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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

**IN THE WASHINGTON STATE COURT OF APPEALS,
DIVISION III**

COURT OF APPEALS NO. 323781
On Appeal From
SPOKANE COUNTY SUPERIOR COURT
CAUSE NO. 2010-2-01008-9
The Honorable Annette S. Plese

REBECCA MAUCH and KELLIE DAVIS,
Plaintiffs/Respondents,
v.

BOURKE OWENS, DIANA OWENS and SWISS VALLEY AGENCY
d/b/a NORTH TOWN INSURANCE AGENCY,
Defendants/Appellants.

APPELLANTS' REPLY BRIEF

Douglas R. Dick
PHILLABAUM, LEDLIN, MATTHEWS
& SHELDON, PLLC
1235 North Post Street, Suite 100
Spokane, Washington 99201
Telephone: 509-838-6055
Facsimile: 509-625-1909
Attorneys for Appellants

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II. INTRODUCTION AND RELIEF REQUESTED

As Appellants Bourke and Diana Owens (“Owens”) and Swiss Valley Agency, Inc. (“Swiss Valley”) (both parties collectively referred to as “Defendants”) discussed in their Appellants’ Brief, this case involved negotiations for the potential sale of an insurance agency to Respondents Rebecca Mauch (“Mauch”) and Kellie Davis (“Davis”) (both parties collectively referred to as “Plaintiffs”). Plaintiffs alleged that they had purchased the agency from Owens based on a document titled “Letter of Offer to Purchase Swiss Valley Agency dba North Town Insurance Agencies” (“Letter of Offer to Purchase”).

The linchpin of Plaintiffs’ Response Brief is that Defendants did not proffer evidence to support their defenses and counterclaims. The reason Defendants did not present this evidence is because the trial court erred by denying them the opportunity to put on their case.

Plaintiffs have failed to rebut Defendants’ clear demonstration of procedural errors, errors in evidentiary rulings, and application of the law by the trial court in granting a “directed verdict”¹ against Defendants.

¹ Although the trial court labeled its ruling a “directed verdict” this case was not heard by a jury. The trial court improperly applied CR 41(b)(3) to grant judgment to plaintiffs on partial evidence.

dismissing Defendants' counterclaims and awarding duplicative and unsupported damages.

Plaintiffs have not provided any legal or factual basis supporting the trial court's grant of a judgment on partial evidence against Defendants prior to Defendants being able to present a defense or offer evidence with respect to counterclaims. For these reasons, Defendants request that this Court reverse the trial court's "directed verdict", award of damages and remand for a trial before a different judge.

III. ARGUMENT

A. Plaintiffs failed to justify the trial court's erroneous "directed verdict".

This Court must answer the following questions: Can a trial court properly grant a judgment on partial findings to a plaintiff without ever allowing the defendant to call witnesses or present direct evidence? When a trial court has only heard one side of the case can it truly make findings of fact against a silenced defendant?

Contrary to Plaintiffs' argument, Defendants did challenge specific findings of fact in their brief. Appellants' Brief at 15. More importantly, Defendants have challenged the very procedure that the court used in arriving at its findings. App. Br. at 8-45. If the trial court had determined its findings of fact after hearing evidence presented by both parties

Defendants would be limited in their arguments on appeal. Obviously, Defendants cannot cite to substantial evidence supporting their case because they were denied the opportunity to present any evidence on their own behalf. The trial court did not consider Plaintiffs' evidence over Defendants' evidence, it only considered Plaintiffs' evidence because Defendants were not permitted to present a single witness.

An individual's right to trial is a right that must remain inviolate. Wash. Const. art. I, § 21; *see also* CR 38; CR 39; *Magana v. Hyundai Motor Am.*, 167 Wash. 2d 570, 591, 220 P.3d 191, 201 (2009). Black's Law Dictionary defines miscarriage of justice as "prejudice to substantial rights of a party." *Black's Law Dictionary* 1150 (4th ed. rev. 1975). Prejudicial error is "error substantially affecting appellant's legal rights and obligations." *Black's Law Dictionary* 1343 (4th ed. rev. 1975). It is a miscarriage of justice to not allow a party to present a defense or its counterclaims and therefore the trial court abused its discretion by granting a "directed verdict".

Judicial discretion "means a sound judgment which is not exercised arbitrarily, but with regard to what is right and equitable under the circumstances and the law." *T.S. v. Boy Scouts of Am.*, 157 Wash. 2d 416, 423, 138 P.3d 1053, 1056-57 (2006). "Abuse of discretion does not mean only the decision of a case by whim or caprice, arbitrarily or from a

bad motive, but it also means that the discretion has not been justly and properly exercised under the circumstances of the case.” *State ex rel. Nielsen v. Superior Court for Thurston Cnty.*, 7 Wash. 2d 562, 566, 110 P.2d 645, 647 *rev'd*, 7 Wash. 2d 562, 115 P.2d 142 (1941) quoting *People v. Pfanschmidt*, 262 Ill. 411, 104 N.E. 804 (1914). The trial court abuses its discretion when it denies a defendant the opportunity to present a case-in-chief on defense prior to a trial court granting a judgment on partial evidence on a plaintiff’s claim. Defendants were denied the inviolate right to put on a defense. Plaintiffs provide no justification for granting a “directed verdict” prior to defendants presenting evidence in defense. This case should be remanded for a new trial by a different judge.

