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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

Court of Appeals No. 333329-III and 338258-III (CONSOLIDATED)

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION III

WATER WORKS PROPERTIES, L.L.C.,

Appellant

v.

WILLIAM DAN COX. et ux

Respondents

BRIEF OF RESPONDENTS/CROSS-APPELLANTS
WILLIAM DAN COX et ux

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I. INTRODUCTION

This matter arises out of a series of largely one-sided financial transactions between William “Dan” and Joy Cox and their associated entities (collectively, “Cox”) and John McQuaig and his associated entities, including Water Works Properties, LLC. Less than a decade ago, Dan and Joy Cox were orchardists with over 600 acres of land, including cherry, apple, and pear trees. CP 2799. After a few poor harvest years, Cox became over-extended, and turned to McQuaig for assistance. CP 2801. Instead of receiving assistance, however, the Coxes were slowly stripped of nearly everything they owned.

The trial court recognized McQuaig’s motives, and ruled in Cox’s favor on the majority of claims. Now, on appeal, Water Works Properties continues its attempt to deprive the Coxes of their property, using its own skewed view of the evidence presented at trial. However, this Court cannot reweigh the evidence. The judgment of the trial court should be AFFIRMED as to all issues except for the failure to award attorneys’ fees.

II. CROSS-ASSIGNMENTS OF ERROR

1. The trial court erred by failing to award attorney’s fees to Cox;
Conclusion of Law No. 15.

III. ISSUES ON CROSS-APPEAL

1. Is Cox entitled to attorney's fees as the prevailing party below?

IV. RESTATEMENT OF THE CASE

A. Factual background

By November 30, 2009, Cox owed approximately \$8 million to creditors, including Water Works Properties, LLC ("WWP"), North Cascades National Bank ("NCNB"), and the Farm Service Agency ("FSA"). Of this amount, the principal amount of \$3.862 million, plus some portion of the \$830,676 accrued interest, was owed to WWP. Ex. 20. To address this debt, WWP and Cox negotiated deeds in lieu of foreclosure transferring all of the Coxes' orchard property, a cabin on Lake Chelan, and certain other property to WWP in exchange for WWP's agreement to defer declaring default. CP 2801.

On February 17, 2010, Cox re-signed all deeds in lieu, an Amended Agreement for Deed in Lieu of Foreclosure, several Bills of Sale, and a comprehensive Amended Forbearance Agreement. CP 2801. Under the terms of the deeds in lieu, Cox deeded to WWP 608 acres of orchard property, which also included the Cox family home. CP 2802. The only property retained by Cox was a 22 acre block of Fuji apples, then owned jointly by Dan Cox and Jaime Pierre. CP 2802. The amended

deeds and Bills of Sale were executed pursuant to an Amended Security Agreement, which provided that the deeds and the Bills of Sale were to be given “as security for all debts now due from the Debtor to the Secured Party...”¹ Ex. 42.

The Bills of Sale signed in connection with the Amended Security Agreement conveyed to WWP:

All payments received or to be received by Debtor because of or under the lawsuit in Douglas County, Washington Superior Court under Cause No. 08-2-00202-0 (“the Suit”); any amount due Debtor from funds now in, or to be put in the Registry of the Court in the Suit, including interest thereon; the personal property located on or associated with the use of the real property described on attached Exhibit “A” and incorporated by reference; 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.

Ex. 49. Attached to the Bill of Sale was a depreciation schedule for equipment owned by Sixth Generation. CP 2802; Ex. 49. WWP knew that this list did not include all personal property owned by Cox, but nevertheless signed a receipt for the Bill of Sale acknowledging only the equipment listed on the schedule. CP 1910, 2802; Ex. 85.

¹ Respondent Twin W Orchards, Inc. was not a party to these agreements.

In connection with the transaction, McQuaig orally promised Cox a one-year right of redemption under which the profits from 2010 could be used to salvage some of the equity in the orchard. CP 2801, 2803. This oral agreement was later confirmed in writing. CP 2803.

Also in March 2010, Cox and WWP agreed that the Lake Chelan cabin should remain in Dan and Joy's possession. An Agreement Amending Prior Agreements was signed to reflect this change. This Agreement acknowledged that Cox had signed all necessary deeds in lieu and Bills of Sale. Ex. 51. In conjunction with this transaction, the parties also signed a \$150,000 promissory note secured by a deed of trust on the Lake Chelan cabin. Ex. 52.

WWP hired Cox to manage the orchards that it had received via the deeds in lieu, and agreed to pay him a salary of \$7,000 per month. Ex. 89. Simultaneously, WWP hired Duane Peart to "oversee" orchard operations. RP 511. Peart's role was essentially to spy on Cox, reporting back to McQuaig with his observations. RP 510-12. Peart did so, visiting the property up to three or four times per week during harvest. RP 545. When he believed that Cox was mismanaging the orchard by not bringing in bees, Peart reported this to McQuaig. RP 513. Peart continued in this role for every crop season thereafter, until the time of trial. RP 507.

In May 2010, Cox received four checks on which WWP was a joint payee, totaling \$43,585, from a grower cooperative known as Trout-Blue Chelan. CP 2803. These checks represented the last of a series of patronage dividends owed to the Coxes as members of the co-op, dating back to 2003. RP 754. McQuaig deposited these into the Water Works account and refused to allow the Coxes to have any of these funds. 253-54. In October 2011, McQuaig took possession of a similar check in the amount of \$10,919.52 that had been issued by Tree Top Fruit and was payable to Cox and NCNB. RP 252; CP 2805. McQuaig's position was that these checks were conveyed to him via the deeds in lieu and Bills of Sale. RP 252-54.

In summer 2010, Cox entity Twin W Orchards, Inc. acquired title to the 22-acre Fuji block. CP 2804. Cox obtained financing to grow crops on this property via a \$30,000 loan from WWP. CP 2804. Cox then executed a \$330,000 promissory note, which both parties understood was actually only worth \$30,000, as evidenced by McQuaig's written statement that the note would be reduced to \$30,000 in the event of his death. CP 2804.

In the spring of 2011, Twin W signed an agreement leasing the 22-acre Fuji block to WWP. CP 2805. Pursuant to the agreement, Twin W was to receive rent equal to the net returns, defined as "sales proceeds,

less brokerage, storage, pre-sizing packing charges, growing costs, including financing costs.” CP 2805. In exchange, WWP was responsible for paying all growing costs and for managing the crop. CP 2806; Ex. 63. Because that year’s crop was financed by WWP, Monson Fruit provided a bonus/packing discount of \$35.00 per bin on Fuji apples. RP 875. McQuaig credited this bonus/packing discount to Cox on that year’s financial statements. RP 1321-22; Ex. 73.

In June 2012, Cox and WWP entered into a Real Estate Contract under which Cox (via Twin W) exchanged the debt-free 22-acre Fuji block for their home, some scrub land and some of the acres of orchard property that had been granted to WWP in the 2010 Deeds in Lieu. The Contract also contained a provision whereby WWP possessed a lien on Cox’s crops, but agreed to subordinate it to any crop financing requested by Twin W. Ex. 118; CP 2806.

In conjunction with the Real Estate Contract, Twin W signed a lease agreement, renting their newly acquired property to WWP. As with the 2011 lease, the 2012 lease entitled Twin W to receive the “net returns,” as defined in the prior lease, “from the fruit harvested on the leased property after payment of expenses.” Ex. 63, 117. Under the terms of this lease, WWP was prohibited from placing any liens on the

crop, other than to secure funds for all growing costs for the 2012 crop year.² Ex. 117; CP 2806.

In connection with the Real Estate Contract, the parties renegotiated the boundaries separating their respective properties. WWP hired Erlandsen & Associates to redraw the boundary lines between the properties – preparing a lot line adjustment. RP 164. Erlandsen did so on paper, but never actually surveyed the property or physically marked the lines. RP 295. It was not until after WWP filed this lawsuit against Cox that WWP ever directed Erlandsen to mark the property. RP 173.

Had Erlandsen actually visited the property as the maps were being drawn, it would have seen that its map did not comport with the parties' intentions. Erlandsen's lines put Cox's only source of water for their home on WWP's property. RP 373, 920. This was contrary to agreements between Cox and McQuaig that the well (and other "environs" near the home) would be part of Cox's property. Ex. 110, 115. In addition, photographs admitted at trial showed that the Erlandsen boundary ran through the middle of rows, splitting individual trees in half. Ex. 171.

² "2.15 Crop Liens. Water Works shall place no liens on the crop during the term of this Lease other than to secure funds for growing and harvest costs for the crop grown and harvested on the leased Property." Ex. 117.

It was Cox's understanding following the negotiations that the boundary lines would follow the irrigation systems that had been in place for decades. Cox testified why he understood this to be the case:

The Greater Wenatchee will not approve for somebody else to get extra water. They'll, they'll take it and put it inside the, the Greater Wenatchee boundary. This is outside the Greater Wenatchee Irrigation District. Also Mr. McQuaig has water from the Columbia River and he's only entitled to 100 acres, and 100 acres is already planted, so we're talking about trees that will not have any water.

RP 774. Before the 2012 harvest, Cox placed flags in all of the trees along what he understood to be the property line. RP 780. Cox then farmed and harvested the crop accordingly. CP 2806. Neither WWP nor any of its employees made any attempt to assert rights over this property for the entire 2012 season. CP 2806. In fact, Peart testified that he never observed Cox harvesting fruit from property that wasn't his. RP 544-45.

That season, the Coxes sold \$102,168.99 in cherries and \$605,363.73 in apples to Monson Fruit. Ex. 153. The proceeds from the cherry sales in 2012 were distributed to Water Works during 2012 and paid for most of the cost of the 2012 operations. The proceeds from the apple sales, however, were to be distributed in early 2013, as is customary in Eastern Washington. RP 869. WWP refused to allow the

release of any of the apple proceeds, claiming that the money was owed for “fruit theft.”³ RP 391, 419, 830, 836; CP 2806.

With WWP withholding all the apple proceeds, Cox had no money to pick the 2013 cherry crop. If he did not get any funding, the crop would rot on the trees, and thus Cox would be deprived of his only means of livelihood. Cox placed Twin W into bankruptcy and then obtained an order from the bankruptcy court to allow him to obtain some financing from Monson Fruit. Ex. 128. In prior years, Cox had received a “bonus,” or packing discount, from Monson Fruit, which WWP credited to Twin W in its accounting. RP 1321-22; Ex. 73. However, because Cox needed to obtain financing from Monson, he was precluded from receiving this bonus in 2013. CP 2806-07; Ex. 128.

B. Procedural History

On April 14, 2013, WWP filed suit against Cox, asserting claims for an unpaid \$150,000 promissory note, fruit theft, reformation of the boundary lines, conversion of equipment, and various other miscellaneous claims. CP 1-21. Cox filed counterclaims against WWP for lender liability, violation of the Consumer Loan Act, conversion, and breach of

³ The trial court found no merit in WWP’s “fruit theft” claim, and WWP does not challenge this finding on appeal. CP 2441-42.

contract.⁴ CP 45-67. Prior to trial, WWP abandoned its conversion claims and miscellaneous claims, and Cox abandoned claims for any action occurring prior to 2009.

The remaining claims were tried before the Douglas County Superior Court over five days, beginning on October 6, 2014. McQuaig, Richard Welk, Bart Gebers, Duane Peart, Brian Kuest, Nicholas Bahena, Vidal Acevedo, and Gustavo Rodriguez testified for the Plaintiff and Third Party Defendants. Dan Cox, Benjamin Bravo-Silva, Michael Cada, Phillip Johnson, and Daniel O'Rourke testified for the Defendants/Third Party Plaintiffs. The deposition of Rod Riggs and portions of the deposition of John McQuaig were also published to the court.

Following the submission of written closing statements, the trial court issued a 21-page Decision of the Court. CP 2433-53. The trial court determined that neither John McQuaig nor Dan Cox were particularly credible witnesses. CP 2434. The trial court's harshest criticisms, however, were of McQuaig: "Candidly, it insults this Court's intelligence for McQuaig to suggest he was attempting to help Cox." CP 2436.

