 judgment in favor of Mr. Burgess.

The parties dispute the validity of the signed, written agreement that binds Mr. Beveridge to pay the late fees and finance charges, but the trial court weighed the evidence and found the challenged late fee and

finance charge provisions valid. Where the provisions are valid, Mr. Beveridge cannot escape his obligation to pay.

II. STATEMENT OF THE CASE

Between September 28, 2010 and September 30, 2010, Mr. Burgess and Mr. Beveridge exchanged a series of e-mails regarding the sale of grapes. RP page 77-78. The e-mails contained as attachments two separate writings proposed as contracts by each party: one proposed by Mr. Burgess (the “Burgess contract”) and one proposed by Mr. Beveridge (the “Beveridge contract”). *Id.* The trial court found that each contract was signed by Mr. Burgess and Mr. Beveridge on Friday, October 1, 2010. RP page 78, lines 5-6. Mr. Beveridge then left grape bins with Mr. Burgess and his picking crew, the bins were filled, and Mr. Beveridge picked up his grapes the following day. RP page 78, lines 19-24. Both contracts stated that the total contract price of \$6,300 would be paid with \$2,000 tendered on the date of harvest and \$4,300 paid by December 15, 2010. Plaintiff’s Ex. 1, pages 1-3. The \$4,300 balance was not paid until February 10, 2011. RP page 79, lines 19-21. The Burgess contract contained additional terms deemed enforceable by the trial court. RP page 80, lines 1-3. The additional terms required payment of interest and a late fee of \$200 for every month the contract was delinquent, and Mr. Beveridge breached these provisions. CP page 8, lines 3-5. Mr. Beveridge continued to refuse payment in violation of the contract terms, and the interest and late fees continued to accumulate until the case was

originally set for trial on April 17, 2013. The case was continued until October 24, 2013 for lack of an available judge. The court determined that the late fees and interest should only be assessed thru April 15, 2013 in accordance with the original trial date. CP page 18.

Mr. Beveridge is a lawyer who read the contract offered by Mr. Burgess – the contract deemed valid by the trial court – a few days before signing it. RP page 53, lines 16-24 & page 79, lines 13-17. He has been practicing law in Washington since 1987. RP page 36, line 5. He has also been in the wine business since 1988. RP page 36, lines 6-18. He found the contract objectionable, but he still signed it. RP page 54, line 1. Directly above Mr. Beveridge’s contact information and signature, the Burgess contract delineates the “credit condition” at issue in this case. Plaintiff’s Ex. 1, page 2. The Burgess contract clearly states that any amount not paid in full would be subject to a monthly late fee of \$200 and a monthly finance charge of 1.5%. *Id.* The final line of the Burgess contract states that the “undersigned individual(s) personally guarantee the performance of the entity for which he/she is signing.” *Id.* The Beveridge contract makes no mention of credit conditions or late fees. Plaintiff’s Ex. 1, page 3. As noted above, the trial court weighed the testimony of both Mr. Burgess and Mr. Beveridge, and the trial court found that both men signed both contracts on Friday, October 1, 2010 immediately before Mr. Beveridge left his grape containers to be filled by Mr. Burgess. RP page 78, lines 5-6 & 19-24.

III. ARGUMENT

A. THE TRIAL COURT FOUND THAT THE BURGESS CONTRACT WAS THE AGREEMENT REACHED BY THE PARTIES AND THE TRIAL COURT FINDINGS OF FACT CANNOT BE SUBVERTED

The trial court found that “the written contract on the form provided by Burgess Vineyard, and all the attendant terms, was the agreement that was reached by both parties, and signed by both parties on October 1, 2010.” CP page 15, lines 14-17. The Supreme Court of Washington has determined that “[w]hether the parties intend a written document to be a final expression of the terms of the agreement is a question of fact.” *M.A. Mortenson Co. v. Timberline Software Corp.*, 140 Wn.2d 568, 579-580 (Wash. 2000). And “the constitution does not authorize [an appeals court] to substitute its findings for that of the trial court.” *Thorndike v. Hesperian Orchards*, 54 Wn.2d 570, 575 (Wash. 1959). Furthermore, RCW 62A.2-204(1) provides, “[a] contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.” After hearing the testimony of the parties and reviewing the documentary evidence, the trial court found that the Burgess contract with all attendant terms constitutes the complete agreement of the parties, and this finding cannot be subverted on appeal.