B. Plaintiffs failed to justify the trial court’s dismissal of Defendants’ Counterclaims.

Plaintiffs devote a substantial portion of their brief expounding on the lack of evidence supporting Defendants’ counterclaims. Respondents’ Brief at 13-22. To state it simply, the lack of evidence to support counter claims is because Defendants were never given the opportunity to present a case-in-chief on counterclaims.

In their arguments against the counterclaims Plaintiffs reference a release agreement proposed as Exhibit 31 to support the proposition that Ms. Davis lost her home. Resp. Br. at 19-20. That document clearly

states that Ms. Davis was renting from Mr. Owens and would only have an option to purchase the home if she signed the release agreement. (Exhibit 31, app. at A-4). When Defendants attempted to adduce evidence regarding counterclaims, on the very issue of this release agreement, the court prohibited questions regarding the release agreement by stating:

“The Court: Well, one, per counsel, you wanted to put on the plaintiff’s case and put on your defense, and then we would start your counterclaims where you would be the moving party, and they would defend.

So, one, I’m still on the first portion of it where the plaintiff’s claims are being addressed. So at this time that’s where I’m operating under.”

Mr. Phillabaum: Okay. Then can I recall this witness in my case-in-chief?

The Court: Yes.” RP 459, l. 14-23.

There was no opportunity to discuss the release agreement or its contents because the trial court limited evidence that could be discussed at that time. The trial court’s “directed verdict” precluded Defendants from presenting their case in chief.

Plaintiffs cite *Boeing v. Sierracin Corp.*, in support of its argument that a “directed verdict” and dismissal of Defendants’ counterclaims was proper in this case. Resp. Br. at 11, 22. In *Boeing*, the court granted a directed verdict dismissing Libbey, a third party defendant, after approximately 9 weeks of trial because Sierracin did not present a prima facie case for recovery against Libbey. *Boeing Co. v. Sierracin Corp.*, 108

Wash. 2d 38, 67, 738 P.2d 665, 683 (1987). *Boeing* is easily distinguishable because the nonmoving party put on its case in chief before its claims were dismissed.

Here, Defendants were not permitted to present any evidence whatsoever to support their counterclaims. The trial court, in essence, dismissed Defendants' case when Plaintiffs completed the presentation of their evidence. If, at the close of Plaintiffs' case, Defendants had moved for a dismissal of Plaintiffs' case, the court would have been required to view evidence in the light most favorable to the nonmoving party (the Plaintiffs). The trial court applied the rule backwards; it viewed the moving party's evidence (the Plaintiffs' evidence) in the light most favorable to the moving party (the Plaintiffs) and denied *Defendants* the opportunity to put on any evidence prior to making its ruling. Plaintiffs do not cite any cases where a "directed verdict" was granted to the only party permitted to present evidence.

This is akin to an entire baseball game consisting of only the top half of the first inning. Only one team gets to stand at the plate and bat. When it is time for the other team to bat, the game is called as a win for the first team. Similarly, Defendants were denied their due process rights to a fair and impartial trial. This case should be remanded for a new trial before a different judge.

C. Plaintiffs fail to justify the procedural irregularities of the trial court that violate the Appearance of Fairness.

Viewing the circumstances of this trial, an objective observer would reasonably question whether Defendants received a fair hearing at trial. Plaintiffs argue that actual or potential bias in the form of personal or pecuniary interest on the part of the decision maker is necessary to violate the appearance of fairness doctrine. Resp. Br. at 22-23. Plaintiffs fail to recognize that perceived bias is sufficient to support a violation of the appearance of fairness doctrine. *GMAC v. Everett Chevrolet, Inc.*, 179 Wash. App. 126, 154, 317 P.3d 1074, 1087 *review denied*, 335 P.3d 941 (Wash. 2014).

The appearance of bias or prejudice can be as damaging to public confidence in the administration of justice as would be the actual presence of bias or prejudice. *Id.* The trial court made dispositive rulings prior to an opportunity for the Defendants to present direct evidence to support both their defenses and their counter-claims. Any potential testimony from Defendants was prejudged by the trial court and excluded. The court determined on the first day what the result of this case was going to be without hearing the evidence. The trial court was biased against Defendants throughout the entire procedure.

As discussed in Appellants' Brief, the trial court refused to allow Defendants the ability to make reference to evidence that they would have produced because it did not permit Defendants to make offers of proof. RP 303; App. Br. at. 43-44.