Relevant to this appeal, the trial court found that:

- [T]his Court believes it is true that McQuaig was not farming the trees in dispute as he didn't have

⁴ Cox asserted these and additional claims against McQuaig & Welk, PLLC and John McQuaig. Both third party defendants were dismissed following trial, and neither are parties to this appeal.

the water to do so. The irrigation system conforms with the Cox' [sic] proposed boundary line, even if he created that by capping the lines. There would be no reason to water property beyond his claimed boundary. The Court will determine that the Cox' [sic] proposed boundary line is the boundary line between the properties. CP 2445.

- [T]he orchard lease between McQuaig and Cox, Exhibit 117, does provide that Water Works shall place no liens on their crop during the term of this lease, other than to secure funds for growing and harvest costs for the crop grown and harvested on the leased property. McQuaig has violated this provision of the lease. Cox' [sic] bankruptcy attorney, Dan O'Rourke, testified in Exhibit 128 that it is his belief that the debtor (Cox) would not have needed financing from Monson Fruit for 2013 or 2014 had Water Works agreed to allow the debtor to use pre-petition crop proceeds to operate post-petition. Cox alleged that this caused damages in the form of lost bonus from Monson Fruit. The Court finds by a preponderance of the evidence that this is true. CP 2448.
- Although there were agreements for a deed in lieu of foreclosure and deeds in lieu of foreclosure and forbearance agreements and amended forbearance agreements, the deeds in lieu of foreclosure for the bill of sale in lieu of foreclosure do not address the retainage of Chelan Fruit or Trout. The agreements for deeds in lieu of foreclosure do advise and state that, "Upon delivery to Water Works of the executed tax affidavits and deeds, debtors shall be fully relieved from liability for payment of the notes to Water Works and debtors shall have no further liability or obligation to Water Works as a result of these notes." If the notes had been fully paid by the deed in lieu of foreclosure and bill of sale in lieu of foreclosure, there is no basis for McQuaig to retain these checks. CP 2450.

- 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 apparently felt was sufficient. He did not do an inventory. It is the Cox' [sic] position that the attached equipment was the only equipment that was secured. He supports this position with Exhibit 115, which is a discussion of a shop sharing agreement. The Cox' [sic] 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 quit claim 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 that was secured is that that was attached as Exhibit B to Exhibit 49. CP 2452.

Ultimately, WWP prevailed only on its claim for the unpaid promissory note. CP 2809-12. Cox, on the other hand, prevailed on claims for conversion and breaches of various contracts. *Id.* The trial court awarded Cox and Sixth Generation a net judgment of \$14,296.34 plus interest, excluding damages for conversion, which were to be determined at a later date. CP 2848. The trial court also awarded Twin W a judgment of \$75,595.00 plus interest. CP 2846. Despite these judgments, the trial court found that neither party was the prevailing party, and declined to award any attorneys' fees. CP 2764, 2811 (CoL 15).

Findings of Fact and Conclusions of Law consistent with the trial court's Decision were issued on March 10, 2015.⁵ CP 2798-2837. The trial court allowed WWP time to return all personal property belonging to Cox, and reserved the issue of damages on Cox's conversion claims. CP 2808, 2811-12. The trial court also ordered that the boundary lines should be adjusted pursuant to its decision, and reserved for further hearing the precise legal description of the new boundaries. CP 2809, 2812.

On May 7, 2015, a supplemental hearing was held on the issues of conversion and the boundary lines. The trial court determined that further fact finding was necessary on these two issues, and a hearing was scheduled for June 1, 2015. RP 1367-68. Mario Bravo, Kenneth Komro, Larry Weinert, and Dan Cox all testified for the Defendants. Mike Miller, Danny Gildehaus, Duane Peart, and John McQuaig testified for WWP. Dan Cox also testified in rebuttal.

Larry Weinert testified that he had surveyed and marked the property in accordance with the trial court's determination that the boundary lines should follow the water. RP 1412-49. The results of his survey were also admitted as exhibits. 6/1/15 Ex. 11-13, 15. Rather than presenting its own survey, WWP merely repeated its argument that the

⁵ The trial court's findings and conclusions are attached as Exhibit A and will not be repeated here, for purposes of brevity.

boundary lines should be where the Erlandsen map showed them. CP 3124-25, 3148.

The trial court reiterated its finding from the trial that Cox's proposed boundary lines most accurately reflected the intent of the parties in the property exchange. CP 3166-67. As WWP did not present any survey comporting with the court's prior ruling, the trial court concluded that Weinert's survey should be the true description of the boundaries between the properties. CP 3168. The trial court also noted once again what it thought of McQuaig's credibility: "It appears that the inability of the Plaintiff and Plaintiff's witnesses to be honest continues." CP 3169.

The trial court issued a supplemental judgment in favor of Dan and Joy Cox in the amount of \$138,825.12 for the property that WWP did not return or that it returned in poor condition. CP ____.⁶ The trial court also awarded post-trial attorneys' fees to Cox and Twin W. CP ____.

WWP filed timely appeals of both the original and the supplemental judgment. CP 2926-72. Cox cross-appealed on the original judgment. CP 2973-3022.

⁶ The supplemental designation of clerk's papers that includes the judgment orders is being filed simultaneous with this brief.

V. ARGUMENT

A. Standard of Review

A trial court's findings of fact are reviewed for substantial evidence. *Ridgeview Properties v. Starbuck*, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982). "Substantial evidence' exists if the record contains evidence of a sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *In re Marriage of Fahey*, 164 Wn. App. 42, 55, 262 P.3d 128 (2011). All evidence and reasonable inferences must be construed in favor of the prevailing party – here, Cox. *Erection Co. v. Dep't of Labor & Indus.*, 160 Wn. App. 194, 202, 248 P.3d 1085 (2011). "Credibility determinations are solely for the trier of fact and cannot be reviewed on appeal." *Cantu v. Dep't of Labor & Indus.*, 168 Wn. App. 14, 22, 277 P.3d 685 (2012).

B. This Court cannot adequately review Appellant's assignments of error.

RAP 10.3 provides that, "[a] separate assignment of error for each finding of fact a party contends was improperly made **must** be included with reference to the finding by number." RAP 10.3(g) (emphasis added). "The appellant must present argument to the court why specific findings of fact are not supported by the evidence and must cite to the record to support that argument." *Inland Foundry Co. v. Dep't of Labor & Indus.*,

106 Wn. App. 333, 340, 24 P.3d 424 (2001). Otherwise, all factual findings are treated as verities. *Id.* WWP's assignments of error do not identify which findings of fact it purports to challenge, if any. WWP also fails to identify which conclusions of law it purports to challenge. Without adequate identification of the alleged errors, this Court cannot overturn the decision of the trial court.

Secondly, Appellant has not fully developed the record on appeal. It is the duty of the appealing party to adequately develop the record for this Court's review. RAP 9.2, 9.6. Since the substantial evidence standard requires the Court to examine the record as a whole, *City of Fed. Way v. Pub. Emp't Relations Comm'n*, 93 Wn. App. 509, 512, 970 P.2d 752 (1998), the Court cannot undergo this analysis when it has only been provided with a small portion of the evidence presented at trial. There were 178 exhibits admitted during the trial on this matter. Appellant did not designate any of them for review. It is inconceivable how this Court could review the record for substantial evidence with a huge amount of evidence missing. For this reason alone, this Court should affirm the trial court's findings and conclusions.

C. The trial court's finding that the new boundary between the properties comports with Cox's understanding is supported by substantial evidence.

The trial court's determination that the boundary lines between the WWP and Cox properties follow the water lines is supported by substantial evidence. It is first worth noting that it was WWP – not Cox – that initially asserted that the real estate contract did not comport with the parties' intentions. CP 6. A party may not assert a cause of action in its complaint only to later adopt a contrary position at trial. *See Procter & Gamble Co. v. King Cty.*, 9 Wn.2d 655, 659, 115 P.2d 962 (1941) (“Ordinarily, one is bound by the allegations of his pleading.”). WWP cannot now argue that the boundaries should never have been reformed when it asked for that relief in the first place.

The boundary line issue having been presented to the trial court, the trial court properly sought to determine Cox's and WWP's intent during the property exchange. A court's “primary goal in interpreting a contract is to ascertain the parties' intent.” *Wash. Prof'l Real Estate LLC v. Young*, 190 Wn. App. 541, 549, 360 P.3d 59 (2015).

When it came to ascertaining the parties' intent, the trial court found Cox more credible than McQuaig. When Cox agreed to transfer Twin W's 22-acre block of Fujis to WWP in exchange for his home and some of the surrounding orchard and scrub land, the boundary lines

between the two properties necessarily had to be redrawn. Both parties had specific requests that had to be accommodated in the line adjustment – for example, Dan Cox needed access to a well for his water supply and WWP wanted to own the spray shed near the house. RP 372-73.

At trial, Dan Cox laid out, in detail, the boundaries precisely as he understood them following the parties' negotiation. *See* Appendix B. Cox drew these boundaries onto Exhibit 158 using black ink. RP 780. As he did so, he explained to the trial court why he was marking the lines where he did. For example, when drawing the line separating the blocks of apples, Cox stated:

And, and the reason I did that, Your Honor, that's fine, the laterals, we're talking about the mainline, the laterals, the water goes to this point and we -- wherever the sprinklers were, we knew that's where the line was and I flagged that with an employee from Water Works. And it's the same with the cherry boundary and going down through here and going through the Braeburn I used Vidal and I used Antonio, and we used pipes and we tried to do it as good as we can because at that time since Mr. McQuaig agreed on that, that we were going by the blocks and by the water, I also talked to Duane Peart, and I even physically went out here with Duane Peart along the road and I told him, "I'm going to mark it," we needed to mark it and he said John was concerned, and I said I was going to mark it according to the water and he said, "That's fine."

RP 780-81. The trial court then inquired as to where Cox's understanding originated from. RP 787. Cox explained:

First, first of all, he [McQuaig] told me he would go by the water lines, so I marked this and have some pictures later I'll show that I marked them and I also spray painted the trees so the distinction would be there and he mentioned the -- to do the water. On the far side... Got to see where it is, I don't know if it's... It's not on this -- Well, on the other side of this in contention that he sold me the property to (sic), it had... The water had to go with that particular piece of property because it was being supplied from a different location. And the other water that McQuaig had that he -- originally he said, "Well, I'm going to go right here along the road," and I says, "Well, you can't do that because you got to have water from down along --"

RP 787.

Further evidence demonstrates that following the water lines was the most intuitive way to divide the property. Cox testified in detail about how the water lines had been set up, and that they had remained in use that way for decades. *See* Appendix B. For example, the disputed cherry block is within the Greater Wenatchee Irrigation District, and currently irrigated using water allotted to Cox. RP 774; CP 1987. WWP's property on the other side is irrigated with water from the Columbia River. RP 774. Cox testified that in order for WWP to water the trees in the disputed block, WWP would have to go above its maximum allotted amount of Columbia River water. RP 774. Thus, if the boundary line did not follow the water lines, the disputed block of cherry trees would go without water and perish. RP 773-74.

Dan's testimony is consistent with the testimony of Mike Miller, an employee of the Greater Wenatchee Irrigation District, and with the testimony of McQuaig. Miller testified that the Bureau of Reclamation prohibits Greater Wenatchee water from being used outside the District's boundaries. RP 1547. McQuaig testified that he was well aware of this rule. RP 296. In fact, McQuaig stated in his deposition that in order to actually water the trees in the disputed block, WWP would have to transport water from an entirely different part of its property. RP 1988. This would be inefficient to say the least. It is not a stretch to believe that two experienced orchardists would not purposely make it more difficult to water their crops.

The Erlandsen map, on the other hand, makes little sense when it is superimposed on the land. Photographs showing the property demonstrate that the Erlandsen boundary runs straight down the middle of a row of cherries on one block, and down the middle of a row of apples on another. Ex. 171. Were the boundaries to follow these lines, WWP would be farming the right half of multiple trees, while Cox would farm the left half. Again, it is readily believable that two experienced orchardists would not purposely divide their property this way.

