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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

Case No. 330371

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COURT OF APPEALS, DIVISION III

STATE OF WASHINGTON

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Deborah Burksfield, a single individual;

LSL Properties, LLC, a Washington limited liability company,

Appellants,

v.

Larry Sali and Gayle Sali, husband and wife;

Steven Sali and Deleta Sali, husband and wife;

and Columbia Ready-Mix, Inc.,

Respondent/Cross-Appellants.

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APPELLANTS' REPLY BRIEF

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I. **A. THE DEFENDANTS CANNOT EVADE PREJUDGMENT INTEREST BY CLAIMING THE RESORT TO CUBIC VOLUME MEASUREMENTS WAS INADEQUATE AFTER THE DEFENDANTS BREACHED THEIR FIDUCIARY AND CONTRACTUAL OBLIGATIONS TO PROVIDE ACCURATE WEIGHTS AND RECORD KEEPING**

The Defendants argue the jury should have assumed all the missing weight tickets came from before April 1, 2006 and thus are time barred, even though the lease allowing the defendants to take any materials didn't even start until 4/01/06 anyhow (See DE-2.2, pg 3, para 1). Regardless, if the defendants wanted the Plaintiff's testifying forensic accountant to see that any unpaid material was taken before April 1, 2006, then all the Defendants had to do was produce any unpaid scale tickets dated before April 1, 2006. Instead, there was no credible evidence thereon for either party's accounting experts to attribute any of the missing and unpaid material to having been taken before April 1, 2006. Not only did the defendant get caught trying to alter records by 10,000 tons on a May 2004 invoice (see RP-285, lines 2-16; RP-520, lines 8-25 and compare the May 2004 invoice at PE-5 to DE-2.7's May 2004 invoice), but the defendants were still given full credit for all direct sales and for ALL the scale tickets the defendants produced, except the ones that were clearly erroneous or fraudulent. RP-368, lines 18-25.

The same goes for the Defendants' arguments that the jury should also have just assumed the Defendants had simply lost scale tickets for materials allegedly taken by a third-party company called KLB, who the Defendants likewise tried to claim was allegedly responsible for taking all the missing unpaid material. However, the biggest problem with all those stories to the jury is that the Defendants were contractually responsible under the lease and also bound by their fiduciary duties "to keep accurate records of all material removed from the demised premises." DE-2.2, page 6, para 8.1. "Material shall be weighed on scales on the leased property and weight tickets shall be issued for each load removed." Id., pg 4, para 3.1. Yet there was no evidentiary basis for either of these dubious attempted explanations for the missing unpaid materials.

In fact, all the Defendants' attempted explanations for the missing material only confirmed even stronger all the breaches which the defendants were fully responsible for as the fiduciary record keepers and lessees charged with accurately tracking all the materials taken from the gravel mine. As such, it was perfectly understandable for the jury to reasonably conclude Defendants' record keeping dereliction was no mere accident. This fact was highlighted when the Defendants' got caught altering some of the few

scale tickets and payment records they did bother to produce towards their attempted accounting for all the material that was taken, especially regarding how much was taken and who was taking it. See RP-285, lines 2-16; RP-520, lines 8-25; and also at RP-521, line 11 to RP-523, line 13.

Despite Defendants' contractual and fiduciary weighing and record keeping responsibilities, their breaches resulted in a completely unexplained missing and unpaid 345,882.85 cubic yards/847,413 tons of gravel and crushed rock material worth \$508,448, which was taken over a definitive, survey-tracked course of 7 years. This triggered the doctrine of Equitable Estoppel against the Defendants' post-verdict attempt to evade paying interest on what they owed and should have paid that whole time.

In this case, the defendants not only had a fiduciary and contractual responsibility to make sure all materials leaving the mining site under their exclusive control were accurately weighed and paid with proper record keeping, they also agreed that surveys of the material removed would control what was taken and owed if their record keeping was ever questioned. DE-2.2, page 4, paragraph 3.1. Defendants' expert, George Bennett, agreed that survey measurements the volume of materials are "very accurate". RP-391, lines 4-6. Those surveys showed 345,882.85 cubic

yards were unaccounted for. Defendants' own CFO Robert Jones agreed that the average truck load was 20 cubic yards. RP-331, lines 12-17.