"Even a mere suspicion of irregularity, or an appearance of bias or prejudice should be avoided by the judiciary." *GMAC v. Everett Chevrolet, Inc.*, 179 Wash. App. 126, 154, 317 P.3d 1074, 1087 *review denied*, 335 P.3d 941 (Wash. 2014) (internal quotations omitted). Granting a "directed verdict" against a party prior to that party's opportunity to present evidence is a significant irregularity.

The day after making its judgment on partial evidence the trial court compounded this irregularity when it attempted to salvage this error. The trial court curiously stated it would "allow [Defendants] to put on a defense to the breach of contract claim" and asked for an offer of proof to rebut what the court had already made a judgment on. RP 508, l. 10-25. The trial court was openly biased against Defendants because it was stating it had already made its decision and it could not see how anyone could testify to change its mind. RP 512-513. Even if Defendants' witnesses had not already been released, presenting their evidence would have been fruitless because the trial court already discounted evidence before it was presented.

The trial court's bias is evident by the procedural and evidentiary irregularities occurring during the conduct of the proceedings. These irregularities are evidence that the appearance of fairness doctrine has been violated. This case should be remanded before a new judge.

D. Mr. Owens Did Not Admit a Material Breach

Respondent's Brief mischaracterizes Mr. Owens' testimony where it states that he admitted to a material breach. Resp. Br. at 12-13. During his direct examination of Mr. Owens, Plaintiffs' attorney asked this question: "Mr. Owens, you never did anything to perform under the terms set forth in Exhibit 36, did you?" Mr. Owens replied "...So I guess not. It's impossible for me - - the answer is no to that because this was simply a discussion." RP 206, l.20 – 207, l.2.

The next day, Defendants' attorney attempted to clarify this response and asked: "Mr. Owens, was there anything on Exhibit D104² that you were supposed to perform that you did not?" Mr. Owens answered "No." RP 304, l. 22-25.

Defendants' attorney asked this question to distinguish between not doing anything under the Letter of Offer to Purchase and testifying

² Defendants' Exhibit 104 is the Letter of Offer to Purchase and is identical to Plaintiffs' Exhibit 36.

that there was nothing the Letter of Offer to Purchase required him to do that he did not do. RP 306, l. 1-5. The court struck the answer and the question stating, “I think it’s inappropriate at this point based on the Court’s ruling.” RP 306, l.8-9.

This ruling, again, prohibited the Defendants from offering relevant evidence. It was not a contradiction for Mr. Owens to testify that he did nothing to perform because there was nothing for him to perform. Both statements were true.

E. Plaintiffs fail to acknowledge the trial court’s erroneous application of the parol evidence rule.

Plaintiffs’ Brief focusses on contract formation, but gives little regard to the law of parol evidence. Resp. Br. at 23-30. In order to properly determine if there was a contract for the sale of Swiss Valley, the trial court must first properly apply the parol evidence rule and then consider contract law. Plaintiffs’ motion in limine was not about whether or not a contract existed. It was about what evidence should be reviewed prior to making that determination. RP 46-61; CP 566-568. The trial court misapplied the parol evidence rule when it excluded testimony and exhibits about the intent of the parties.

An important aspect of this appeal is the timing of the trial court’s decisions. The trial court determined that the Letter of Offer to Purchase

was the sale contract before hearing any evidence that the terms of the sale were not agreed upon or finalized, and that the Plaintiffs did not sign the closing documents that were prepared to facilitate the sale of Swiss Valley. The trial court had not heard any evidence as to the circumstances surrounding the making of the Letter of Offer to Purchase or the subsequent acts and conduct of the parties. This evidence is necessary when determining the intent of parties. *Wimberly v. Caravello*, 136 Wn. App. 327, 336, 149 P.3d 402, 408 (Div. III 2006). A “court may always consider the surrounding circumstances leading up to the execution of an agreement.” *Spokane Helicopter Serv., Inc. v. Malone*, 28 Wash. App. 377, 381-82, 623 P.2d 727, 730 (Div. III 1981). Plaintiffs fail to recognize the breadth of parol evidence that is permissible.

Plaintiffs did not provide proof that the Letter of Offer to Purchase was a fully integrated agreement. Parol evidence is therefore admissible to determine if the parties intended that a writing be a complete and accurate integration of their agreement. *Spokane Helicopter Serv., Inc. v. Malone*, 28 Wash. App. 377, 382, 623 P.2d 727, 730 (Div. III 1981). Although, parol evidence precludes **prior and contemporaneous** agreements, “if it appears to the court that the entire agreement of the parties was made up of more than one written document, that such documents were made as parts of the same transaction, related to the same

subject matter and were not inconsistent with each other, all of them may be considered together, and from them a determination made as to all of the terms of the agreement and the intention of the parties.” *Paine-Gallucci, Inc. v. Anderson*, 41 Wash. 2d 46, 50, 246 P.2d 1095, 1097 (1952). The trial court must necessarily review and look at **subsequent** documents that were prepared as part of the same transaction and are related to the same subject matter.

