

FILED

JAN 08 2016

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NOS. 333329 and 338258-III (CONSOLIDATED)

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

WATER WORKS PROPERTIES, L.L.C.,

Appellant,

v.

WILLIAM DAN COX . et ux

Respondents.

**BRIEF OF APPELLANT
WATER WORKS PROPERTIES, L.L.C.**

J. KIRK BROMILEY
WSBA #05913
kirk@bromileylaw.com
Bromiley Law, PLLC
227 Ohme Garden Road
Wenatchee, WA 98801
(509) 293-5300

Attorneys for Appellant
Water Works Properties, L.L.C.

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR 7

III. STATEMENT OF CASE..... 8

IV. ARGUMENT 17

 1. Boundary Line Issue 17

 2. Breach of Lease Issue 24

 3. Chelan Fruit and Tree Top Checks 29

 4. Equipment 33

 5. Attorney's Fees 39

V. CONCLUSION..... 40

VI. REQUESTED RELIEF 45

TABLE OF AUTHORITIES

American Exp. Centurion Bank v. Stratman,
172 Wash.App. 667, 292 P.3rd 128 (2012); 19

Bennett v. Shinoda Floral, Inc., 108 Wn.2d
386, 396, 739 P.2nd 648 (1987); 20

CPL (Delaware) LLC v. Conley, 110 Wash.App.
786, 791, 40 P.3rd 679 (2002)..... 20

Diamond B Constructors, Inc. v. Granite Falls
School District, 117 Wash..App. 157, 70 P.3rd
966 (2003); 19

Gill v. Waggoner, 65 Wash.App. 272, 276, 828
P.2d 55 (1992) 19, 21

Public Utility District No 1 v. Washington Public
Power Supply System, 104 Wn.2d 353, 356, 705
P.2d 1195 (1985) 21

Snap On Tools Corp. v. Robert, 35 Wash. App.
32, 34-35, 665 P.2d 417 (1983)..... 22

Tiegs v. Boise Cascade Corp., 83 Wash.App.
411, 292 P2d. 115 (1986)..... 20

U.S. Bank Nat. Ass’n v. Oliverio, 190 Wash.App.
68, 33 P.3rd 1104 (2001)..... 19

Western Farm Service, Inc. v Olsen, 151 Wn.2d 645,
90 P.3d 1053 (2004)..... 32

Restatement (2nd) of Contracts, Sec. 154 (1981)..... 20

RCW 62A.9A-102 32

RCW 62A.9A-102(33)..... 36

RCW 62A.9A-601(a)..... 38

RCW 64.04.02023, 24

25 Wash.Prac. Contract Laws and Principles,
Sec. 9:25 (2nd Ed. 2013) 19, 21, 22

I. INTRODUCTION

This appeal arises from the entry of Findings of Fact and Conclusions of Law and Judgments entered March 10, 2015, and the entry of Supplemental Findings of Fact and Conclusions of Law and a Supplemental Judgment entered October 5, 2015, all by the Douglas County Superior Court.

Plaintiff filed this lawsuit seeking payment from the Defendants in regard to a Promissory Note in the principal sum of One Hundred Fifty Thousand and No/100 Dollars (\$150,000.00), a claim against the Defendants for an alleged fruit loss and a number of miscellaneous claims. See Plaintiff's Complaint (CP 2).

Defendants answered denying Plaintiff's claim, asserting a number of counterclaims and filing a Third-Party Complaint against John D. McQuaig and his accounting firm, McQuaig & Welk, PLLC. Mr. McQuaig and his wife are the only members of the Plaintiff, Water Works Properties, L.L.C., a Washington limited liability company. Defendants/Third Party Plaintiffs asserted the following causes of action: negligence and breach of fiduciary duty, unauthorized practice of law and legal malpractice, lender liability, violation of the Consumer Loan Act, intentional infliction of emotional distress, negligent infliction of

emotional distress, conversion, breach of contract and Pierce limited liability veil regarding alter ego.

By Order dated April 17, 2014, the Defendants/Third-Party Plaintiff claims of unauthorized practice of law and legal malpractice, intentional infliction of emotional distress and negligent infliction of emotional distress were dismissed on summary judgment.

The Plaintiff's claims, the Defendants' counterclaims and the claims of the Third-Party Plaintiff were tried to the court.

The Plaintiff and the Third-Party Defendants filed a Joint Pretrial Statement (CP 104). The Pretrial Statement of the Plaintiff and the Third-Party Defendants identify the issues to be tried as follows:

1. Do the Coxes owe Water Works \$150,000.00 plus interest?
2. Do the Coxes owe Water Works for converted equipment, labor, building materials, a washer, dryer and stolen crops?
3. Do the Coxes owe Water Works for destroyed trees?
4. What is the boundary line between Cox and Water Works properties?
5. Did the Coxes suffer any damage attributable to a breach of contract or conversion of their property?
6. Are Water Works or Third-Party Defendants liable for "strangle hold" damages?

7. Dismissal of all the Third-Party causes of action to which no damages have been attributed?

The Pretrial Statement of the Plaintiff and Third-Party Defendants itemized the claims for special damages of the Plaintiff totaling \$390,104.32.

The Defendants/Third Party Plaintiffs filed a list of special claim damages totaling \$2,053,061.00 (CP 111). The Defendant's/Third party Plaintiff's Pretrial Statement (CP 113) identified the issues as follows:

- A. Whether Defendants owe any amount on the \$150,000.00 Promissory Note;
- B. Whether Third-Party Defendants John D. McQuaig and/or McQuaig & Welk, PLLC (hereafter "M&W") have breached fiduciary duties owed the Defendants/Third-Party Plaintiffs which breaches include but are not necessarily limited to a failure to account for funds retained by M&W, McQuaig & Water Works Properties, L.L.C., (hereinafter "WWP") continuing to charge fees that were not guaranteed by the Coxes and that had been written off, conversion of funds and of personal property and failure to provide business advice and guidance in the best interest of the Defendants/Third Party Plaintiffs;

- C. Whether McQuaig, WWP and/or M & W breached any duties to the Coxes by continuing to control the cash flow of the Coxes and Twin W and to control their personal property and receivables, and at the same time allowing McQuaig and WWP to enter into new contracts with the Coxes and Twin W without disclosing that the Coxes remain liable to FSA for in excess of \$700,000.00, all while M & W provided accounting and financial advice to the Coxes and Twin W;
- D. Whether McQuaig and WWP are liable as lenders for damages arising from the breaches of fiduciary duty described above;
- E. Whether Plaintiff can carry its burden of proof with regard to the fruit theft claims;
- F. Whether WWP, McQuaig and M & W violated the Consumer Loan Act and the Consumer Protection Act through deceptive acts or practices in the course of making loans to the Defendants/Third Party Plaintiffs, failing to provide written disclosures, and being unlicensed during the course of these events;
- G. Whether McQuaig, M & W and/or WWP converted property belonging to the Defendants/Third Party Plaintiffs, including farm equipment and funds and six checks received from Trout

