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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

**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' BRIEF

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TABLE OF CONTENTS

I. TABLE OF AUTHORITIES..... iii

II. ASSIGNMENTS OF ERROR 1

III. INTRODUCTION AND RELIEF REQUESTED.....2

IV. STATEMENT OF THE CASE3

V. LAW AND ARGUMENT8

 A. The trial court erred and violated Defendants’ due process rights when it granted Plaintiffs’ motion for a directed verdict and dismissed Defendants’ counterclaims prior to Defendants being able to present a defense.8

 1. The trial court erred by granting a directed verdict prior to allowing Defendants to present evidence.9

 2. The trial court violated the appearance of fairness doctrine by granting Plaintiff’s motion for a directed verdict.11

 3. The trial court erred by not weighing the evidence in the light most favorable to Defendants and granting a directed verdict.12

 B. The trial court erred in finding that Plaintiff’s Exhibit 36 was a contract by misapplying the parol evidence rule and prohibiting admission of documents related to the transaction.15

 C. The trial court erred by not considering lesser sanctions when it imposed the most severe sanction excluding Defendants’ expert witnesses on the day of trial.....20

 D. The trial court erred by misapplying rules of evidence and precluding admissible testimony.24

 E. The trial court erred in awarding a judgment against Swiss Valley Agency Inc.....27

F. The trial court erred in awarding damages that are not supported with reasonable certainty, which shock the conscience, and which provide multiple recoveries for a single harm.	31
1. The trial court erred by granting damages for lost profits.	31
a. Plaintiffs submitted no evidence of lost profits.	32
b. The trial court abused its discretion by speculating on the amount of damages.	34
2. The trial court erred by providing multiple recovery by granting both restitution and expectation damages.	37
3. The amount of trial court’s award of damages shocks the conscious.	40
G. The trial court erred in granting prejudgment interest when there were no liquidated damages.	40
H. A New Trial Should Be Heard Before a Different Judge	43
VI. CONCLUSION	44
VII. APPENDIX	A-1
Exhibit 36.	A-2
Exhibit 42.	A-5
Exhibit 44.	A-10
Exhibit 102.	A-16
Exhibit 125.	A-18
Rule CR 26	A-21
Rule CR 41	A-27
Rule CR 50	A-30
Evidence Rule 612	A-33

I. TABLE OF AUTHORITIES

Cases

<i>Armstrong v. Manzo</i> , 380 U.S. 545, 85 S.Ct. 1187 (1965).....	8
<i>Banuelos v. TSA Washington, Inc.</i> , 134 Wn. App. 607, 141 P.3d 652 (2006).....	31
<i>Berg v. Hudesman</i> , 115 Wn.2d 657, 801 P.2d 222 (1990).....	16, 17, 19
<i>Blair v. Ta-Seattle E. No. 176</i> , 171 Wn.2d 342, 254 P.3d 797 (2011).....	21
<i>Bracy v. United Retail Merchants</i> , 189 Wash. 162, 63 P.2d 491 (1937) ..	32
<i>Broxson v. Chicago, M., St. P. & P. R. Co.</i> , 446 F.2d 628 (9th Cir. 1971)	18
<i>Burnet v. Spokane Ambulance</i> , 131 Wash.2d 484, 933 P.2d 1036 (1997)	20, 21, 23
<i>Carlson v. Lake Chelan Cmty. Hosp.</i> , 116 Wn. App. 718, 75 P.3d 533 (2003).....	20
<i>Chaney v. Providence Health Care</i> , 176 Wn.2d 727, 295 P.3d 728 (2013)	13
<i>Chrobuck v. Snohomish Cnty.</i> , 78 Wn.2d 858, 480 P.2d 489 (1971).....	12
<i>Columbia Park Golf Course, Inc. v. City of Kennewick</i> , 160 Wash. App. 66, 248 P.3d 1067 (2011)	34
<i>DePhillips v. Zolt Const. Co., Inc.</i> , 136 Wash. 2d 26, 959 P.2d 1104 (1998).....	17
<i>Dix v. ICT Grp., Inc.</i> , 160 Wn.2d 826, 161 P.3d 1016 (2007)	24
<i>Endicott v. Icicle Seafoods, Inc.</i> , 167 Wn.2d 873, 224 P.3d 761 (2010)..	40
<i>Guijosa v. Wal-Mart Stores, Inc.</i> , 144 Wn.2d 907, 32 P.3d 250 (2001) ...	13
<i>Hansen v. Rothaus</i> , 107 Wn.2d 468, 730 P.2d 662 (1986).....	40

<i>Harmony at Madrona Park Owners Ass'n v. Madison Harmony Dev., Inc.</i> , 160 Wash. App. 728, 253 P.3d 101 (2011)	34
<i>Hoffman v. United States</i> , 87 F.2d 410 (9th Cir. 1937)	25
<i>Hole v. Unity Petroleum Corp.</i> , 15 Wn.2d 416, 131 P.2d 150 (1942)	32
<i>In re Hanford Nuclear Reservation Litig.</i> , 894 F. Supp. 1436 (E.D. Wash. 1995)	32, 34
<i>In re Pers. Restraint of Duncan</i> , 167 Wn.2d 398, 219 P.3d 666 (2009) ...	10
<i>Kane v. Klos</i> , 50 Wn.2d 778, 314 P.2d 672 (1957)	27
<i>Kiewit-Grice, McConnell v. Mothers Work, Inc.</i> , 131 Wash. App. 525, 128 P.3d 128 (2006)	41
<i>Larsen v. Walton Plywood Co.</i> , 65 Wn.2d 1, 390 P.2d 677 (1964).....	32, 35
<i>Lopez v. Reynoso</i> , 129 Wn. App. 165, 118 P.3d 398 (2005).....	15
<i>Mason v. Mortgage Am., Inc.</i> , 114 Wn.2d 842, 792 P.2d 142 (1990).....	31
<i>Mathews v. Eldridge</i> , 424 U.S. 319, 96 S.Ct. 893 (1976)	8
<i>Matter of Prior Bros., Inc.</i> , 29 Wash. App. 905, 632 P.2d 522 (1981)	16
<i>Mayer v. Sto Indus., Inc.</i> , 156 Wn.2d 677, 132 P.3d 115 (2006)	21
<i>McCoy v. Courtney</i> , 30 Wash. 2d 125, 190 P.2d 732 (1948)	24
<i>Moe v. Wise</i> , 97 Wn. App. 950, 989 P.2d 1148 (1999)	13
<i>Monjay v. Evergreen Sch. Dist. No. 114</i> , 13 Wash.App. 654, 537 P.2d 825 (1975).....	37
<i>Morgan v. Stokely-Van Camp, Inc.</i> , 34 Wash. App. 801, 663 P.2d 1384 (1983).....	16, 20
<i>Peluso v. Barton Auto Dealerships, Inc.</i> , 138 Wash.App. 65, 155 P.3d 978 (2007).....	21
<i>Platts v. Arney</i> , 50 Wash.2d 42, 309 P.2d 372 (1957).....	38

<i>Prier v. Refrigeration Eng'g Co.</i> , 74 Wash.2d 25, 442 P.2d 621 (1968)...	40
<i>Rathke v. Roberts</i> , 33 Wn.2d 858, 207 P.2d 716 (1949)	34, 37, 38
<i>Salas v. Hi-Tech Erectors</i> , 168 Wn.2d 664, 230 P.3d 583 (2010) ..	9, 10, 15
<i>Saunders v. Lloyd's of London</i> , 113 Wn.2d 330, 335, 779 P.2d 249, 252 (1989).....	8, 13, 14
<i>Schmidt v. Van Woerden</i> , 181 Wash. 39, 42 P.2d 3 (1935).....	24
<i>Scoccolo Const., Inc. ex rel. Curb One, Inc. v. City of Renton</i> , 158 Wash. 2d 506, 145 P.3d 371 (2006)	41
<i>Smith v. Fourre</i> , 71 Wn. App. 304, 858 P.2d 276 (1993).....	8, 9
<i>Spokane Helicopter Service, Inc. v. Malone</i> , 28 Wash.App. 377, 623 P.2d 727 (1981).....	18
<i>State v. Cloud</i> , 95 Wn. App. 606, 976 P.2d 649 (1999)	43
<i>State v. Coffey</i> , 8 Wash. 2d 504, 112 P.2d 989 (1941)	24, 25
<i>State v. Gamble</i> , 168 Wn.2d 161, 225 P.3d 973 (2010)	11
<i>State v. Hall</i> , 74 Wash.2d 726, 446 P.2d 323 (1968)	13
<i>State v. Little</i> , 57 Wash. 2d 516, 358 P.2d 120 (1961).	24
<i>State v. M.L.</i> , 134 Wn.2d 657, 952 P.2d 187 (1998)	43
<i>State v. Madry</i> , 8 Wn. App. 61, 504 P.2d 1156 (1972)	9, 12, 43
<i>State v. Tobin</i> , 161 Wn.2d 517, 166 P.3d 1167 (2007).....	15
<i>Tatham v. Rogers</i> , 170 Wn. App. 76, 283 P.3d 583 (2012)	9
<i>Tiegs v. Watts</i> , 135 Wash. 2d 1, 954 P.2d 877 (1998).....	32
<i>Unigard Ins. Co. v. Mut. of Enumclaw Ins. Co.</i> , 160 Wash. App. 912, 250 P.3d 121 (2011)	40, 41, 42

<i>Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.</i> , 122 Wn.2d 299, 858 P.2d 1054 (1993).....	20
<i>Weyerhaeuser Co. v. Commercial Union Ins. Co.</i> , 142 Wash.2d 654, 15 P.3d 115 (2000)	41, 42
<i>Willener v. Sweeting</i> , 107 Wn.2d 388, 730 P.2d 45 (1986).....	27
<i>Wimberly v. Caravello</i> , 136 Wn. App. 327, 149 P.3d 402 (2006)	15
Rules	
CR 26.....	22
CR 41	9, 10
CR 50.....	9
ER 612	24, 26
Treatises	
15 Am.Jur. 442, § 43 ‘Breach of Contract’	37
<i>Corbin on Contracts</i> , Volume 11 § 55.6	38
Karl B. Tegland, <i>Washington Practice: Courtroom Handbook On Washington Evidence</i> , 5D, 2012–13	25

II. ASSIGNMENTS OF ERROR

1. The trial court erred and violated Defendants' due process rights when it granted Plaintiffs' motion for a "directed verdict"¹ and dismissed Defendants' counterclaims prior to Defendants being able to present a defense.

2. The trial court erred in finding that the Letter of Offer to Purchase (Ex 36) was a contract by misapplying the parol evidence rule and prohibiting admission of documents related to the transaction.

3. The trial court erred by not considering lesser sanctions when it imposed the most severe sanction excluding Defendants' expert witnesses on the day of trial.

4. The trial court erred in awarding damages that are not supported with reasonable certainty, shock the conscience and provide multiple recovery for a single harm.

5. The trial court erred in both granting and calculating prejudgment interest when there were no liquidated damages.

6. The trial court erred by misapplying rules of evidence and precluding admissible testimony.

¹ Although this case was not tried by a jury, the trial court labeled its ruling a "directed verdict". References to "directed verdict" in this brief are to Rule 41, not to Rules 49 or 50.

7. The trial court erred in awarding a judgment against Swiss Valley Agency, Inc. by including Swiss Valley Agency, Inc. as a judgment debtor when no claim was ever alleged against Swiss Valley Agency, Inc. and no findings of fact or conclusions of law support a judgment against Swiss Valley Agency, Inc.

III. INTRODUCTION AND RELIEF REQUESTED

This case involved negotiations for the sale of an insurance agency by its owner to two of his employees. In 2010, Plaintiffs, Rebecca Mauch (“Mauch”) and Kellie Davis (“Davis”) sued Defendant, Bourke and Diana Owens (“Owens”), alleging, among other things, that Owens had sold to Mauch and Davis the business entity Swiss Valley Agency, Inc. d/b/a North Town Insurance Agencies (referred to as “North Town” or “Swiss Valley”). The trial court granted a motion in limine based on the parol evidence rule and found that the Letter of Offer to Purchase (Ex 36, app. at A-3) was a contract for the sale of North Town. The trial court then granted a directed verdict at the close of plaintiffs’ case in chief prior to Defendants being able to present a defense or any direct evidence. In doing so the trial court misapplied the law on parol evidence, the law on damages, as well as the rules of civil procedure and rules of evidence. For these reasons Owens requests that this Court reverse the trial court’s rulings and grant Owens a new trial before a different judge.

IV. STATEMENT OF THE CASE

Bourke Owens (Owens) has been the sole owner and shareholder of Swiss Valley Agency, Inc. since it was incorporated in 1992. CP at 395. Owens personally owned the building the corporation was operating in and received rent from the corporation. RP 309, l. 7-310, l.7. Davis began employment at North Town in May of 1994. RP 359, l.10-12. Mauch began employment at North Town in July of 2005. RP 87, l.4-6.