If the fact finder determines that a written document was not intended to be a complete expression of all of the terms agreed upon by the parties, then the fact finder may also consider evidence of the circumstances surrounding the making of the agreement. 6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 301.06 (6th ed.). As Defendants discussed in their Appellant Brief the trial court made no determination that the Letter of Offer to Purchase is a fully integrated agreement. RP 131, L. 18-24.

The fact finder is required:

“[To] determine the intent of the contracting parties by viewing the contract as a whole, considering the subject matter and apparent purpose of the contract, all the facts and circumstances leading up to and surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of the respective interpretations offered by the parties.”

6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 301.05 (6th ed.).

As previously discussed, there were numerous provisions of the sale which were not addressed in the Letter of Offer to Purchase. App. Br. at 17-20. For example, the sale price of the business was not yet agreed upon since it was to be adjusted³ to September 30th. Plaintiffs entirely ignore these ambiguous words in the Letter of Offer to Purchase.

The Letter of Offer to Purchase was an agreement to make an agreement. An agreement to do something which requires a further meeting of the minds of the parties is not complete, and is therefore unenforceable. *Sandeman v. Sayres*, 50 Wash. 2d 539, 541-42, 314 P.2d 428, 429 (1957). The Letter of Offer to Purchase requires a myriad of additional elements necessary for the sale of a business to occur.

Plaintiffs' argument fails to recognize that there was not sufficient evidence presented at the trial to determine that the Letter of Offer to Purchase was a contract for the sale of Swiss Valley. As stated above, the trial court's ruling that the Letter of Offer to Purchase was a contract for the sale of Swiss Valley was made before any evidence was presented by any party.

³ The Letter of Offer to Purchase made no reference to how the adjustment would be calculated.

The burden of proving a contract, whether express or implied, is on the party asserting it, and he must prove each essential fact, including the existence of a mutual intention. *Cahn v. Foster & Marshall, Inc.*, 33 Wash. App. 838, 840, 658 P.2d 42, 43 (1983). There was no evidence that Mr. Owens intended that the Letter of Offer to Purchase constitute the entire documentation for the sale of Swiss Valley. To the contrary, he stated he did not believe it was a contract.

The Washington Supreme court has stated that “[u]nder *Berg*, ‘extrinsic evidence is admissible as to the entire circumstances under which the contract was made, as an aid in ascertaining the parties’ intent.’” *Nationwide Mut. Fire Ins. Co. v. Watson*, 120 Wash. 2d 178, 189, 840 P.2d 851, 857 (1992). “Extrinsic evidence may be relevant in discerning [the parties’] intent, where the evidence gives meaning to words in the contract.” *Hollis v. Garwall, Inc.*, 137 Wash. 2d 683, 695, 974 P.2d 836, 843 (1999). When determining intent, language is given its ordinary and common meaning. *Id.* The very title of the document includes the word offer. Giving offer its plain meaning the document can be nothing more than an offer, not a purchase and sale agreement.

The trial court’s misapplication of the parol evidence rule to preclude **subsequent** conduct of the parties also precluded relevant evidence on the issue of whether the Letter of Offer to Purchase was

anything more than just an offer to purchase the business. As stated previously, there was evidence of ongoing negotiations, the planned closing, and all the closing documents were improperly excluded. App. Br. at.18-19. The subsequent conduct of the parties and extrinsic evidence showing whether the contract was to be the final expression of the agreement is permitted under the parol evidence rule. *Berg v Hudesman*, 115 Wash. 2d 657, 668, 801 P.2d 222, 229 (1990); *Morgan v. Stokely-Van Camp, Inc.*, 34 Wash. App. 801, 808, 663 P.2d 1384, 1389 (1983). The trial court improperly did not consider the evidence of the ongoing negotiations, the planned closing, and the closing documents when ruling that the Letter of Offer to Purchase was the sale contract. This erroneous application of the parol evidence rule requires that this case be remanded for a new trial.

F. Plaintiffs failed to justify the basis for the trial court's judgment against Swiss Valley.

Plaintiffs are not entitled to judgment against Swiss Valley.

Plaintiffs did not offer any evidence at trial or in their Respondents' Brief that both Owens and Swiss Valley jointly owned any property. Property of a corporation is not automatically property of a shareholder. *See Nursing Home Bldg. Corp. v. DeHart*, 13 Wash. App. 489, 495, 535 P.2d 137, 142 (1975) (It cannot be doubted that a corporation's separate legal

identity is not lost merely because all of its stock is held by the members of a single family or by one person.)

Mr. Owens is the sole owner of the Swiss Valley stock and that stock is not jointly owned by Swiss Valley. Swiss Valley does not own any property belonging to the Owenses. A judgement against Mr. Owens cannot be used to execute against the assets of Swiss Valley.

Plaintiffs argue that failure to serve Swiss Valley with a complaint is somehow without merit and that a default judgment could be taken against it. CR 55(a)(1) requires that a motion for default be made before a default judgment is granted. No motion has been made for default against Swiss Valley. CR 55(b)(4) requires proof of service in order for a default judgment to be granted. No proof of service on Swiss Valley has been filed with the court. CR 55(a)(3) requires that any party who has appeared in the action be served with a written notice of a motion for default and the supporting affidavit before a default occurs. No notice or affidavit of default has been filed on any party. Since there has been no compliance with CR 55 there can be no default against Swiss Valley.