- Blue Chelan, which were property of the Defendants/Third Party Plaintiffs but nevertheless were retained by WWP;
- H. Whether WWP and McQuaig breached an April 26, 2010 agreement to pay Cox \$7,000.00 per month to manage the orchard property of WWP and to pay Cox the next proceeds from a 22-acre block of Fuji apples for the 2010 growing crop;
 - I. Whether WWP and McQuaig breached an agreement to pay a loan obligation owed by Sixth Generation to North Cascades National Bank and the Farm Service Administration and guaranteed by Coxes and that was secured by a variety of liens on property conveyed to WWP by deeds in lieu of foreclosure in March of 2010;
 - J. Whether WWP and McQuaig breached a real estate contract by failing and refusing to subordinate their security interest in Twin W property when asked so that Twin W could obtain crop financing;
 - K. Whether WWP & McQuaig breached several orchard leases by failing and refusing to release and pay Twin W all the net proceeds from the property's harvest and by refusing to allow Twin W to obtain advances from Monson Fruit for fruit picked and delivered to Monson in the prior years;

L. Whether McQuaig is the alter ego of WWP such that he should be personally liable for any damages awarded against WWP.

Trial to the court resulted in Findings of Fact and Conclusions of Law entered by the Court on March 10, 2015 (CP 211). Further, the Court entered three judgments on the same day. One judgment dismissed the claims against McQuaig & Welk, PLLC and John D. McQuaig and his spouse personally, which claims were set forth in the Third-Party Complaint filed by the Defendants. (CP 213). Further, the Court entered a judgment in the amount of \$75,595.00 in favor of Twin W Orchards, Inc., which judgment was entered in favor of Ford Elsaesser, as Bankruptcy Trustee for Twin W Orchards, Inc. (CP 214). Lastly the court on said date entered a judgment in favor of Defendant Sixth Generation, L. P., a Washington limited partnership, in the sum of \$14,296.34. (CP 215). The latter two Judgements were entered against the Plaintiff, Water Works Properties, LLC.

In the Findings of Fact and Conclusions of Law entered on March 10, 2015, the Court reserved the issues with regard to the boundary lines between the properties owned by the Plaintiff and the Defendant, Twin W Orchards, Inc., and the issues with regard to the equipment.

A subsequent hearing was had in regard to those issues which hearing resulted in Supplemental Findings of Fact and Conclusions of Law

and a Supplemental Judgment entered by the court on October 5, 2015. (CP 282 and 283).

The Supplemental Judgment was entered in favor of the Defendants, William Dan Cox, Jr. and Joy K. Cox, against Water Works Properties, L.L.C. in the principal sum of \$138,825.12, together with attorney's fees of \$64,548.05, for a total judgment of \$203,373.17 and a Supplemental Judgment in favor of Twin W Orchards, Inc. against the Plaintiff, Water Works Properties, L.L.C. in the sum of \$16,137.00 of attorney's fees.

II. ASSIGNMENTS OF ERROR

1. The Trial Court erred in revising the boundaries of the real property sold by the Plaintiff to the Defendant Twin W Orchards, Inc. by Real Estate Contract dated June 28, 2012 (Exhibit 66). Was it proper for the Trial Court to allow the Defendants, Cox, to submit a survey at the supplemental hearing? Were the Defendants, Cox, entitled to relief under the Doctrine of the Unilateral Mistake?

2. The Trial Court erred in determining the Plaintiff breached the orchard lease (Exhibit 63) entered into between the Plaintiff and the Defendant Twin W Orchards, Inc. by placing a lien on the crop and in determining the Defendants were damaged in regard to obtaining a bonus from Monson Fruit due to the actions of the Plaintiff.

3. The Trial Court erred in finding the Defendants were entitled to damages in regard to the Chelan Fruit and Tree Top checks.

4. The Trial Court erred in finding the Defendants were entitled to certain personal property the court identified as equipment or alternatively the Defendants were entitled to damages in regard to said equipment.

5. The Trial Court erred in finding the Defendants were entitled to attorney's fees in regard to the supplemental proceedings involving the boundary line and the equipment.

III. STATEMENT OF CASE

John D. McQuaig is a Certified Public Accountant practicing in Wenatchee, Washington, with the accounting firm of McQuaig & Welk, PLLC. (RP Page 42, Line 14). Mr. McQuaig and his wife, Melanie (RP Page 42, Line 19) are the sole members of the Plaintiff, Water Works Properties, L.L.C. (RP Page 42, Line 20 through Page 43, Line 3). Mr. McQuaig has experience in the orchard industry, first buying orchards in approximately 1980 (RP Page 45, Line 14). Mr. McQuaig first had contact with the Defendants, William Dan Cox, Jr. and Joy K. Cox in the accounting practice context (RP Page 49). His partner, Dick Welk, was providing tax services to Mr. and Mrs. Cox (RP Page 50).

In 2006, Dick Welk talked to John McQuaig regarding the Cox orchard financing situation. Mr. and Mrs. Cox were having problems obtaining financing to operate their orchards in 2007 (RP 51, Lines 9-22).

The initial discussions between John McQuaig and William Dan Cox, Jr. and his attorneys led to the Plaintiff, Water Works Properties, providing financial assistance to Mr. and Mrs. Cox (RP Page 55, Lines 1-15) (See Exh. 2). This financial assistance was in the form of Water Works Properties purchasing a loan wherein Zions Bank was the lender to Mr. and Mrs. Cox (RP Page 58, Lines 9-19). The Zions Bank debt was approximately \$800,000.00 (RP Page 60, Line 20). In connection with purchasing the Zion's loan, Water Works Properties received an assignment of the bank's security interest in the property of the borrower and the borrower's related entities (RP Page 63, Lines 17-22) (See Exh. 6).

Shortly after the initial financing assistance by Water Works Properties to Mr. and Mrs. Cox and their related entities, Mr. Cox came to John McQuaig seeking additional financial assistance with regard to an obligation owed by them to U.S. Bank (RP Page 66, Lines 21 through Page 67, Line 5). Mr. Cox told Mr. McQuaig he was in special credits at U.S. Bank and the bank was going to foreclose (RP Page 70, Line 23 through Page 71, Line 6).

Ultimately, the Plaintiff, Water Works Properties, paid off the U.S. Bank obligation and entered into a loan transaction with Mr. and Mrs. Cox and their related entities (RP Page 73, Lines 15-18). (See Exh. 9) Sixth Generation, L.P. is a limited partnership owned by the Coxes (RP Page 77, Lines 9-12). As part of the loan by Water Works Properties to the Coxes and their entities, Water Works Properties was granted a security interest in all of the borrower's and their related entities, real property and personal property, including equipment, retainages and patronage dividends (RP Page 79, Lines 5-24 and Page 80, Lines 1-18).

There was another loan by the Plaintiff, Water Works Properties, which occurred in June of 2008 in the amount of \$934,684.24 (RP Page 82, Lines 19-22). This loan by the Plaintiff was at the request of Mr. Cox and was for the purposes of satisfying a dispute with Stemilt Growers, the warehouse processing the Defendants' fruit to allow the Defendants to move to a different warehouse. (RP Page 83, Lines 4-15).