In and around September of 2008 Owens discussed the possibility of selling North Town to Mauch and Davis. CP at 227. Attorney Dale L. Russell (Russell) was retained in connection with the proposed sale. CP at 215. Mauch, Davis, Bourke Owens and Diana Owens all met personally with Mr. Russell and signed a document titled "Letter of Offer to Purchase Swiss Valley Agency dba North Town Insurance Agencies" (Letter of Offer to Purchase). CP at 216; Ex 36, app. at A-3.

The Letter of Offer to Purchase provided, among other things, that the purchase price would be paid at the rate of \$7,000 per month. The Letter of Offer to Purchase did not, however, make provisions for such terms as a security agreement, a promissory note, rights to occupy the business location, transfer of ownership of the book of business, stock transfers or voting rights of the parties. Ex 36, app. at A-3.

Russell prepared numerous documents to effectuate the proposed sale. It was scheduled to close on September 30, 2008. CP at 215. However, the parties to the proposed sale could not agree on the final terms, including the purchase price and, as a result, the sale did not close. CP at 227. None of the documents prepared by Russell were ever signed by the parties. CP at 215. After the sale fell through Russell wrote “Sale Failed 9-30-2008 DR” on the Letter of Offer to Purchase and “Sale Failed Lack of Buyer Participation 9-30-08 DR” on the unsigned “Agreement of Purchase and Sale of Corporation Stock.” CP at 216. Owens allowed Mauch and Davis to manage the business while he was at his residence in California. CP at 227. Mauch and Davis would contact Owens as necessary regarding goings on at the business and continued to identify Owens as the owner of the business. CP at 227-228.

From October 1, 2008 through January 30, 2010 the North Town records show deposits of \$798,544.28 and debits of \$799,540.23. Ex 42, app. at A-6; Ex 44, app. at A-11. The deposits included loans to North Town totaling \$50,345: \$11,800 loan from a bank and a \$38,454 loan from Bourke Owens. *Id.*

In late 2009 and early 2010, Owens became aware of mismanagement of the agency by Mauch and Davis, including failing to pay commissions to employees, misusing company funds, and writing a

policy for a commercial business as a personal residence. CP at 229. The misdeeds and mismanagement caused Owens to terminate Mauch in early 2010. *Id.* Davis resigned from her position on March 15, 2010. CP at 166.

Mauch and Davis filed this lawsuit on March 16, 2010. CP at 3-7. They alleged that the Letter of Offer to Purchase was a sales agreement. CP at 151.

Owens moved the court and the Honorable Judge Leveque granted the motion to join parties with leave to file an answer and counterclaims. CP at 8-28. Owens answered the complaint and Owens and Swiss Valley brought counterclaims on June 15, 2010 against Mauch and Davis as well as Kassa Insurance Services, Inc. (Kassa). CP at 29-40.² Plaintiffs filed a motion for summary judgment to dismiss the counterclaims. CP at 100-176. Owens submitted materials in opposition to the motion. CP at 183-324.

Daniel Harper (“Harper”) was disclosed as an expert witness on July 19, 2010. CP at 605; RP 10, 1.12-14. Harper was prepared to testify about the conduct and ownership of Swiss Valley, mismanagement by Mauch and Davis, misallocation and misappropriation of funds by Mauch and Davis, and damages suffered by Swiss Valley. RP 10, 1.20-11, 1.4.

² Kassa was later dismissed from the case following settlement and compromise between Kassa, Owens and Swiss Valley. CP at 526-530.

Harper had reviewed and evaluated tax records, ledgers from the business, personal check registers to provide assistance to the court with the significant accounting in the case. RP 11, 1.5-12, 1.25. Harper was also prepared to testify that the business did not produce profits sufficient to make the \$7,000 per month payments, did not generate enough income to meet its obligations, and without change in the financial performance could not continue to meet its financial obligations. CP at 1063-1067.

On November 18, 2013, the trial began with motions in limine. RP 5-64. The first motion in limine was to preclude Defendants expert witnesses. RP 5-46. The trial court precluded all of Defendants expert witnesses from testifying as experts.³ RP 5-46. The second motion in limine dealt with the parol evidence rule. RP 46-64. The trial court suppressed any evidence of the intent of the parties and summarily ruled without considering any controverting evidence as a matter of law that the Letter of Offer to Purchase was a contract. RP 63-64.

Defendants sought reconsideration of the court's rulings on the motions in limine. RP 213-237. The court denied the motion to reconsider RP 234-237. On November 20, 2013, at the close of Plaintiffs' case in chief the trial court granted a directed verdict on Plaintiffs' claims and

³ Dale Russell was named both as an expert and a fact witness and the court stated he would be allowed to testify as a fact witness. RP 32.

dismissed Defendants' counterclaims. RP 478-496. On November 21, 2013, the trial court made its oral ruling. RP 540-547.

Plaintiffs proposed findings of fact and conclusions of law.⁴ CP at 1141-1168. Defendants objected to the proposed findings and conclusions and sought reconsideration of the court's oral ruling and moved for a new trial. CP at 1172-1212; CP at 1235-1243. Plaintiffs responded to defendants' motions. CP at 1215-1228. On March 7, 2014, the trial court held a hearing for the entry of the findings of fact and conclusions of law. RP March 7, 2014 1-28. The trial court stated it did not have time to hear all the motions and that it "didn't look at any of the paperwork from the motions." RP March 7, 2014 18, 1.25-19, 1.6. The trial court stated it would review the documents in the court record, including additional documents from Defendants and send out an order. RP March 7, 2014 24-27; CP at 1235-1243. The trial court's order was issued on March 17, 2014. CP at 1244-1263. This appeal followed. CP at 1269-1295.

⁴ Plaintiffs proposed their first set of findings and conclusions on December 6, 2013. CP at 1027-1055. On December 19, 2013 Bourke and Diana Owens filed a Chapter 11 bankruptcy, which stayed proceedings in the trial court. CP at 1136-1138. On February 18, 2014, the Bankruptcy court, at Owens request, granted relief from the automatic stay. Thereafter, Plaintiffs proposed a second set of proposed findings and conclusions. CP 1141-1168.

V. LAW AND ARGUMENT

A trial court has no discretion in ruling on a motion for a directed verdict and must accept as true the nonmoving party's evidence and draw all favorable inferences from it. *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 335, 779 P.2d 249, 252 (1989). The appellate court reviews the evidence in the light most favorable to the aggrieved party and determines whether the trial court correctly applied the law. *Id.*

A. The trial court erred and violated Defendants' due process rights when it granted Plaintiffs' motion for a directed verdict and dismissed Defendants' counterclaims prior to Defendants being able to present a defense.

The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 902 (1976). The "right to be heard before being condemned to suffer grievous loss of any kind...is a principle basic to our society." *Id.* (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191(1965)).

A fundamental principle of law is that every litigant is entitled to be heard before his or her case is dismissed. *Smith v. Fourre*, 71 Wn. App. 304, 306, 858 P.2d 276, 277 (1993). A fair trial in a fair tribunal is a basic requirement of due process and Washington's system of law has always

endeavored to prevent even the probability of unfairness. *State v. Madry*, 8 Wn. App. 61, 68, 504 P.2d 1156, 1160 (1972).

1. The trial court erred by granting a directed verdict prior to allowing Defendants to present evidence.

Court Rules and case law clearly establish that plaintiffs must be given the opportunity to present all and not just part of their evidence before the court rules on the sufficiency of the evidence. CR 41, app. at A-28; CR 50, app. at A-31; *Fourre*, 71 Wn. App. at 307. When making motions for summary judgment, during trial, or even after trial, a plaintiff will have the opportunity to present all of his or her evidence through witnesses and exhibits and a court cannot grant a motion to dismiss without first giving the plaintiff the opportunity to present all of his or her evidence. *Fourre*, 71 Wn. App. at 307, n.7. A defendant is entitled to the same opportunity.

A trial court's decisions are reviewed for abuse of discretion. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668, 230 P.3d 583, 585 (2010). The trial court abuses its discretion when its decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons. *Tatham v. Rogers*, 170 Wn. App. 76, 87, 283 P.3d 583, 590 (2012). A trial court's decision is manifestly unreasonable if it adopts a view that no reasonable person would take. *Salas v. Hi-Tech Erectors*, 168

Wn.2d 664, 668-69, 230 P.3d 583, 585 (2010). A decision is based on untenable grounds or for untenable reasons if the trial court applies the wrong legal standard or relies on unsupported facts. *In re Pers. Restraint of Duncan*, 167 Wn.2d 398, 403, 219 P.3d 666, 669 (2009).

Here, the directed verdict was an abuse of discretion because the trial court made its decision prior to the Defendants presenting any direct evidence or presenting their counterclaims. RP 494, 1.21-495, 1.7 In effect, the trial court had already decided prior to any witness being called by Defendants that any testimony that was going to be offered would not be admissible or sufficient.

In an action tried by the court without a jury a defendant is permitted under CR 41(b)(3) to move for dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. App. at A-28-29. There is no court rule that grants a plaintiff a similar right at the end of the presentation of his or her own evidence. Therefore, a defendant must be given the opportunity to be heard and to present its evidence before a directed verdict may be entered. A court cannot enter a directed verdict on a counterclaim until after the defendant has presented its evidence on counterclaims. CR 41(c), app. at A-29.

Defense witnesses Andy Franklin and Dale Russell were both present outside the courtroom waiting to testify when the trial court

granted a directed verdict⁵. RP 508, 1.18-20; RP 511, 1.19-21. Mr. Russell's testimony would have provided relevant factual information about the negotiations between the parties, the terms of the sale, the documents he had prepared to close the sale, and Plaintiffs' failure to appear to close the sale. Other witnesses that had been arranged to appear had also been sent away. RP 508, 1.18-20. Defendants were ready to present a defense as well as the elements of their counterclaims, but the trial court took away both those opportunities on November 20th.

Defendants were not given the opportunity to present the merits of their defenses and counterclaims, and were not given the opportunity to call witnesses prior to entry of a directed verdict on November 20th. The trial court prejudged the case before any defense was offered. This irregular proceeding of the court materially affected substantial rights of the Defendants.

2. The trial court violated the appearance of fairness doctrine by granting Plaintiff's motion for a directed verdict.

"[A] judicial proceeding is valid only if a reasonably prudent, disinterested observer would conclude that the parties received a fair, impartial and neutral hearing." *State v. Gamble*, 168 Wn.2d 161, 187, 225 P.3d 973, 987 (2010). The appearance of fairness doctrine focuses "not

⁵ Dale Russell was only precluded as an expert witness and not as a fact witness. RP 32.

only in the elimination of actual bias, prejudice, improper influence or favoritism, but also in the curbing of conditions which, by their very existence, tend to create suspicion, generate misinterpretation, and cast a pall of partiality, impropriety, conflict of interest or prejudgment over the proceedings to which they relate.” *Chrobuck v. Snohomish Cnty.*, 78 Wn.2d 858, 868, 480 P.2d 489, 495 (1971).

“Justice must satisfy the appearance of justice,” and in order to render a righteous judgment proceedings must be accomplished in a manner that will cause no reasonable questioning of the fairness and impartiality of the judge. *State v. Madry*, 8 Wn. App. 61, 69-70, 504 P.2d 1156, 1160-61 (1972).

The plaintiff bears the burden of proof and the defendant must be given the chance to rebut the plaintiff’s evidence. To grant a directed verdict before a party presents its case clearly demonstrates that Defendants were denied a fair opportunity to be heard. The trial court’s granting of a directed verdict before Defendants presented their case clearly demonstrates that they were denied a fair opportunity to be heard.

3. The trial court erred by not weighing the evidence in the light most favorable to Defendants and granting a directed verdict.

A directed verdict is appropriate if, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the

nonmoving party. *Chaney v. Providence Health Care*, 176 Wn.2d 727, 732, 295 P.3d 728, 731 (2013). Evidence is viewed in the light most favorable to the nonmoving party. *Moe v. Wise*, 97 Wn. App. 950, 957, 989 P.2d 1148, 1154 (1999). “Such a motion can be granted only when it can be said, as a matter of law, that there is no competent and substantial evidence upon which the verdict can rest.” *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 915, 32 P.3d 250, 254 (2001) (quoting *State v. Hall*, 74 Wash.2d 726, 727, 446 P.2d 323 (1968)).

As the nonmoving party, all of Defendants’ evidence must be accepted as true and all favorable inferences must be drawn from it. *Saunders*, 113 Wn.2d at 335, 779 P.2d at 252. Although Defendants were not permitted to present any evidence, inferences favorable to Defendants drawn from Plaintiffs’ evidence would not have supported the directed verdict. Four examples follow:

1. Plaintiffs’ continued to represent to taxing agencies and to others that Mr. Owens was the owner of the business. RP 141, 1.16-143, 1.16; RP 423, 1.14-440, 1.13; RP 442, 1.12-444, 1.21.
2. Mr. Owens testified⁶ that the money he received from North Town was either repaying him for a loan made by him to the agency or

⁶ As a witness called by Plaintiffs.

rent payments. RP 199, 1.9-11; RP 246, 1.10-17; RP 271, 1.22-273, 1.11; RP 306, 1.10-19; RP 409, 1.11-19.