Swiss Valley had nothing to defend against because Plaintiffs alleged no claims against it and no evidence was presented against it at trial. Plaintiffs fail to address the fact that there was no evidence presented that Swiss Valley owed any duty to Plaintiffs, breached any duty to

Plaintiffs or was even a party to the Letter of Offer to Purchase. No evidence was presented that Swiss Valley violated or materially breached any contract. The trial court did not make a single finding of fact that supported the judgment against Swiss Valley.

The trial court's entry of judgment against Swiss Valley is yet another irregularity, and is further evidence of its bias against Defendants. This irregularity is compounded by the fact, as Defendants argued in their opening brief and Plaintiffs failed to address in their response, that the trial court stated it had not read Defendants' motions but was making a finding that any judgment would include Swiss Valley. App. Br. at 31. This case should be remanded for a new trial with a different judge.

G. Plaintiffs failed to demonstrate sufficient elements for exclusion of Defendants' expert testimony.

As stated previously, the elements necessary to impose the most severe discovery sanctions require: 1) findings of willful violation, 2) consideration of lesser sanctions **and** 3) substantial prejudice. *Burnet v. Spokane Ambulance*, 131 Wash. 2d 484, 933 P.2d 1036 (1997) (emphasis added). Plaintiffs do not make any reference to the record where the court applied all of the elements necessary to impose the most severe discovery sanctions.

Plaintiffs cite *Detwiler v. Gall*, 42 Wash. App. 567 (1986) to support the trial court's exclusion of Defendants' expert witnesses as an appropriate sanction. Resp. Br. at 31. The *Detwiler* court only discusses the sanction of exclusion of expert's testimony as a warning to prevent inappropriate trial tactics. The facts surrounding the cases that the *Detwiler* court relies on to support its proposition that exclusion of expert testimony is an appropriate sanction support Defendants' argument that willful nondisclosure, consideration of lesser sanctions and substantial prejudice must be considered.

In *Rupert v. Gunter*, 31 Wash. App. 27 (1982), expert testimony was excluded because the plaintiff had not made arrangements for an expert to testify until 4 p.m. the day before the trial and did not notify opposing counsel of the general intent to use an expert until two days before trial. In *Lampard v. Roth*, 38 Wash. App. 198 (1984), expert testimony was excluded because expert witnesses were not disclosed until after trial began and because the plaintiff failed to comply with an order compelling discovery. There, the court concluded that the plaintiff's actions and omissions were "a **willful** failure to comply with discovery rules." 38 Wash. App. at 202 (emphasis added). The *Lampard* court also stated "the court should exclude testimony if there is a showing of **intentional** or tactical nondisclosure." *Id* (emphasis added).

Here there is nothing in the record or any finding of willful failure to comply with discovery, intentional nondisclosure or substantial prejudice. Expert witness Daniel Harper was disclosed as early as July 19, 2010, forty months before trial. It was no surprise that he was going to be called. RP 20, l.19-21. Defendants disclosed that Mr. Harper would give expert testimony on the issue of damages. RP 22, l. 20-23, l.6. Plaintiffs made no motions to compel; there were no orders compelling discovery regarding experts. Without evidence that nondisclosure was willful, without evidence that lesser sanctions were considered, and without evidence of substantial prejudice, it was an error for the trial court to impose the most severe sanction by excluding Defendants' expert witnesses on the day of trial. Defendants should be granted a new trial so they may be permitted to present expert witness testimony.

H. Plaintiffs failed to rebut compliance with ER 612 and the trial court's error prohibiting Mr. Owens from refreshing recollection.

Plaintiffs fail to cite any law or rule of evidence that requires a party to produce prior to trial a document that will be used to refresh the recollection of a witness. ER 612 requires that opposing counsel have the right to examine the writing. Here, Plaintiffs were given the writing and the opportunity to cross examine Mr. Owens, and even to admit those notes into evidence if they so chose.

“Anything may in fact revive a memory; a song, a scent, a photograph, an allusion, even a past statement known to be false” *Lindsey v. M & M Rest. Supply*, 170 F. Supp. 2d 788, 790 (N.D. Ohio 2001). A witness may refresh his memory from notes that have been copied from another memorandum so long as the witness can testify from his own recollection. *Olmstead v. United States*, 19 F.2d 842, 846 (9th Cir. 1927) *aff’d*, 277 U.S. 438, 48 S. Ct. 564, 72 L. Ed. 944 (1928). “[A] witness can testify only as to such facts as are within his own knowledge and recollection, yet he is permitted to refresh and assist his memory by the use of a written instrument, memorandum, or entry in a book, and may be compelled to do so if the writing be presented in court. It does not seem necessary that the writing should have been made by the witness himself, nor that it should be an original writing, provided that, after inspecting it, he can speak to the facts from his own recollection.” *Id.*

As stated previously, all of the requirements necessary to satisfy ER 612 are present in the court record. App. Br. at 25-26. Since all of the requirements of ER 612 were satisfied it was an abuse of the trial court’s discretion to prohibit Mr. Owens from using his notes to testify about the amount of money he loaned to Swiss Valley during the time Plaintiffs allege they owned Swiss Valley. This error limited Defendants’ ability to

present pertinent evidence. This error is further basis for this Court granting a new trial on the merits.