Furthermore, both parties behaved as if the water lines served as the boundary lines between WWP's and Cox's property. Erlandsen &

Associates never actually visited the property, nor did it ever attempt to flag the boundary lines.⁷ RP 295-96. WWP and its employees also never visited the property to determine the boundary lines. RP 295. After the real estate contract was finalized, Cox farmed the disputed property as though it belonged to him. CP 2806. Cox even flagged the trees that he believed fell near the boundary. RP 1012-13; Ex. 171.

It is reasonable to infer, as the trial court did, that had WWP truly believed that the boundary lay where McQuaig claimed it did at trial, then it would have addressed the issue with Cox during the 2012 season. After all, WWP employee Duane Peart supervised the orchard, including the disputed property, on a regular basis, up to 3-4 times per week during harvest. RP 545. McQuaig also testified that he knew Dan Cox had flagged the trees to mark the boundary line. CP 384. However, neither Peart nor WWP informed Cox that he needed to stop farming that land. Peart even testified that he never observed Cox doing anything improper (such as farming land that belonged to WWP). RP 545. In fact, it was not until after WWP filed this lawsuit that it claimed title to the disputed land. RP 173. Even then, WWP did not attempt to locate a water source to irrigate the trees in the disputed area. CP 1988.

⁷ This was a glaring omission, considering that boundaries are controlled by the lines surveyed on the ground, and not by the written map. *Staaf v. Bilder*, 68 Wn.2d 800, 803, 415 P.2d 650 (1966).

It is apparent that the trial court considered all of this evidence when it found that the intent of the parties was for the boundaries to follow the water lines. As the trial court noted, “[t]he surveys and the partition cuts across orchard rows and in some cases make little or no sense.” CP 3166. The trial court did not find McQuaig to be a credible witness on this issue, and this Court should not disturb that determination.

WWP’s assertion that Cox can only claim the disputed property in the event of a unilateral mistake is incorrect.⁸ RCW 58.04.020 provides:

Whenever the boundaries of lands between two or more adjoining proprietors ... have become obscure, or uncertain, and the adjoining proprietors cannot agree to establish the same, one or more of the adjoining proprietors may bring a civil action in equity, in the superior court, for the county in which such lands, or part of them are situated, and that superior court, as a court of equity, may upon the complaint, order such ... uncertain boundaries to be erected and established and properly marked.

Here, the boundaries between the WWP and Cox properties were uncertain due to the fact that they made little to no sense when actually applied to the landscape. The boundaries drawn by Erlandsen left blocks of trees without a water source, cut trees in half, separated the Cox residence from its only source of potable water, and did not provide the residence with access to any public roads. This could not have been what

⁸ WWP’s complaint alleges that the mistakes in the real estate contract were bilateral, not unilateral. This is supported by the evidence demonstrating that the Erlandsen boundaries would make farming rather difficult for both parties, which is surely not what they intended.

the parties, both experienced orchardists, actually intended. The intent of the parties supersedes a written map if the two do not match, and it is the duty of the court to carry out the parties' intent. *Staaf v. Bilder*, 68 Wn.2d 800, 803, 415 P.2d 650 (1966). The trial court did precisely this here.⁹

WWP's argument that the boundary adjustment is barred by the statute of frauds is similarly without merit. This argument ignores the trial court's findings regarding the parties' intent and performance of their contracts following execution. CP 2445. In addition, the parties' conduct (including WWP's failure to farm the trees in dispute and the fact that the irrigation system conforms with Cox's proposed boundary line) constitutes part performance. Under this doctrine, oral agreements to convey real property may be proved without a writing and specifically enforced, if there is sufficient part performance. *Berg v. Ting*, 125 Wn.2d 544, 556, 886 P.2d 564 (1995). The doctrine is applicable in cases of oral agreements and in cases involving inadequate legal descriptions. *Id.*

The oft-repeated rule again applies here: "Obviously the purpose of the statute of frauds is to prevent a fraud, not to perpetuate one, and in

⁹ Contrary to Appellant's assertion, this issue was not "reopened" at Respondents' insistence, but rather was specifically reserved by the trial court for a future hearing. CoL 7, CP 2809. The motion to which WWP refers asked the trial court to reopen an entirely separate issue. CP 2602-09. The boundary line issue was addressed only to the extent that Cox asked the trial court to allow time to obtain a survey of the property consistent with the court's decision. CP 2604-05. Moreover, it was Appellant who insisted upon an additional fact finding hearing. RP 1357-59.

this regard the courts of this state are empowered to disregard the statute when necessary to prevent gross fraud from being practiced.” *Powers v. Hastings*, 20 Wn. App. 837, 842, 582 P.2d 897 (1978). Here, Dan Cox testified, and the evidence supports, that the parties agreed the boundaries would follow the irrigation lines. They farmed according to their oral agreements and not a cross word was uttered until WWP sued Cox in 2013. Under these circumstances, WWP cannot point to documents it caused to be prepared and argue that the agreed boundary line was something different, especially when the boundaries were never flagged. The trial court did not err in reforming the boundaries to match the parties’ intentions.

D. The trial court did not err by finding that WWP breached its lease with Twin W by failing to subordinate its crop lien.

The trial court did not err by finding that WWP’s failure to subordinate its crop lien to allow Twin W to obtain crop financing constituted a breach of its lease. Under the 2012 Orchard Lease,¹⁰ Twin W was entitled to receive the net returns from all crops grown on the property it owned. Ex. 117, clause 2.6. “Net returns” was defined as “the sales proceeds, less brokerage, storage, presizing packing charges,

¹⁰ WWP, in its opening brief, completely disregards the existence of this lease.

growing costs, including financing costs.” Ex. 117. The lease also provided that “Water Works shall place no liens on the crop during the term of this Lease other than to secure funds for growing and harvest costs for the crop grown and harvested on the leased Property.” Ex. 117, clause 2.15.

Appellant’s assertion that there was no evidence that WWP asserted a lien over Twin W’s crop proceeds is utterly false. McQuaig himself testified *repeatedly* that not only did he withhold all of Twin W’s crop proceeds for the 2012 crop year, but that he would not release them under any circumstances. This testimony includes the following:

A: -- he asked me to advance him 10% of what -- I don’t know 10% of what, but he asked me to advance him 10%.

Q: And your response was no, right?

A: That’s right.

RP 213.

A: Would I have agreed to release the --

Q: To, to release the 2012 crop proceeds?

A: No.

Q: And tell us why not.

A: Well, two reasons. One is I owned them and I would owe a lease payment based on what was the -- after the expenses were covered I would owe a lease payment, and so really there is no release *per se* provision, right?

RP 214.

A: At that point we had -- You know, I owned the crop and so there wasn’t -- there wouldn’t be a subordination *per se* because it was a lease, and so he didn’t have any right to

any funds. The other piece was that we had an allegation that the fruit had been stolen, so we owned a portion of the, of the remaining crop, and so that, that -- those two issues, you know, so we said no.

Q: So the answer to my question you wouldn't even let him have \$22,000.00 is yes, correct?

A: That's right.

RP 391.

A: Right, it says, "Twin W requests that Water Works notify Monson Fruit immediately that we will release its claim to the net proceeds currently held by Monson Fruit upon receipt by Water Works of the balance of the growing and financing costs," so, yeah, so it was total release of those, of those funds.

Q: And why were you unwilling to do that?

A: Well, because I felt we owned some of those proceeds because they were stolen from us.

RP 419.

Even if this Court does not characterize WWP's withholding of funds as a "lien," the above testimony still demonstrates that WWP failed to pay Twin W the net proceeds of the harvest, as required by clause 2.6 of the lease. Ex. 117. This evidence more than supports the trial court's finding that WWP breached the 2012 lease with Twin W.

The trial court's award of damages in the amount of a lost bonus or packing discount is also proper. It is well-established that a plaintiff may recover for breach of contract all damages that are reasonably foreseeable by the parties. *Gaglidari v. Denny's Restaurants, Inc.*, 117 Wn.2d 426, 446, 815 P.2d 1362 (1991) (quoting *Hadley v. Baxendale*, 9 Ex. 341,

354, 156 Eng.Rep. 145, 151 (1854)). By the time it signed the lease, WWP was well aware that Cox had limited avenues for financing his growing costs. With such significant loan debt and WWP unwilling to finance the 2013 crop, Cox really only had two options: the previous year's net proceeds or an advance from Monson Fruit.

Dan O'Rourke, Cox's bankruptcy attorney, testified via affidavit that had WWP turned over the net proceeds as promised, then Cox would not have needed financing from Monson Fruit. Ex. 128. Dan Cox testified that as a result of having to turn to Monson for financing, he was unable to obtain a bonus or packing discount such as the one he received in 2011. RP 875, 884. This testimony is supported by Rod Riggs, who stated in his deposition that Monson does not provide bonuses or packing discounts to anyone to whom it provides crop financing. CP 1804, 1812.

WWP would have been well aware of Monson's policy, as it used the same company to pack its fruit and had received the bonus/packing discount itself. CP 1811. Further, McQuaig testified that he believed Twin W was entitled to Monson's bonus/packing discount for the 2011 and 2012 crop years, and even credited Twin W with the bonus on the 2011 accounting. RP 1321-22; Ex. 73. Cox's lost bonus/packing discount was therefore a foreseeable harm of WWP's breach of contract and properly awarded as damages.

The portions of the deposition of Rod Riggs that Appellant attempts to rely on to support its argument to the contrary are not admissible evidence. Riggs did not testify as the CR 30(b)(6) designee of Monson and there is no foundation for his comments regarding the amounts or recipients of bonuses. Riggs is in charge of procurement at Monson Fruit, and his position involves mostly sales and recruitment. CP 1789. Riggs offered no testimony to the effect that he personally negotiated or drafted contracts with growers. In fact, asked about Monson's willingness to finance Cox's crops, Riggs stated more than once that he referred all such issues to the legal department. CP 1821, 1828. There is therefore no foundation for Riggs' statements with regard to grower contracts as set forth by WWP and thus they are inadmissible. ER 602. *See also* CR 32 (deposition may be used at trial "so far as admissible under the Rules of Evidence applied as though the witness were then present and testifying").

Even if this testimony were admissible, however, it appears that the trial court did not afford it any weight, as the trial court never discussed it in all 21 pages of its decision. CP 2433-53. The weighing of evidence is within the sole provision of the trial court, and should not be disturbed on appeal. *Segall v. Ben's Truck Parts, Inc.*, 5 Wn. App. 482, 484, 488 P.2d 790 (1971). The trial court did not err by finding that WWP

breached the 2012 orchard lease, nor did it err by awarding the lost bonus/packing discount as damages.

E. The trial court did not err by finding that WWP had no property interest in Cox's retainage checks.

The trial court did not err by finding that WWP was not entitled to the retainage checks from Trout-Chelan and Tree Top Fruit. A court's "primary goal in interpreting a contract is to ascertain the parties' intent." *Washington Prof'l Real Estate LLC v. Young*, 190 Wn. App. 541, 549, 360 P.3d 59 (2015). It was McQuaig's position at trial that he was entitled to all of Cox's patronage checks under the deeds in lieu and Bills of Sale. RP 252 (discussing Tree Top checks: "the equity was conveyed by the bill of sale"); 253-54 (discussing Trout-Chelan Fruit checks: "with the deed in lieu, those were conveyed to us"). Accordingly, the trial court analyzed these documents to determine whether the parties intended to convey Cox's years-old patronage dividends to WWP. The evidence before the trial court indicates that it came to the correct conclusion.

Collateral not listed in a security agreement is not encumbered thereby. *Puget Sound Nat. Bank v. Honeywell, Inc.*, 40 Wn. App. 313, 318, 698 P.2d 584 (1985). Patronage dividends are not mentioned anywhere in the deeds in lieu or the Bills of Sale. Rather, the Bills of Sale conveyed:

All payments received or to be received by Debtor because of or under the lawsuit in Douglas County, Washington Superior Court under Cause No. 08-2-00202-0 (“the Suit”); any amount due Debtor from funds now in, or to be put in the Registry of the Court in the Suit, including interest thereon; the personal property located on or associated with the use of the real property described on attached Exhibit “A” and incorporated by reference; 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.