Unlike "disfavored" doctrines which require evidence of the most positive character as courts have required for waiver or estoppel (see Dombrosky v. Farmers Ins. Co., 84 Wash. App. 245, 255, 928 P.2d 1127 (1996), prejudgment interest is actually "favored in the law" because it promotes justice and is designed to compensate for the lost usage of the money that should have been paid by the defendants. Seattle-First national Bank v. Washington Insurance Guarantee Association, 94 Wash. App. 744, 759-760, 972 P.2d 1282 (1999). In this regard, the defendants' assert that "a defendant should not, however, be required to pay prejudgment interest in cases where he is unable to ascertain the amount he owes to the plaintiff." Respondent's brief page 15, lines 2-6 (further citation omitted).

However, Defendants were always readily able to ascertain the amount they owed down to the last pound and penny had they simply honored their contractual and fiduciary duties owed to the Plaintiffs to weigh and pay and keep track with record keeping. Instead, the defendants willfully breached their duties and thus spoliated the tonnage records by failing to track tens of thousands of now conveniently missing and critically

important scale tickets for each truck load taken (345,882.85 net cubic yards as surveyed, divided by just 20 cubic yards per truck load according to defendants' own CFO Robert Johnson, = at least 17,294 truckloads). This dereliction and breach of duty to weigh every load and keep accurate records is what forced the resort to surveys. The surveys gave the exact cubic yardage of materials taken which required an estimated conversion factor to reasonably convert those cubic volumes back to tons to apply the \$.60 per ton royalty rate owed, before all paid-for material was deducted.

It is precisely on that basis of their own breaches and or effective spoliation that the Defendants now claim their own wrongful actions entitle them to evade interest on the \$508,448 that they willfully avoided paying for over 7 (SEVEN) YEARS. In turn, the Plaintiffs have shown that the Defendants should be equitably estopped from any such arguments. This is because the Plaintiffs were induced to reasonably rely on the Defendants' contractual and fiduciary promises that the Defendant would accurately weigh and pay and fully account for all materials taken from the mine while under the Defendants' exclusive control.

Instead, the surveys and accounting records showed that the Plaintiffs' reliance was betrayed and they were shorted out of 345,882.85

cubic yards/847,413 tons of unpaid material worth \$508,448. This \$508,448 was taken over the course of 7 years as confirmed by three surveys. The Defendants should not be rewarded with free interest on top of almost getting away with taking the material, but for the expensive and heroic derivative action that forced the Defendants to be held accountable.

What is clear, is that the jury determined the 2.45 tons per cubic yard conversion rate was reasonable since they awarded (at CP-2265) the exact \$508,448 amount requested for unpaid materials plus the \$27,226.82 in underpaid materials totaling the \$535,674.62 - exactly as calculated in PE-15 by Plaintiff's accountant Bruce Moorer, using the 2.45 conversion rate.

Even if the defendants relied on their own expert George Bennett's testimony (at RP-387, line 4 to RP-388, line 22) that the worst parts of the mine property could have a conversion factor of less than 2.0 tons per yard which "averaged out" with the more highly sought after, good, rocky areas he said could be over 2.45 tons per cubic yard, Defendants, especially these fiduciaries, still knew they would at least owe interest on something over 2.0 tons per yard, especially when they were clearly focused on taking from the best gravel and crushed rock sources for their concrete and asphalt.

The law on prejudgment interest only requires "reasonable

exactness”, not mathematical precision. Prier v. Refrigeration Engineering Co., 74 Wn. 2d 25, 34 (1968)(further citations omitted). It was still readily ascertainable that the Defendants should pay interest at a market range of no less than 2.00 tons per yard, which has reasonable certainty. Polygon NW v. American National Fire Ins., 143 Wn. App. 753, 792, 198 P.3d 777 (2008) (citing Egerer v. CSR West, LLC, 116 Wn. App. 645, 655, 67 P.3d 1128 (2003)(Discretion within a range of readily ascertainable market values still suffices for prejudgment interest).

To calculate the minimum owed we simply use Plaintiff’s accounting expert Bruce Moorer’s interest calculations at CP-2052-2056 and CP-2044-2051. Then ignoring the 2.45 figure the jury used for the principal amount owed, interest is calculated using at least 2.0 ton rate, for every cubic yard the jury found taken. We simply reverse out the 2.45 jury-approved conversion rate used by Moorer (who calculated the interest owed after all three surveys to \$290,298.33 just on the unpaid materials), and then simply plug back in the most minimal 2.00 tons per cubic yard conversion rate.