I. Plaintiffs admit the trial court erred in calculating damages and failed to justify the basis for damages they deem appropriate.

Plaintiffs' Brief recognizes that the court erroneously applied the law by awarding both expectation and restitution damages. Resp. Br. at 44-45. Plaintiffs also recognize the trial court used an improper method of measuring damages. Resp. Br. at 47. A trial court necessarily abuses its discretion if it awards damages based upon an improper method of measuring damages. *Farmer v. Farmer*, 172 Wash. 2d 616, 625, 259 P.3d 256, 262 (2011).

If a trial court's findings of fact are clearly unsupported by the record, then an appellate court will find that the trial court abused its discretion. *Magana v. Hyundai Motor Am.*, 167 Wash. 2d 570, 583, 220 P.3d 191, 197 (2009). Defendants reiterate that "a court necessarily abuses its discretion if its decision is based on an erroneous view of the law." *In re Rogers*, 117 Wash. App. 270, 274, 71 P.3d 220, 222 (2003). Since Plaintiffs admit an improper method of awarding damages a new trial should be granted.

Plaintiffs are dismissive of the trial court's reference to lost profits and state its reference to lost profits "was a generic reference and not

meant to invoke a damage award.” Resp. Br. at 41. However, the trial court’s statements clearly invoked lost profits were included in the damage award. The court stated: “the payments from the business loan would be taken out of that future **profit**, especially if the **profits** would be coming to the new owners,” RP 546, l. 1-3 (emphasis added); “they did increase **profits**,” RP 546, l. 14 (emphasis added); “The Court will, also, grant prejudgment interest as those **profits** would have continued to increase over the years;” RP 547, l.1-2 (emphasis added).

These are not generic references. They are specific instances where the court was considering lost profits as part of the damage award. The court erred by awarding damages based on lost profits when there was no evidence in the record to support the certainty of lost profits.

Additionally, Plaintiffs argue against themselves with respect to damages. First, they argue that the \$480,000 expectation damage award was foreseeable and should not be disturbed because there is a reasonable basis for estimating the loss. Resp. Br. at 43. Later they admit these damages are unsupported due to “the uncertainty of the trial court’s calculation” and their failure to provide “the basis therefore.” Resp. Br. at 46-47.

Plaintiffs emphasize the trial court’s words, “but as stated in the contract,” and argue that those words somehow removed opinion or

discretion by the court. Resp. Br. at 46-47. Nowhere in the Letter of Offer to Purchase is there any reference to \$480,000.

If Plaintiffs are entitled to any damages, restitution is the only appropriate damage in this case. The claimed lost profits and expectation damage awards are speculative and cannot be awarded. *Rathke v. Roberts*, 33 Wn.2d 858, 866, 207 P.2d 716, 721 (1949). The only evidence in the record supporting any of the damages awarded by the trial court are the alleged restitution payments. Even if Plaintiffs are entitled to restitution damages the trial court erred by not applying deductions for rent payments and repayment of loans.

Furthermore, Plaintiffs fail to recognize they are not entitled to the prejudgment interest awarded by the trial court. Prejudgment interest is available only “(1) when an amount claimed is ‘liquidated’ or (2) when the amount of an ‘unliquidated’ claim is for an amount due upon a specific contract for the payment of money and the amount due is determinable by computation with reference to a fixed standard contained in the contract, without reliance on opinion or discretion.” *Rekhter v. State, Dep’t of Soc. & Health Servs.*, 180 Wash. 2d 102, 124, 323 P.3d 1036, 1047 (2014).

Plaintiffs admit in their Respondents’ Brief that there is no certainty to the court’s calculation of damages. Resp. Br. at 47. Plaintiffs also admit that they did not provide the basis for proper damages, and

admit they cannot point to the record where the trial court could reach such a calculation. Resp. Br. at 46-47. Plaintiffs request this court to not overturn the prejudgment interest award and to remand on the issue of damages as an attempt to remedy their inadequate evidence. As stated above, however, remand of the entire case is necessary on other issues in addition to the issue of damages.

Lastly, despite Plaintiffs' argument otherwise, the damages awarded here do shock the conscience. Duplicating damages, awarding both expectation and restitution damages, was punitive in nature. The damages also shock the conscience because, as Plaintiffs admit in their brief, "neither party knows what figuring was done" by the trial court to determine the amount of the judgment. Resp. Br. at 47.