3. In interpreting a prior Stipulation made by the Parties that Plaintiffs did pay Defendants \$7,000.00 per month, the trial court initially made a correct ruling that there was nothing in that Stipulation which characterized the purpose of those payments. RP 349, 1.10-351, 1.6. It later changed its mind, and failed to construe evidence most favorable to Defendants that the payments were for rent; instead, it ruled they were “on the contract.” RP 493, 1.15-20.
4. If there was a contract, there was a material breach because payments were not received by the 15th of the month. RP 410, 1.7-415, 1.4; RP 493, 1.15-20.

All of this evidence was produced in plaintiff’s case in chief. Defendants had not called any witnesses to present evidence when the court granted a directed verdict on November 20th. If there was a contract, Plaintiffs did not meet their burden of proof that there was a material breach. At the time the trial court made its decision it must be accepted as true that Mr. Owens was still the owner of the business and a directed verdict should not have been granted. *Saunders*, 113 Wn.2d at 335, 779 P.2d at 252.

Taken in the light most favorable to Defendants, there was sufficient evidence and reasonable inferences to sustain a verdict for Defendants and it was improper for the court to issue a directed verdict. Appellants request that this Court reverse the trial court's granting a directed verdict for Plaintiffs.

B. The trial court erred in finding that Plaintiff's Exhibit 36 was a contract by misapplying the parol evidence rule and prohibiting admission of documents related to the transaction.

A trial court's decisions are reviewed for abuse of discretion. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668, 230 P.3d 583, 585 (2010). A trial court may abuse its discretion by applying an incorrect legal analysis or other error of law. *State v. Tobin*, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007). The trial court applied an incorrect legal analysis when it summarily ruled that the Letter of Offer to Purchase was a contract and precluded admissible and relevant evidence.

In Washington the touchstone of contract interpretation is the parties' intent. *Lopez v. Reynoso*, 129 Wn. App. 165, 170, 118 P.3d 398, 402 (2005). Courts are to determine the intent of parties by viewing "the contract as a whole, its subject matter and objective, *the circumstances surrounding its making, the subsequent acts and conduct of the parties.*" *Wimberly v. Caravello*, 136 Wn. App. 327, 336, 149 P.3d 402, 408 (2006)

(emphasis added) (citing *Berg v. Hudesman*, 115 Wash.2d at 667, 801 P.2d 222 (1990)).

Parol evidence may be admitted to determine the issue of validity of the contract or to impeach its creation. *Matter of Prior Bros., Inc.*, 29 Wash. App. 905, 909, 632 P.2d 522, 526 (1981). Trial courts must first hear all extrinsic evidence to determine whether parties intended the contract to be the final expression of their agreement before it can apply parol evidence rule. *Morgan v. Stokely-Van Camp, Inc.*, 34 Wash. App. 801, 808, 663 P.2d 1384, 1389 (1983).

At the time the trial court made its ruling that the Letter of Offer to Purchase was the contract between the parties, it had not heard any evidence to determine whether the parties intended the Letter of Offer to Purchase to be the final expression of their agreement. During trial, the court suppressed all evidence, except the testimony of Plaintiffs, of what the intent of the parties was prior to the writing of the Letter of Offer to Purchase. RP 63, 1.24-64, 1.1. The trial court recognized that the parties did not agree to the final details of some of the terms but then ruled that it would not consider the intent of the parties prior to preparing the Letter of Offer to Purchase. RP 63, 1.6-8; RP 63, 1.19-23.

The parol evidence rule treats fully integrated agreements different than partially integrated agreements. *Berg v. Hudesman*, 115 Wn.2d 657,

670, 801 P.2d 222, 230 (1990). Where a partially integrated contract is involved, parol evidence may be used to prove the terms not included in the writing, provided, that the additional terms are not inconsistent with the written terms. *DePhillips v. Zolt Const. Co., Inc.*, 136 Wash. 2d 26, 32-33, 959 P.2d 1104, 1108 (1998).

Although the trial court never found that the Letter of Offer to Purchase was a fully integrated agreement, it did rule that the Letter of Offer to Purchase was the contract for the sale of Swiss Valley. RP 131, l.18-24. There are no terms in the Letter of Offer to Purchase which evidence that it is a fully integrated agreement. It does not include a merger clause, there is no reference that the document is the final expression of the parties' intent, and there is no statement that prohibits modifications, oral or written. It makes no reference to the parties' intent that the transaction would be secured by the assets of Swiss Valley⁷. Ex 36, app. at A-3. The trial court should have given Defendants the opportunity to adduce evidence to prove terms not included in the Letter of Offer to Purchase. *DePhillips v Zolt Const. Co., Inc.*, 136 Wash. 2d 26, 32-33, 959 P.2d 1104, 1108 (1998).

⁷ Ms. Mauch testified that the purchase was like buying a car RP 101, l.8-10; RP 141, l.11-15.

The parol evidence rule operates only to exclude evidence of prior or contemporaneous oral agreements; it does not prevent proof of an agreement which is made subsequent to a prior written contract. *Broxson v. Chicago, M., St. P. & P. R. Co.*, 446 F.2d 628, 630 (9th Cir. 1971).

The parol evidence rule is concerned not only about what the evidence being offered states, but more importantly when the evidence was created. Parol evidence is designed to prevent parties from attacking documents with agreements and oral statements made before or at the time of a written agreement but it does not preclude subsequent statements or agreements. *Broxson v. Chicago, M., St. P. & P. R. Co.*, 446 F.2d 628, 630 (9th Cir. 1971). Parol evidence is admissible to explain ambiguities or supply material omissions in a writing. *Spokane Helicopter Service, Inc. v. Malone*, 28 Wash.App. 377, 382, 623 P.2d 727, 730 (1981) (*review denied*).

By improperly applying the parol evidence rule prior to any evidence being presented, the trial court precluded Defendants from offering any evidence that there was no contract for the sale of Swiss Valley. It rejected Defense Exhibit 102 which was a letter written by Davis after the Letter of Offer to Purchase was signed that discusses ongoing negotiations. RP 452, 1.12-553, 1.1; Ex 102, app. at A-17. It rejected Defense Exhibit 125 which contains handwritten notes by Kellie

Davis made after the offer to purchase was signed. RP 451, 1.10-22; Ex 125, app. at A-19-20. The parties admit a closing with additional documents was contemplated. RP 419, 1.23-420, 1.10. The trial court rejected all documents associated with Dale Russell, including notes on a lease option, his letter with the closing documents, the security agreement, and the closing document itself, all of which were made after the Letter of Offer to Purchase was signed. RP 300, 1.13-304, 1.21; RP 451, 1.10-22; RP 502, 1.15-25.

It was error to exclude evidence of the failed closing, which prejudiced the Defendants. Defendants should not have been precluded from submitting this evidence because it shows the parties' intent as a factor to be used in interpreting the Letter of Offer to Purchase. *Berg v. Hudesman*, 115 Wash. 2d 657, 668, 801 P.2d 222, 229 (1990).

In discerning the parties' intent, the subsequent conduct of the contracting parties may aid in determining their intent, as well as the reasonableness of the parties' respective interpretations may also be a factor in interpreting a written contract. *Berg v Hudesman*, 115 Wash. 2d 657, 668, 801 P.2d 222, 229 (1990). Parties are entitled to present extrinsic evidence to show whether the contract is to be the final expression of the agreement before a court can apply the parol evidence

rule. *Morgan v. Stokely-Van Camp, Inc.*, 34 Wash. App. 801, 808, 663 P.2d 1384, 1389 (1983).

The trial court's ruling was erroneous because it precluded statements made after the Letter of Offer to Purchase was signed. The parol evidence rule is not that expansive. The trial court's application of the parol evidence rule to preclude introduction of relevant evidence was improper and is grounds for a new trial.

C. The trial court erred by not considering lesser sanctions when it imposed the most severe sanction excluding Defendants' expert witnesses on the day of trial.

It is an abuse of discretion to exclude testimony without a showing of (1) intentional nondisclosure, (2) willful violation of a court order, or (3) other unconscionable conduct. *Carlson v. Lake Chelan Cmty. Hosp.*, 116 Wn. App. 718, 737, 75 P.3d 533, 543 (2003).

Trial courts are directed to impose the least severe sanction that will be adequate to serve the purpose of the particular sanction.

Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 355-56, 858 P.2d 1054, 1085 (1993). A court may consider the wrongdoer's intent and whether the responding party failed to mitigate damages. *Id.*

A trial court may impose only the most severe discovery sanctions upon a showing that (1) the discovery violation was willful or deliberate,

(2) the violation substantially prejudiced the opponent's ability to prepare for trial, and (3) the court explicitly considered less severe sanctions. *Burnet v. Spokane Ambulance*, 131 Wash.2d 484, 494, 933 P.2d 1036, 1040-41 (1997). The *Burnet* factors must be considered before imposing a harsh sanction such as witness exclusion. *Blair v. Ta-Seattle E. No. 176*, 171 Wn.2d 342, 349, 254 P.3d 797, 801 (2011). The factors must be considered on the record. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 688, 132 P.3d 115, 120 (2006).

The Supreme Court has concluded that it is an abuse of discretion for the trial court to impose the sever sanction of excluding expert witness testimony without these essential findings. *Peluso v. Barton Auto Dealerships, Inc.*, 138 Wash.App. 65, 69-70, 155 P.3d 978 (2007) (citing *Burnet*, 131 Wash.2d at 497, 933 P.2d 1036).

In this case, Plaintiffs filed a motion in limine shortly before the day of trial to exclude expert witnesses on the basis of failure to disclose witnesses and failure to provide information on experts' opinion. CP 561-566; CP 602-606; CP 627-632; RP 5, 1.23-25. On the day of trial, both parties presented oral argument on the motion. RP 5, 1.23-46, 1.15. The trial court granted Plaintiff's motion in limine and imposed the most severe sanction by excluding all of Defendants' expert witnesses. RP 32, 1.15-33, 1.13; RP 36, 1.23-24; RP 46, 1.12-13. The imposition of the most severe

sanction was not supported by consideration of the factors outlined in *Burnet*. RP 5, 1.23-46, 1.15. The trial court's order did not include any findings as to willfulness, prejudice, or consideration of lesser sanctions before making its decision. *Id.*

Court Rules require both parties to be involved in supplementing discovery answers. CR 26, app. at A-22. Equally important is that a party must be put on notice that discovery responses need to be supplemented. *Id.* CR 26(i) requires counsel to confer with respect to motions or objections regarding discovery. App. at A-25-26.

Plaintiffs admit they were aware that Defendants intended to call Harper as an expert witness. RP 20, 1.19-21. Harper was disclosed as a witness as early as July 19, 2010. CP at 605. Plaintiffs never requested for more detail about Harper's testimony. Plaintiffs did not depose Harper. RP 31, 1.16-18. Plaintiffs' attorney admits that he waited to bring the motion in limine until the eve of trial as a trial tactic. RP 229, 1.2-8. Plaintiffs made no effort to contact the Defense in order to remedy their claim of discovery deficiencies and waited until the last moment to complain.

The exclusion of Harper was particularly harmful to Defendants' case and the court's understanding of the complex evidence in this case. He was the only accountant who had reviewed all the financial records to

be able to explain the transactions to the court. Due to his importance as a witness, Defendants made a motion to reconsider and offered less severe alternatives to the court after Harper was excluded from testifying. RP 213, 1.6-237, l. 20. One less severe sanction available was offering an opportunity for Plaintiff's to interview or depose Harper during trial. RP 216, 1.8-19. Another option would be to continue the trial. A third would be to allow limited testimony. The court did not consider these lesser sanctions prior to the time it excluded the expert witnesses.

The trial court did not make the explicitly required finding of "intentional nondisclosure, willful violation of court order, or other unconscionable conduct." *Burnet v. Spokane Ambulance*, 131 Wash. 2d 484, 933 P.2d 1036 (1997). It did not find that Plaintiff's trial preparation was substantially prejudiced. It did not consider that Plaintiff's did not attempt to mitigate by not requesting a deposition of Harper or notifying Defendants that the discovery response was inadequate and needed supplementing. Without findings as to willfulness, prejudice, and consideration of lesser sanctions and without a record that reflects these factors were considered the trial court abused its discretion by excluding expert testimony. The Defendants should be granted a new trial and be permitted to present expert witness testimony in support of their defenses.