These defendants, also fiduciaries, reasonably knew by simple mathematical calculation, even using all the best numbers in their own favor, that with “reasonable certainty” they should have paid interest of no

less than \$236,978.28 on top of what the jury found was unpaid for 7 years.

The breach of the weighing and record keeping duties and otherwise the doctrine of Spoliation applies to any arguments against paying interest. The doctrine of equitable estoppel blocks any arguments to the contrary. In any event, “[t]he most elementary conception of justice and public policy require that the wrongdoer shall bear the risk of uncertainty which his own wrong has created.” Moore v. Health Care Authority, 181 Wn.2d 299 (2004)(further citations omitted).

Equitable Estoppel applies to any defense arguments against being held accountable for that breach and or spoliation. “The elements of equitable estoppel include: (1) an admission, statement, or act inconsistent with the claim afterwards asserted, (2) action by the other party on the faith of such admission, statement, or act, and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission statement or act.” Dombrowski, supra. at 256 (citing McDaniels v. Carlson, 108 Wn.2d 299, 308 (1987)(quoting Harbor Air serv. Inc. v. State Dept. of Revenue, 88 Wn.2d 359, 366-7 (1977)).

Had the Defendant ever revealed they were not honoring their promises at any time prior to the material being taken without payment and

before the surveys and all the forensic accounting needed to confirm and expose the non-payments, the Plaintiffs could have set up their own scales with video cameras to make sure no payments were being missed and that no accrued interest thereon was also not lost.

But for the surveys on what was really taken and the court ordered forensic accounting on what was really paid, the defendants nearly got away without paying for a substantial amount of material, and they should definitely not get away with evading interest thereon for 7 years. All the risks of any record keeping discrepancies between the cubic yards of the surveys and the materials actually paid for were allocated and assigned to the Defendants. There were just too many tens of thousands of missing loads that cannot be explained no matter what conversion factor was used.

The bottom line is that there was no agreement that the Defendant would be allowed to make up the difference between their survey measured takings and the documented payments years later without paying any interest. That would unjustly enrich the defendants and encourage more unauthorized takings and underpayments until long after the fact - a recipe for needless further litigation instead of simply awarding interest to deter it.

**B. THE RCW 4.84.185 FRIVOLOUS COSTS AWARD WAS GIVEN ON AN IMPROPER BASIS**

The mere fact that Plaintiff chose not to pursue one co-defendant named Columbia Asphalt and Gravel (CAG) at trial does not establish anything. That was not the proper inquiry or measuring stick for the Court for evaluating alleged frivolity. The voluntary elimination of litigation that a party, after completing discovery, ultimately deems unnecessary, should always be encouraged not baselessly punished. If it were truly otherwise, then the Court was required to likewise automatically conclude that all the Defendants' own counterclaims, which were also voluntarily abandoned and unsupported at trial, were equally per se frivolous under RCW 4.84.185 too. See again Appendix A to Appellants' Opening Brief, page two wherein the trial Court also ruled "The Defendants' Counterclaims against Plaintiff Deborah Burksfield, which the Defendants pleaded but presented no evidence at trial, and otherwise stipulated to the dismissal of said claims, are hereby dismissed with prejudice as a matter of law." (Emphasis added).

However, that is not how it works, and aside from the mere proposition that Plaintiff simply chose not to advance the claim, the Defendants' motion seeking RCW 4.84.185 fees and costs against the

Plaintiff was completely unsupported both legally and factually. In fact, Plaintiff Deborah Burskfield's declaration explaining the basis for the CAG claim and the admirable decision not to pursue it at CP-2236-2242 was uncontested, whereas the moving party defendants submitted nothing to support their motion. The Court ignored Burksfield's declaration and supporting evidence at CP-2242 and CP-1524, and focused on the irrelevant fact that "there was no testimony . . . no argument to the jury", as if that dictated frivolity under RCW 4.84.185. RP-58, line 22 to RP-59, line 7.