In November of 2009, it appeared Cox would not be able to repay Water Works Properties. The parties entered into a forbearance agreement (RP Page 101 Line 16) (See Exh. 20) to allow Mr. and Mrs. Cox to try to repay the loans then in default. Exhibits 20 through 37 are the documents relating to the forbearance that were entered into in November of 2009 (RP Page 109, Line 9 through Page 110, Line 12).

By January of 2010, it became apparent the Coxes could not get financing to farm the orchards beginning in the spring of 2010. (RP Page 107, Lines 15-19).

In February of 2010, a new set of deeds in lieu of foreclosure and related documents were prepared and executed (RP Page 110, Line 16 through Page 111, Line 16). The parties concluded the transaction on approximately March 1, 2010, and the deeds in lieu of foreclosure were recorded.

One of the documents executed in February of 2010, was a Bill of Sale in Lieu of Foreclosure (RP Page 116, Lines 2-5) (See Exh. 49). Mr. McQuaig expected Water Works Properties would get all of the personal property and equipment used in the operation of the orchard pursuant to the foreclosure. (RP Page 117, Line 3 through Page 118, Line 18).

After the Deed in Lieu of Foreclosure was given to Water Works Properties, Water Works took possession of the orchard, arranged financing to grow the crop and entered into a consulting contract with Sixth Generation, L.P. to allow Mr. Cox to manage the orchard properties. (RP Page 129, Lines 8-24) (See Exh. 89).

Thereafter, Cox formed a new Washington corporation, Twin W Orchards, Inc. to take title to a 29-acre Fuji apple orchard that the Coxes had acquired in a separate transaction. That orchard was leased by Twin

W to Water Works Properties for the 2011 crop year (RP Page 143, Lines 16-20) (See Exh. 63).

In 2012, Water Works Properties and Twin W Orchards, Inc. entered into a real estate contract (See Exh. 66) whereby Water Works Properties sold to Twin W a portion of the orchard property the Coxes referred to as the "Home Place" that had been the subject of the Deed in Lieu of Foreclosure given to Water Works Properties in March of 2010 (RP Page 159, Lines 15-22).

Mr. McQuaig and Mr. Cox determined the parcels of property that would be included in the real estate contract by negotiation, review of maps and a boundary line adjustment done by an engineering and survey firm, Erlandsen & Associates. (RP Page 162, Line 3 through Page 164, Line 21). Erlandsen prepared the legal descriptions of the parcels to be sold under the real estate contract and the descriptions were reviewed and approved by Mr. McQuaig and Mr. Cox before the real estate contract was executed (RP Page 162, Line 3 through Page 164, Line 21).

After the sale by Water Works Properties to Twin W Orchards, Inc. under the real estate contract, Mr. Cox continued to manage the Water Works Orchard under the consulting contract (Exh. 89) and he also managed the orchard purchased by Twin W Orchards, Inc. under the real estate contract (RP Page 165, Lines 4-8).

Water Works Properties terminated the consulting contract whereby Mr. Cox was managing the Water Works orchards in December, 2012 (RP Page 165, Line 8). At that point, Mr. Cox claimed the boundaries between the properties retained by Water Works Properties and the property sold to Twin W Orchards under the real estate contract were significantly different than the boundary reflected by the legal descriptions prepared by Erlandsen & Associates, reflected in the boundary line adjustment and set out in the real estate contract. In each instance, Cox claimed the boundaries the parties had agreed on included more property than was included in the legal descriptions in the real estate contract (RP Page 167, Lines 5-19).

In negotiating the real estate contract, Cox and McQuaig itemized the various components of the transaction. One of the components was a block of pears. The parties identified the pear block as consisting of four acres of pears and determined the purchase price as a specific amount of money per acre and set out that there was to be four acres of pears included in the transaction. The legal description of the pear block included in the real estate contract was four acres of pears. However, the boundary for the pear block as claimed by Mr. Cox was almost six acres (RP Page 171, Line 18 through Page 172, Line 8) (See Exh. 67).

Under the terms of the real estate contract (Exh. 66) between Water Works Properties as seller and Twin W Orchards as purchaser, Water Works was granted a security interest in the crops grown on the Twin W property provided Water Works was required to subordinate to crop financing. (RP Page 208, Line 9 through Page 209, Line 5).

Monson Fruit agreed to crop financing for the Twin W Orchards for the 2013 crop year. Water Works received notice that Monson would provide financing and a request by Monson to subordinate came to Water Works counsel from Monson's counsel. Water Works timely signed and delivered to counsel for Monson the subordination agreement. (RP Page 209, Line 12 through Page 210, Line 22).

One of the items in dispute in this litigation was a check from Tree Top in the amount of \$10,919.62 (Exh. 23). According to Mr. McQuaig, the check was dated October 11, 2011 and represented two items. One was payment for Gala apples delivered to Tree Top for the 2011 crop year, and the other item was equity retains payment that would have been for prior crop years. The two items were roughly equal (RP Page 252, Line 2-18).

Water Works Properties believes it was entitled to the Tree Top check as it was in payment for Water Works apples in part and entitled to the other portion of the check under its security agreement for the

obligations of Cox to Water Works Properties, under the loan documents and the bill of sale in lieu of foreclosure. (RP Page 252, Lines 14-22).

There were also checks from Chelan Fruit in dispute in this litigation. (Exh. 139). Those checks were dated June 16, 2010 and were originally sent to Mr. Cox, who delivered them to Water Works Properties. Water Works understood they were entitled to these retainage proceeds because they were part of the collateral pledged in regard to the Water Works loans owed by Cox and transferred by the Bill of Sale in Lieu of Foreclosure. (RP Page 253, Line 20 through Page 254, Line 7).

The Chelan Fruit checks were payable to Mr. Cox for Sixth Generation, L.P. and he voluntarily signed off on those checks and delivered them to Water Works Properties (RP Page 409, Lines 10-23).

The disposition of the equipment used to farm the orchard was also disputed by the parties. When it became apparent in early 2010 Cox could not get financing to operate the orchard for the coming crop year (RP Page 107, Lines 15-19) and the orchard was conveyed to Water Works Properties by Deeds in Lieu of foreclosure there was also a Bill of Sale in Lieu of Foreclosure (Exh. 49) executed transferring the orchard equipment to Water Works Properties. Pursuant to the Deed in Lieu of Foreclosure and the Bill of Sale in Lieu of Foreclosure, Water Works Properties took possession of the orchard and the orchard equipment necessary to operate

the orchard. The Bill of Sale in Lieu of Foreclosure (Exh. 49) was executed by Mr. and Mrs. Cox and by Sixth Generation, L.P. It was not executed by High Top Cherries, Inc., one of the Cox-owned entities, nor was it executed by Twin W Wind Machines, Inc, another Cox-owned entity. Attached to the Bill of Sale in Lieu of Foreclosure was Exhibit "B" which was a copy of the depreciation schedule from the Sixth Generation, L.P. tax return. (RP Page 491, Lines 10-24 and Page 492, Lines 1-24)

According to John McQuaig, he met with Dan Cox at the orchard in December of 2012, after the consulting arrangement under which Dan Cox was managing the orchard was terminated and agreed on what equipment would be Water Works Properties' equipment and what equipment would be Cox equipment (RP Page 410, Lines 5-22).