Mr. Beveridge offers no evidence to invalidate the written contract he signed on October 1, 2010, so Mr. Beveridge is liable for all amounts

owed under that contract. The Honorable Salvador Mendoza, Jr. heard testimony from both Mr. Burgess and Mr. Beveridge, he reviewed the documents, and he determined that Mr. Beveridge and Mr. Burgess signed the Burgess contract on October 1, 2010. RP page 78, lines 5-6. Mr. Beveridge contends that: 1) he was afraid of Mr. Burgess and his crew of laborers and 2) he was tricked into signing the contract. Appellant's Brief pages 18-20. But Judge Mendoza determined that there was no coercion or duress. RP page 78, lines 16-17. Any fear of a physical altercation over a grape sale contract was entirely without merit. Judge Mendoza also found that Mr. Beveridge's status as an attorney eradicated the potential for trickery in this transaction. When he signed the contract, "he understood what it meant and what the penalties were if he did not comply with it." RP page 79, lines 13-17.

Still, Mr. Beveridge claims that his renting of a truck and journey from Seattle to Pasco left him with no other option than to sign the contract. (Brief pages 18-20). He *felt* tricked and coerced. RP page 43, line 6. But it does not matter how Mr. Beveridge felt. There is no evidence to controvert the fact that Mr. Beveridge signed a contract on October 1, 2010 obligating him to pay interest and penalties should he fail to pay his bill on time. Mr. Beveridge knew what the contract said, and he even knew what the contract meant. In fact, he admitted that he found the contract objectionable – so objectionable that he attempted to avoid personal liability on the contract by scratching out his name on the first

page of the contract. RP page 54, line 1 & Plaintiff's Exhibit 1, page 1.

He clearly understood the full ramifications of signing the Burgess contract.

Additionally, it does not matter if Mr. Beveridge *thought* "if there's no meeting of the minds, there's no contract." RP page 53, lines 19-20. Mr. Beveridge signed the contract knowing that Mr. Burgess would pick grapes and fill the order as soon as the contract was signed. Despite feeling "tricked," it was actually Mr. Beveridge doing the tricking. He signed the contract fully intending to induce Mr. Burgess to pick his grapes and load them in the truck while quietly reserving his scheme to assert his "meeting of the minds" defense at the first mention of fees and finance charges by Mr. Burgess. If Mr. Beveridge did not wish to be bound by the Burgess contract, he should not have signed it. He could have made an unequivocal objection,¹ returned to Seattle, and sought reliance damages. But he chose to sign the contract and take the grapes home. The trial court weighed the evidence in this case and found that the excuses proffered by Mr. Beveridge for why his signature on the Burgess contract should not bind him to that contract are not supported by the evidence. The findings of the trial court should stand.

¹ Throughout his briefing and testimony, Mr. Beveridge claims that he made a clear objection to the Burgess contract. However, he merely stated in his e-mail that he thought the Burgess contract would be more appropriate as an annual contract. He then offered a different draft. This is not a clear objection. Refusing to sign the contract would have been a clear objection.