Other than the fact that the Plaintiff elected not to pursue CAG at trial, there simply were no relevant findings of fact regarding the actual CR 11 factual and legal sufficiency of the plaintiff's claim against CAG whatsoever. This is fatal to Defendant CAG's claim of frivolity because the absence of a finding on an issue amounts to a finding against the party with the burden of proof. Silverdale Hotel Assocs. v. Lomas & Nettleton Co., 36 Wn. App. 762, 769, 677 P.2d 773, review denied, 101 Wn.2d 1021 (1984). Moreover, a claim is only frivolous if no debatable issues are presented upon which reasonable minds might differ, and it is so devoid of merit that no reasonable possibility of prevailing existed. State v. Parada, 75 Wash. App. 224, 877 P.2d 231 (1994). However, the uncontested

evidence showed a basis for suing CAG and CAG's only response thereto was a mere denial and a technical statute of limitations defense. CP-1845, lines 17-21, CP-1847, lines 7-22, and CP-1851-1852.

As Deborah Burksfield (the former CFO for all the defendants including CAG) stated in her uncontested sworn declaration, Defendants CAG, CRM and the Salis all operated together in trinity-like unison. They even filed their appellate brief together, jointly shared employees like CFO Robert Jones who actually testified for them all at trial, and were also so intertwined that they actually filed joint business reports. CP-2236-2242. They jointly sold the LSL material (see CP-1524, and CP-2242), all of which was uncontested, unchallenged, and the facts therein undisputed.

Moreover, the forensic accounting turned up more evidence that CAG was also on LSL's mine site and had actually taking materials off that site despite having no lease to mine there at all. See both of the Exhibit DE 2.7's June and July 2007 invoice records showing that Defendant CAG actually sold some of LSL's material well within the statute of limitations cutoff. The Salis' mining activity through the CAG company was despite the fact that only the Salis' CRM company had leased mining rights. This refuted Defendants' claim that "there was never any – any evidence that

CAG was ever involved in taking material.” RP-43 (12/05/04).

So what we have here is the Salis, CRM and CAG all taking materials from the site, all operating jointly together in an intertwined manner regardless of who was on the lease or the invoice, and the surveyed result was there were 345,882.85 cubic yards/847,413 tons of material worth \$508,448 that had been taken offsite but not paid for. As the Salis were operating their twin companies of CRM and CAG, apparently it didn't matter to them which company signed the lease, which trucks and employees were used, because it was simply the Sali trinity at work. So, of course all the defendants including CAG were properly named in the suit.

In any event, the Defendants' RCW 4.84.185 motion was the equivalent of a motion for summary judgment on whether reasonable minds could disagree about the frivolity of the Plaintiff's filing of the complaint. Summary judgments are viewed in the light most favorable to the non-moving party. Mountain Park Homeowners Assoc. v. Tydings, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994). As such, the Plaintiff's uncontested and unchallenged affidavit of Deborah Burksfield at CP-2236-2242 and CP-1524 should have been viewed in the light most favorable to the Plaintiff as the non-moving party on the RCW 4.84.185 motion just like in a summary

judgment motion. Summary judgment rulings are reviewed de novo and the appellate court will engage in the same inquiry on the same record as the trial court. Id. In the case at bar, the standard of review was effected by the fact that the claims against CAG were not presented at trial.

Since Burksfield's affidavit and the court file were the sole evidence on the RCW 4.84.185 motion for the claim never presented at trial, the Appellate court reviews this matter de novo. Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 222, 829 P.2d 1099(1992)(citing to Lobdell v. Sugar 'N Spice, Inc., 33 Wash. App. 881, 887, 658 P.2d 1267 (appellate courts may independently review evidence consisting of written documents and can then make the required findings), review denied, 99 Wn.2d 1016 (1983)).

In this case at bar, the Defendants could not explain beyond mere self-serving, conclusory assertions, how the facts allegedly presented no debatable issues to the trial court about CAG in order to meet their burden under Kearney v. Kearney, 95 Wash. App. 405, 416, 974 P.2d 872 (1999)(examining whether allegations in the complaint are not supported by any affidavit or case law). To be sure, a frivolous action has been defined as one that cannot be supported by any rational argument on the law or facts. Bill of Rights Legal Foundation v. Evergreen State College, 44

Wash. App. 690, 696-697, 723 P.2d 483 (1986)(affirming Court's rejection of an RCW 4.84.185 motion where the situation was debatable)(citing to Bennett v. Passic, 545 F.2d 1260, 1261 (10th Cir. 1976)).