IV. CONCLUSION

Plaintiffs failed to justify the basis for a "directed verdict" and dismissal of counterclaims prior to Defendants presenting evidence. A trial court cannot grant a "directed verdict" without ever allowing the defendant to call witnesses or present direct evidence. It is necessary that each party be provided the opportunity to present evidence to preserve the inviolate right of a fair trial. Defendants were denied that right.

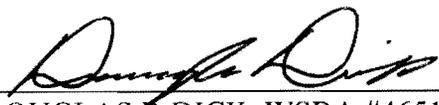
Here, the trial court utilized procedural and evidentiary irregularities during the conduct of the proceedings, thereby demonstrating

bias against Defendants. These irregularities violate the Appearance of Fairness doctrine. An objective observer would reasonably question whether Defendants received a fair hearing at trial.

Plaintiffs admit the trial court erred in calculating damages and failed to justify the basis for damages. Plaintiffs' recognition of the trial court's damage award error and request for remand on the issue of damages is not sufficient to remedy the numerous other procedural and evidentiary errors. As a result of the numerous errors committed by the trial court, Defendants respectfully request this Court remand the entire case for a new trial by a different judge.

DATED this 1st day of December, 2014.

Respectfully submitted,



DOUGLAS R DICK, WSBA #46519
Attorneys for Appellants

V. APPENDIX

EXHIBT 31

EMPLOYMENT SEVERANCE AGREEMENT, RELEASE OF ALL CLAIMS
AND OPTION TO PURCHASE REAL ESTATE

This Severance Agreement and Release of All Claims ("Agreement") is made and entered into by and between Swiss Valley Agency, a Washington corporation dba North Town Insurance, Bourke Owens, its agents and employees and Bourke Owens (hereinafter referred to as "Employer") and Kellie Davis, (hereinafter referred to as the "Employee").

WHEREAS, Employee was an Office Manager of Employer and served in that capacity until her voluntary resignation on March 15, 2010; and

WHEREAS, the Employer and Employee wish to enter into this Agreement to fully and finally resolve any claims, if any, between them, arising out of the employment relationship; and

WHEREAS, Employee acknowledges that the Employer has made a significant investment in its employees and customer relationships which Employer is entitled to protect;

NOW, THEREFORE, in consideration of the mutual covenants and promises herein contained and other good and valuable consideration, including a payment of Eight Thousand Eight Hundred Dollars (\$8,800) from Employer to Employee, the receipt of which is hereby acknowledged, it is hereby agreed by and between the Parties as follows:

SEVERANCE AGREEMENT

1. **Payments of Amounts Owed.** Employer has paid Employee her normal salary through the date of termination, plus any and all accrued but unused benefits through the date of termination and all other sums to which she is entitled. In addition, Employer has paid Employee \$8,800 as consideration for this Severance Agreement and Release of Claims. Employee acknowledges and agrees that the Employer has made no representations to her regarding the tax consequences of any amounts received or to be received during her employment or as a consequence of this Agreement and that such sums are likely to be considered taxable income, subject to disclosure to appropriate taxing authorities. Employee agrees to pay all federal or state taxes, if any, which are required by law to be paid with respect to amounts paid to her during the course of employment and pursuant to this termination. Employee further agrees to indemnify and hold Employer harmless from any claims, demands, deficiencies, levies, assessments, executions, judgments or recoveries by any government entity against Employer for any amounts claimed due on account of Employee's employment or this agreement, including Employer's reasonable attorneys' fees.

2. **Confidential Information.** During Employee's employment, she has learned trade and business secrets and has been exposed to customer lists, lead lists, sources of leads, marketing and sales data, product and product development, employee lists, marketing plans, commission computations and other financial data of Employer. All such information is deemed Confidential Information. Employee agrees that she will keep all such information confidential and not disclose it to any third party, or make use of the information in any manner. Any documents containing Employer's Confidential Information shall be returned by Employee to Employer and not disclosed to any third persons.

3. Employee agrees that for a period of eighteen months from the date of this Agreement, Employee will not contact any of Employer's customers or former customers to directly or indirectly solicit or attempt to solicit any business from them.

Employee further agrees that for a period of eighteen months from the date of this Agreement, Employee will not directly or indirectly solicit or attempt to solicit any employees of Employer to leave their employment, to remove their business from Employer or participate in any manner in a competing business.

In the event Employee violates any provisions of this section, she shall pay Employer, as monetary damages, a sum of money equal to 100% of the gross revenue received or related to any activities done in violation of this Agreement, plus any other damages and reasonable attorneys' fees incurred by Employer.

Because of the unique nature of the matters covered by this Agreement, the difficulty of proving actual damages and the irreparable harm caused by a breach of this Agreement, monetary damages will be inadequate to compensate Employer for breach; accordingly, the Parties agree that Employer shall, in addition to any other remedies available to it, be entitled to injunctive relief to enforce the terms of this Agreement.