Should this Court agree with Mr. Beveridge's assertion that the Burgess contract needs to be considered in tandem with the Beveridge contract, the credit condition in the Burgess contract is still enforceable. While only tangentially, Mr. Beveridge seems to assert that RCW 62A.2-207 applies to this agreement because there was no acceptance of the terms in the Burgess contract. Appellant's Brief pages 17-18. However, RCW 62A.2-207 only applies where there has been no express acceptance of terms on conflicting forms offered by the various parties to an agreement. *Tacoma Fixture Co., Inc. v. Rudd Co., Inc.*, 142 Wn. App. 547, 554 (2008); see *M.A. Mortenson Co.*, 140 Wn.2d at 582 (where the terms of a contract were expressly accepted, the discussion should regard contract formation under RCW 62A.2-204, and not alteration under RCW 62A.2-207). Here, Mr. Beveridge signed and dated the Burgess contract; this is a clear manifestation of consent to the credit condition. Thus, the main issue with regard to this contract – the issue that was unequivocally decided by the trial court – is which of the parties' communications make up the complete contract integration under RCW 62A.2-204. And according to the trial court's finding, the complete integration includes the Burgess contract credit condition. RP page 7, lines 13-17.

B. THE LATE FEE AND FINANCE CHARGE PROVISION PROVIDES A REASONABLE DAMAGES FIGURE FOR SERVICING A DELINQUENT ACCOUNT

The late fees and finance charges included in the Burgess contract are a reasonable estimate of future damages resulting from non-payment.

They should not be denied merely because Mr. Beveridge finds them unsavory. Washington courts favor liquidated damages clauses. *Wallace Real Estate Inv., Inc. v. Groves*, 124 Wn.2d 881, 886 (Wash. 1994). “In Washington, a provision for liquidated damages will be upheld unless it is a penalty or otherwise unlawful.” *Id.* Furthermore, the Supreme Court of Washington “follows the United States Supreme Court's view that liquidated damages agreements fairly and understandingly entered into by experienced, equal parties with a view to just compensation for the anticipated loss should be enforced.” *Id.* Here, the parties are experienced and they understood the agreement they both signed. Furthermore, the agreement is not a penalty, nor is it unlawful in any respect – the trial court made this finding, and the law in Washington supports this finding.

The trial court found that the late fees and finance charges in the Burgess contract were reasonable. CP page 16, lines 3-6. The court accurately noted that liquidated damages are a way to account for the stress, time, and hassle of collecting on delinquent accounts. RP page 80, lines 15-23. These categories of damages are inherently difficult to quantify, which makes liquidated damages a prudent way to account for the difficulties the breaching party has imposed upon the non-breaching party. Mr. Beveridge goes to great lengths to label the late fee and finance charge in the Burgess contract as an unenforceable penalty, but his analysis does not comport with Washington law.

In evaluating whether a liquidated damages provision in a contract is a penalty, the Washington Supreme Court has adopted a “single-factor approach” where the court considers the reasonableness of the forecasted damages *at the time the contract is entered*. *Wallace Real Estate Inv., Inc. v. Groves*, 124 Wash. 2d 881, 893 (1994); *Watson v. Ingram*, 124 Wash. 2d 845, 851 (1994). Actual damages do not have to be proven, but they “may be considered where they are so disproportionate to the estimate that too enforce the estimate would be unconscionable.” *Wallace*, 124 Wash. 2d at 894. Thus, the damages provided for in the Burgess contract need only pass a reasonableness test, and actual damages need not be proven by Mr. Burgess.

Here, Judge Mendoza evaluated the evidence with regard to the projected damages and found them to be reasonable in accordance with Washington law. RP page 16, lines 3-6. His reasonableness determination should be afforded substantial deference because it was based on the evidence presented at trial. *Thorndike*, 54 Wn.2d 570, 575. While Mr. Burgess has not presented evidence of actual damages, he does not need to present evidence of actual damages. *Wallace*, 124 Wash. 2d at 894. The court need only find that the damages agreed upon in the contract act as reasonable compensation for the harm caused by Mr. Beveridge’s non-payment. And the reasonableness must be evaluated from the time the contract was made. *Id* at 893.

As the trial court noted, the damages in this case are general business damages related to collection of debts and extension of credit. Grape growers are not debt collectors. In order to collect on debts, a grape grower must perform a myriad of administrative functions that have nothing to do with growing and picking grapes. Mr. Burgess knows that any extension of credit in the sale of grapes carries with it the implied risk that the debt will not be repaid. This is precisely why Mr. Burgess extends credit only very rarely. RP page 15, lines 12-19. As a small grower, he needs to mitigate his risks as much as possible. He needs to make sure extensions of credit will not destroy his operation. It is a common sense principle of credit-based business transactions that credit provisions transfer the risk of non-payment to the borrower as much as possible in the form of late fees. Finance charges are simply the cost of borrowing money. Hence, late fees and finance charges are not only commercially reasonable – they are commercially necessary.