D. The trial court erred by misapplying rules of evidence and precluding admissible testimony.

If the trial court's ruling is based on an erroneous view of the law or involves application of an incorrect legal analysis, it necessarily abuses its discretion. *Dix v. ICT Grp., Inc.*, 160 Wn.2d 826, 833, 161 P.3d 1016, 1020 (2007). In Washington the criteria for the use of notes or other memoranda to refresh a witness' recollection are (1) that the witness' memory needs refreshing, (2) that opposing counsel have the right to examine the writing, and (3) that the trial court be satisfied that the witness is not being coached-that the witness is using the notes to aid, and not to supplant, his own memory. ER 612, app. at A-34; *State v. Little*, 57 Wash. 2d 516, 521, 358 P.2d 120, 122 (1961). A witness may be allowed to refresh his memory by looking at a printed or written paper or memorandum and if he thereby recollects a fact or circumstance he may testify to it. *State v. Coffey*, 8 Wash. 2d 504, 508, 112 P.2d 989, 991 (1941). Washington allows witnesses to refer to written memorandum taken from account books for purpose of refreshing recollection. *McCoy v. Courtney*, 30 Wash. 2d 125, 190 P.2d 732 (1948) *see also Schmidt v. Van Woerden*, 181 Wash. 39, 44, 42 P.2d 3, 5 (1935).

The testimony is the evidence, the writing is not. *State v. Little*, 57 Wash. 2d 516, 521, 358 P.2d 120, 122 (1961), *see also State v. Coffey*, 8

Wash. 2d 504, 508, 112 P.2d 989, 991 (1941) (It is not the memorandum which is evidence but the recollection.) “The writing is used only to refresh the witness’s memory to enable him or her to testify; the writing itself is not evidence. Because the writing itself is not evidence, it need not satisfy the hearsay and best evidence rules.” 5D Karl B. Tegland, Washington Practice: Courtroom Handbook On Washington Evidence ch. 5, at 342 (2012–13). When the statement is made or by whom it is made is not as important if it serves the purpose to refresh the mind and unfold the truth. *Hoffman v. United States*, 87 F.2d 410, 411 (9th Cir. 1937).

Plaintiffs call Mr. Owens as an adverse witness to testify during their case-in-chief. Following his examination, Defendants began examining him. When Mr. Owens was asked whether he received consistent payments of \$7,000 a month, Plaintiffs’ counsel objected on the basis of lack of foundation. RP 240, l.10-18. Mr. Owens was then asked whether he received a specific payment in the month of October. To refresh his recollection he referred to his own handwritten notes. RP 240, l.23-241, l.13. Mr. Owens testified that his personal notes were “just for me to remember everything. I know you guys would be asking me questions.” RP 241, l. 16-17. Mr. Owens prepared the notes because he believed he would be asked questions regarding loans he made to Swiss Valley. His testimony in response to these questions would have included

information which would have been introduced by Harper if he had not been excluded as a witness. RP 241, l. 20-22. The trial court denied Mr. Owens the ability to use his handwritten notes to refresh his recollection. RP 240, l.10-289, l.5.

Opposing counsel was given a copy of Mr. Owens' handwritten notes to examine and to use for cross examining him. RP 242, l.1-14. Mr. Owens' notes came from his own business account records which had been recorded when the loans were originally made, and were accurate at the time they were recorded. RP 261, l.21-262, l.15; RP 263, l.10-17. Mr. Owens was not being coached. RP 241, l.19-22.

Mr. Owens should have been allowed to refer to his notes in order to refresh his recollection. All of the elements required under ER 612 and Washington law were established. App. at A-34. The trial court's sustaining of Plaintiffs counsel's objection to permit Mr. Owens to use his handwritten notes was in error. This error limited Mr. Owens' ability to follow-up on the testimony Plaintiffs had elicited from him. This error denied Mr. Owens a fair trial. Appellants should be granted a new trial on the merits.

E. The trial court erred in awarding a judgment against Swiss Valley Agency Inc.

In Washington “findings of fact control inconsistent conclusions of law.” *Kane v. Klos*, 50 Wn.2d 778, 789, 314 P.2d 672, 679 (1957).

Appellate review is limited to determining whether the trial court's findings are supported by substantial evidence and, if so, whether the findings in turn support the conclusions of law. *Willener v. Sweeting*, 107 Wn.2d 388, 393, 730 P.2d 45, 49 (1986).

The trial court entered a Conclusion of Law that Mauch and Davis are awarded damages “as a direct result of the Defendants material breach.” CP at 1251, l.17-19. The trial court also entered a Conclusion of Law that “The Defendants will have to pay back the \$105,000 that they took in payments from Mauch and Davis made pursuant to the contract.” CP at 1251, l.9-10. It entered judgment against Swiss Valley in addition to the judgment against the Owens. CP at 1264-1267. This Conclusion and Judgment are improper since no claim was ever alleged against Swiss Valley. Plaintiffs’ Complaint filed March 16, 2010 did not name Swiss Valley as a defendant and only listed “BOURKE OWNES [sic] and DIANE [sic] OWENS, a marital community.” CP at 3-7.

Swiss Valley was not listed in the Complaint’s allegations of jurisdiction and parties. *Id.* The Complaint does not allege any claim

against Swiss Valley, nor does it allege any duty that Swiss Valley owed to the Plaintiffs. *Id.* The Complaint does not allege any breach of a duty owed by Swiss Valley to Plaintiffs, nor does it allege any prayer for relief against Swiss Valley. *Id.* The prayer for relief was against the Owens for breach of contract, against the Owens for loss of profits, against the Owens for unjust enrichment, and against the Owens for specific performance. CP at 6-7. Since the Complaint does not allege any claim against Swiss Valley or make a prayer for relief for damages against Swiss Valley, no judgment should be taken against Swiss Valley.

The purpose of joining Swiss Valley was because “complete relief cannot be obtained on Defendants’ *counterclaims* without joinder of these parties.” CP at 8 (emphasis added). Moreover, Swiss Valley was joined “because it is the insurance agency that asserts tort claims for interference, among others, against the Plaintiffs and proposed defendants on the counterclaim.” CP at 12.

After this joinder was permitted by the court, Plaintiffs did not allege any claims against Swiss Valley in their Answer to the Counterclaim filed June 25, 2010. CP at 44-47. The Plaintiff’s twice referred to “Defendants/Counter Plaintiffs” in their answer filed June 25, 2010. *Id.* Plaintiffs did not serve a summons and complaint or claim upon Swiss Valley after it was joined. CP at 1202-1205. Without a complaint

ever being served and without any allegations ever being raised by the Plaintiffs against Swiss Valley no judgment should be entered against it.

Exhibit A to Defendants' Motion for Joinder properly captioned the roles of the party in the litigation with Swiss Valley named as a Third-Party Plaintiff. CP at 15. Defendants' Answer, Affirmative Defense, Counterclaims filed June 15, 2010 also differentiated the roles of the parties. CP at 29-40. The answer and affirmative defense sections were only answered on behalf of Defendants Bourke and Diane Owens. CP at 30-32. The Counterclaim section has its own listing of parties wherein Swiss Valley is then included as to counterclaims only. CP at 32.

Thereafter Plaintiffs did not amend their Complaint to allege any claims against Swiss Valley, make any prayer for relief from the court or present any evidence at trial to establish any findings of fact against Swiss Valley.

There is no testimony in the record of any violation by Swiss Valley. No evidence was presented at trial that Swiss Valley breached any duty to the Plaintiffs. Swiss Valley was not a party to the Letter of Offer to Purchase. Ex 36, app. at A-3. No testimony by any witness was presented that Swiss Valley breached a duty. Instead, all evidence was exclusively directed against Mr. Owens.

There is no evidence, testimony, or finding of fact that any individual signed the Letter of Offer to Purchase for or in behalf of Swiss

Valley. There is no evidence, testimony, or finding of fact that Swiss Valley owed a duty to the Plaintiffs or breached a duty owed to the Plaintiffs. There is no evidence, testimony, or finding of fact that Swiss Valley violated or materially breached any contract.

The trial court's findings of fact and its oral ruling both found that Mr. Owens materially breached the contract. CP at 1244-1263. The trial court did not make any findings that Swiss Valley breached any contract. *Id.* There are no facts to support a conclusion of law for a judgment against Swiss Valley.

In effect, Plaintiffs seek to make the object (Swiss Valley) of a potential sale liable for the Owens' alleged breach. They assert some sort of theory that Swiss Valley is liable because the owners allegedly breached their obligation to sell it. This is the same as saying that if a car owner breached his duty to sell his Chevrolet, the expectant purchaser would be entitled to a money judgment against the object of the sale, the car itself. The object of the alleged sale (Swiss Valley) neither owed a duty to Plaintiffs nor breached a duty to the Plaintiffs.

Defendants filed a motion asserting that no judgment should be taken against Swiss Valley. CP at 1200-1212. At the presentment hearing held on March 7, 2014, the trial court stated, "I didn't look at any of the paperwork from the motions. I saw the findings. I read the findings

through, and then I'm really not prepared to hear any of the motions because I didn't actually have time to read them." RP March 7, 2011 19, 1.2-6. After stating it had not read the motions the trial court then ruled that it was making a finding that any judgment will include Swiss Valley. RP March 7, 2011 20, 6-7.

There is no evidence in the record to support a finding of fact or conclusion of law justifying a money judgment against Swiss Valley. Because there are no findings of fact to support that conclusion, the trial court erred by entering judgment against Swiss Valley.

F. The trial court erred in awarding damages that are not supported with reasonable certainty, which shock the conscience, and which provide multiple recoveries for a single harm.

A trial court's award of damages is reviewed for abuse of discretion. *Banuelos v. TSA Washington, Inc.*, 134 Wn. App. 607, 613, 141 P.3d 652, 656 (2006). Appellate Courts will reconsider damages when "it is outside the range of substantial evidence in the record, or shocks the conscience, or appears to have been arrived at as the result of passion or prejudice." *Mason v. Mortgage Am., Inc.*, 114 Wn.2d 842, 850, 792 P.2d 142, 146 (1990).

1. The trial court erred by granting damages for lost profits.

Lost profits are recoverable as damages when (1) they are within the contemplation of the parties at the time the contract was made, (2) they

are the proximate result of defendant's breach, and (3) they are proven with reasonable certainty. *Larsen v. Walton Plywood Co.*, 65 Wn.2d 1, 15, 390 P.2d 677, 686 (1964) *adhered to*, 65 Wn.2d 1, 396 P.2d 879 (1964). Washington law requires parties alleging lost profits to provide some affirmative evidence of the proper estimation of such damages. *In re Hanford Nuclear Reservation Litig.*, 894 F. Supp. 1436, 1445 (E.D. Wash. 1995). The usual method for proving lost profits is to establish profit history. *Tiegs v. Watts*, 135 Wash. 2d 1, 18, 954 P.2d 877, 886 (1998).

a. Plaintiffs submitted no evidence of lost profits.

Parties alleging lost profits must provide some affirmative evidence of the proper estimation of such damages. *In re Hanford Nuclear Reservation Litig.*, 894 F. Supp. 1436, 1445 (E.D. Wash. 1995). The proper calculation of damages for a trial court to consider are the net profits representing the difference between the gross sales and the cost thereof and administrative expenses. *Hole v. Unity Petroleum Corp.*, 15 Wn.2d 416, 425, 131 P.2d 150, 154 (1942) *holding modified by Larsen v. Walton Plywood Co.*, 65 Wn.2d 1, 390 P.2d 677 (1964); CP 1066. Net profits can also be represented by such profit that is left after all costs of operation have been deducted. *Bracy v. United Retail Merchants*, 189 Wash. 162, 168-69, 63 P.2d 491, 494 (1937).

The Plaintiffs did not prove that they made any profit from October 1, 2008 through January 31, 2010. Their only evidence was cash flow statements. Ex 42, app. at A-6; Ex 44, app. at A-11. Ms. Davis's testimony on these records was limited only to amounts deposited into the Swiss Valley Agency account.

The Plaintiffs did not prove profits because they did not deduct expenses from income during the relevant period. Plaintiffs did not present evidence showing an analysis which reduced the gross sales by the costs and administrative expenses associated with obtaining those sales.

The cash flow statements from October 1, 2008 through January 30, 2010 show deposits into the Swiss Valley Agency totaling \$798,544.20, and payments from that account totaling \$799,540.23, resulting in a loss of \$996.03 on the books. Ex 42, app. at A-6-8; Ex 44, app. at A-11-12. This net loss was actually greater than shown on the cash flow statements because \$50,345 of the deposits represented \$11,800 in loans from a bank and \$32,545 from Mr. Owens. Ex 42, app. at A-6; Ex 44, app. at A-11. Therefore, according to Plaintiffs own exhibits the total loss from October 1, 2008 through January 30, 2010 is \$51,341.03. The award of damages was not supported by the evidence and was an abuse of discretion.

b. The trial court abused its discretion by speculating on the amount of damages.