In order to invoke RCW 4.84.185, the burden is high and the lawsuit must be frivolous in its "entirety". Wright v. Dave Johnson Insurance, Inc., 167 Wash. App. 758, 785, 275 P.3d 339, review denied, 175 Wn.2d 1008, 285 P.3d 885 (2012). However, allegations that, upon careful hind-sight examination, later prove legally insufficient to require a trial are not, for that reason alone, frivolous. Evergreen State College, supra. at 697 (citing to Hughes v. Rowe, 449 U.S. 5, 66 L. Ed. 2d 163, 101 S. Ct. 173, 178 (1980)). There simply must be "some rational argument based upon the law or facts" when the claim was filed even if it is later abandoned or unsuccessful if actually pursued thereafter.

In the case at bar, the Plaintiff's complaint at CP-4, lines 7-22 and CP-1813, lines 7-22 and CP-1814, line 7 to CP-1815, line 20, alleged that these companies and defendants were all operating as one and the same as Ms. Burksfield, their former CFO, revealed in her sworn statement at CP-2236-2242. This definitely implicated a good faith claim for potential alter-ego liability under the doctrine of corporate disregard. Defendants

have yet to brief to the trial court or this appellate court how the facts known to the Plaintiff and in the record were entirely frivolous on those allegations, let alone did Defendants ever get any ruling with any findings of fact and conclusions of law thereon as expressly required by RCW 4.84.185.

The defendants would literally need to claim that the Plaintiff actually knew for a fact that CAG was absolutely not involved in taking any of the material without paying. This would have easily been shown if the scale weight tickets had been properly kept by the Salis to show who actually had removed the material that didn't get paid for. It turned out that tens of thousands of scale tickets inexplicably went missing, but the Plaintiff could not have known this before conducting FULL DISCOVERY AND THE FORENSIC AUDIT. That is key because "courts should be especially reluctant to impose sanctions for factual errors or deficiencies in the complaint before there has been an opportunity for discovery." Bryant v. Joseph Tree, Inc., supra. at 222 (further citations omitted).

Basically, CAG and its owners the Salis are saying, entirely based on mere HINDSIGHT, that it was unfair that CAG got sued and that Plaintiff somehow should have known from inception that someone else took LSL's materials just like the Salis and CRM tried to claim to

unsuccessfully defend themselves too. If that was ever deemed to be a valid defensive allegation, then CRM and the Salis should have made the same argument for themselves, based on the same theory, equally unsupported by any records, that KLB or some unknown third party is the one that took all the materials. The jury rejected all those excuses and stories and certainly did not care which company the Salis used or allowed to take the materials. Obviously, the Salis were held liable for the missing material as the fiduciaries to LSL (regardless of what entity they took the material through) and CRM was contractually liable based on the lease.

CAG simply lucked out and was not pursued at trial solely because the Plaintiff backed off because the Salis' and CRM's record keeping in breach of their fiduciary duties and or the contract or via spoliation had effectively hidden who took the materials, thus protecting CAG by controlling the evidence. Had Plaintiff left CAG in, the jury likely would have found them liable too, but Plaintiffs got what they needed already.

**C. DEFENDANTS CANNOT SHOW THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO DISMISS THE PLAINTIFF'S DERIVATIVE CLAIMS:**

A directed verdict is only proper if there is no evidence or reasonable inference therefrom, when considered most favorably to the non-moving

party, to sustain the verdict in favor of the non-moving party. Oliver v. Pacific Northwest Bell Telephone Co., 106 Wn.2d 675, 678, 724 P.2d 1003 (1986). There was plenty of evidence to sustain the verdict and there was no abuse of discretion in the proper denial of the defendants' motion.

Our State Supreme Court has held that “[o]n review of a ruling on a motion for a directed verdict, the appellate court applies the same standard as the trial court. Hizey v. Carpenter, 119 Wn.2d 251, 272, 830 P.2d 646 (1992) (quoting Indus. Indem. Co. of NW. v. Kallevig, 114 Wn.2d 907, 915-16, 792 P.2d 520 (1990)). 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. Harris v. Drake, 152 Wn.2d 480, 493, 99 P.3d 872 (2004) (citing Moe v. Wise, 97 Wn. App. 950, 956, 989 P.2d 1148 (1999)).” Chaney v. Providence Health Care, 176 Wn.2d 727, 732 (2013).