Bart Gebers, a business consultant (RP 463, Lines 1-2) who worked for the third-party Defendant, McQuaig & Welk in 2010, testified he was involved in getting the Bill of Sale in Lieu of Foreclosure prepared and signed (RP Page 493, Line 1-24). Mr. Gebers testified Dan Cox told him he did not want a jeep, a mustang and his mother-in-law's home to be conveyed to Water Works Properties and did not ask to have anything else in the way of equipment or personal property excluded from the transfer to Water Works Properties in March 2010. Later, Dan Cox

raised the issue of the Twin W Wind Machines equipment (RP Page 494, Lines 7-15).

Dan Cox testified the farm equipment in 2010 prior to the transfer to Water Works Properties was owned by Sixth Generation, L.P., Twin W Wind Machines, Inc., High Top Cherries and his wife's mother's estate (RP 684, Lines 15-24 and Page 685, Lines 1-2). Twin W Wind Machines primarily owned tools and High Top Cherries owned "lots of equipment, it had tractors, sprayers, mowers" etc. (RP 685, Lines 10-25 and Page 686, Lines 1-3).

The Trial Court adopted a list of "equipment" provided by the Defendants and ordered the Plaintiff to either return the equipment or pay damages based upon the value of the "equipment" as established by testimony of the Defendant.

IV. ARGUMENT

1. Boundary Line Issue

The evidence is undisputed the Plaintiff, Water Works Properties, and the Defendant, Twin W Orchards, Inc., entered into a Real Estate Contract that contained legal descriptions of the real property parcels included under the terms of the contract. The evidence is further undisputed the parties engaged a surveyor to prepare legal descriptions of those parcels, and maps were prepared by the surveyor and reviewed by Mr. McQuaig

and Mr. Cox and the Real Estate Contract was executed and recorded. (RP Page 162, Line 3 through Page 164, Line 21). The evidence is undisputed Cox was paying the surveyor for his work (RP Page 163, Line 7) and that the parties received a title report containing the legal description of the parcels to be conveyed prior to the Real Estate Contract closing. (RP Page 1265, Lines 8-24).

The Defendant Cox took the position at trial the parties had actually agreed on boundaries of the parcels different from those determined by the surveyor and contained in the contract. The Defendant saying the boundaries “followed the water” referring to the source of the water used to irrigate the trees on the various parcels.

The Trial Court ultimately accepted boundaries suggested by the Defendants prepared by a surveyor hired after trial and presented at the supplemental hearing held after trial was concluded.

The Trial Court mistakenly believed neither party accepted the legal descriptions contained in the contract. The court wrote, in its decision dated January 16, 2015 “neither Cox nor McQuaig agree that the survey is the true boundary” (CP 211, Page 12 of Court’s Decision, Lines 21 and 22). That statement by the Court was clearly in error. During trial, the Court commented to that affect and counsel for McQuaig made it clear to the Court that Plaintiff accepted the surveyed legal descriptions (RP

Page 786, Lines 10-15). Plaintiff also made it clear in its Trial Brief that Plaintiff accepted the legal descriptions in the Real Estate Contract. (CP 124)

In order to prevail on his theory, Cox must prove he is entitled to relief under the “Doctrine of Unilateral Mistake.”

A unilateral mistake occurs when one party to a contract has an erroneous belief as to a basic assumption which induced him to enter into the contract, and the effect of such mistake is material and adversely affects the mistaken party. 25 Wash.Prac. *Contract Laws and Principles*, Sec. 9:25 (2nd Ed. 2013), citing American Exp. Centurion Bank v. Stratman, 172 Wash.App. 667, 292 P.3rd 128 (2012); Diamond B Constructors, Inc. v. Granite Falls School District, 117 Wash.App. 157, 70 P.3rd 966 (2003); U.S. Bank Nat. Ass’n v. Oliverio, 190 Wash.App. 68, 33 P.3rd 1104 (2001).

If a party holds a belief which is not in accord with the facts, a mistake exists. Gill v. Waggoner, 65 Wash.App. 272, 276, 828 P.2d 55 (1992). If a unilateral mistake was made, the party who made the mistake may be granted a relief only if (i) he did not bear the risk of the mistake and (ii)(a) the mistake is material to the contract so that it would be unconscionable to enforce the contract, or (b) the other party knew or had

reason to know of the mistake, or (c) the other party caused the mistake.
25 Wash.Prac. *supra*.

A party to the contract bears the risk of loss in three specific circumstances. First, a party cannot assert the Doctrine of Mistake if the mistake was allocated to him in the agreement. *Restatement (2nd) of Contracts*, Sec. 154 (1981). Second, a party bears the risk if he is aware, at the time the contract is entered into, that his knowledge is limited with respect to the subject matter, yet treats that knowledge as sufficient. Bennett v. Shinoda Floral, Inc., 108 Wn.2d 386, 396, 739 P.2nd 648 (1987); CPL (Delaware) LLC v. Conley, 110 Wash.App. 786, 791, 40 P.3rd 679 (2002). “In other words, a party’s willingness to enter into a contract notwithstanding limited knowledge of certain facts shows of those circumstances were not essential to the elements of the contract”.

Finally, the Court may allocate risk to one party if such allocation is reasonable to properly effectuate the purpose of the contract. *Restatement, supra: Tieg v. Boise Cascade Corp.*, 83 Wash.App. 411, 292 P2d. 115 (1986). The Real Estate Contract was entered into by Water Works Properties and Twin W Orchards after mutual participation and negotiation. The parties viewed maps, discussed the various parcels to be included and had a title report with legal descriptions presented to them prior to closing. Plaintiff submits that Defendant cannot now claim the

boundaries were different than as set forth in the agreement under these circumstances. The Court should allocate the risk to the Defendants because the agreement was negotiated between the parties and clearly the Defendants treated their knowledge with regard to the parcels to be acquired as sufficient. There must be some sanctity with regard to the written agreement.

A contract is unconscionable if “no man in his senses, not under delusion, would make . . . and which no fair and honest man would accept . . .” Gill, 65 Wash.App at 278 (quoting Montgomery Ward and Company v. Annuity BD., 16 Wash.App. 439, 444, 556 P.2d 552 (1976). The agreement must shock the conscious in order for it to be unconscionable. Gill, 65 Wash.App. at 278. Unconscionability will not be found in cases where the other party has relied on the contract. *Restatement (2nd) of Contracts* Sec. 153 (1981); 25 Wash.Prac., *Contract Law and Practice* Sec. 9:25 2nd Ed. (2013). A party who enters into an obligation without knowledge has consciously disregarded the surrounding circumstances and must bear the consequences of that decision. Public Utility District No 1 v. Washington Public Power Supply System, 104 Wn.2d 353, 356, 705 P.2d 1195 (1985). Plaintiff suggests that Defendants Cox consciously entered into the Real Estate Contract with the legal descriptions prepared by the surveyor and cannot be allowed

to now say the boundaries were different than set forth in the contract. It does not shock the conscious to believe the parties intended the boundary lines to be as drawn when they both participated in the process. Under these circumstances, the Real Estate Contract descriptions are not unconscionable.