A recovery of speculative or conjectural profits should be denied. *Rathke v. Roberts*, 33 Wn.2d 858, 866, 207 P.2d 716, 721 (1949). Without expert witnesses or designated documents providing competent evidence a fact finder is left to "speculation or guesswork" in determining the amount of damages to award. *In re Hanford Nuclear Reservation Litig.*, 894 F. Supp. 1436, 1445 (E.D. Wash. 1995). Mathematical certainty is not required but if an award of damages is outside the range of substantial evidence in the record, or shocks the conscience, or appears to have been arrived at as the result of passion or prejudice an appellate court will adjust the award. *Harmony at Madrona Park Owners Ass'n v. Madison Harmony Dev., Inc.*, 160 Wash. App. 728, 737, 253 P.3d 101, 106 (2011).

Ms. Davis is not an expert in evaluating the profitability of a business and cannot establish any profit or loss with reasonable certainty. CP at 1066-1067.

Plaintiffs did not present any expert testimony to provide an analysis of similar businesses as required by Washington law. *Columbia Park Golf Course, Inc. v. City of Kennewick*, 160 Wash. App. 66, 88, 248 P.3d 1067, 1079 (2011), reconsideration denied (Apr. 11, 2011). As discussed above, Defendants were precluded from presenting their expert

on damages who would have testified that the business did not generate enough income to meet its obligations. RP March 7, 2014 23, l.10-24, l.13; CP 1063-1067.

Without experts and analysis to assist the finder of fact in making a determination as to future profits the court was left to speculate and conjecture an award of damages that lacked reasonable certainty; which is also prohibited in Washington. *Larsen v. Walton Plywood Co.*, 65 Wash. 2d 1, 390 P.2d 677 (1964), *adhered to*, 65 Wash. 2d 1, 396 P.2d 879 (1964).

In *Larsen* lost profits awarded by trial court were reduced by the appellate court based on lack of evidence to support the award with reasonable certainty. 65 Wash. 2d at 20-21, 396 P.2d at 689. Loss of profits as a proximate result of defendant's breach requires certainty as to the fact that damage resulted from defendant's breach. *Id.* at 16, 390 P.2d at 686. To be reasonably certain, damages cannot be remote and speculative. *Id.*

The trial court stated in its oral ruling, "the Court *did some figuring* to come up with a number less than the actual price of the business, but as stated in the contract, it should put them back in the place that they should have been." RP 546, l.21-24 (emphasis added). The trial court's own admission that it *did some figuring* shows plaintiffs failed to present

evidence sufficient to prove damages with reasonable certainty. The trial court also stated the Plaintiffs “*probably* lost their profitable salary for the *next many years* even though one of them is apparently working” indicating again that the trial court was left to speculation and guesswork to determine the amount of damages. RP 546, 1.17-19 (emphasis added).

There is no evidence in the record or in the trial court's ruling to determine how the amount of \$480,000 in damages was calculated. From the record, it appears that the calculation of \$480,000 in damages was purely speculative, and is arguably prejudicial. There is no evidence of what figures the court considered when it “*did some figuring.*” No evidence of what “*the next many years*” means or how many years the court provided recovery for. No evidence of net profits lost, no evidence of what values the court assigned and no evidence of any multipliers the court may have used to determine the amount of damages.

There is no explanation, by the trial court in its oral ruling, on the record or by the plaintiffs in their proposed findings and conclusions that indicates how the \$480,000 figure was calculated. Appellants request this court to remand this case for a new trial.

2. *The trial court erred by providing multiple recovery by granting both restitution and expectation damages.*

The trial court also committed error by providing multiple recovery on the contract claim. A plaintiff cannot have a multiple recovery for a single wrong. *Monjay v. Evergreen Sch. Dist. No. 114*, 13 Wash.App. 654, 658, 537 P.2d 825, 828 (1975). “A plaintiff’s recovery is limited to the loss he has actually suffered by reason of the breach; he is not entitled to be placed in a better position than he would have been in if the contract had not been broken. Otherwise stated, the measure of damages is the actual loss sustained by reason of the breach, which is the loss of what the contractee would have had if the contract had been performed, *less the proper deductions.*” *Rathke v. Roberts*, 33 Wn.2d 858, 865, 207 P.2d 716, 721 (1949) (quoting 15 Am.Jur. 442, § 43 ‘Breach of Contract’) (emphasis added).

In *Rathke*, the plaintiff contracted to sell a refrigeration system and install it in the defendant’s fruit warehouse. *Rathke v. Roberts*, 33 Wn.2d 858, 860, 207 P.2d 716, 718 (1949). Defendant’s repudiated the contract and were contracting with plaintiff’s competition for installation of a refrigeration system. *Id.* The plaintiff sued for \$7,426.53 in damages for the loss of the nets profits which he would have made if the defendants had performed their contract obligations. *Id.* The jury returned a verdict

for the plaintiff for \$750 dollars. *Rathke v. Roberts*, 33 Wn.2d 858, 863, 207 P.2d 716, 719 (1949). Plaintiff appealed and requested the appellate court either order the trial court to enter judgment in his favor for \$6,800 or grant a new trial. *Rathke v. Roberts*, 33 Wn.2d 858, 863, 207 P.2d 716, 720 (1949). The Supreme Court extensively discussed the calculation of damages in breach of contract cases and remanded the case to the superior court for a new trial. *Rathke v. Roberts*, 33 Wn.2d 858, 882, 207 P.2d 716, 729-30 (1949).

Corbin on Contracts states "as a general rule, a plaintiff may not recover both restitution and damages for breach of contract." *Corbin on Contracts*, Volume 11 § 55.6, page 21. Plaintiffs are not entitled to receive more than they would have received had the contract been performed especially where the defendant, by his breach, relieves the plaintiff of duties under the contract which would have required a plaintiff to spend money. *Platts v. Arney*, 50 Wash.2d 42, 46, 309 P.2d 372 (1957). An amount equal to such expenditures must be deducted from a plaintiff's recovery. *Id.*

Plaintiff's counsel gave great weight to Mr. Kime's stipulation made on October 15, 2010 before the Honorable Jerome J. Leveque. RP October 15, 2010 8, l.10-12. At all times the nature and purpose of

payments received by Mr. Owens is disputed but undisputed is the fact that Mr. Owens was receiving payments from Swiss Valley.

Plaintiffs' argue that the stipulation should be interpreted as Mr. Owens receiving payments "on the contract" however the trial court did not agree. RP 349, l.10-351, l.6. Additionally it is also clear in the record that the alleged payments "on the contract" were not received by the 15th of the month as required by the alleged contract. RP 410, l.7-415, l.4.

The trial court awarded the plaintiffs restitution damages of \$105,000 representing payments made to Mr. Owens and then added additional recovery by awarding \$480,000 "to put them back in the place they should have been." RP 546, l.4-6; RP 546, l.21-25. In effect the court has awarded the Plaintiffs the value they would have received had they paid for the business each month for twelve years as well as reimbursement for payments made.

To return to Plaintiffs any money arguably paid for the business and then award the present value of the business, or a large portion of it, provides Plaintiffs with a double recovery. They receive something they did not pay for. To put it colloquially - they get their cake and can eat it too. Such a result shocks the conscience.

3. *The amount of trial court's award of damages shocks the conscious.*

After already awarding \$105,000 in restitution damages for payments made, with no evidence presented to calculate damages with reasonable certainty an award of \$480,000 where Plaintiffs' financial records establish a loss of \$51,341.03 clearly shocks the conscience and appears to be assessed as the result of passion or prejudice. Appellants respectfully request this case be remanded to the trial court for a new trial.

G. The trial court erred in granting prejudgment interest when there were no liquidated damages.

Appellate Court's review a prejudgment interest award for abuse of discretion. *Endicott v. Icicle Seafoods, Inc.*, 167 Wn.2d 873, 886, 224 P.3d 761, 768 (2010). A ruling based on an erroneous legal interpretation is an abuse of discretion. *Id.*

Prejudgment interest awards are based on the principle that a defendant "who retains money which he ought to pay to another should be charged interest upon it." *Hansen v. Rothaus*, 107 Wn.2d 468, 473, 730 P.2d 662, 665 (1986) quoting *Prier v. Refrigeration Eng'g Co.*, 74 Wash.2d 25, 34, 442 P.2d 621 (1968). A party is entitled to prejudgment interest where the amount due is "liquidated." *Unigard Ins. Co. v. Mut. of Enumclaw Ins. Co.*, 160 Wash. App. 912, 925, 250 P.3d 121, 128 (2011)

quoting *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wash.2d 654, 685, 15 P.3d 115 (2000).

A liquidated claim is one where the evidence furnishes data "which, if believed, make it possible to compute the amount due with exactness, without reliance on opinion or discretion." *Id.* A claim is unliquidated "where the exact amount of the sum to be allowed cannot be definitely fixed from the facts proved, disputed or undisputed, but must in the last analysis depend upon the opinion or discretion of the judge or jury as to whether a larger or a smaller amount should be allowed." *Scoccolo Const., Inc. ex rel. Curb One, Inc. v. City of Renton*, 158 Wash. 2d 506, 519, 145 P.3d 371, 377 (2006) (quotations in original). A claim is unliquidated, for instance, if the amount must be arrived at by a determination of reasonableness. *Kiewit-Grice, McConnell v. Mothers Work, Inc.*, 131 Wash. App. 525, 536, 128 P.3d 128, 133 (2006).

In *Weyerhaeuser*, there was a disputed amount of insurance coverage available and the amount of damage sustained was disputed. 142 Wash. 2d at 686, 15 P.3d at 133. In that case calculating the amount due in damages required no discretion because it equaled the invoices for cleanup work performed and it was purely a question of liability and did not involve opinion or an exercise of discretion regarding the amount of the award "as would be the case with general damages." *Weyerhaeuser Co. v.*

Commercial Union Ins. Co., 142 Wash. 2d 654, 686-87, 15 P.3d 115, 133 (2000) (emphasis added).

This case is distinguishable from *Weyerhaeuser* because the proposed expectation damages cannot be computed with exactness and the court's decision relied on opinion or discretion. As discussed above, there is no evidence of a fixed amount of net profits in the record to establish expectation damages. Restitution damages cannot be calculated without deducting for rent and repayment of loans. Also, the trial court's oral ruling infers the use of discretion to arrive at an amount of damages and that the evidence was insufficient to provide an exact amount when the trial court stated plaintiffs "both *probably* lost their profitable salary *for the next many years*" and "the Court *did some figuring* to come up with a number." RP 546, l.17-24 (emphasis added).

The level of exactness required to determine damages without opinion or discretion is absent in both the trial court's oral ruling and the Plaintiff's proposed findings and conclusions. The prejudgment interest is also being applied to money that Plaintiffs have no expectancy of until they pay for the full value of the business. Therefore, Plaintiff's claim for expectation damages of \$480,000 is an unliquidated claim and prejudgment interest is not appropriate. *Unigard Ins. Co. v. Mut. of Enumclaw Ins. Co.*, 160 Wash. App. 912, 925, 250 P.3d 121, 128 (2011).

H. A New Trial Should Be Heard Before a Different Judge

The law requires both an impartial judge and a judge that appears impartial. *State v. Madry*, 8 Wn.App. 61, 70, 504 P.2d 1156, 1161 (1972). A righteous judgment is accomplished in such a manner that it will cause no reasonable questioning of the fairness and impartiality of the judge. *Id.* Where it appears that a judge will have difficulty setting aside prior knowledge of a case and to promote the appearance of fairness, the case should be remanded to a different trial court judge. *See, e.g., State v. Cloud*, 95 Wn. App. 606, 616, 976 P.2d 649, 654 (1999) (remanding for another hearing before a different judge because it would be extremely difficult for the trial judge to discount everything that transpired in the first hearing); *State v. M.L.*, 134 Wn.2d 657, 660–61, 952 P.2d 187 (1998) (remanding for resentencing before different judge when trial judge imposed excessive sentence without evidence that such sentence was warranted).

During the course of the trial, Defendants attempted to make numerous offers of proof that the Letter of Offer to Purchase was not the contract for the sale of Swiss Valley. The trial court would not permit counsel to make the offers of proof and ultimately ruled, “No more offers of Proof.” RP 303, l.12-304, l.21; RP 409, l.17-19; RP 420, l.2-421, l.21; RP 503, l.3-504, l.5; RP 509, l.1-3. The trial court’s refusals to hear offers

of proof evidences the trial court's unwillingness to listen to Defendants' arguments.

Other examples of partiality and unfairness include:

1. Directing a verdict for Plaintiffs without permitting Defendants to put on its defenses and counterclaims. RP 493, L.21-24.
2. The trial court entered judgment against Swiss Valley without reading Defendants' motion. RP March 7, 2011 19, 1.2-6; RP March 7, 2011 20, 6-10.

The trial court's conduct clearly indicates that it was not impartial and that Defendants were denied a fair opportunity to be heard. The trial court was not willing to listen to the Defendants' side of the case at trial and is not likely to do so on remand.

Appellants respectfully request that a new trial be granted before a different judge.