As a sophisticated player in this transaction, Mr. Beveridge should not be able to skirt such common sense contract provisions. In fact, the Supreme Court of Washington has held sophisticated parties to a higher standard when they are seeking to shirk liquidated damages provisions. *Wallace*, 124 Wash. 2d at 896. Not only did Mr. Beveridge begin practicing law in 1987, but he also entered the wine business in 1988. RP page 36, lines 5-18. This experience alone should make it clear to any court that Mr. Beveridge is not susceptible to the trickery he claims is

afoot. Furthermore, he should know that he will be held to a higher standard any time he signs his name to a contract. The contracting party in *Wallace* only had experience as a businessman. *Wallace*, 124 Wash. 2d at 896. As both a lawyer and a businessman, Mr. Beveridge's sophistication "highlights the inequity of allowing him to now challenge the provisions as penalties simply because they constitute too large a percentage of the contract price." *Id.* The trial court properly factored Mr. Beveridge's sophistication into the penalty calculus, and the late fees and finance charges were correctly held to be reasonable sums for servicing a delinquent account under the circumstances.

C. IF THE BURGESS CONTRACT WERE DEEMED A
MODIFICATION, IT WOULD BE A VALID
MODIFICATION BECAUSE BOTH PARTIES ARE
MERCHANTS AND IT WAS MADE IN GOOD FAITH

Assuming this Court does not accept the above analysis of the contract formation and chooses to supplant the trial court determination, the credit condition at the heart of this dispute remains enforceable. The Burgess contract would be a valid modification of any earlier contract.

Viewing the Burgess contract as a modification will not affect its enforceability because it was made in good faith. Washington's version of the Uniform Commercial Code (UCC) very clearly states that "[a]n agreement modifying a contract within this Article needs no consideration to be binding." RCW 62A.2-209. The parties need only abide by the duty of good faith that applies to every contract under the UCC. RCW 62A.1-

304. Here, the Burgess contract was signed by both parties and both parties were in “observance of reasonable commercial standards of fair dealing” as required by the UCC. RCW 62A.1-201(b)(20). Mr. Beveridge had plenty of time to review the Burgess contract, and, as determined by the trial court, there was no action by Mr. Burgess that would constitute bad faith dealing. Furthermore, as established *supra*, Mr. Beveridge is a sophisticated player. He knew what he was signing, and he signed the Burgess contract so that he could receive delivery of the grapes. This was a commercially reasonable transaction where both parties were fully informed. Thus, whether deemed a modification or not, the credit provision will stand.

D. MR. BEVERIDGE IS PERSONALLY OBLIGATED TO PAY
THE DELINQUENT AMOUNT ON THE CONTRACT
BECAUSE HE PERSONALLY GUARANTEED PAYMENT
IN WRITING

Mr. Beveridge signed a contract that stated he personally guaranteed performance under the contract. CP page 7, lines 18-19. He claims that by crossing out his name on the first page of the contract and writing “Secretary” rather than printing his name on the second page of the contract, he was voiding the personal guarantee. Appellant’s Brief page 21. He contends that he was signing on behalf of his company, Tapenade, Inc. *Id.* However, the guarantee provision does not discriminate between individuals and companies. It clearly states that even those signing *for* a company personally guarantee contract performance: “The undersigned individual(s) personally guarantee the