Ex. 49. A literal interpretation of the language of the collateral would have included absolutely everything Cox owned, including personal vehicles, household furnishings, and clothing. McQuaig testified to that effect, asserting that he believed he owned even the couches and pots and pans in Cox’s home. RP 393; CP 1912.

The trial court found, rightly so, that McQuaig’s testimony was highly incredible. Even McQuaig’s former associate Bart Gebers testified that the Bills of Sale were not meant to include all of Cox’s property. RP 493. As the trial court stated, “it has never seen a security agreement that secures and takes everything owned by the debtor, including his and her underwear.” CP 2452. The trial court’s credibility determination should not be disturbed on appeal.

The 2007 Security Agreements, under which WWP attempts to assert a right to the patronage checks, were extinguished by the time WWP took possession of the checks. The 2007 Security Agreements were signed to secure a promissory note for a loan issued by WWP. Ex. 9. The agreements for the deeds in lieu contain a provision that “Upon delivery to Water Works of the executed tax affidavits and deeds, **debtors shall be fully relieved from liability for payment of the notes to Water Works and debtors shall have no further liability** or obligation to Water Works as a result of these notes.” Ex. 31, 32 (emphasis added). Further, the Agreement Amending Prior Agreements Regarding Transfers in Lieu of Foreclosure signed on March 17, 2010 specifically states:

The conveyance by members of the Cox Group to Water Works of the WW Collateral, except for the Lake House, shall release the members of the Cox Group from liability to Water Works for all of the WW Debt, except One Hundred Fifty Thousand Dollars (\$150,000), bearing interest at the rate of ten percent (10%) per annum, due and payable in full on March 1, 2013, in the form agreed upon by the Parties (the “New Note”), simultaneous to the execution of this Agreement.

Ex. 51.

If neither the note nor the debt continued to exist, then there was nothing to secure via property pledge. The trial court was therefore correct when it concluded, “If the notes had been fully paid by the deed in

lieu of foreclosure and bill of sale in lieu of foreclosure, there is no basis for McQuaig to retain these checks.” CP 2450. This Court should affirm the trial court’s finding.

F. The trial court did not err by finding that WWP had converted various pieces of personal property belonging to Cox.

The trial court did not err by finding that WWP had converted all of Cox’s property that was not listed on Exhibit B to the Bills of Sale. Again, the trial court’s “primary goal in interpreting a contract is to ascertain the parties’ intent.” *Young*, 190 Wn. App. at 549. Here, the trial court determined that the parties’ intent was to transfer ownership of only those items listed in the depreciation schedule attached to the Amended Bill of Sale.

The UCC, to which Washington adheres, requires that all property encumbered by a security agreement (such as a Bill of Sale that operates as a mortgage), must be sufficiently described such that it can reasonably be identified. *See, e.g., Morris v. Ark Valley Credit*, 536 B.R. 887, 892 (D. Kan. 2015); *Lankhorst v. Indep. Sav. Plan Co.*, 39 F. Supp. 3d 1359, 1363 (M.D. Fla. 2014) *aff’d*, 787 F.3d 1100 (11th Cir. 2015); *Bishop v. All. Banking Co.*, 412 S.W.3d 217, 219 (Ky. Ct. App. 2013). “All personal property” does not constitute a sufficient description of collateral for a security agreement. RCW 62A.9A-108.

The Amended Forbearance Agreement also required that the Bills of Sale detail all of the property to be transferred to WWP:

Prior to or with the execution of this Agreement, 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, the \$20,000 Advance, and the \$181,144.32 Advance, and shall deliver such the Deeds and the Bill of Sale to Water Works.

Ex. 38 (emphasis added). Given the requirements of the UCC and the language of the Amended Forbearance Agreement, one would expect that any property that was meant to be included in the Bills of Sale would be described in the document itself, or in any attachments thereto.

There were only two attachments to the Amended Bill of Sale. The first was a description of the real property owned by Cox. The second was a depreciation schedule, listing a substantial amount, but not all, of Cox’s personal orchard property. Bart Gebers testified that he “knew there needed to be a list of equipment” attached to the Bills of Sale, so he attached the depreciation schedule from Sixth Generation’s latest tax return. RP 491-92, 502. Although he knew that the schedule did not list all of Cox’s property, Gebers never performed an inventory nor asked Cox to compile one. RP 492, 504. It is reasonable to infer, as the trial court did, that had WWP intended to secure far more property than what appears on the depreciation schedule, that it would have made an effort to obtain a

complete inventory, rather than settle for a list of property owned by only one of Cox's three entities.

After the Bills of Sale were signed, the parties behaved as though the only property transferred were those items listed in the depreciation schedule. In May 2012, McQuaig and Cox were negotiating a "shop sharing" agreement. Ex. 115. According to McQuaig, this agreement would allow Cox to use WWP's shop for fixing tractors and other equipment, until Cox built his own shop. RP 375. This, of course, presumes that Cox still owned some of his own equipment. After all, if Cox no longer owned any equipment, why would he have needed a shop?

All of this evidence supports the trial court's finding that the only property belonging to WWP was what was listed in the depreciation schedule.¹¹ Therefore, the trial court did not err by finding that any of Cox's other property retained by WWP was unlawfully converted.

WWP further contends that the trial court erred in awarding insurance proceeds to Cox, because WWP owned the insurance policy. While WWP may have paid the policy premiums, the subject insurance

¹¹ WWP contends that Cox should not have been awarded damages for conversion of various items because they are not "equipment." This argument is without merit. The Bills of Sale defined "equipment" by a comprehensive list of property, not by the UCC's default definition. "Equipment" as used in the Bills of Sale included multiple items that would not be included under the UCC definition, such as damages from a lawsuit, crop proceeds, and chattel paper. Exhibit B also lists multiple items that do not fall under the UCC definition of "equipment," including bathroom fixtures, pots, scales, poles, and radios. The UCC definition of equipment has no bearing on Cox's conversion claims.

claim was submitted for fire damage to a number of items, many of which belonged to Cox. RP 938. Contrary to WWP's contention, it is not "undisputed" that all of the damaged equipment was pledged to it in the Bills of Sale. See Br. of Appellant, at 37. As discussed *supra*, the Bills of Sale did not transfer everything Cox owned to WWP. At trial, Cox testified that the Gator that was damaged in the fire, which was included in the insurance claim, was owned by High Top Cherries. RP 937. Cox further testified that other items damaged in the fire were the property of Twin W Wind Machine (a Cox entity) or of his father-in-law. RP 1204. WWP presented no evidence to contradict Cox's claims of ownership. The trial court's finding that WWP converted the property and that the insurance proceeds are the appropriate measure of damages is supported by substantial evidence.

VI. ARGUMENT ON CROSS-APPEAL

A. The trial court erred by failing to award Cox attorneys' fees under the Net Affirmative Judgment Rule.

The trial court erred by failing to award attorney's fees to Cox as the prevailing party in this action. The \$150,000 promissory note signed by the Coxes contains an attorneys' fees provision which states:

In the event it is necessary to utilize the services of an attorney to enforce the provisions of this note, the

undersigned^[12] agrees to pay the costs and fees of such attorney, in addition to all other payments called for herein.

Ex. 52. Under RCW 4.84.330, where a unilateral attorneys' fee provision, such as this one, is included in a contract or lease, "the prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements. . . . As used in this section 'prevailing party' means the party in whose favor final judgment is rendered." An award of attorney's fees under this statute is mandatory, and the court does not have discretion to deny fees to the prevailing party. *Nw. Cascade, Inc. v. Unique Const., Inc.*, 187 Wn. App. 685, 704, 351 P.3d 172 (2015).

Whether a party is a "prevailing party" under the statute is a mixed question of law and fact that this Court reviews *de novo*. *Hawkins v. Diel*, 166 Wn. App. 1, 10, 269 P.3d 1049 (2011). In cases where both parties are awarded relief, the net affirmative judgment determines the prevailing party. *Phillips Bldg. Co. v. An*, 81 Wn. App. 696, 701-03, 915 P.2d 1146 (1996) (citing *Marassi v. Lau*, 71 Wn. App. 912, 915, 859 P.2d 605 (1993)); *Moritzky v. Heberlein*, 40 Wn. App. 181, 183, 697 P.2d 1023 (1985)).

¹² The note was signed by Dan and Joy Cox, individually and on behalf of Sixth Generation L.P., High Top Cherries Inc., and Rocking Arrow Fruit Inc. Ex. 52.

Here, following trial, the trial court awarded Sixth Generation a net affirmative judgment of \$14,296.34. CP 2848. On the same date, the trial court awarded Twin W an affirmative judgment totaling \$75,595.00. CP 2846. Neither of these judgments included any damages for the conversion claims, as the trial court instead gave WWP an opportunity to return the converted equipment. Because WWP did not return all of the equipment, and some of what it did return was in poor condition, the trial court later awarded an additional \$138,825.67 to Cox. CP _____. All told, the final judgment¹³ in favor of Cox and his related entities amounts to \$228,717.01. Cox clearly obtained the net affirmative judgment in this matter and should have been awarded attorney fees under RCW 4.84.330. The trial court erred when it denied Cox all fees incurred before March 10, 2015.

B. The trial court erred by failing to award Cox attorneys' fees under the Orchard Lease and the Real Estate Contract.

The trial court also erred by failing to award attorneys' fees to Cox under the 2012 Orchard Lease and Real Estate Contract. The lease and the real estate contract both include bilateral attorneys' fee provisions,

¹³ A final judgment is “[a] court’s last action that settles the rights of the parties and disposes of all issues in controversy”. *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 492, 200 P.3d 683 (2009) (quoting BLACK’S LAW DICTIONARY 859 (8th ed.2004)). Thus, the “final judgment” here includes the judgments entered on March 10, 2015, and the supplemental judgment entered on October 5, 2015.

authorizing the award of fees to the “substantially prevailing party”. Ex. 117-18. RCW 4.84.330 does not apply to a bilateral attorneys’ fee provision such as this. *Kaintz v. PLG, Inc.*, 147 Wn. App. 782, 197 P.3d 710, 713 (2008). Therefore the Court need not determine the “prevailing party” as required by statute, but instead enforces the parties’ contract as written.

In *Marine Enterprises, Inc. v. Security Pacific Trading Corp.*, 50 Wn. App. 768, 750 P.2d 1290 (1988), the Court of Appeals held that the addition of the word “substantially” requires that the Court consider the substance of the parties’ respective recoveries:

When the court determined that MEI was the “prevailing party” and granted it \$33,000 in attorney’s fees, the court ignored the parties’ specific contract language regarding attorney’s fees. The court should have determined which party was the “substantially prevailing party” since neither party wholly prevailed. “Where the terms of the contract are plain and unambiguous, the intention of the parties shall be ascertained from the language employed.’ . . . ‘The determination as to who substantially prevails turns on the substance of the relief which is accorded the parties. The prevailing party need not prevail on the entire claim.’”

Durland v. San Juan Cnty., 174 Wn. App. 1, 298 P.3d 757 (2012) (quoting *Marine Enterprises*, 50 Wn. App. at 772; *Silverdale Hotel Assocs. v. Lomas Nettleton Co.*, 36 Wn. App. 762, 774, 677 P.2d 773 (1984)). Thus, where MEI “brought a suit for \$600,000, lost on all major issues,

materially breached the contract and was awarded a net judgment of \$5,701 for services rendered”, it was not the substantially prevailing party. Instead, the defendant SPTC substantially prevailed because it “successfully defended all claims, did not materially breach the contract, and was awarded \$5,424.” *Id.*

Here, WWP prevailed on only one claim: its claim for the unpaid promissory note. Cox, on the other hand, prevailed on multiple claims, including breach of the orchard lease, breach of Cox’s employment agreement, charging Cox mortgage payments for a property he no longer owned, an “accidental” overcharge of \$45,000.00, conversion of the retainage checks, and conversion of multiple pieces of equipment. CP 2835-36. Cox was also awarded the net affirmative judgment, which even after subtracting the value of the amount owed on the promissory note, totaled over \$200,000. Cox was the substantially prevailing party and should have been awarded attorneys’ fees.