VI. CONCLUSION

The trial court made reversible errors in its rulings on procedural issues, evidentiary issues, and in calculating damages.

Procedurally, the court granted a directed verdict prior to Defendants being able to present a defense. In so doing, it did not weigh the evidence in the light most favorable to Defendants. It prejudged the case before any defense was offered, thereby denying Defendants a fair

opportunity to be heard. It awarded a judgment against Swiss Valley when there was no claim made against Swiss Valley and no findings to support that judgment.

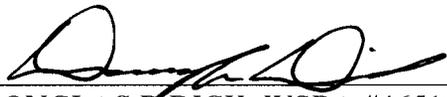
The trial court precluded admissible testimony by misapplying the parol evidence rule. It excluded testimony by Defendants' expert witnesses without considering lesser sanctions.

The trial court calculated damages not supported by the evidence. It improperly granted a double recovery by granting both restitution and expectation damages. It granted prejudgment interest even though there were no liquidated damages.

The trial court was not impartial. It misapplied the law and violated Defendants' due process rights. Defendants request that this Court reverse the trial court, remand the case, and grant a new trial before a different judge.

DATED this 15th day of August, 2014.

Respectfully submitted,



DOUGLAS R DICK, WSBA #46519
Attorneys for Appellants

VII. APPENDIX

EXHIBIT 36

Purchaser by Swiss Valley Agency, Inc *on asset* *500 shares of common stock*

**LETTER OF OFFER TO PURCHASE
SWISS VALLEY AGENCY dba NORTH TOWN INSURANCE AGENCIES**

- PURCHASE PRICE TO BE THE SUM OF \$651,000 *raised to Sept 30, 2008*
- INTEREST RATE TO BE 7.8% FIXED *As per wpa plan*
- PAYMENTS TO BE MADE TO THE SELLER IN THE AMOUNT OF \$7000.00 PAYABLE ONE TIME PER MONTH ON THE 15TH
- PAYMENTS TO BE MADE OVER A 12 YEAR PERIOD OF TIME
- THERE WILL BE NO PRE-PAYMENT PENALTY
- SELLER TO BE PRIMARY BENEFICIARY ON PURCHASER'S LIFE INSURANCE IN THE AMOUNT OF \$350,000 FOR 12 YEARS OR UNTILL THE BALANCE OF LOAN PAID IN FULL
- PURCHASERS TO PURCHASE LIFE INSURANCE ON THE SELLER IN THE AMOUNT OF \$200,000 TO BE PAID TO DIANA OWENS-SPOUSE UPON TIME OF DEATH
- PURCHASE PRICE TO INCLUDE COMPUTERS, OFFICE FURNITURE, SUPPLIES, AND ALL OFFICE EQUIPMENT
- PURCHASE PRICE TO INCLUDE ADVERTISING RIGHTS, LOGOS, NAME, CORPORATION, PHONE NUMBERS, COMPANY CONTRACTS, EMPLOYEES, AND ALL PRODUCER CONTRACTS
- CORPORATE CREDIT CARDS CONTAINING THE TAX ID NUMBER OF THE CORPORATION TO BE CLOSED OR TO BE INCLUDED IN PURCHASE
- PURCHASERS WILL PROVIDE OPTION TO PURCHASE HEALTH INSURANCE UNDER THE GROUP PLAN AT THE EXPENSE OF THE RECIPIENT *seller's* (TO BE DEDUCTED FROM MONTHLY PAYMENT)
- SELLER TO HAVE ACCESS TO ACCOUNTING RECORDS VIA ACCOUNTANT UNTILL PAID IN FULL
- SELLER TO APPOINT EXECUTOR TO HANDLE ALL BUSINESS TRANSACTIONS UPON DEATH OF BOTH SELLERS BEFORE LOAN IS PAID IN FULL TO AVOID ANY ILL WILL WITH REMAINING FAMILY MEMBERS PURCHASERS TO DEAL DIRECTLY WITH THAT SOLE APPOINTED EXECUTOR
- ALL CORPORATE UN-FILED TAXES IF ANY PRIOR TO SALE DATE TO BE THE RESPONSIBILITY OF THE SELLER
- SELLER TO BE RESTRICTED ON THE NO COMPETE CLAUSE
- SELLER TO BE LISTED AS BOARD MEMBER UNTILL BALANCE PAID IN FULL
- ALL BANK ACCOUNTS STAY IN CORPORATION NAME AND ARE TRANSFERABLE AT THE TIME OF SALE
- SALE TO BE EFFECTIVE SEPTEMBER 30, 2008
- ALL MONIES IN ACCOUNT AT TIME OF SALE TO BE ADDED TO SALE PRICE AND PAID AS A PAYMENT AT THE END

Davis
EXHIBIT 1
8-30-10
D. Cavizel

No 6/1/10

with FAW
9-30-2008
RD

50% of performance bonus seller can ~~take~~ for 2008

Ala
Commission Newark
Account 5PM

Bank of America
A-3
Diana Owens

Kellie Davis

SPOKANE COUNTY SUPERIOR COURT
Cause No. 10-2-01008-9
Mauch, et al vs. Owens, et al
Plaintiffs' Exhibit No. 36
Disposition _____

A-4

EXHIBIT 42

A-5

Cash Flow
1/1/09 Through 1/30/10

2/8/10

Page 1

Category Description	Unclassified T...	OVERALL TOTAL
INFLOWS		
AIG SPECIALTY	10,607.10	10,607.10
AMERICAN STATES	48,370.43	48,370.43
ARROW-DEPOSIT	3,100.44	3,100.44
Austin Mutual	49,043.11	49,043.11
Cochrane	35.60	35.60
COMMERCIAL COMM	4,265.30	4,265.30
CPS Reliable	195.70	195.70
Credit Card Fees	21,714.22	21,714.22
DAIRYLAND	6,300.83	6,300.83
Encompass	4,056.70	4,056.70
Equipment Sold	50.00	50.00
ERROR BY BANK	-152.47	-152.47
Fidelity Nation Insurance Group	5,607.13	5,607.13
FINANCIAL IMDEM	33,157.36	33,157.36
FOREMOST	6,434.30	6,434.30
Genworth Financial	104.61	104.61
Griffin	85.20	85.20
Hagerty	22.90	22.90
Hartford	50,273.57	50,273.57
INFINITY	64.00	64.00
INTEGON	24,116.77	24,116.77
Bonus	250.00	250.00
GM Motor Club	239.00	239.00
TOTAL INTEGON	24,605.77	24,605.77
Integrty Surety Underwriters	919.25	919.25
JE Brown		
American Modern Home	104.68	104.68
TOTAL JE Brown	104.68	104.68
Loan From Bank	11,800.00	11,800.00
Loan From BOURKE	32,545.00	32,545.00
Met-Life	9,275.31	9,275.31
MUTUAL INS.	274.68	274.68
OLD REPUBLIC	220.00	220.00
P & Snipper	275.23	275.23
P.I.U.	532.60	532.60
Phoenix Indemnity	18,196.23	18,196.23
PROGRESSIVE	45,195.61	45,195.61
REFUND	199.83	199.83
REIMBURSE Charge Earned Premium	1,476.04	1,476.04
REIMBURSE Dental	45.00	45.00
REIMBURSE FOR Commissions	1,873.23	1,873.23
RON ROTHERT	2,642.67	2,642.67
SAFECO	185,742.43	185,742.43
Bonus	13,583.81	13,583.81
TOTAL SAFECO	199,326.24	199,326.24
Sagamore	6,300.50	6,300.50
Service Charges	7,173.00	7,173.00
Symetra	1,184.90	1,184.90
Transfer In Error	1,500.00	1,500.00
TRAVELERS	10,815.20	10,815.20
Umialik	82.05	82.05
Victoria	7,457.92	7,457.92
VIKING	14,770.10	14,770.10
WESTERN SURETY	533.10	533.10
Workmens	1,941.10	1,941.10
FROM Payroll Liabilities	12,946.82	12,946.82
TOTAL INFLOWS	657,548.09	657,548.09

OUTFLOWS

A-6

00113

Cash Flow
1/1/09 Through 1/30/10

2/8/10

Page 2

Category Description	Unclassified T...	OVERALL TOTAL
ADVERTISING	525.00	525.00
Black Book	10,011.44	10,011.44
Exchange	94.00	94.00
FAFB	2,725.00	2,725.00
Golf Course	375.00	375.00
Golf Tourney	400.00	400.00
Yellow Book	4,052.80	4,052.80
Yellow Page	63.26	63.26
TOTAL ADVERTISING	<u>18,246.50</u>	<u>18,246.50</u>
ALARM SYSTEM	661.13	661.13
App. Fee Bonus	1,625.00	1,625.00
Attorney Fees	27,394.10	27,394.10
AUTOS	4,760.08	4,760.08
BANK CHARGES	2,349.15	2,349.15
Bank Fees	376.60	376.60
Bourke & Diana		
Credit Card		
American Exp.	54.00	54.00
Banner Bank V	382.00	382.00
TOTAL Credit Card	<u>436.00</u>	<u>436.00</u>
TOTAL Bourke & Diana	<u>436.00</u>	<u>436.00</u>
BUS. EXPENSES	6,880.39	6,880.39
AMERICAN EXPRESS	1,040.99	1,040.99
AT & T	3,986.80	3,986.80
Capital One	10,018.01	10,018.01
Discover	3,270.18	3,270.18
TOTAL BUS. EXPENSES	<u>25,196.37</u>	<u>25,196.37</u>
CHARGE BACK COMM.	2,434.99	2,434.99
Commission	227,283.73	227,283.73
COMPUTERS	4,806.49	4,806.49
Equipment	147.00	147.00
Off Site Server	3,400.00	3,400.00
TOTAL COMPUTERS	<u>8,353.49</u>	<u>8,353.49</u>
DAYCARE	828.00	828.00
DRAW	2,600.00	2,600.00
Error By Agent	528.00	528.00
IIABW FEE	470.50	470.50
INSURANCE		
BLDG.	584.50	584.50
BOND	749.00	749.00
Dental	10,186.80	10,186.80
E & O	4,647.34	4,647.34
Life	1,112.80	1,112.80
MEDICAL	25,789.21	25,789.21
RENTERS'S	630.00	630.00
TOTAL INSURANCE	<u>43,699.65</u>	<u>43,699.65</u>
LICENSING		
APPOINTMENT FEE	40.00	40.00
Business	80.00	80.00
NON-RESIDENT	90.00	90.00
RENEWAL FEE	310.00	310.00
TOTAL LICENSING	<u>520.00</u>	<u>520.00</u>
MAINTENANCE	730.47	730.47
Office		
BUILDING PAY	34,741.72	34,741.72
COMPUTER	1,108.24	1,108.24
Furniture	185.00	185.00
Lunch Meeting	60.00	60.00
Maintenance	363.21	363.21
Supplies	1,433.41	1,433.41
TOTAL Office	<u>37,891.58</u>	<u>37,891.58</u>
OFFICE 2		

A-7

: 00114

Cash Flow
1/1/09 Through 1/30/10

2/8/10

Page 3

Category Description	Unclassified T...	OVERALL TOTAL
BLDG PAYMENT	20,908.94	20,908.94
TOTAL OFFICE 2	20,908.94	20,908.94
OFFICE 3	14,781.08	14,781.08
OFFICE SUPPLIES	2,844.44	2,844.44
OVERPAYMENT	200.00	200.00
Payroll Expense	74,237.24	74,237.24
POSTAGE	3,417.66	3,417.66
EQUIPMENT RENTAL	1,107.90	1,107.90
TOTAL POSTAGE	4,525.56	4,525.56
Reimburse For Advertising	914.00	914.00
Reimburse For Agent Error	39.00	39.00
REIMBURSE Petty Cash	155.45	155.45
REIMBURSE WASH	746.52	746.52
RENT	11,324.68	11,324.68
REPAY LOAN	82,476.10	82,476.10
SPONSERSHIP	500.00	500.00
Tax		
940'S	267.20	267.20
941'S	12,305.05	12,305.05
B & O	832.07	832.07
EMPLOYMENT SEC	4,334.41	4,334.41
LABOR & IND.	582.16	582.16
PROPERTY	47.29	47.29
TOTAL Tax	18,368.18	18,368.18
TELEPHONE		
489-3919	50.19	50.19
TOTAL TELEPHONE	50.19	50.19
Transfer Error	1,500.00	1,500.00
Travel		
Gasoline	170.14	170.14
TOTAL Travel	170.14	170.14
UTILITIES		
Electric	4,759.00	4,759.00
Internet Sercive	2,143.99	2,143.99
Telephones	5,842.39	5,842.39
Water & Garbage	1,294.51	1,294.51
TOTAL UTILITIES	14,039.89	14,039.89
TOTAL OUTFLOWS	654,166.75	654,166.75
OVERALL TOTAL	3,381.34	3,381.34