Defendants' allegation that the Plaintiffs' complaint was unverified is incorrect. The Plaintiff's original complaint was fully verified and contained all the allegations required. CP-1-18. After the amended complaint repeating the exact same allegations verbatim was filed at CP-1812-1829, Defendants thereafter failed to assert any CR 23.1 or RCW 25.15.370 affirmative defenses about the same for trial. Those were

preliminary procedural pretrial matters anyhow, relating to standing, not actual substantive elements of the claim itself. Either way, these are affirmative defenses, and such defenses must be promptly and specifically pleaded, and should have been immediately asserted in a CR 12(b) motion, or they are waived under CR 8(c) and may not thereafter be considered as triable issues in the case. Taliesen Corp. v. Razore Land Co., 135 Wn. App. 106, 134 (2006)(further cites omitted).

Moreover, as trial approached, the defendants actually filed a CR 16 motion to clarify all the issues needing resolution at trial (CP-1880-1885). The Defendants then filed a proposed CR 16 Pretrial Statement wherein the Defendants identified all the contested claims and defenses at issue. See **Appendix A** hereto. Therein, the Defendant wisely refrained from stating that either CR 23.1 and or RCW 25.15.370 were contested issues at all or there would have been proposed jury instructions thereon, but there weren't. As Defense counsel referenced his proposed order, he stated “. . . the other order that we had presented was an order based on that CR 16 motion that we brought . . . and the purpose was to identify what claims we would be discussing at trial. I think with our pretrial statement and the plaintiff's pretrial statement, I think we've got the claims identified.” RP-9, lines 12-

20.

The Court and the Plaintiff then relied on the Defendant's position on the matters actually at issue in approving a jury instruction describing the claims and defenses at issue to the jury at RP-193, line 17 through RP-196, line 2. The parties identified all the issues for the trial and the Defendants did not assert there was any issue under CR 23.1 or RCW 25.15.370 issues or seek any jury instructions thereon. Otherwise, these issues would have been taken care of, if needed at all, and any dispute thereon resolved by pre-trial motion so the trial would be unaffected.

Ms. Burksfield was an LSL shareholder at the time of the derivative claims (at RP-296, lines 19-21) and she successfully won LSL \$561,582.34. CP-2258-2265. Yet Defendants assert that under RCW 25.15.370, there was no evidence that (a) the Plaintiff brought the claims to the attention of LSL prior to resorting to litigation, and (b) that the managers refused to bring the action, and (c) that Ms. Burksfield's claims fairly represented the interests and claims of LSL, based on the mere fact that Ms. Deborah Burksfield did not testify.

However, Larry Sali himself was cross-examined for starters about the obvious \$.10 per ton underpayment in direct breach of the agreed royalty

rate, which willful underpayments were the core matter for which the derivative action was for. Therein, he acknowledged that in fact, Ms. Deborah Burksfield had tried to resolve the issue with him prior to the lawsuit, and stated “when Deb asked about it, I called my attorney and – asked him his opinion”, but then he conceded they decided they were not going to pay and the lawsuit followed. RP-492 line 2 to RP-493 line 17.

Larry Sali then further testified that the trust level between the Salis and Deborah Burksfield’s other sibling in the LSL group (Lenny Sali) was “very stressful” after Lenny Sali came back from a mission, checked the books on royalty payments entrusted to the Defendants Sali in his absence, and found they had shorted Lenny Sali out of his share of payments for 65,000 tons of material. RP-486, lines 3-12; CP-819-820. Lenny Sali then got out of LSL leaving their sister Deborah Burksfield with an 18% interest which Defendant Larry Sali took pains to make clear he felt was simply an undeserved gift that he clearly resented. RP-486, line 15 through RP-487, line 8; RP-466, lines 3-24.

Additionally, the Sali’s and CRM’s and CAG’s loyal accountant, John Rothenbueller, admitted during his testimony that he was aware of a lot of complaints from Ms. Burksfield before this litigation too, but claimed

he allegedly could not recall if Ms. Burksfield had ever specifically complained about gravel not being properly accounted for. RP-429, line 25 through RP-430, line 16. However, he did acknowledge that Ms. Burksfield had complained about a significant drop in company income (which of course is derived from gravel extractions from LSL's mines leased by the same defendants) that occurred immediately after the Sali brothers had someone else take over her duties. RP-453, lines 1-24.