At the very least, the trial court should have awarded attorneys’ fees to Twin W. Twin W was not a signatory to the promissory note and not a party to the claim thereon. Thus, WWP did not receive **any** affirmative relief against Twin W. On its claims against WWP, Twin W was awarded \$75,595.00. CP 2846. Twin W was clearly the substantially

prevailing party against WWP, and should have been awarded its attorneys' fees. The trial court erred when it failed to do so.

C. Cox is entitled to attorneys' fees on appeal.

This Court should award Cox attorneys' fees, pursuant to RAP 18.1. RAP 18.1 provides that a party may recover fees on appeal if authorized by law. "A contract provision that authorizes attorney fees below authorizes attorney fees on appeal." *Nw. Cascade, Inc. v. Unique Const., Inc.*, 187 Wn. App. 685, 705, 351 P.3d 172 (2015). Cox was awarded partial attorneys' fees for post-trial litigation, pursuant to the terms of the promissory note, orchard lease, and real estate contract. Additionally, Cox should have been awarded fees for all pre-trial expenses pursuant to these same documents. Thus under these three documents and RAP 18.1, Cox is entitled to recover his attorneys' fees on appeal.

VII. CONCLUSION

The trial in this matter lasted five days, involved 14 witnesses, considered 178 exhibits, and was followed by two more hearings and multiple post-trial motions. There was no one in a better position to assess the evidence than the trial court. Its findings of fact were supported by ample evidence, particularly in light of the trial court's assessments of credibility. This Court should not disturb those findings on appeal.

The trial court's only error was in failing to award attorneys' fees to Cox as the prevailing party. While WWP obtained affirmative relief on only one of its claims, Cox obtained affirmative relief on numerous claims and was awarded judgment of over \$200,000. Therefore, this Court should AFFIRM the factual findings of the trial court and REVERSE its conclusion on the issue of attorneys' fees.

RESPECTFULLY SUBMITTED this 18th day of February, 2016.

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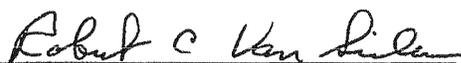
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BARRETT & GILMAN

By: 
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1000 Second Avenue, Suite #3500
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APPENDIX A

FILED

40 MAR 10 2015

FILM NO. ~~TRISTEN WORTHEN~~
DOUGLAS COUNTY CLERK
WATERVILLE, WA
BY  DEPUTY

Hon. John Hotchkiss

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SUPERIOR COURT OF WASHINGTON FOR DOUGLAS COUNTY

**WATER WORKS PROPERTIES, LLC, A
Washington limited liability company,**

Plaintiff,

vs.

**WILLIAM DAN COX and JOY K. COX,
Husband and wife; SIXTH GENERATION,
LP, a Washington limited partnership; HIGH
TOP CHERRIES, INC., a Washington
corporation; ROCKING ARROW FRUIT,
INC., a Washington corporation; and TWIN
W ORCHARDS, INC., a Washington
corporation,**

Defendants and Third Party Plaintiffs,

vs.

**JOHN D. McQUAIG, a married man, and
JOHN D. McQUAIG and MELANIE
McQUAIG, husband and wife; and McQUAIG
& WELK, P.L.L.C., a Washington professional
limited liability company,**

Third Party Defendants.

No. 13-2-00167-2

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

The Court having taken testimony, including the testimony of John McQuaig, Richard Welk, Dan Cox, Ben Bravo-Silva, Dan O'Rourke, Rod Riggs, Mike Cada, Brian Kuest, Phil Johnson, Duane Peart, Nicholas Bahena, Vidal Acevedo, Gustavo Rodriguez and Bart Gebers, having received into evidence exhibits 1 – 140, 142, 143, 146 – 181, having delivered a written

FINDINGS OF FACT AND CONCLUSIONS OF LAW -

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1 Decision of the Court filed on January 16, 2015, and a Decision on prejudgment interest fees
2 and attorney fees on February 27, 2015, which are incorporated herein by reference and
3 attached hereto and being otherwise informed, makes the following findings of fact and
4 conclusions of law.

5 6 I. FINDINGS OF FACT

7 1. Defendants and third party plaintiffs Dan and Joy Cox are orchardists residing in
8 Orondo, Washington. Before 2006, the Coxes and their defendant entities (collectively referred
9 to as "Cox") owned orchard property in Orondo and surrounding areas, including cherry, apple
10 and pear trees, numerous outbuildings, their family home and the house in which Joy Cox's
11 mother had lived. Coxes operated their orchards using Sixth Generation LP until on or about
12 the middle of 2010, when the properties were deeded to Water Works Properties, LLC.
13 ("WWP"), as set forth in paragraphs 17-19, below. Thereafter Cox formed Twin W Orchards,
14 Inc. and farmed using that entity.

15
16 2. This property is now either owned or encumbered by WWP owned by John D.
17 McQuaig ("McQuaig") who is the sole member of WWP.

18 3. McQuaig is more than a 99% ownership interest in third party defendant McQuaig
19 & Welk, P.L.L.C., a Washington professional limited liability company ("M&W"). Richard L.
20 Welk owns the remaining ownership interest. McQuaig was the chairman of the Board of
21 North Cascades National Bank ("NCNB") during the time that NCNB had a significant lending
22 relationship with the Coxes and their legal entities.
23
24
25

1 4. McQuaig is a CPA and a Certified Management Consultant. The relationship
2 between McQuaig and his entity, WWP, his accounting firm, M&W, and NCNB allowed
3 McQuaig to personally benefit from the transactions between WWP and the Coxes.

4
5 5. In the 1990s, the Coxes' accountant passed away. His practice was purchased by
6 M&W, and Welk became the Coxes' accountant. The relationship between Cox and McQuaig
7 was almost exclusively business.

8 6. Cox was unable to obtain financing and was in serious financial difficulty after the
9 2006 crop year. Welk discussed Cox's situation with McQuaig and put the two parties in touch
10 with each other. McQuaig agreed to loan money to Cox through WWP.

11 7. The interest on the loans WWP made to Cox was high, but commercially reasonable
12 and consistent with other such "hard money" loans.

13
14 8. In December 2006, WWP purchased Cox's loan from Zion's Bank. In early 2007
15 WWP loaned Sixth Generation \$2.399 million to pay off a loan from US Bank. In June 2008,
16 WWP made a loan to Sixth Generation for \$972,000. Each of these loans was at high interest
17 consistent with hard money loans and was the only financing available to the Coxes.

18 9. The purpose of the June 2008 loan was to allow Cox to change processors from
19 Sternilt Growers, Inc., to Monson Fruit. Cox believed that Sternilt was not paying guaranteed
20 production amounts to Cox and had not been doing so for a number of years. The accounting
21 fees for this work amounted to \$203,076.56 and were paid from the proceeds of the 2008 loan.

22
23 10. WWP continued to provide loans to pay Sixth Generation's accounting fees to
24 M&W and made the payment of those fees a condition of further loans to the Coxes and Sixth
25 Generation.

1 11. In 2009, Cox had a disastrous season, losing approximately \$2 million. These
2 losses were the result of a bad crop year. Cox also spent approximately \$1.2 million of his
3 working capital on moving a migrant housing camp. By the end of 2009 his working capital
4 was totally depleted. Cox was unable to make payments on his outstanding obligations to
5 WWP.
6

7 12. In November 2009, Cox and WWP agreed to a Forbearance Agreement. This
8 document contains a recital that Cox was indebted to M&W for the sum of \$163,644.32 for
9 services rendered and that Cox desired to borrow funds to satisfy this debt. In addition in
10 October 2010 Cox borrowed funds to pay delinquent Labor and Industry taxes among other
11 needs. The Coxes deeded all of their orchard property, a cabin located on Lake Chelan in
12 Chelan County, and certain other property to WWP as part of a Forbearance Agreement
13 pursuant to which WWP would defer declaring a default.
14

15 13. In January Cox settled the Stemilt litigation, but only for enough proceeds to pay his
16 attorneys and repay about 40% of the \$972,000. McQuaig was uninvolved in this settlement.
17

18 14. In February Cox re-signed all of the deeds in lieu, an Amended Agreement for Deed
19 in Lieu of Foreclosure, several Bills of Sale and a comprehensive Amended Forbearance
20 Agreement concerning the deeds in lieu of foreclosure and the bills of sale in lieu of
21 foreclosure. The Amended Forbearance Agreement contained a merger and integration clause,
22 but WWP and Cox made an oral agreement for a right of redemption for the next year. A
23 management contract with Sixth Generation for Cox to manage the property was later signed.
24

25 15. On February 17, 2010, Cox signed a Bill of Sale in connection with the Forbearance
Agreement, under which Cox would transfer and convey to WWP:

FINDINGS OF FACT AND CONCLUSIONS OF LAW -

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1 All payments received or to be received by Debtor because of or under the
2 lawsuit in Douglas County, Washington Superior Court under Cause No. 08-2
3 00201-0 ("the Suit"); any amount due Debtor from funds now in, or to be put in
4 the Registry of the Court in the Suit, including interest thereon; the personal
5 property located on or associated with the use of the real property described on
6 attached Exhibit "A" and incorporated by this reference; all crops and farm
7 products grown, growing, or to be grown in Washington State and the harvest
8 and proceeds of harvest of such crops, or such harvested crops and the products
9 thereof, together with all proceeds of said collateral; chattel paper; warehouse
10 receipts; accounts receivable; contract rights; crop insurance proceeds; and all
11 cash and non-cash proceeds.

12
13 16. WWP attached a depreciation schedule to the Bill of Sale that described only
14 equipment owned by Sixth Generation. WWP selected this attachment and at the time knew or
15 should have known that it did not describe all of the personal property owned by the Cox
16 entities.

17 17. WWP prepared a receipt for the Bill of Sale that acknowledges only the receipt of
18 the schedule of Sixth Generation equipment, and both parties signed it.

19 18. In addition to the Bill of Sale signed on February 17, 2010 transferring equipment;
20 the Stemilt lawsuit proceeds, personal property, and crop proceeds to WWP, Cox also executed
21 deeds in lieu of foreclosure dated February 17, 2010, that transferred approximately 608 acres
22 of property from the Coxes to WWP. The deeds excluded 22 acres of property (the Fuji Block).
23 These February 17, 2010, bills of sale and deeds in lieu were executed pursuant to the
24 Amended Forbearance Agreement and Amended Agreement for Deed in Lieu of Foreclosure,
25 which were also dated February 17, 2010.

1 19. In connection with the deeds in lieu, WWP agreed to a right of redemption using the
2 profits from the 2010 crop year (on the foreclosed property) as a credit and agreed with Sixth
3 Generation for Dan Cox's management services at the rate of \$7,000 per month.

4 20. In March 2010 at Cox's request, WWP agreed that the Lake Chelan cabin would be
5 excluded from the deeds in lieu. Cox signed a note for \$150,000 and deed of trust as
6 consideration for the cabin's removal. At the time there was little equity in the cabin.

7 21. On June 11, 2010, McQuaig sent an email to Dan Cox regarding accounting fees
8 still owed to M&W from Sixth Generation, and attached several pages of M&W billing
9 statements. These fees totaled \$86,363.99.

10 22. On April 26, 2010, an agreement was executed by WWP and Cox verifying the
11 parties' oral agreement whereby Sixth Generation would perform management services for
12 WWP in exchange for a monthly fee of \$7,000. The letter stated the term of the contract was
13 for the 2010 and 2011 orchard seasons that it would be terminable only for cause, and the
14 management fee would be reduced only in the event that WWP sold part of the acreage. WWP
15 did not sell any acreage during the 2010 and 2011 orchard seasons.

16 23. In addition the April 26 letter addressed the issue of WWP financing the operations
17 of Cox on the Fuji Block.