The last element of the unilateral mistake is that of knowledge or fault by the other party. If the other party knew or had reason to know of the mistake or cause the mistake, the contract is voidable regardless of whether or not its enforcement would be unconscionable. 25 Wash.Prac. *Contract Law and Practice* Sec. 9:25 (2nd Ed. 2013); *Restatement (2nd) of Contracts*, Sec. 153, Comment e (1981); Snap On Tools Corp. v. Robert, 35 Wash. App. 32, 34-35, 665 P.2d 417 (1983).

Again, the parties participated in and negotiated the boundaries that are set forth in the Real Estate Contract. There is no evidence of knowledge or fault by McQuaig in regard to the alleged mistake. If there was a mistake made, it was a unilateral mistake by Cox and not a mistake upon which relief can be granted.

One of the significant boundary disputes related to the pear orchard. In negotiating the Real Estate Contract the parties discussed the various parcels to be included in the transaction and attached a per acre price to the orchard parcels. (Exh. 67). That exhibit indicates Twin W

was buying four acres of pears at \$15,000 per acre. The survey boundaries contained four acres but Cox was claiming at trial nearly five acres in the boundary he proposed for the pears (RP, page 1164 Lines 9-19), which boundary was ultimately accepted by the Trial Court after the supplemental hearing.

After the Trial Court rendered its written decision in January of 2015, the Defendants made a motion to reopen the case to allow the Defendants to submit evidence in regard to Defendants' proposed boundary lines. Plaintiff objected to the motion to reopen and no order was ever entered by the Trial Court allowing the Defendant to reopen the case to submit that evidence. Plaintiff submits there was no basis under the rules to allow Defendants reopen the case, and that it was error to allow the Defendants to submit the evidence in the supplemental hearing that occurred in this case. At trial, Defendants submitted no evidence upon which the Court could rely on in establishing the boundary lines proposed by the Defendants. At trial, the only evidence submitted by the Defendants concerning the boundary lines was Mr. Cox's testimony that the boundaries should "follow the water." The Defendants submitted at trial no other evidence of any writing, description, survey, maps, or any other evidence of any nature which would have been necessary to effectuate the Defendants' proposed boundaries.

The evidence submitted by the Defendants at trial could not satisfy the Statute of Frauds. RCW 64.04.020 specifically requires that “every deed shall be in writing, signed by the party bound thereby, and acknowledged by the party before some person authorized by this act to take acknowledgment of deeds.”

In this case, the Defendants failed to submit any evidence into the record at trial that would satisfy the requirements of RCW 64.04.020.

The record, however, is complete with regard to the requirements of RCW 64.04.020 as to the survey boundary line which is the boundary line advocated by the Plaintiff. The Real Estate Contract is in writing, is signed by the parties, and satisfies all of the elements of the statute.

The Plaintiff respectfully submits that the survey boundary lines as identified in the Real Estate Contract should be the boundary lines between the properties of the parties.

2. Breach of Lease Issue.

Mr. and Mrs. Cox conveyed their orchard properties by Deed in Lieu of Foreclosure in favor of WWP, which occurred in March of 2010.

On October 6, 2010, PC Columbia, LLC, an entity in which Cox had an ownership interest, conveyed a 29-acre Fuji apple orchard to Twin W Orchards, Inc. (Exh. 77) a newly-formed Washington corporation owned by Mr. and Mrs. Cox. Recall, also, at that time, Mr. Cox, through

Sixth Generation, L.P. was managing the former Cox orchard then owned by WWP.

Thereafter, Twin W Orchards, Inc. entered into an Orchard Lease (Ex. 63) wherein Twin W was the Lessor and WWP was the Lessee, relating to this 29-acre Fuji apple orchard. The term of that lease was June 1, 2011, to October 31, 2011 (Ex. 63). WWP with Mr. Cox running the operation, farmed the 29 acres of Fuji apples for the 2011 crop year under this lease. The 29 acres of Fuji apples was conveyed by Twin W Orchards to WWP in connection with the Real Estate Contract (Ex. 66) and thereafter farmed by WWP.

To this issue, it is also relevant to remember WWP sold portions of the Cox original orchard back to Twin W Orchards, Inc (Cox) on a Real Estate Contract dated June 28, 2012 (Ex. 66).

The Trial Court, in its original decision, found WWP had breached the orchard lease (Ex., 63) by placing a lien on the fruit proceeds due the Lessee under the lease and as a consequence of said breach, awarded damages to the Defendants for a claimed lost bonus from Monson Fruit in the amounts of \$30,483.50 and \$45,112.00. (See Court's Decision dated January 16, 2015, Page 16 – CP 211 – Decision attached to Findings of Fact and Conclusions of Law). It is respectfully submitted the Trial Court was mistaken. The damages the Defendants were seeking in terms of the

claimed lost bonuses for Monson Fruit were for crops grown on the property Twin W purchased from WWP under the Real Estate Contract (Ex. 66), not from a crop or crops grown under the terms of the orchard lease (Ex. 63). The crops the Defendants sought the damages related to cherries and apples grown on the property purchased under the Real Estate Contract for the 2012 crop year. (PR-Page 880, Lines 10-16).

The court was also mistaken in that there was absolutely no evidence in the record whatsoever of a lien filing by WWP against any crop of any nature grown by the Defendants on any property. The Plaintiff believes what the court confused were the provisions of the Real Estate Contract between WWP and Twin W Orchards (Ex. 66) which gave the seller, WWP, a lien on the purchaser's crops grown on the property that is subject to the Real Estate Contract and required the seller (WWP) to subordinate to crop financing.

The Plaintiff submits there is no evidence in the record of a breach of the orchard lease by the Plaintiff as found by the court, nor is there any evidence in the record of a breach of the Real Estate Contract by the Plaintiff.

The Defendants theory in regard to the damages awarded by the court for the lost bonuses for Monson Fruit was based upon the mistaken idea held by Dan Cox, that but for his requirement to obtain grower

financing from Monson Fruit, Twin W Orchards, Inc. would have been entitled to the bonuses from Monson Fruit. However, the Defendants failed to produce any evidence whatsoever from Monson Fruit to support their claim. The Defendants did not produce a grower contract between Monson Fruit and Twin W for the 2012 crop year, nor did they produce any writing whatsoever from any representative from Monson Fruit to the affect Twin W would have been entitled to some sort of bonus program had they not needed crop financing from Monson.

Contrary, the Plaintiff submitted the deposition of Rodney C. Riggs, an authorized representative of Monson Fruit. Mr. Riggs' deposition was published at trial and his testimony is instructive on this issue. Portions of that testimony are as follows:

Q: Do you know whether in 2013 or 2014 Dan Cox or his orchard were entitled to any type of bonus pursuant to their grower contract?

A. No.

Q: OK, meaning they weren't or you don't know?

A: No, they weren't. They - - that's negotiated. I mean every contract's different.

When asked about Cox's position that a grower either got financing or a bonus/discounted packing rate, Riggs conclusively stated that it was not a case of either/or. Rather, it was a case of negotiation depending on the circumstance of the grower:

Q: If Dan Cox or someone took the position that because they were receiving financing that they were absolutely not eligible for a discounted packing rate, is that true?

A: I - - I would say that is not true.

Q: OK.