SPOKANE COUNTY SUPERIOR COURT
Cause No. 10-2-01008-9
Mauch, et al vs. Owens, et al
Plaintiffs' Exhibit No. 42
Disposition _____

A-9

EXHIBT 44

A-10

Cash Flow
10/1/08 Through 12/31/08

2/8/10

Page 1

Category Description	Unclassified T...	OVERALL TOTAL
INFLOWS		
AIG SPECIALTY	2,937.20	2,937.20
AMERICAN STATES	12,804.28	12,804.28
ARROW-DEPOSIT	366.96	366.96
ARROWHEAD	249.23	249.23
Austin Mutual	10,034.40	10,034.40
CNA	26.00	26.00
COMMERCIAL COMM	1,000.00	1,000.00
DAIRYLAND	1,799.63	1,799.63
Encompass	297.30	297.30
FINANCIAL IMDEM	8,257.59	8,257.59
FOREMOST	1,102.66	1,102.66
Hartford	12,389.87	12,389.87
INTEGON	3,610.56	3,610.56
Bonus	925.00	925.00
GM Motor Club	40.00	40.00
TOTAL INTEGON	4,575.56	4,575.56
Integrity Surety Underwriters	146.25	146.25
JE Brown		
American Modern Home	67.30	67.30
TOTAL JE Brown	67.30	67.30
Loan From BOURKE	6,000.00	6,000.00
Met-Life	2,152.45	2,152.45
MUTUAL INS.	23.04	23.04
OLD REPUBLIC	90.00	90.00
P & Snipper	1,101.25	1,101.25
P.I.U.	104.30	104.30
Phoenix Indemnity	340.47	340.47
PROGRESSIVE	15,048.38	15,048.38
REFUND	24.00	24.00
REIMBURSE AIRBORNE	351.31	351.31
Reimburse For Dental Insurance	90.90	90.90
Reimburse Health Insurance	352.90	352.90
REIMBURSEMENT FOR Chargebacks	813.01	813.01
Repayment For Loan	6,230.33	6,230.33
RON ROTHERT	1,105.20	1,105.20
SAFECO	42,343.29	42,343.29
Sagamore	342.68	342.68
Symetra	8.19	8.19
Victoria	695.68	695.68
VIKING	3,717.99	3,717.99
WESTERN SURETY	117.00	117.00
Workmens	172.50	172.50
FROM Payroll Liabilities	3,717.09	3,717.09
TOTAL INFLOWS	140,996.19	140,996.19
OUTFLOWS		
ADVERTISING		
AAU Basketball	500.00	500.00
Black Book	1,727.00	1,727.00
Golf Course	790.00	790.00
St Thomas More	2,000.00	2,000.00
Whitworth	400.00	400.00
TOTAL ADVERTISING	5,417.00	5,417.00
AUTOS	1,098.48	1,098.48
BANK CHARGES	219.37	219.37
BUS. EXPENSES		
AMERICAN EXPRESS	351.31	351.31
Capital One	1,786.75	1,786.75

A-11

00119

Cash Flow
10/1/08 Through 12/31/08

2/8/10

Page 2

Category Description	Unclassified T...	OVERALL TOTAL
TOTAL BUS. EXPENSES	2,138.06	2,138.06
CHARGE BACK COMM.	915.04	915.04
Commission	57,253.33	57,253.33
COMPUTERS	839.50	839.50
Off Site Server	1,380.00	1,380.00
TOTAL COMPUTERS	2,219.50	2,219.50
Error By Agent	75.00	75.00
IIABW FEE	110.50	110.50
INSURANCE		
Dental	2,380.20	2,380.20
E & O	637.94	637.94
Life	172.20	172.20
MEDICAL	5,805.14	5,805.14
RENTERS'S	15.75	15.75
TOTAL INSURANCE	9,011.23	9,011.23
LICENSING	104.25	104.25
APPOINTMENT FEE	60.00	60.00
NON-RESIDENT	189.00	189.00
TOTAL LICENSING	353.25	353.25
Office		
BUILDING PAY	8,017.32	8,017.32
COMPUTER	363.75	363.75
Furniture	2,500.00	2,500.00
Printing	150.20	150.20
Supplies	83.09	83.09
TOTAL Office	11,114.36	11,114.36
Office #4	2,962.86	2,962.86
OFFICE 2		
BLDG PAYMENT	4,844.67	4,844.67
Misc	5,100.00	5,100.00
REmodel	230.33	230.33
TOTAL OFFICE 2	10,175.00	10,175.00
OFFICE SUPPLIES	565.16	565.16
Payroll Expense	16,138.32	16,138.32
POSTAGE	300.00	300.00
POSTAGE METER	78.19	78.19
REIMBURSEMENTfor Office Party	96.47	96.47
RENT	19,786.14	19,786.14
Tax	100.00	100.00
941'S	1,531.28	1,531.28
EMPLOYMENT SEC	510.96	510.96
LABOR & IND.	67.56	67.56
TOTAL Tax	2,209.80	2,209.80
Travel		
Gasoline	560.00	560.00
TOTAL Travel	560.00	560.00
UTILITIES		
Electric	1,035.00	1,035.00
Telephones	1,177.30	1,177.30
Water & Garbage	364.12	364.12
TOTAL UTILITIES	2,576.42	2,576.42
TOTAL OUTFLOWS	145,373.48	145,373.48
OVERALL TOTAL	-4,377.29	-4,377.29

Cash Flow
10/1/07 Through 12/31/07

2/8/10

Page 1

Category Description	Unclassified T...	OVERALL TOTAL
INFLOWS		
AIG SPECIALTY	1,687.87	1,687.87
AMERICAN STATES	9,525.84	9,525.84
ARROW-DEPOSIT	550.15	550.15
Asuris	326.91	326.91
Austin Mutual	9,493.70	9,493.70
DAIRYLAND	3,272.83	3,272.83
FINANCIAL IMDEM	7,446.13	7,446.13
FOREMOST	1,424.16	1,424.16
Hartford	5,816.87	5,816.87
INTEGON	1,024.41	1,024.41
GM Motor Club	118.00	118.00
TOTAL INTEGON	1,142.41	1,142.41
Integrity Surety Underwriters	453.75	453.75
JE Brown		
American Modern Home	35.05	35.05
TOTAL JE Brown	35.05	35.05
OLD REPUBLIC	180.00	180.00
P & Snipper	874.76	874.76
P.I.U.	246.23	246.23
Phoenix Indemnity	19.23	19.23
PROGRESSIVE	9,561.76	9,561.76
RBC Insurance	125.93	125.93
REFUND	2,532.61	2,532.61
Reimburse For Bank Fee	5.00	5.00
Reimburse For Education	376.00	376.00
Reimburse Health Insurance	1,398.08	1,398.08
Rent Income	1,423.22	1,423.22
Repayment For Loan	5,000.00	5,000.00
RON ROTHERT	1,356.54	1,356.54
SAFECO	33,919.91	33,919.91
Sagamore	11.55	11.55
Symetra	1,314.94	1,314.94
VIKING	4,833.84	4,833.84
WESTERN SURETY	197.00	197.00
FROM Payroll Liabilities	1,711.14	1,711.14
TOTAL INFLOWS	106,263.41	106,263.41
OUTFLOWS		
ADVERTISING	442.00	442.00
Black Book	1,712.34	1,712.34
Exchange	344.85	344.85
Russian Paper	400.00	400.00
St Thomas More	2,000.00	2,000.00
Whitworth	400.00	400.00
TOTAL ADVERTISING	5,299.19	5,299.19
ALARM SYSTEM	90.00	90.00
AUTOS	2,298.48	2,298.48
BANK CHARGES	330.91	330.91
BONUS	200.00	200.00
BUS. EXPENSES	1,000.00	1,000.00
AMERICAN EXPRESS	5,291.98	5,291.98
AT & T	521.00	521.00
VISA	5,471.93	5,471.93
TOTAL BUS. EXPENSES	12,284.91	12,284.91
Commission	23,721.35	23,721.35
COMPUTERS	275.54	275.54
Off Site Server	840.00	840.00
TOTAL COMPUTERS	1,115.54	1,115.54

A-13

00121

Cash Flow
10/1/07 Through 12/31/07

2/8/10

Page 2

Category Description	Unclassified T...	OVERALL TOTAL
DAYCARE	1,349.00	1,349.00
IIABW FEE	100.00	100.00
INS. AUTOMATION INSURANCE	514.64	514.64
E & O	676.40	676.40
Life	172.20	172.20
MEDICAL	4,686.16	4,686.16
TOTAL INSURANCE	5,534.76	5,534.76
LICENSING		
APPOINTMENT FEE	20.00	20.00
RENEWAL FEE	50.00	50.00
TOTAL LICENSING	70.00	70.00
MAINTENANCE	27.15	27.15
Office		
BUILDING PAY	8,017.32	8,017.32
COMPUTER	400.94	400.94
Maintenance	329.43	329.43
Supplies	299.94	299.94
TOTAL Office	9,047.63	9,047.63
Office #4	6,047.82	6,047.82
OFFICE 2		
Auto Exp.	164.59	164.59
BLDG PAYMENT	4,884.24	4,884.24
Insurance	1,090.08	1,090.08
MAINTENANCE	300.00	300.00
Misc	16,756.45	16,756.45
Taxes	318.30	318.30
UTILITIES	1,335.54	1,335.54
TOTAL OFFICE 2	24,849.20	24,849.20
OFFICE 3	72.00	72.00
MAINTENANCE	1,200.00	1,200.00
TOTAL OFFICE 3	1,272.00	1,272.00
OFFICE SUPPLIES	633.94	633.94
Payroll Expense	8,890.09	8,890.09
POSTAGE	820.89	820.89
POSTAGE METER	78.19	78.19
REIMBURSE Petty Cash	72.00	72.00
REIMBURSE Rental Car	747.57	747.57
REIMBURSEMENT	104.00	104.00
RENT	3,900.00	3,900.00
Tax		
941'S	773.30	773.30
EMPLOYMENT SEC	600.34	600.34
LABOR & IND.	100.69	100.69
TOTAL Tax	1,474.33	1,474.33
UTILITIES	363.00	363.00
Electric	726.00	726.00
Telephones	644.00	644.00
Water & Garbage	429.74	429.74
TOTAL UTILITIES	2,162.74	2,162.74
TOTAL OUTFLOWS	113,036.33	113,036.33
OVERALL TOTAL	-6,772.92	-6,772.92

SPOKANE COUNTY SUPERIOR COURT
Cause No. 10-2-01008-9
Mauch, et al vs. Owens, et al
Plaintiffs' Exhibit No. 44
Disposition _____

A-15

EXHIBT 102

A-16

Facsimile

NORTH TOWN INSURANCE AGENCIES

5727 N. DIVISION ST.
SPOKANE WA 99208
Phone (509)483-3030
northtowninsurance@comcast.net

Fax (509)487-8355

September 29, 2008

Total Number of Pages: 9

Dale L Russell

Phone:

Fax: 276-7161

Re: North Town Insurance Sell. Owens, Mauch & Davis

Dear Dale:

Attached is some more documents. We do not have a lease for the building yet we are not worried about this to finalize papers. We will be putting one in place as soon as possible. Dave Franklin will have the tax returns for 2007 for Swiss Valley and he has the Articles of Incorporation ect. The shares should be adjusted to 15,000. Unfortunately, we did not keep minutes as we should. Rebeckah and I will be doing this with our first meeting being 10-3-08.

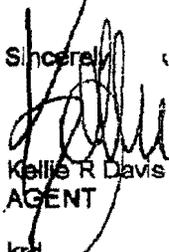
I have attached a cash flow report from 9-30-07 to 09-30-08. The companies that we receive commission from are marked. The new sale price is also on this report. Shows an overall cash flow that Rebeckah and I are satisfied with. We were not in the negative as it shows Bourke Owens has always paid his personal bills out of the account. I did remove \$120,000 from the inflows that Bourke has repaid for some of his expenses. I did not want this to show on total inflows.

Rebeckah and I will be taking over the business as of October 1 even if agreements are not signed per Bourke Owens.

We are being audited by Employment Security on 10-3-08 for 2007. We need to have this put in if any penalties come out of audit will be responsibility of Bourke Owens.

Please let us know what else you may need to draw up paperwork.

Sincerely,


Kellie R Davis
AGENT

KRD

Page 1

Spokane County No.: 10-2-01008-9
MAUCH & DAVIS v OWENS
Defendants' Exhibit No.: 102
Disposition: _____

P. 1

5094878355

A-17

INS NORTH TOWN

00012

EXHIBT 125

A-18

Dale L. Russell - MS-MBA-JD-CPA.
ATTORNEY AT LAW

Park Center Professional Building
WEST 208-FIRST STREET, SUITE E
DEER PARK, WA 99008-1225
(509) 276-5014

Mailing Address
P.O. BOX 1225
DEER PARK, WA 99008-1225

September 8, 2008

Bourke and Diana Owens
5727 N. Division
Spokane, WA 99207

Dear Bourke and Diana:

Please have the corporation send me the following information that will part of the September 30, 2008, closing.