18 24. In May 2010 Cox delivered four checks to WWP representing patronage dividends
19 from Trout Blue Chelan. The checks totaled \$43,584.63.

20 25. None of the parties' written agreements entitled WWP to any dividend checks.
21 WWP is liable to Sixth Generation for \$43,584.63 plus 12% interest as of the date of deposit.
22
23
24
25

1 26. In the late summer of 2010, Twin W Orchards acquired title to the Fuji Block. The
2 property was placed in the name of Twin W Orchards, Inc., a corporation that Cox formed for
3 that purpose. Cox also signed a \$330,000 Note and a \$330,000 Mortgage on the Fuji Block
4 property to WWP. McQuaig signed a statement reducing the Note to \$30,000 in the event of
5 McQuaig's death. WWP provided the crop financing to grow the crops on the Fuji block for
6 the 2010 crop year which crop financing was repaid from crop proceeds.
7

8 27. The purpose of creating Twin W Orchards was to protect the property from Cox's
9 other creditors, and the purpose of the note was to protect WWP's investment in apple
10 production on the Fuji Block. Only \$30,000 of the note actually represented debt from Cox to
11 WWP, and Cox was never required to pay any of the note back.
12

13 28. WWP financed the operation on the Fuji Block in 2010 and retained the proceeds of
14 that operation.

15 29. The consideration for the Lake Chelan cabin was the \$150,000 note. The consider-
16 ation for the \$330,000 note was WWP's financing of the Fuji Block and \$30,000 cash loaned to
17 Cox. No other consideration passed between the parties concerning these transactions.

18 30. Neither WWP nor McQuaig made promises to assume or extinguish any of Cox's
19 debts.
20

21 31. Cox was represented by and consulted with and/or had access to lawyers throughout
22 his dealings with WWP. He made informed choices about the courses of action he took with
23 respect to his loans from WWP and the documents and agreements he signed. He was advised
24 to file for bankruptcy by his attorneys, but instead chose to take the financing and its
25 concomitant obligations offered by WWP.

1 32. Starting in November 2010, WWP unilaterally reduced Sixth Generation's
2 management fee from \$7,000 to \$4,700, even though WWP had not sold any acreage.

3 33. There was no sale of property or other justification as set forth in the April 26
4 agreement for the reduction in the management fee. Sixth Generation lost income in the
5 amount of \$2,300 per month for 14 months, totaling \$32,200.
6

7 34. In 2011, Cox came to McQuaig with a check payable to NCNB and Cox personally
8 in the amount of \$10,919.52 (the "Tree Top check"). The check represented \$6,350.40 for
9 processed fruit and \$4,569.12 for a patronage refund. The check was deposited into WWP's
10 bank account. Sixth Generation was entitled to this check and WWP is liable for the check plus
11 interest of 12% as of the date of deposit.
12

13 35. From 2010 to 2011, WWP overcharged Cox \$34,562.01 for the mortgage on the
14 Cox residence and in 2011 overcharged the Coxes \$45,000 on a \$177,978.34 note.

15 36. Sixth Generation managed all the properties between 2010 and 2012 sharing
16 equipment, supplies and other items. WWP allowed all of the equipment, whether owned by
17 Sixth Generation or any other entity to be stored in the same buildings that had previously been
18 owned by Sixth Generation and that were transferred to WWP as a result of the deeds in lieu.
19

20 37. Cox signed an Orchard Lease in 2011, permitting WWP to lease orchard property
21 from Twin W Orchards. The Orchard Lease provides for Twin W Orchards to receive rental
22 payments from WWP, equal to the net returns, defined as the "sales proceeds, less brokerage,
23 storage, pre-sizing packing charges, growing costs, including financing costs." At the end of
24 that growing season, Twin W Orchards and WWP settled these accounts.
25

1 38. In June 2012, the Coxes signed a Real Estate Contract with WWP. Under the
2 contract, the Coxes exchanged the Fuji Block for their home, some scrubland, and 50 acres of
3 property previously conveyed by the deeds in lieu. Pursuant to the Real Estate Contract, WWP
4 possessed a lien over the Cox's crops, but expressly agreed to subordinate the lien to crop
5 financing as requested by Twin W.
6

7 39. Cox and WWP agreed that the boundaries between the orchards would follow the
8 water lines laid out many years ago for this property.

9 40. Twin W Orchards leased its property to WWP again in 2012. The 2012 Orchard
10 Lease is identical to the 2011 lease, in terms of the obligation of WWP to pay net returns to the
11 Lessor for rent. Cox farmed this property during the 2012 season.
12

13 41. During the 2012 season Cox marked the boundaries of the orchard properties
14 according to the waterlines, and cultivated and harvested according to these boundaries.
15 Neither McQuaig nor any of WWP's employees complained about this or mentioned it to Cox.

16 42. In November 2012 WWP notified Cox that it would no longer lease the Cox
17 orchard, meaning that Cox had to find other financing.

18 43. The orchard lease between McQuaig and Cox, Exhibit 117, provides that Water
19 Works could place no liens on their crop during the term of this lease, other than to secure
20 funds for growing and harvesting costs for the crop grown and harvested on the leased
21 property. WWP violated this provision of the lease when it claimed the 2012 crop year
22 proceeds should be used to pay off a fruit theft claim first asserted by it in January 2013.
23

24 44. Twin W Orchards filed for bankruptcy protection in June 2013 and would not have
25 needed financing from Monson Fruit for 2013 or 2014 had Water Works agreed to allow the

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1 Twin W to use pre-petition crop proceeds to operate post-petition. This caused damages in the
 2 form of lost bonuses from Monson Fruit. This damaged Cox \$30,483.50 attributable to cherries
 3 and \$45,112.00 to apples for a total of \$75,595.50.

4
 5 45. The following property rightfully belonging to the defendants Cox, Sixth
 6 Generation, Twin W Wind Machines, Inc. and High Top Cherries and Cox testified they are
 7 valued as set forth below and are currently in WWP's possession:

8	\$50,000	Cherry line with water dumper and sort tables and scales belonging to HTC
9	\$6,448	Gator belonging to HTC destroyed in Fire
10	\$53,000	Insured recovery for shop belonging to Twin W Wind Machines
11	\$2,737	1000 gals of gas and 3000 gals of diesel
12	\$1,000	Shop oils and greases
13	\$400	welding rods & supplies
13	\$6,000	Pipe room parts and supplies
14	\$30,000	Three trailers
14	\$20,000	200 used-picking ladders at \$100 each
15	\$17,500	Kubota 7030 tractor
16	\$24,000	Kubota tractor w/ loader
16	\$9,000	Sprayer
17	\$2,500	Mower
17	\$14,500	Compressor
18	\$12,000	Spray Materials
19	\$5,250	Electric and Water payment on housing areas, sheds @ \$125/every other month
20	\$15,000	3 motor vehicles
21	\$10,000	HTC Cherry boxes @ \$1
21	\$3,000	HTC Cherry boxes @ \$1
22	\$3,000	HTC Cherry Buckets @ \$3
22	\$5,000	Batting Machine
23	\$10,000	Cold Storage HTC removable
24	\$15,000	HTC Berkley Pump used by WWP supplies all of the water to HTC
25	\$4,680	Cherry blower

FINDINGS OF FACT AND CONCLUSIONS OF LAW -

1 \$3,777 Cherry blower
2 \$269,335 Total Equipment

3 47. Although Twin W Wind Machines, Inc. owned some of the property listed above
4 and is not a party to this action, it is inactive and has been inactive for a number of years. The
5 Coxes are the sole owners of Twin W Wind Machines, Inc. and are entitle to assert its claims in
6 and to its property for the purpose of this action.

7 48. Cox's values may be excessive but these values are the only evidence as to value
8 submitted at trial. Accordingly WWP may return the property not destroyed by March 30,
9 2015. Damages for property not returned and/or disputes as to the condition of property so
10 returned are reserved for another hearing and supplemental Findings and Conclusions if the
11 parties cannot otherwise agree.

12 49. In conjunction with the Real Estate Contract executed by the parties in 2012, WWP
13 negotiated a boundary line adjustment with Cox.

14 50. The boundary lines will be adjusted in keeping with the Decision of the Court. The
15 actual boundaries as described in a survey are reserved for another hearing and supplemental
16 Findings and Conclusions.

17 51. The balance of the various claims by the parties is not supported by sufficient
18 evidence.

19 52. The plaintiff WWP has been damaged in the amount of \$150,000.00 plus interest,
20 through maturity as provided in the note and as set forth in Conclusion of Law 12.

21 53. Defendants/Third Party Plaintiff Sixth Generation has been damaged in the amount
22 of \$32,200 in management fees plus interest, \$34,562 for accounting errors related to the
23
24
25

1 mortgage on Cox's family residence plus interest, \$54,504 for the five checks deposited to
2 WWP's account plus interest, and Cox was overcharged \$45,000 on receivables plus interest,
3 all as set forth in Conclusion of Law 12.

4
5 54. Twin W Orchards has been damaged in the amount of \$75,595.50 the lost bonus
6 that it would have received had WWP not breached the 2012 Lease and the Real Estate
7 Contract. Twin W Orchards, Inc. is in bankruptcy and the Trustee is Ford Elsaesser.

8 II. CONCLUSIONS OF LAW

9 1. No Fiduciary or other special relationship existed between the parties for any
10 purpose related to this litigation.

11 2. M&W is not liable on any claim in this action.

12 3. John McQuaig and his marital community are not liable on any claim in this action.

13 4. John McQuaig did not disregard the corporate entity of WWP.

14 5. WWP breached its agreement to pay Sixth Generation \$7,000 per month in return
15 for orchard management for two full seasons and is liable for the deficiency plus interest at the
16 rate of 12% per annum.

17 6. WWP breached its lease with Twin W Orchards, Inc. to not place liens on crops and
18 to subordinate crop financing for the 2013 and 2014 season and is liable for the damages plus
19 interest at the rate of 12% per annum.

20 7. The boundary lines between the WWP property and Twin W's property shall be
21 reformed consistent with the intent of the parties and shall be determined at a subsequent
22 hearing at which specific property and access easements will be argued. The Court retains
23 jurisdiction to resolve this aspect of this dispute.
24
25

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1 8. High Top Cherries, Inc., Sixth Generation, LP, Rocking Arrow Fruit, Inc., and
2 the Coxes, personally, defaulted on their note to WWP and are obligated for the principal offset
3 as provided in 12, below, plus accumulated interest as set forth in the Findings and in
4 Conclusion 12, below.

5
6 9. RESERVED.

7 10. It is equitable to allow Coxes, Sixth Generation, LP, High Top Cherries, Inc.,
8 and Rocking Arrow Fruit Inc., to offset their respective claims against WWP against the
9 balance due under the \$150,000 Note. As set forth below these offsets exceed the balance due
10 under the \$150,000 Note at maturity on March 1, 2013 by \$14,296.34

11 11. The damages caused by the failure to subordinate are property of Twin W
12 Orchards and may not be offset.

13
14 12. A summary of the claims including interest are as follows:

15 Item		Interest to 3/1/2013	Total Owed	Original date	Creditor
16 Note balance	\$150,000	\$44,383.56	\$194,383.56	3/17/2010	WWP
17					
18 Trout checks	\$43,585.00	\$13,957.42	\$57,542.42	7/1/2010	Sixth Gen
19 Tree Top check	\$10,920.00	\$3,130.48	\$14,050.48	10/11/2011	Sixth Gen
20 Mgmt. Contract	\$32,200.00	\$6,601.00	\$38,801.00	12/31/2012	Sixth Gen.
21 Mortgage payoff	\$34,562.00	\$9,258.40	\$43,820.40	12/7/2010	Sixth Gen
22 Overcharge	\$45,000	\$9,7665.60	<u>\$54,465.6</u>	5/31/2011	Cox
23 Total			<u>\$208,679.90</u>		Sixth Gen
24					
25					

1	Total to Sixth		\$14,296.34	Sixth Gen
2	Gen			and Cox
3	<hr/>			
4	Bonus (Cherry)	\$30,483.00	\$30,483.00	Twin W
5	Bonus (Apple	\$45,112.00	<u>\$45,112.00</u>	Twin W
6	2013)			
7	Total to Trustee		\$75,595.00	Twin W
8				Orchards

10 13. The Coxes, High Top Cherries, Inc., Sixth Generation, LP, and Rocking Arrow
11 Fruit, Inc., are the net judgment creditors in the claims between them and Water Works
12 Properties in the amount of \$14,296.34. This is net of all sums due WWP under the \$150,000
13 Note. This amount bears interest from the maturity date of the Note (March 1, 2013) at the rate
14 of 12% per annum at \$4.70/day. Interest from March 1, 2013 through March 10, 2015 (740
15 days) is \$13,024.00.