A: I mean every case is different.

Q: So it is not a universal truth?

A: No, it is not a universal truth.

(Deposition of Rodney C. Riggs, September 23, 2014, Page 23, Lines 13-22.)

The parties and the court referred to the Monson incentive as a bonus. However, Mr. Riggs' deposition made it clear there really is no bonus, but rather a packing discount. Mr. Riggs further testified that not only did Cox financing not preclude the packing discount, but that Cox never even attempted to negotiate for any such discount or incentive.

(Deposition of Rodney C. Riggs, September 23, 2014, Pages 27 and 28.)

Mr. Riggs also testified that WWP got the packing discount because they had negotiated for it. He further testified that WWP was the only cherry grower that got any such incentive. (Deposition of Rodney C. Riggs, September 23, 2014, Pages 28 and 29.)

Plaintiff submits it is clear the court was mistaken in regard to a breach of the orchard lease (Ex. 63) on the part of WWP. The evidence also clearly does not support the proposition that Twin W Orchards, Inc. would have been entitled to any sort of bonus/packing discount from Monson Fruit for the 2012 crop year irrespective of any action or inaction by the Plaintiff, WWP.

3. Chelan Fruit and Tree Top Checks.

The Trial Court found WWP was not entitled to the proceeds of a series of checks from Chelan Fruit totaling \$43,584.63, and awarded the Defendants damages in that amount, together with interest at the rate of 12% per annum. The checks were payable to Mr. Cox for Sixth Generation, L.P. He voluntarily endorsed the checks and delivered them to WWP who negotiated the checks. Chelan Fruit is a cooperative warehouse and retains portions of growers' fruit proceeds and pays those proceeds out to the growers over a period of years. The check at issue in this case represented proceeds from crops grown by Sixth Generation, L.P. in earlier years. The Chelan Fruit checks were dated June 16, 2010.

The Trial Court similarly found WWP was not entitled to the proceeds of the check written by Tree Top, a fruit processor and another cooperative similar to Chelan Fruit. That check was in the amount of \$10,919.62. The court awarded Defendants damages in that amount, together with interest from the date of the check. This check also had Mr. Cox's name on it and it was delivered to WWP and deposited in its account. This check was dated October 16, 2011. Mr. McQuaig testified this check was for WWP's gala apples delivered to Tree Top in 2011, and for prior years in retainages in roughly equal amounts. The Trial Court appears to have overlooked this testimony.

The Trial Court based its decision on the thinking that Defendants' obligations to WWP were satisfied by the Deed and Bill of Sale in Lieu of Foreclosure, which were delivered to WWP in March of 2010, and therefore the retainage payments from Chelan Fruit and Tree Top would be Defendants' property since when they were issued there was no debt owed by the Defendants to WWP.

There can be no dispute that WWP clearly had a security interest in the Tree Top and Chelan Fruit proceeds. The security agreements in connection with the loan in the amount of \$2,399,131.63 of February 15, 2007 (Ex. 9, Subsections 6-9) specifically identify the Trout and Tree Top

retainages as part of the collateral for the loan made by WWP. Trout is the predecessor to Chelan Fruit.

Further, the Forbearance Agreement (Ex. 20) dated November 20, 2009, and the Amended Forbearance Agreement (Ex. 38) dated February 17, 2010, executed by the Plaintiff and the Defendants obligate the Defendants execute a Bill of Sale in Lieu of Foreclosure which includes all of the personal property held by WWP as collateral for the debts owed WWP. Clearly, the documents contemplated WWP would have ownership of the Chelan Fruit and Tree Top funds.

The Forbearance Agreement (Ex. 20) specifically provides:

Obligors shall execute Deeds in Lieu of Foreclosure (the “Deeds”) and a Bill of Sale in Lieu of Foreclosure (the “Bill of Sale”) describing all of the real and personal property collateral pledged to secure the Notes, . . .

(Ex. 20, Forbearance Agreement, Page 5).

Additionally, the Amended Bill of Sale dated February 17, 2010

(Ex. 44) recites that the Bill of Sale includes the following:

All crops and farm products grown, growing or to be grown in Washington State and the harvest and proceeds of harvest of such crops, or such harvested crops and the products thereof, together with all proceeds of said collateral: chattel paper; warehouse receipts; accounts receivable; contract

rights; crop insurance proceeds; and all cash and non-cash proceeds.

The personal property transferred pursuant to this Bill of Sale is comprehensive and would include the Chelan Fruit and Tree Top proceeds. Specifically, crop proceeds are included in the conveyance.

Pursuant to RCW 62A.9A-102, “proceeds” mean the following property:

- (A) Whatever is acquired upon the sale, lease, license, exchange, or other disposition of collateral;
- (B) Whatever is collected on, or distributed on account of, collateral;
- (C) Rights arising out of collateral.

RCW 62A.9A-102(64).

Washington courts have given the word “proceeds” a broad meaning. In Western Farm Service, Inc. v Olsen, 151 Wn.2d 645, 90 P.3d 1053 (2004), our Supreme Court was interpreting a prior version of the statute quoted above to hold that a potato hauling allowance was part of crop proceeds and thus payable to a secured creditor.

The retainage checks from both Chelan Fruit and Tree Top were acquired due to the sale of Sixth Generation fruit and, Plaintiff submits, clearly represent proceeds as defined by the statute and as contemplated by the parties as set forth above in the agreements entered into between the parties.

Plaintiff submits the Bill of Sale in Lieu of Foreclosure, together with the Security Agreements and Forbearance Agreements identified above indicate the Chelan Fruit and Tree Top proceeds were intended by the parties to become the property of WWP and the Trial Court award of damages to Defendant's in regard to these issues was error.

4. Equipment.

Finally, the court must address allegations that McQuaig converted equipment and other personal property. The court has never seen a security agreement that secures and takes everything owned by the debtor, including his and her underwear. The court does not believe that this was the intent of anybody. There was an attachment to the security agreement which at the time McQuaig felt was sufficient. He did not do an inventory. It is the Cox's position that the attached equipment was the only equipment that was secured. He supports this position with Exhibit 115, which is a discussion of shop sharing arrangement. The Cox position is if he owned no equipment, why would they have to have a shop sharing agreement? Further, High Top Cherries, Inc., never signed a quitclaim bill of sale for the equipment (Exhibit 154) and, as indicated previously, the notes were extinguished by the deeds in lieu of foreclosure. The court finds by a preponderance of the evidence that the only equipment was secured is that that was attached as Exhibit "B" to Exhibit 49.

(Court's Decision of January 16, 2015, Page 20, Lines 3-16 attached to the Findings of Fact and Conclusions of Law entered by the court) (CP 211).

At trial, the Defendants argued the only equipment transferred to WWP by the Defendants was the equipment listed on Exhibit "B" to the Bill of Sale in Lieu of Foreclosure executed in the spring of 2010 (Ex. 49). The Exhibit "B" was a depreciation schedule from the tax return of Sixth Generation, L.P. The Trial Court in its decision above confused the Bill of Sale (Ex. 49) with a security agreement, determined "the only equipment secured" was listed in Exhibit "B" to Exhibit 49, and adopted the Defendants' position ordering WWP to either return the equipment or pay damages at values claimed by the Defendants. In rendering its decision, the Trial Court noted High Top Cherries, Inc., an entity owned by Mr. and Mrs. Cox, never signed a Bill of Sale in Lieu of Foreclosure for the equipment. The Trial Court concluded therefore none of the equipment owned by High Top Cherries, Inc. was transferred to WWP.