Mr. Rothenbueller also acknowledged that if the Salis were importing non-native materials to LSL's mines it would be improper to deduct those imported volumes from the cut volumes of native materials that were taken from the mine. RP-447, line 21 through RP-448, line 12. Yet, he then admitted that the Salis told him "it was not worth the bother of trying to record" incoming materials (RP-447, lines 12-20), specifically because the only person who would lose any money on the resulting underreported materials was just the 18% shareholder (Deborah Burksfield). RP-426, lines 10-14; RP-466, lines 3-24.

Mr. Rothenbueller also made it readily apparent that any complaint by Ms. Burksfield to him would have been futile since he saw no problem with the defendant lessee CRM and the Sali brothers writing up their own

invoices to themselves on what they decided they would to pay LSL for materials they extracted from the mine (RP-429, lines 4-20), and writing up invoices that made no reference to any supporting scale weight tickets. RP-434, line 1 through RP-439, line 20. Plaintiff had already gotten the joint CAG/CRM CEO, Robert Jones, to confirm at trial that CRM typed up its own invoices for what it claimed it should pay to LSL for materials. RP-352, lines 5-13. Mr. Jones also confirmed he could not think of any other situation where his own company had ever allowed a customer to write up its own bill. RP-352, lines 14-23.

Furthermore, the Defendants' CFO, Robert Jones, also admitted that not a single one of the Defendants CRM invoices, that it wrote up for itself for materials taken from the LSL mine in DE-2.7, referenced a single weight scale ticket. RP-346, lines 4-7. In fact, Mr. Jones confirmed that for some reason this was the case only for LSL debts that Ms. Burksfield would get paid from, even though for all other customers that CRM dealt with, CRM gave invoices that clearly listed all the scale tickets corresponding to the actual charges being invoiced. RP-357, line 18 to RP-360, line 14.

Moreover, Plaintiff's forensic accounting expert Bruce Moorer exposed at RP-521, line 8 to RP-523, line 13, that the Defendants Sali were

also intentionally submitting fraudulent records that had been altered as to who had taken the material and also how much. First, Moorner showed that the Defendants had originally given him a May 2004 invoice produced in discovery which he identified at trial as PE-5 and was admitted as evidence. Id. Mr. Moorner then explained that contrary to what the Defendants gave him at PE-5, the Defendants later submitted at trial a doctored version of that same May 2004 invoice at DE-2.7 with 10,000 tons more material that the defendants were trying to claim was taken by KLB in a direct sale which he caught the defendants trying to get credit for against the measure of materials that were taken from the mine. Id. Mr. Moorner also pointed out how PE-14 was submitted at trial by the Defendants as DE-2.7 with an altered letterhead hiding the fact that defendant CRM had taken the material, not KLB, as the Defendants had tried to claim and get credit for.

Considering the evidence in the light most favorable to Plaintiffs, the record actually shows that any missing material that was taken and didn't get paid for directly, clearly benefitted the Salis alone, who could then resell it for \$66.00 per ton through either CRM or CAG for their concrete and asphalt products (See CP-875), while only "losing" less than sixty cents a ton taken from LSL's mine. This meant that stopping thefts

at LSL by either of the Salis' CRM or CAG companies wasn't "worth the bother." Thus, it was hardly a surprise that their record keeping was a disaster with tens of thousands of scale tickets inexplicably missing and out of sequence. Yet, the Defendants allege the Plaintiff should have done more to complain to them. The evidence shows Ms. Burksfield sufficiently tried and anything more would be a useless act the law does not require. Franklin County v. Sellers, 97 Wn.2d 317, 646 P.2d 113 (1982).

## II. ATTORNEY FEES AND COSTS:

Plaintiff is requesting reasonable fees on all the issues on appeal pursuant to RCW 4.84.330 and the fee shifting provisions of paragraph 3.2 of the LSL agreement at DE-2.1, and will comply with RAP 18.1 and 14.4.

## III. CONCLUSION:

This Court should reverse the trial court's ruling on prejudgment interest as requested. The Court should also reverse the trial court's award of RCW 4.84.185 frivolous action costs, and should affirm the denial of the defendants' motion for directed verdict. Respectfully submitted this 29<sup>th</sup> day of October, 2015. David Trujillo

DAVID B. TRUJILLO, WSBA #25580,

Attorney for Appellants Burksfield and LSL

# Appendix A

1 HONORABLE MICHAEL G. MCCARTHY

2 3 pages  
3 F I L E D  
4 SEP 29 2014

5 KIM M. EATON, YAKIMA COUNTY CLERK

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7  
8 IN THE SUPERIOR COURT OF WASHINGTON  
FOR YAKIMA COUNTY

9 DEBORAH BURKSFIELD, a single  
10 individual; LSL PROPERTIES, LLC, a  
Washington limited liability company,

11 Plaintiff,

12 v.