17 14. Ford Elsaesser as Trustee of Twin W Orchards, Inc., and is the judgment
18 creditor against WWP in the amount of \$75,595.00. This claim is not liquidated.

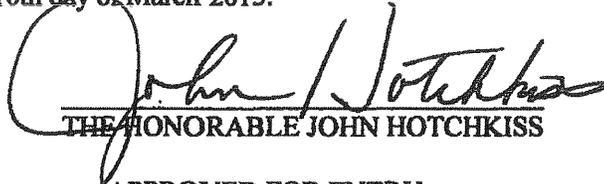
19 15. In the exercise of the Court's discretion as set out in its Decision of February 27,
20 2015, no party shall receive costs, fees, or reasonable attorneys' fees.

21 16. There is no just reason why judgment should not now be entered in this matter
22 as to the money judgments involving the disputes between WWP and the defendants the as to
23 the items set forth herein. The court shall retain jurisdiction to issue supplemental Findings of
24 Fact and Conclusions of Law and a Supplemental Judgment as to the remaining issues
25

1 concerning the boundary line of the real property owned by Twin W Orchards, Inc., and return
2 of personal property to Cox, Sixth Generation, High Top Cherries and Rocking Arrow Fruit.

3 17. All claims not specifically dealt with in these findings and conclusions, or
4 reserved in paragraph 16, above, are denied or dismissed as the case may be for want of proof.
5

6 DONE IN OPEN COURT this 10th day of March 2015.

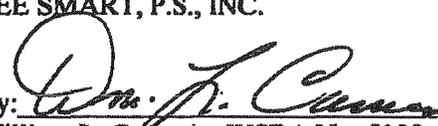
7 
8 THE HONORABLE JOHN HOTCHKISS

9 PRESENTED BY:

APPROVED FOR ENTRY

10 LEE SMART, P.S., INC.

VAN SICLEN, STOCKS & FIRKINS

11 
12 By: William L. Cameron, WSBA No. 5108
13 Michelle A. Corsi, WSBA No. 24156
14 Attorneys for Third Party Defendants

By: 
Robert VanSiclen, WSBA #4417
Co-Counsel for Defendants/
Third Party Plaintiffs

15 APPROVED FOR ENTRY

APPROVED FOR ENTRY

16 JEFFERS, DANIELSON, SONN &
17 AYLWARD, P.S.

BARRETT & GILMAN

18 
19 By: J. Kirk Bromiley, WSBA No. 5913
20 Clay M. Gatens, WSBA No. 34102
21 Attorneys for Plaintiff

By: 
Thomas L. Gilman, WSBA #8432
Amy C. Hevly, WSBA #23162
Co-Counsel for Defendants /
Third Party Plaintiffs

APPENDIX B

1 A: Yes.

2 Q: There's been testimony about water from the Greater
3 Wenatchee Irrigation District and other water rights. Did
4 you have discussions, any discussions with Mr. McQuaig
5 about whether or not the boundary lines would follow the
6 water lines as they were laid out?
7

8 A: Yes, Mr. McQuaig and I, Your Honor, we, we talked to each
9 other and we agreed on the boundaries because it was the
10 cherry block, it was the grafted block, and we talked about
11 the Greater Wenatchee Irrigation District because all that
12 water had to do with the Greater Wenatchee Irrigation Dis-
13 trict.
14

15 Q: So why don't you point out for the Court where the cherry
16 block is on this map, because I'm not sure anyone's been
17 able to do that yet.
18

19 A: Yes. The cherry block, Your Honor, is right here. This is
20 the cherry block.

21 Q: So it's, it's the darker --

22 A: Yes, it's the darker color right here.

23 Q: -- colored parcel --
24
25

1 A: Yes.

2 Q: -- directly to the east of your -- not directly, but one
3 parcel over --

4 A: Yes.

5 Q: -- from your --

6 A: Yes.

7 Q: -- house?

8 A: Yes.

9 Q: And in between the cherry block and your house is what, the
10 pears?
11

12 A: Yes, the pears are right here.

13 Q: Okay. So you say there -- were there water lines laid out
14 in the, in the cherry block?
15

16 A: Yes.

17 Q: And how were they laid out?

18 A: Okay. The original -- Right here is the Greater
19 Wenatchee, it's a big, big valve, it's the largest valve on
20 everything up here, and my father-in-law put a pipeline in
21 here and put a pipeline all the way down to the end in
22 1964, and this -- then off of this he put laterals and they
23
24
25

1 went down --

2 THE COURT: And you're talking about all the way down
3 that road (inaudible over witness)

4 WITNESS: Yes, down to the road, yes, Your Honor.

5 THE COURT: It goes east to the cherry block? Thank
6 you.

7 WITNESS: Yes, Your Honor.

8 THE COURT: Thank you.

9
10 Q: The road that's north of your -- directly north of your
11 house?

12 A: Correct.

13 Q: And east to where it Ts at the --

14 A: Correct.

15 Q: -- end of the cherry block?

16 A: Yes.

17 Q: Okay. And, then, we were talking about laterals?

18 A: Yes. From the mainline, then you run laterals, in this
19 case, because it was an older system, was every fourth row
20 you'd have a lateral that would water.
21

22 Q: And how big are those laterals in diameter, just --
23
24
25

1 A: Some of them --
2 Q: -- two inch?
3 A: -- inch-and-a-half.
4 Q: Inch-and-a-half?
5 A: Inch-and-a-half.
6 Q: Okay. PVC pipe generally?
7 A: Yes.
8 Q: Okay.
9 A: PVC pipe, and then you'd have sprinklers. In this case
10 they were Wrangler sprinklers for this cherry block.
11 Q: Okay. And, so, you ran laterals in a north-south direc-
12 tion?
13 A: Correct.
14 Q: And is there a, is there a dividing line or a boundary line
15 at the east side of that cherry block for the Greater
16 Wenatchee District?
17 A: Yes, there is, and it went along this line right here.
18 Q: So you started from the corner that's --
19 A: Yes --
20 Q: -- labeled 718 --
21
22
23
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1 A: -- 718 --

2 Q: -- heading north.

3 A: And it went across, went across here. However, since we --
4 it was agreed that we own this property way back in the
5 60s, this was their original old fence line went through
6 here and it went way down to this point down -- can't see
7 all of it here, but down here.

9 Q: We'll see some photos later.

10 A: Okay.

11 Q: You're pointing to an area that's just to the right of the
12 number 7 --

14 A: Yes, yes --

15 Q: -- it says center of 7?

16 A: (inaudible over Counsel) yes.

17 Q: There's a tree that it goes to, is that right?

18 A: Yes, and there's a post still there, Your Honor, it's over
19 100 and some years old, and this fence line back here is
20 over 100 years old. There'll be some photos for that also.

22 Q: So there's a, there's a fence line that you planted up to,
23 is that right?
24
25

1 A: Yes.

2 Q: And does the fence line in the east side of the cherry
3 block follow --

4 A: The road.

5 Q: It follows the road --

6 A: That's where it was originally.

7 Q: -- not the line, okay.

8 A: No. And, so, it was grandfathered in from the Greater
9 Wenatchee to be okay to go ahead and have those trees.

10 Q: Okay.

11 A: And they've been in it ever since 1964, and this block went
12 in in '86.

13 Q: Okay. So the... And that's -- that Greater Wenatchee wa-
14 ter is -- that's water that you take from the Greater
15 Wenatchee District, right, it's your allotment?

16 A: Correct.

17 Q: And for the trees, the cherry trees that are to be -- We
18 have the red lines that Mr. Erlandsen drew in as the bound-
19 ary, the cherry trees that are the east to that -- to the
20 east of that boundary, if they don't use your water, can
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1 they grow?

2 A: These, these little trees right here?

3 Q: Yes.

4 A: No, they can't.

5 Q: Why not?

6
7 A: The Greater Wenatchee will not approve for somebody else to
8 get extra water. They'll, they'll take it and put it in-
9 side the, the Greater Wenatchee boundary. This is outside
10 the Greater Wenatchee Irrigation District.

11 Also Mr. McQuaig has water from the Columbia Riv-
12 er and he's only entitled to 100 acres, and 100 acres is
13 already planted, so we're talking about trees that will not
14 have any water.

15
16 THE COURT: And which trees are those?

17 Q: So that starts with the cherry trees?

18 WITNESS: It's right here part of the cherries, Your
19 Honor, part of the Galas, and going down this way with some
20 Grannies that were cut down and grafted to Galas, and it
21 goes here and it went across this direction here, and then
22 here.
23
24
25

1 Q: Now, so this area of trees, then, let's talk about the
2 cherry block.

3 A: Sure.

4 Q: You've been farming this area here because you're paying
5 water for it, you've got the water?

6 A: Yes.

7
8 Q: Okay. And, then, to the north of the cherry block, this is
9 in -- did you say Galas?

10 A: Yes.

11 Q: And that's -- It looks the line, if you look at it, it al-
12 most goes down the middle of one row of trees?

13 A: That's correct, yes.

14 Q: Did anyone put a string line down there to try to do that
15 after this dispute erupted?

16 A: Yes, I did in the cherries.

17 Q: What about in the Galas?

18 A: I didn't in the Galas because it was right in the middle of
19 the row.

20 Q: Okay. Kind of hard to farm one-half a tree?

21 A: Yes. You can't do it.
22
23
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1 Q: And, then, the crop in this next block to the north of the
2 Galas, what is that?

3 A: Okay. There was some Grannies that were planted here, Your
4 Honor, there was -- there's a couple rows of Grannies and
5 I've been irrigating that ever so, man, when I planted this
6 block (sic), and so they've been planted with the Greater
7 Wenatchee water, they've been irrigated by the Greater
8 Wenatchee water.
9

10 Q: And have you been growing those trees or harvesting from
11 those?
12

13 A: These trees?

14 Q: These trees, the Grannies?

15 A: No, they're young trees and (inaudible - away from mic)
16 grafted the mover.
17

18 Q: Are those ones you cut down?

19 A: Yes.

20 Q: In what year?

21 A: (no audible response)

22 Q: This is 2014.

23 A: 2013 I cut them down, Your Honor, because I thought they
24
25

1 were on -- I didn't think, I knew they were on my property,
2 and I had flagged this prior.

3 THE COURT: You cut them down to graft them?

4 WITNESS: Yes, I did, Your Honor.

5 THE COURT: And where do the trees that are east of
6 that red line get their water from?
7

8 WITNESS: East of this?

9 THE COURT: Yes.

10 WITNESS: It comes from the Columbia River.

11 Q: So, and, and let's just follow this --

12 A: Okay.

13
14 Q: -- red line past this bluff or knoll or whatever, what
15 would you call that, is that scabland?

16 A: It was, it was a real bad rock --

17 Q: Outcropping?

18 A: -- and I had to blast it and blast it and I cleared that,
19 and so I planted as much as I could there.
20

21 Q: So, then, going north of that, is that an area that you
22 farm at all?

23 A: Yes.
24
25

1 Q: And what's in there?

2 A: There was, there was Braeburns in there and I cut those
3 trees down also so I could be more efficient because this
4 whole block here, this one now and all of this are Galas
5 and all of this are Galas (sic), and I cut this down so I
6 could be more efficient. It's a small amount of Braeburns
7 and we were getting stink but in that and you won't get
8 that as prevalent in Galas because you pick them so much
9 earlier, so I -- to be more efficient and also to divide --
10 so the employees never knew where they were or whose block,
11 so this way they knew, and so that's why I did it.