RELEASE OF ALL CLAIMS

1. **Release.** Employee hereby releases and forever discharges Employer from all claims, demands, damages, or causes of action related to her employment, actions or inactions by individuals she met or interacted with as a result of her employment, including all those that are known or unknown. These released claims include all those related to payment of wages, benefits, taxes, any sort of employment discrimination, retaliation, wrongful discharge, assault, battery, consumer protection, infliction of emotional distress, negligence and all forms of unlawful conduct and discrimination.

2. **Finality.** The parties have negotiated for and it is understood and agreed that this is a FULL AND FINAL RELEASE of all claims of every nature and kind whatsoever and releases claims that are known, unknown, suspected and unsuspected against Employer, its agents, owners, employees, officers, directors, successors and assigns.

OPTION TO PURCHASE REAL ESTATE

Employee, KELLIE DAVIS, and her husband, JASON DAVIS ("the Davises"), have, for more than a year, resided in a home owned by BOURKE OWENS and DIANA OWENS ("the Owens"). Employee has paid month-to-month rent equivalent to the mortgage payment, real estate taxes and insurance costs associated with the home under an oral month-to-month tenancy agreement. The Davises and Owens wish to continue the month-to-month tenancy agreement for up to one year and the Owens hereby grant the Davises an option to purchase the home they have been renting under the following terms and conditions:

1. **Legal Description.** The property leased by the Davises and the option to purchase granted by the Owens is for the following described property:

Lot 1 in Block 2 of Argonaut estates as per plat thereof recorded in Volume 14 of Plats, Page 1;

Situate in the County of Spokane, State of Washington.

2. **Purchase Price.** The Davises may purchase the property for \$165,157.12 cash payment.

3. **Term.** This Option to Purchase Real Estate and month-to-month lease shall terminate the sooner of one year from the date of this agreement or the date Kellie Davis and/or Jason Davis end their occupancy of the property. Upon termination of this Agreement, all rights of occupancy or other rights claimed or acquired by the Davises in the property or related to the property based upon deposits, payments or improvements made, shall terminate with no right of reimbursement to the Davises.

4. The Davises, or either of them, in their sole discretion, may give the Owens sixty (60) days advance written notice of intent to move from the property and terminate their month-to-month lease and option to purchase. If such notice is given, their option to purchase and obligations to make further payments at the end of the 60 day notice period shall end and their sole responsibility will be to leave the property in its pre-occupancy condition, normal wear and tear excepted, or pay damages equal to the cost of repair or restoration.

5. **Assignability.** This Option to Purchase the property is not assignable.

6. **Conveyance.** If the Davises give written notice of exercising the option to purchase, upon payment, the Owens will convey the property by quit claim deed with no warranties regarding the condition of the property or title, other than a warranty that the Owens will discharge the existing mortgage on the property at closing. The Davises will pay all closing costs, fees and taxes associated with purchase and sale of the property.

7. **Rent.** During the pendency of this option, the Davises will continue to pay monthly rent in the amount of \$1,484.44.

KELLIE DAVIS

DATE

JASON DAVIS

DATE

BOURKE OWENS

DATE

DIANA OWENS

DATE

STATE OF WASHINGTON)
)ss
County of SPOKANE)

On this ____ of _____, 2010, before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared Kellie Davis and Jason Davis, known to be the individuals that executed the foregoing instrument, and acknowledged the said instrument to be their free and voluntary act and deed for the uses and purposes therein mentioned.

WITNESS my hand and official seal hereto affixed the day and year in this certificate above written.

Notary Public for the State of Washington
Residing at _____
My Commission Expires _____

STATE OF WASHINGTON)
)ss
County of SPOKANE)

On this ____ of _____, 2010, before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared Diana Owens and Bourke Owens, known to be the individuals that executed the foregoing instrument, and acknowledged the said instrument to be their free and voluntary act and deed for the uses and purposes therein mentioned.

WITNESS my hand and official seal hereto affixed the day and year in this certificate above written.

Notary Public for the State of Washington
Residing at _____
My Commission Expires _____

EMPLOYMENT SEVERANCE AGREEMENT.docx

SPOKANE COUNTY SUPERIOR COURT
Cause No. 10-2-01008-9
Mauch, et al vs. Owens, et al
Plaintiffs' Exhibit No. 31
Disposition _____

CERTIFICATE OF SERVICE

I declare under penalty of perjury of the laws of the state of Washington that on this date, a true and correct copy of the document to which this declaration is attached was served by the method(s) indicated below, addressed to the following:

Chad Freebourn
Axtell, Briggs & Freebourn PLLC
621 W. Mallon Ave Ste 509
Spokane, WA 99201-2181

U.S. Mail
 Hand Delivered
 Overnight Mail
 Telecopy (Fax):
 Email: chadf@axtellbriggs.com

Michael V. Felice
Law Office of Michael V. Felice, PLLC
621 W. Mallon Ave Ste 509
Spokane, WA 99201-2181

U.S. Mail
 Hand Delivered
 Overnight Mail
 Telecopy (Fax):
 Email: mike@felice-law.com

DATED DECEMBER 1, 2014



Douglas Dick