13 LARRY SALI and GAYLE SALI, husband  
14 and wife; STEVEN SALI and DELETA  
SALI, husband and wife; COLUMBIA  
15 READY-MIX, INC., a Washington  
corporation; COLUMBIA ASPHALT &  
16 GRAVEL, INC., a Washington corporation;  
JOHN ROTHENBUELLER, an individual;  
17 ALEGRIA & COMPANY, P.S., a  
Washington professional service  
18 corporation,

19 Defendants.

Case No.: 11-2-01268-8

[PROPOSED] PRETRIAL ORDER  
RE: PARTIES' TRIAL  
POSITIONS

20  
21 A conference was held in the above-entitled cause on May 9, 2014, with Judge  
22 McCarthy presiding. The parties were represented by their respective attorneys of record.  
23 Pursuant to that hearing and Civil Rule 16, the following Pretrial Order is proper:  
24

[PROPOSED] PRETRIAL ORDER RE: PARTIES' TRIAL POSITIONS - 1  
51847-001 \ 1285302 docx

STOKES LAWRENCE  
VELIKANJE MOORE & SHORE  
120 N. NACHES AVENUE  
YAKIMA, WASHINGTON 98901-2757  
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**I. PLAINTIFFS' CONTENTIONS**

Plaintiffs' contentions as to disputed issues are:

1. The leases between Columbia Ready-Mix, Inc. ("CRM") and LSL Properties, LLC ("LSL") for AK Anderson and Resthaven require that CRM pay royalties to LSL for *all* materials removed from those gravel pits, regardless of whether the material originated at those pits, or from some other source.

2. CRM has not paid LSL royalties for all of the material that has been removed from the AK Anderson and Resthaven pits.

3. Because CRM has not paid LSL royalties for all of the material that has been removed from the AK Anderson and Resthaven pits, CRM has breached the leases that it has with LSL.

4. Under the LSL Operating Agreement, Larry Sali, Gayle Sali, Steven Sali, and Deleta Sali had a fiduciary relationship with Deborah Burksfield.

5. The fiduciary relationship established by the LSL Operating Agreement was breached when CRM understated the amount of materials that were removed from AK Anderson and Resthaven.

6. LSL should be dissolved because it is no longer reasonably practicable to carry on the business in conformity with a limited liability company agreement.

**II. DEFENDANTS' CONTENTIONS**

Defendants' contentions as to disputed issues are:

1. The leases between CRM and AK Anderson only apply to the removal of material that originated from AK Anderson and Resthaven pits, not to any material that Defendants imported to the gravel pits.



Case No. 330371

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COURT OF APPEALS, DIVISION III

STATE OF WASHINGTON

---

Deborah Burskfield, a single individual; and  
LSL Properties, LLC, a Washington limited liability company,

Appellants,

v.

Larry Sali and Gayle Sali, husband and wife;  
Steven Sali and Deleta Sali, husband and wife;  
Columbia Ready-Mix, Inc., a Washington corporation; and  
Columbia Asphalt & Gravel, Inc., a Washington corporation,

Respondents.

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CERTIFICATE OF SERVICE  
FOR APPELLANTS' REPLY BRIEF

---

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Attorney for Appellants  
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(509)972-3838 Phone  
[tdtrujillo@yahoo.com](mailto:tdtrujillo@yahoo.com)

I, DAVID B. TRUJILLO, certify and declare under penalty of perjury that on the 29<sup>th</sup> day of October, 2015, pursuant to a service by email agreement, I Emailed a copy of the Appellants' Reply Brief along with this Certificate of Service regarding the same, to the attorneys of record for the Respondents: John A. Maxwell, Jr. at maxwell@mftlaw.com; and to Sean A. Russel at sean.russel@stokeslaw.com.

SUBSCRIBED AND SWORN TO this 29<sup>th</sup> day of October, 2015,  
in Yakima, Washington.

Attorney for Appellants Burksfield, et al.:

BY: David Trujillo  
DAVID B. TRUJILLO, WSBA #25580