Between the court's initial ruling in January, 2015 and the hearing on the equipment and boundary issues in June of 2015, the Plaintiff returned a number of items of equipment to the Defendants.

The "equipment" list the court ordered returned or damages paid is included in the Findings of Fact entered by the court on March 10, 2015 (CP 211). Finding of Fact No. 45 is as follows:

The following property rightfully belonging to the Defendants Cox, Sixth Generation, Twin W Wind Machines, Inc., and High Top Cherries and Cox testified they are valued as set forth below and are currently in Water Works Properties' possession:

\$50,000	Cherry line with water dumper and sort tables and scales belonging to HTC
\$6,448	Gator belonging to HTC destroyed in fire
\$53,000	Insured recovery for shop belonging to Twin W Wind Machines
\$2,737	1,000 gallons of gas and 3,000 gallons of diesel
\$1,000	Shop oils and greases
\$400	Welding rods and supplies
\$6,000	Pipe room parts and supplies
\$30,000	Three trailers
\$20,000	200 used picking ladders at \$100 each
\$17,500	Kubota 7030 tractor
\$24,000	Kubota tractor with loader
\$9,000	Sprayer
\$2,500	Mower
\$14,500	Compressor
\$12,000	Spray materials
\$5,250	Electric and water payment on housing areas, sheds at \$125 every other month
\$15,000	3 motor vehicles
\$10,000	HTC cherry boxes at \$1.00
\$3,000	HTC cherry boxes at \$1.00
\$3,000	HTC cherry boxes at \$3.00
\$5,000	Batting machine
\$10,000	Cold storage HTC removable
\$15,000	HTC Berkley pump used by WWP

	supplies all of the water to HTC
\$4,680	Cherry blower
\$3,777	Cherry blower
\$269,335	TOTAL EQUIPMENT

As indicated above, a number of these items were delivered by WWP to the Defendants. Those include the cherry line with water dumper and sort tables and scales belonging to HTC; three trailers; picking ladders; Kubota 7030 tractor; Kubota tractor with loader; sprayer; mower; batting machine; cold storage HTC removable. During that same time frame, WWP paid the Defendants \$15,000 for the Berkley pump. After the hearing in June of 2015, the court ordered WWP pay the Defendants for the balance of the items contained on this list. First, Plaintiff would note the list identified by the court contains a number of items that are clearly not “equipment”, were not subject to the security agreements or pledged as collateral and should not have been included in the analysis by the court regarding the equipment.

Equipment is defined by Washington’s Uniform Commercial Code as “goods other than inventory, farm products or consumer goods.” RCW 62A.9A-102(33). The equipment list adopted by the court contains items such as fuel, lubricants, welding rods, pipe room parts and supplies and spray materials, which are clearly not “equipment” as the term is defined. Rather, these items are inventory. At trial, the Defendants actual claim to

these items of inventory was that he was entitled to reimbursement for those items at the termination of the Orchard Lease between the Plaintiff and Twin W Orchards, Inc. However, there was nothing in the Orchard Lease that would so entitle the Defendants and the evidence was undisputed there was no inventory of the various items done by the parties either at the beginning or the conclusion of the lease. The record contains no evidence from which to support an award of these inventory items to the Defendants.

Also, excluded from “equipment” are the insurance proceeds in the approximate amount of \$53,000 that relate to a fire that destroyed personal property owned by WWP. The evidence was undisputed that the insurance was owned by WWP and that none of the Defendants had any interest in the insurance policy. The evidence was unrefuted that WWP was the named insured. There is no basis upon which the Defendants should be awarded any of the insurance proceeds.

It is respectfully submitted the Trial Court was clearly in error in awarding the Defendants an interest in the insurance proceeds or the inventory items and should be reversed in regard to those issues.

In regard to the equipment that is actually equipment on the list set forth above, it is also undisputed that all of said equipment was originally pledged to WWP under the terms of the loan documents. Further, it is

undisputed that after the Deed in Lieu of Foreclosure in the spring of 2010, WWP took possession of the orchards, the equipment and all the personal property necessary to operate the orchards which property includes all of the equipment on the foregoing list.

In reaching its decision in regard to the equipment, the court noted High Top Cherries, Inc. had not signed the Bill of Sale in Lieu of Foreclosure. However, because all of the equipment was the subject of a security interest in favor of WWP and possession of that equipment was delivered to WWP, no Bill of Sale was required to transfer the equipment to WWP. Additionally, the Defendants including High Top Cherries were required, and continue to be required under a contractual obligation contained in the Forbearance Agreement Ex.20 and Amended Forbearance Agreement Ex. 38 to execute the Bill of Sale and convey all of the personal property subject to the security agreements to WWP.

Paragraph 12.1 of the Security Agreement (Exhibit 17) provides High Top Cherries agreed to put WWP in possession of the collateral which included all of this equipment upon default. After default, a secured party has the rights provided to it in any agreement of the parties. RCW 62A.9A-601(a).

The court found the Plaintiff had converted the “equipment.” In order to prevail under a claim of conversion, the Claimant must establish it

is entitled to possession of the property claimed. Given the undisputed facts of this case, the Defendants cannot establish they were entitled to possession of any of the equipment. It is Plaintiff's position that the only property potentially not covered by the Security Agreements was the property of Twin W Wind Machines. The Plaintiff submits that it has turned over all of the Twin W Wind Machines property to the Defendants.

The Plaintiff respectfully submits the court was in error in regard to awarding damages to the Defendants concerning the equipment on the foregoing list. Plaintiff believes the Trial Court should be reversed in regard to its Order concerning all of the "equipment".

5. Attorney's Fees Award.

After the supplemental hearing held June 1, 2015, the Trial Court entered judgment against the Plaintiff in favor of the Defendants for attorney's fees incurred by Defendants relating to the boundary line issue and the equipment issue. Fees were awarded to Defendants William D. Cox and Joy Cox in the sum of \$64,548.05 and to Twin W Orchards, Inc. in the sum of \$16,137.00. The Trial Court found the basis for the award of attorney's fees relating to the boundary line issues were the provisions of the real estate contract (Ex. 66) and that "all of the agreements that addressed the equipment also provide for attorney's fees" (Court's Decision dated September 11, 2015, at Page 2, which decision is attached

to the Supplemental Findings of Fact and Conclusions of Law entered by the court October 6, 2015. SCP 282). Presumably, the agreements in regard to the equipment the court was referring to were the security agreements (Ex. 9, Subpart 6, 7, 8 and 9; Ex. 14, Ex. 17, Ex. 18, Ex. 24, Ex. 25) and the Forbearance Agreements (Ex. 20 and Ex. 38). There are prevailing party attorney's fees provisions in the documents entered into by the parties and referred to by the court. Plaintiff believes, however, for the reasons set out above, that Defendants should not be the prevailing party on either the boundary line or the equipment issues and therefore the Trial Court should be reversed in regard to the award of attorney's fees contained in the Supplemental Judgment entered by the Trial Court entered October 6, 2015 (SCP 283).