14 Q: Okay. So just so I understand, you cut -- These are Brae-
15 burns in this area?

16 A: Yes.

17 Q: And you cut your own Braeburns over here, as well, is that
18 correct?

19 A: Yes, I cut some down. I didn't finish all of them, I will
20 be doing that over a couple-year term because it's too much
21 for me to take out with the smaller acreage that I have
22 right now.
23
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1 Q: So are there any trees in that adjacent area, the Braeburns
2 or the Galas, to the east of this handwritten red line that
3 have been since taken out by Mr. McQuaig's employees, cut
4 down?

5 A: Yes, this whole block here was done by Mr. McQuaig this
6 year, this used to be a Braeburn block, they cut it down
7 and they grafted it to Galas.
8

9 Q: The whole block?

10 A: Yes, the whole block.

11 Q: Now, we were doing this a little bit earlier, pears.

12 A: Yes.
13

14 Q: So is there... We've got one red line drawn in by Mr.
15 McQuaig, I believe --

16 A: Yes.

17 Q: -- and then a blue line that appears to be what the survey-
18 or has drawn in. I don't know if we have a different col-
19 or. Do you agree with the red line that that -- is that
20 where you're farming to, where the red line is that's drawn
21 in by Mr. McQuaig?
22

23 A: No.
24
25

1 Q: Where is your estimate of where that area is?

2 A: I flagged all those trees before harvest in 2012. That
3 line --

4 Q: Maybe you can have a -- Do you have a black pen?

5 MR. GILMAN: Maybe we can have him do black and then
6 we'll have a different color.
7

8 WITNESS: I have black.

9 THE COURT: You okay with that?

10 MR. BROMILEY: It's okay with me.

11 THE COURT: Let's do it.
12

13 A: It's before the dip, and so it's some way up in here, about
14 through here and it comes this way and it comes through and
15 it goes down this way.

16 Q: Okay.

17 A: That's about where it is. And, and the reason I did that,
18 Your Honor, that's fine, the laterals, we're talking about
19 the mainline, the laterals, the water goes to this point
20 and we -- wherever the sprinklers were, we knew that's
21 where the line was and I flagged that with an employee from
22 Water Works. And it's the same with the cherry boundary
23
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25

1 and going down through here and going through the Braeburn
2 I used Vidal and I used Antonio, and we used pipes and we
3 tried to do it as good as we can because at that time since
4 Mr. McQuaig agreed on that, that we were going by the
5 blocks and by the water, I also talked to Duane Peart, and
6 I even physically went out here with Duane Peart along the
7 road and I told him, "I'm going to mark it," we needed to
8 mark it and he said John was concerned, and I said I was
9 going to mark it according to the water and he said,
10 "That's fine."
11

12
13 Q: When did you do that marking?

14 A: I talked to Duane in June and I marked it in July.

15 Q: Of what year?

16 A: 2012, so I would not have any problem and nobody would have
17 any problem of knowing where the boundary lines were.

18 THE COURT: Where is Mr. McQuaig's line?
19

20 WITNESS: Mr. McQuaig's line was down here, and Mr.
21 McQuaig says his line goes along this, this line here.

22 THE COURT: I want the east-west line, where's that
23 at?
24
25

1 WITNESS: The east-west line, he says it goes from
2 this section 7 --

3 MR. GILMAN: That's north-sound, I think.

4 WITNESS: North-south, yes, Your Honor.

5 THE COURT: I want east-west. Where's the east-west
6 line go according to Mr. McQuaig?
7

8 WITNESS: Mr. McQuaig's down here.

9 THE COURT: Alright. Those trees between that line
10 and your black line, if Mr. McQuaig is awarded those trees,
11 will they get watered?
12

13 WITNESS: Yes, they would, Your Honor, yes, they will.

14 THE COURT: And they'd get water from where?

15 WITNESS: From this side over here, there's a valve
16 here --

17 THE COURT: And is that from the Columbia River?

18 WITNESS: -- and it comes down here. Huh?

19 THE COURT: Is that from the Columbia River or the
20 Wenatchee Irrigation (sic)?
21

22 WITNESS: It's the Wenatchee Irrigation there.

23 THE COURT: So Mr. McQuaig has some water from the
24
25

1 Wenatchee Irrigation?

2 WITNESS: Yes, he does, Your Honor.

3 THE COURT: Alright. Thank you.

4 MR. GILMAN: For the pears.

5 THE COURT: Right.

6 MR. BROMILEY: Just so I, just so I think the Court's
7 certain --

8 THE COURT: Sure.

9 MR. BROMILEY: -- the blue line in the middle here is
10 what Mr. McQuaig believes to be the line. The red line is
11 what Mr. McQuaig believes Mr. Cox thinks is his line.
12

13 THE COURT: Alright.

14 MR. BROMILEY: And the black line is now Mr. Cox's
15 line --

16 THE COURT: Alright.

17 MR. BROMILEY: -- but the blue line is the survey
18 line.
19

20 THE COURT: Alright. Thank you.

21 MR. BROMILEY: Uh-huh (affirmative).
22

23 Q: So --
24
25

1 MR. BROMILEY: Too many lines.

2 MR. GILMAN: That's a lot of lines, but that's okay,
3 we'll continue.

4 THE COURT: Okay.

5 Q: I just want to go through a couple more things here.

6 A: Yes.

7 Q: Am I right, does it -- is there a draw that runs east-west
8 through this pear --

9 A: Yes.

10 Q: -- orchard? And what's -- Just what's to the west of the
11 pear orchard?

12 A: (no audible response)

13 Q: Is that cherries?

14 A: Originally these were apples.

15 Q: Yeah.

16 A: Okay. This, this block right in here is cherries now. I
17 took them out and I planted it to Sweetheart Cherries.
18 This block was apples, was old Oregon Spur and we grafted
19 them to Gala, and a Gala here, and because of the cold, I
20 put Grannies in the bottom because they're more tolerable
21
22
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1 (sic).

2 Q: Now, you did this all before you deeded the property to Wa-
3 ter Works --

4 A: Yes.

5 Q: -- is that right?

6 A: Yes.

7
8 Q: You haven't taken any fruit or farmed this since 20 --
9 well, since you did the whole farming operation in 2012?

10 A: Correct.

11 Q: Okay. But the draw runs -- does it run along this road, is
12 that the low part of the draw?

13 A: Right, right through there, yes.

14
15 Q: And the red line that Mr. McQuaig drew, is that the low
16 point of the draw?

17 A: Yes.

18 Q: And you're quite certain that you aren't farming any --

19
20 THE COURT: I believe that Mr. Cox drew the red line,
21 is that correct?

22 MR. GILMAN: No, Mr. Cox --

23 MR. BROMILEY: Mr. McQuaig did the red line, Cox the
24
25

1 black line.

2 THE COURT: Well, who drew the blue line?

3 MR. BROMILEY: The surveyor.

4 THE COURT: Oh.

5 MR. GILMAN: The blue line is the surveyor, I think.

6 THE COURT: Alright. Thank you. Thank you.

7
8 Q: Okay. So you're not farming to the bottom of the draw?

9 A: No --

10 THE COURT: So neither, neither party believes the
11 surveyor?

12 MR. BROMILEY: No, John believes the surveyor.

13 THE COURT: Oh.

14 MR. BROMILEY: McQuaig believes the surveyor. McQuaig
15 believes Mr. Cox was farming to the red line.

16 THE COURT: Okay. Alright. Alright. Thank you.

17 MR. GILMAN: Mr. Cox says he's farming to the blue
18 line.
19

20 THE COURT: Alright. Thank you.

21 WITNESS: The black line.

22 MR. GILMAN: The black line, excuse me.
23
24
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1 THE COURT: Alright. Thank you. Thank you.

2 Q: So this is Greater Wenatchee Water?

3 A: Yes.

4 Q: So what is it about any conversation or discussion you had
5 with Mr. McQuaig leads you to believe that this, your black
6 line, should be the line that you agreed upon?
7

8 A: There's two reasons, Your Honor. First, first of all, he
9 told me he would go by the water lines, so I marked this
10 and have some pictures later I'll show that I marked them
11 and I also spray painted the trees so the distinction would
12 be there and he mentioned the -- to do the water. On the
13 far side... Got to see where it is, I don't know if
14 it's... It's not on this -- Well, on the other side of
15 this in contention that he sold me the property to (sic),
16 it had... The water had to go with that particular piece
17 of property because it was being supplied from a different
18 location. And the other water that McQuaig had that he --
19 originally he said, "Well, I'm going to go right here along
20 the road," and I says, "Well, you can't do that because you
21 got to have water from down along --"
22
23
24
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1 Q: Does that have anything to do with this pear issue?

2 A: No, it does not.

3 Q: Okay.

4 THE COURT: Let's talk about the pears.

5 Q: Let's talk about the pears.

6 A: I was trying to show --

7 Q: Yeah.

8 A: (inaudible over Counsel) by water.

9 Q: Okay. So by the waterline, is there a waterline that runs
10 near this black line?
11

12 A: No, it's here, and he would have to run the laterals up
13 here, he'd have to extend his laterals to get to that, that
14 point. In other words, (unintelligible) back to this line,
15 he would have to add pipes to get this in there.
16

17 Q: Okay.

18 THE COURT: But if you farm to the black line, neither
19 party has to add lines?
20

21 WITNESS: No, Your Honor, neither one has --

22 Q: Okay. So what you're saying is their laterals run north-
23 south.
24

25

1 A: Yes.

2 Q: And what's this road called? The road that --

3 A: That's just my road that through the property.

4 Q: And it's a dirt road, a gravel road?

5 A: Yeah, it's just a dirt road in between the orchard blocks.

6 Q: So it runs -- The laterals run north -- or south from the
7 dirt road.

8 A: Yes.

9 Q: And they stop where the black line is?

10 A: Correct.

11 Q: Okay.

12 THE COURT: And do waterlines presently run along the
13 line that is south of that to the black line?

14 WITNESS: Yes.

15 THE COURT: Alright. So the black line --

16 MR. GILMAN: In a northerly direction.

17 THE COURT: -- the black line cuts the pipes in two,
18 so to speak?

19 WITNESS: Yeah (inaudible over Court and Counsel)

20 MR. GILMAN: Okay.

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1 THE COURT: Alright. Thank you.

2 Q: And you didn't cut the pipes in two, that's where the pipes

3 --

4 A: That's where they are.

5 Q: -- kind of butted up against each other --

6 A: Yes.

7 Q: -- for lack of a better term.

8 THE COURT: Alright. Alright. Thank you.

9 MR. GILMAN: Okay.

10 Q: What's that block called, that pear block?

11 A: (no audible response)

12 Q: Anything? Is it --

13 A: We just called it the pear block --

14 Q: Okay.

15 A: -- but it's block number 36 on the map.

16 Q: Block number 36.

17 THE COURT: Are we done with the map, Counselor?

18 MR. GILMAN: Pardon?

19 THE COURT: Are we done with the map?

20 MR. GILMAN: I think for right now. He can get back

21

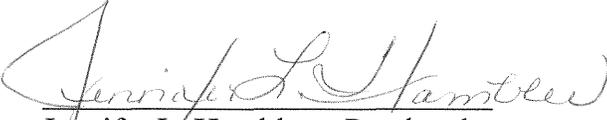
Appellants in this action, by Federal Express to the following individual by using the method stated:

Ms. Renee S. Townsley, Clerk
The Court of Appeals, Division III
500 North Cedar Street
Spokane, WA 99201-1905

That on the 18th day of February, 2016, she sent a copy of the **Brief of Respondents/Cross-Appellants** in this action, by Federal Express to the following individual by using the method stated:

J. Kirk Bromiley
Bromiley Law
227 Ohme Garden Road
Wenatchee, WA 98801

DATED this 18th day of February, 2016 in Auburn, Washington.


Jennifer L. Hamblen - Paralegal