1. Tax return for Swiss Valley Agency, Inc., as of December 31, 2007. *Dave Franklin*
2. Financial statement including balance sheet, as of ~~August~~ *Sept. 30th* 31, 2008. *2008*
3. A complete listing of unpaid creditors and amounts owe as of the closing date including unpaid payroll taxes. *none*
- ✓ 4. A complete listing of equipment, fixtures, leasehold improvements, as of the closing date. *attached*
- ✓ 5. Lease of the building. *None*
6. Articles of Incorporation, By-laws, Minutes, existing stock certificate for 15000 shares, and stock transfer ledger. *Dave Franklin per Corp. papers*
7. Listing of current employees and yearly compensation. *attached*
8. Copy of all leases, equipment, warranties, maintenance schedules, and repair contractors. *none*
9. Listing to be called "Insurance Book of Business," as of the closing date.

Spokane County No.: 10-2-01008-9
MAUCH v. OWENS
Defendants' Exhibit No.: 125
Disposition: _____



A-19

000245

Bourke Owens

P.2

September 8, 2008

10. Renewal commission listing, as of closing date, *attached*

Sincerely,

Dale L. Russell
Dale L. Russell
Attorney At Law.

DLR:vld

RULE CR 26

A-21

RULE CR 26
GENERAL PROVISIONS GOVERNING DISCOVERY

- (a) Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.
- (b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
- (1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The frequency or extent of use of the discovery methods set forth in section (a) shall be limited by the court if it determines that:

- (A) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;
- (B) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or
- (C) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under section (c).
- (2) Insurance Agreements. A party may obtain discovery and production of: (i) the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment; and (ii) any documents affecting coverage (such as denying coverage, extending coverage, or reserving rights) from or on behalf of such person to the covered person or the covered person's representative. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this section, an application for insurance shall not be treated as part of an insurance agreement.
- (3) Structured Settlements and Awards. In a case where a settlement or final award provides for all or part of the recovery to be paid in the future, a party entitled to such payments may obtain disclosure of the actual cost to the defendant of making such payments. This disclosure may be obtained during settlement negotiations upon written demand by a party entitled to such payments. If disclosure of cost is demanded, the defendant may withdraw the offer of a structured settlement at any time before the offer is accepted.
- (4) Trial Preparation: Materials. Subject to the provisions of subsection (b)(5) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subsection (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

- A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this section, a statement previously made is:
- (A) a written statement signed or otherwise adopted or approved by the person making it; or
 - (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.
- (5) Trial Preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subsection (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:
- (A) (i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, and to state such other information about the expert as may be discoverable under these rules. (ii) A party may, subject to the provisions of this rule and of rules 30 and 31, depose each person whom any other party expects to call as an expert witness at trial.
 - (B) A party may discover facts known or opinions held by an expert who is not expected to be called as a witness at trial, only as provided in rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.
 - (C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subsections (b)(5)(A)(ii) and (b)(5)(B) of this rule; and (ii) with respect to discovery obtained under subsection (b)(5)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subsection (b)(5)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.
- (6) Claims of Privilege or Protection as Trial-Preparation Materials for Information Produced. If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; and must take reasonable steps to retrieve the information if the party disclosed it before being notified. Either party may promptly present the information in camera to the court for a determination of the claim. The producing party must preserve the information until the claim is resolved.
- (7) Discovery From Treating Health Care Providers. The party seeking discovery from a treating health care provider shall pay a reasonable fee for the reasonable time spent in responding to the discovery. If no agreement for the amount of the fee is reached in advance, absent an order to the contrary under section (c), the discovery shall occur and the health care provider or any party may later seek an order setting the amount of the fee to be paid by the party who sought the discovery. This subsection shall not apply to the provision of records under RCW 70.02 or any similar statute, nor to discovery authorized under any rules for criminal matters.
- (8) Treaties or Conventions. If the methods of discovery provided by applicable treaty or convention are inadequate or inequitable and additional discovery is not prohibited by the treaty or convention, a

party may employ the discovery methods described in these rules to supplement the discovery method provided by such treaty or convention.

- (c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the county where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
- (1) that the discovery not be had;
 - (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;
 - (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
 - (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
 - (5) that discovery be conducted with no one present except persons designated by the court;
 - (6) that the contents of a deposition not be disclosed or be disclosed only in a designated way;
 - (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;
 - (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of rule 37(a) (4) apply to the award of expenses incurred in relation to the motion.

- (d) Sequence and Timing of Discovery. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.
- (e) Supplementation of Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:
- (1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to:
 - (A) the identity and location of persons having knowledge of discoverable matters; and
 - (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.
 - (2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which:
 - (A) he knows that the response was incorrect when made; or
 - (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.
 - (3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.
 - (4) Failure to seasonably supplement in accordance with this rule will subject the party to such terms and conditions as the trial court may deem appropriate.
- (f) Discovery Conference. At any time after commencement of an action the

court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes:

- (1) A statement of the issues as they then appear;
- (2) A proposed plan and schedule of discovery;
- (3) Any limitations proposed to be placed on discovery;
- (4) Any other proposed orders with respect to discovery; and
- (5) A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion.

Each party and his attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party.

Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than 10 days after service of the motion.

Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any, and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.

Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by rule 16.

(g) Signing of Discovery Requests, Responses, and Objections. Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state his address. The signature of the attorney or party constitutes a certification that he has read the request, response, or objection, and that to the best of his knowledge, information, and belief formed after a reasonable inquiry it is:

- (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;
- (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and
- (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection and a party shall not be obligated to take any action with respect to it until it is signed.

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney fee.

- (h) Use of Discovery Materials. A party filing discovery materials on order of the court or for use in a proceeding or trial shall file only those portions upon which the party relies and may file a copy in lieu of the original.
- (i) Motions; Conference of Counsel Required. The court will not entertain any motion or objection with respect to rules 26 through 37 unless counsel have conferred with respect to the motion or objection. Counsel for the moving or objecting party shall arrange for a mutually convenient conference in person or by telephone. If the court finds that counsel for any party, upon whom a motion or objection in respect to matters covered by such rules has been served, has willfully refused or failed to confer in good faith, the court may apply the sanctions provided under rule

37(b). Any motion seeking an order to compel discovery or obtain protection shall include counsels certification that the conference requirements of this rule have been met.

(j) Access to Discovery Materials Under RCW 4.24.

- (1) In General. For purposes of this rule, "discovery materials" means depositions, answers to interrogatories, documents or electronic data produced and physically exchanged in response to requests for production, and admissions pursuant to rules 26-37.
- (2) Motion. The motion for access to discovery materials under the provisions of RCW 4.24 shall be filed in the court that heard the action in which the discovery took place. The person seeking access shall serve a copy of the motion on every party to the action, and on nonparties if ordered by the court.
- (3) Decision. The provisions of RCW 4.24 shall determine whether the motion for access to discovery materials should be granted.

[Amended effective July 1, 1972; September 1, 1985; September 1, 1989; December 28, 1990; September 1, 1992; September 17, 1993; September 1, 1995, January 12, 2010.]

RULE CR 41

A-27

RULE 41
DISMISSAL OF ACTIONS

(a) Voluntary Dismissal.

(1) Mandatory. Subject to the provisions of rules 23(e) and 23.1, any action shall be dismissed by the court:

(A) By stipulation. When all parties who have appeared so stipulate in writing; or

(B) By plaintiff before resting. Upon motion of the plaintiff at any time before plaintiff rests at the conclusion of his opening case.

(2) Permissive. After plaintiff rests after his opening case, plaintiff may move for a voluntary dismissal without prejudice upon good cause shown and upon such terms and conditions as the court deems proper.

(3) Counterclaim. If a counterclaim has been pleaded by a defendant prior to the service upon him of plaintiff's motion for dismissal, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court.

(4) Effect. Unless otherwise stated in the order of dismissal, the dismissal is without prejudice, except that an order of dismissal operates as an adjudication upon the merits when obtained by a plaintiff who has once dismissed an action based on or including the same claim in any court of the United States or of any state.

(b) Involuntary Dismissal; Effect. For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him or her.

(1) Want of Prosecution on Motion of Party. Any civil action shall be dismissed, without prejudice, for want of prosecution whenever the plaintiff, counterclaimant, cross claimant, or third party plaintiff neglects to note the action for trial or hearing within 1 year after any issue of law or fact has been joined, unless the failure to bring the same on for trial or hearing was caused by the party who makes the motion to dismiss. Such motion to dismiss shall come on for hearing only after 10 days' notice to the adverse party. If the case is noted for trial before the hearing on the motion, the action shall not be dismissed.

(2) Dismissal on Clerk's Motion.

(A) Notice. In all civil cases in which no action of record has occurred during the previous 12 months, the clerk of the superior court shall notify the attorneys of record by mail that the court will dismiss the case for want of prosecution unless, within 30 days following the mailing of such notice, a party takes action of record or files a status report with the court indicating the reason for inactivity and projecting future activity and a case completion date. If the court does not receive such a status report, it shall, on motion of the clerk, dismiss the case without prejudice and without cost to any party.

(B) Mailing notice; reinstatement. The clerk shall mail notice of impending dismissal not later than 30 days after the case becomes eligible for dismissal because of inactivity. A party who does not receive the clerk's notice shall be entitled to reinstatement of the case, without cost, upon motion brought within a reasonable time after learning of the dismissal.

(C) Discovery in process. The filing of a document indicating that discovery is occurring between the parties shall constitute action of record for purposes of this rule.

(D) Other grounds for dismissal and reinstatement. This rule is not a limitation upon any other power that the court may have to dismiss or reinstate any action upon motion or otherwise.

(3) Defendant's Motion After Plaintiff Rests. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence

in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subsection and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under rule 19, operates as an adjudication upon the merits.

(c) Dismissal of Counterclaim, Cross Claim, or Third Party Claim. The provisions of this rule apply to the dismissal of any counterclaim, cross claim, or third party claim. A voluntary dismissal by the claimant alone pursuant to subsection (a) (1) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) Costs of Previously Dismissed Action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of taxable costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

(e) Notice of Settlements. If a case is settled after it has been assigned for trial, it shall be the duty of the attorneys or of any party appearing pro se to notify the court promptly of the settlement. If the settlement is made within 5 days before the trial date, the notice shall be made by telephone or in person. All notices of settlement shall be confirmed in writing to the clerk.

RULE CR 50

A-30

RULE CR 50
JUDGMENT AS A MATTER OF LAW IN JURY TRIALS;
ALTERNATIVE MOTION FOR NEW TRIAL; CONDITIONAL RULINGS

(a) Judgment as a Matter of Law.

(1) Nature and Effect of Motion. If, during a trial by jury, a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against the party on any claim, counterclaim, cross claim, or third party claim that cannot under the controlling law be maintained without a favorable finding on that issue. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment. A motion for judgment as a matter of law which is not granted is not a waiver of trial by jury even though all parties to the action have moved for judgment as a matter of law.

(2) When Made. A motion for judgment as a matter of law may be made at any time before submission of the case to the jury.

(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment - and may alternatively request a new trial or join a motion for a new trial under rule 59. In ruling on a renewed motion, the court may:

(1) if a verdict was returned:

- (A) allow the judgment to stand,
- (B) order a new trial, or
- (C) direct entry of judgment as a matter of law; or

(2) if no verdict was returned:

- (A) order a new trial, or
- (B) direct entry of judgment as a matter of law.

(c) Alternative Motions for Judgment as a Matter of Law or for a New Trial--Effect of Appeal. Whenever a motion for a judgment as a matter of law and, in the alternative, for a new trial shall be filed and submitted in any superior court in any civil cause tried before a jury, and such superior court shall enter an order granting such motion for judgment as a matter of law, such court shall at the same time, in the alternative, pass upon and decide in the same order such motion for a new trial; such ruling upon said motion for a new trial not to become effective unless and until the order granting the motion for judgment as a matter of law shall thereafter be reversed, vacated, or set aside in the manner provided by law. An appeal to the Supreme Court or Court of Appeals from a judgment granted on a motion for judgment as a matter of law shall, of itself, without the necessity of cross appeal, bring up for review the ruling of the trial court on the motion for a new trial; and the appellate court shall, if it reverses the judgment entered as a matter of law, review and determine the validity of the ruling on the motion for a new trial.

(d) Same: Denial of Motion for Judgment as a Matter of Law. If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

[Amended effective January 1, 1977; July 1, 1980; September 1, 1984; September 17, 1993; September 1, 2005.]

EVIDENCE RULE 612

RULE 612
WRITING USED TO REFRESH MEMORY

If a witness uses a writing to refresh memory for the purpose of testifying, either: while testifying, or before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony, the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires.

[Amended effective September 1, 1992.]

Comment 612

[Deleted effective September 1, 2006.]

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
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