performance of the entity for which he/she is signing.” Plaintiff’s Ex. 1, page 2. In this case, by signing, Mr. Beveridge personally guaranteed the late fees and finance charges due under the contract. Again, he claims his objection to the guarantee was clearly manifested. Appellant’s Brief page 21. But a man of Mr. Beveridge’s sophistication should know that his actions to not amount to a bona fide objection. He could have taken the simple step of crossing out the actual guarantee provision. Or he could have refused to sign the contract. This would have been much clearer. Mr. Burgess rarely sells grapes on credit. RP page 15, lines 12-19. Given his aversion to credit as a small grape grower, it is commercially reasonable to demand the personal assurance of any credit-based customer. Mr. Beveridge knew that Mr. Burgess was demanding Mr. Beveridge’s personal assurance as consideration for the extension of \$4,300 worth of product on credit. Mr. Beveridge should not be allowed to refuse personal liability because he knew exactly what he was agreeing to, as determined by the trial court.

IV. REQUEST FOR ATTORNEY FEES

Pursuant to the contract and RAP 18.1(b), the plaintiff, Mr. Burgess, requests that the court award reasonable attorney fees in addition to those already awarded at the trial court level. Where the contract provides for attorney fees, fees may be awarded on appeal pursuant to RCW 4.84.330. *Deere Credit, Inc. v. Cervantes Nurseries, LLC*, 172 Wash. App. 1, 8, 288 P.3d 409, 412 (2012). Here, the contract provides:

If a past due account is placed in the hands of any attorney or agency for collection or to foreclose any security, the person(s) or company owing the account shall pay all reasonable costs, fees and expenses incurred by Burgess Vineyards including without limitation, reasonable attorney fees (with or without litigation) and court costs.

The Court should award reasonable attorney fees and costs in conjunction with the contract and applicable law.

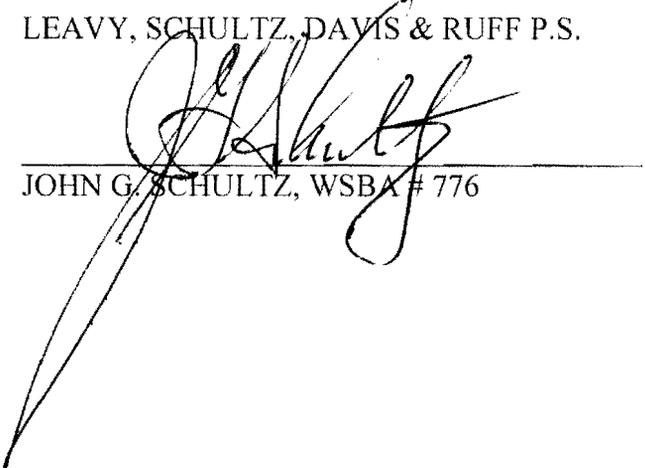
V. CONCLUSION

This case should have been resolved on December 15, 2010. Unfortunately, Mr. Beveridge did not have the funds to uphold his promise to pay. No matter. There was another opportunity for resolution. It could have been resolved two months later when Mr. Beveridge tendered payment of the \$4,300 – he should have included the \$606.59 he owed in late fees and finance charges. Unfortunately, Mr. Beveridge thought he could claim that his signature on the Burgess contract did not matter – he thought he could claim that his mind had not met Mr. Burgess in agreement. No matter. There was yet another opportunity for resolution. It could have been resolved when Mr. Burgess sent Mr. Beveridge a letter very clearly informing him that he was not taking his signature on the Burgess contract for granted – he was holding him to the bargain he had struck. Unfortunately, another round of late fees and finance charges had tolled and Mr. Beveridge owed \$815.86. One check in March of 2010 could have ended this matter. But Mr. Beveridge clung to his defensive scheme and erringly assured himself that he could talk his

way around a bona fide, unequivocal, express contractual agreement. Unfortunately for Mr. Beveridge, the trial court found the credit provision and the entirety of the Burgess contract enforceable, and this finding cannot be altered on appeal. Because he could not convince himself that he had erred, Mr. Beveridge's \$606.59 debt has now ballooned into a \$10,253.52 judgment, and the fees are still mounting.

Respectfully submitted this 21st of August, 2014.

LEAVY, SCHULTZ, DAVIS & RUFF P.S.



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