V. CONCLUSION

The relationship between the parties to this lawsuit spanned approximately seven years and was complex. Trial of this case required five full days of testimony at the initial trial and an additional day of testimony at the supplemental hearing regarding the boundary line and equipment issues. There were many issues presented to the Trial Court by the parties and 182 exhibits were submitted at trial.

Plaintiff submits the Trial Court "got it right" in regard to the majority of the issues presented by the parties. However, it is clear from

the written decision entered by the Trial Court that the Trial Court was mistaken in regard to the issues to which the Plaintiff has assigned error. The court misunderstood the evidence in regard to the boundary line, believing neither party accepted the legal description boundaries set out in the Real Estate Contract (Ex. 66). That mistaken belief forced the Trial Court to attempt to resolve the boundaries between the parties with a supplemental hearing and with presentation of additional evidence that was not warranted or necessary. Plaintiff submits the Trial Court would not have invaded the sanctity of a written contract involving real estate so easily had the court not been under the mistaken belief that neither party accepted the boundaries as set out in the written Real Estate Contract (Ex. 66). The actual evidence is crystal clear the Plaintiff believed the boundaries as set out in the contract were the boundaries agreed to by the parties and accepted those boundaries.

The Trial Court found the Plaintiff breached the lease between the Plaintiff and Twin W Orchards, Inc. by placing a lien on crop proceeds for fruit grown under the term of the lease and awarded Defendants damages in the form of lost bonuses from Monson Fruit. The record, however, is quite clear Plaintiff did not breach the lease by placing a lien against the crop. There was absolutely no evidence of any such lien submitted in the record. Rather, the actual issue, as the record demonstrates, was whether

the Plaintiff was liable to the Defendants for being unwilling to release Plaintiff's claim for fruit theft in regard to the proceeds payable to Twin W Orchards by Monson Fruit for a crop grown by Twin W Orchards not grown under the terms of the lease. Plaintiff suggests there is no legal basis for such a claim, and as the record demonstrates, damages in the form of the lost Monson Fruit bonuses are speculative at best and actually completely unsubstantiated by the evidence in the record.

The court found the Plaintiff had converted equipment and the personal property of the Defendants and awarded damages for said property. As indicated in the court's written decision, that determination was based on the mistaken conclusion the only personal property and equipment the Plaintiff had security interested in was listed on Exhibit "B" to Ex. 49. That exhibit was actually an exhibit to the Bill of Sale in Lieu of Foreclosure (Ex. 49) and not an exhibit to any of the various security agreements entered into by the parties. The record is quite clear the Plaintiff had very comprehensive and all-inclusive security agreements covering all the personal property and equipment of the Defendants (Ex. 9, Subparts 6 through 9; Ex. 14, Ex. 17, Ex. 18, Ex. 24, Ex. 25). The record is also clear and the evidence is undisputed the Plaintiff took possession of the orchard and all of the personal property and equipment in the spring of 2010 after the Deed in Lieu of Foreclosure was executed by the

Defendants and recorded with Douglas County. The fact there was a Bill of Sale in Lieu of Foreclosure executed that had a depreciation schedule attached as Exhibit "B" does not alter the fact that all of the personal property and equipment became owned by the Plaintiff when the Plaintiff took possession of that property in the spring of 2010 (See the security agreements identified above). Further, High Top Cherries was and is contractually bound to do whatever is necessary to transfer ownership of any personal property and equipment owned by High Top Cherries (Forbearance Agreements, Ex. 20 and Ex. 38).

The court also quite clearly mischaracterized some of the items the court labeled as equipment. Plaintiff suggest the court's analysis of the "equipment" issue would not apply even if the court's analysis of this issue were correct, to the other items including the insurance proceeds and items of inventory. There is no evidence in this record to support the court's determination that the Plaintiff converted property owned by the Defendants.

In coming to its conclusions, the Trial Court decided when the parties executed the Deed in Lieu of Foreclosure and the Bill of Sale in Lieu of Foreclosure the Plaintiff took ownership of the real property described in the deed and the personal property described on Exhibit "B" to the Bill of Sale, and that Defendants retained ownership of everything

else. On that basis, the court determined Defendants were entitled to recover the proceeds of the Tree Top and Chelan Fruit checks, even though the Defendants had endorsed those checks and delivered them to the Plaintiff for negotiation. The court completely ignored the unrefuted testimony of the Plaintiff that approximately one-half of the Tree Top check represented payment to Water Works Properties for fruit delivered by WWP to Tree Top for that crop year. Plaintiff submits if the agreement of the parties had been Defendants were entitled to the proceeds of those checks, the Defendants would not have endorsed the checks and turned them over to the Plaintiff without dispute or complaint. The Defendants never raised the issue of being entitled to the proceeds of those checks until this lawsuit. Further, Plaintiff is entitled to the proceeds of the Tree Top and Chelan Fruit checks under the terms of the Forbearance Agreement (Ex. 20) and the Amended Forbearance Agreement (Ex. 38) which requires Defendants to convey by bill of sale all personal property pledged by Defendants to Plaintiff as collateral for the loans. The security agreements as identified above executed in favor of the Plaintiff by the Defendants specifically identified the Tree Top and Chelan Fruit (Trout) proceeds. Further, these funds are crop proceeds and were included in the Bill of Sale (Ex. 44). Plaintiff was entitled to the proceeds of these checks. In the event this court reverses the Trial Court in regard to the

boundary line and equipment issues, the Trial Court's award of attorney's fees should be reversed as well.

VII. REQUESTED RELIEF

Plaintiff, Water Works Properties, LLC, respectfully requests the court reinstate the Real Estate Contract's (Ex. 66) legal descriptions as the legal boundaries between the properties owned by the Plaintiff, Water Works Properties, LLC and Twin W Orchards, Inc. Plaintiff also seeks return of the equipment items delivered by the Plaintiff to the Defendants pursuant to the Trial Court's direction and vacation of the Supplemental Judgments entered by the Trial Court on October 5, 2015 (SPC 283) against the Plaintiff, Water Works Properties, LLC in favor of Mr. and Mrs. Cox and Twin W Orchards in regard to the damages for conversion of personal property and the award of attorney's fees. The Supplemental Judgment (SCP 283) required WWP pay damages to Defendants for repairs to equipment WWP returned to Defendants and if WWP prevails on the equipment issue that award of damages should be reversed as well.

Lastly, the Plaintiff seeks reversal of the award to the Defendants set out in the initial Judgments entered March 10, 2015 (CP 214 and 215) regarding the Trout checks (\$43,585.00, together with \$13,957.42 interest for a total of \$57,542.42), the Tree Top check (\$10,920.00, together with interest of \$3,130.48 for a total of \$14,050.48) and a damage award

regarding the breach of lease claim concerning the Monson bonus of
\$75,595.00.

RESPECTFULLY SUBMITTED this 6 day of January, 2016.

BROMILEY LAW, PLLC

By



J. KIRK BROMILEY

WSBA #05913

Attorneys for Plaintiff