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COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

NO. 337197

WING CENTRAL'S ROADHOUSE GRILL, INC., and WC
ROADHOUSE, LLC,

Respondents-Plaintiffs

v.

ALFRED W. BUCHELI

Appellant-Defendant

REPLY BRIEF OF APPELLANT

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I. REPLY FACTS

James Rowe, the manager of Wing Central's¹, has never disputed that the week before he signed the lease with Mr. Bucheli that he gave Mr. Bucheli a writing that stated, "Agreement to purchase meats from Matterhorn at market price. Pay C.O.D on delivery."² CP 335, 322. Wing's Central has never disputed that Mr. Bucheli would not sell to Mr. Rowe until Mr. Rowe offered to buy meat from Mr. Bucheli's butcher shop in Yakima. CP 321.

Wing Central's misstates the record when it claims that "In his declaration, Mr. Bucheli states that he 'insisted on Paragraph 5 because it provided him with a guarantee [sic] source of revenue in addition to the rent.' CP 321, 323."³ Neither page and no part of Mr. Bucheli's declaration states that he wanted a "guarantee."

Wing Central's misstates that record when it claims the first draft of the Lease "shows no such guarantee[]" that it would buy meat from Mr. Bucheli.⁴ The first draft of the Lease shows that Mr. Bucheli was

¹ For purposes of the his Reply Brief, Mr. Bucheli will continue to refer to Respondents WC Roadhouse LLC, Wing Central's Roadhouse Grill, Inc. and James and Shannon Rowe collectively as Wing Central's.

² Font and format edited. Punctuation in original.

³ Brief of Respondents, 15. Internal punctuation corrected.

⁴ Brief of Respondents, 15.

proposing that Wing Central's buy "all meat products form Lessor so long as they are available" CP 340.⁵

Mr. Bucheli asked Wing Central's in an interrogatory to "Explain in detail the negotiations, if any, that [they] had with Mr. Bucheli or any of his representatives regarding Paragraph 5 of the Lease before [they] signed the Lease." CP 380, 325-326. In response, Wing Central's did not claim that Mr. Bucheli or his attorney ever told them that they would have an inspection issue if they changed the name. CP 380-381.

The Lease between Mr. Bucheli and Wing Central's does not have an integration clause. CP 148-162. It does have a Non-Waiver provision that states as follows:

The consent of Lessor in any instance to any variation of the terms of this Lease or the receipt of rent with knowledge of any breach, shall not be deemed to be a waiver as to any subsequent breach of any covenant or condition herein contained. No waiver shall be claimed against Lessor as to any provision of this Lease unless the same be in writing and signed by Lessor or its authorized agent. Lessor's acceptance of any rent due hereunder shall not be a waiver of Tenant's failure to pay the remaining full amount due, or any preceding or existing breach other than failure to pay the particular amount of rent.

⁵ Again, Mr. Bucheli did not say the Lease contained a guarantee.

CP 156-157. Wing Central's Reply to Mr. Bucheli's Counterclaims in his First Amended Complaint and Counter-Claims did not allege any affirmative defenses. CP 104-107. Wing Central's did not argue delay as a basis for defending against Mr. Bucheli's claim of mutual mistake at the summary judgment hearing.

No evidence exists in the record that Mr. Bucheli has any education past trade school. CP 321. In fact, the trial court stated that it had no doubt that Mr. Bucheli did not know that the United States Department of Agriculture (USDA) required certain things. RP 43:24-25.

Wing Central's attorney hired Robert Leifert, a retired compliance officer from the USDA, to help explain the USDA regulations to him. CP 388-394. Mr. Bucheli objected to Mr. Liefert's legal opinions at the summary judgment hearing. RP 33:7-9. Even though Wing Central's information from Mr. Leifert in 2011 was that Mr. Bucheli should have had his meat inspected and labeled, Wing Central's never shared that information with Mr. Bucheli until it had answered interrogatories from Mr. Bucheli in August of 2013. CP 326. Mr. Leifert admits that Mr. Bucheli could have sold 25% of his total meat sales to Wing's Central as an exempt butcher in his February 2012, emails to Wing Central's attorney. CP 390-391. Wing Central's did not raise a labeling issue with

Mr. Leifert until August 2012. CP. 393. It never told Mr. Bucheli that labeling was an issue until the lawsuit. CP 326.⁶

Wing Central's knew that Mr. Bucheli claimed that he was owed for inventory when he sold the restaurant and briefed the issue in its Motion for Summary Judgment. CP 140-141. The trial court ruled that the amount of inventory Wing Central's used "may be a material issue of fact" RP 45:23-25. It stated, however, that it was not going to have a trial over what was owed and asked Wing Central's to pay him for it. RP 46:1-6. The court found it was not material to the issue of the execution of the option to purchase. RP 52:15-16.

Wing Central's misrepresents that Mr. Bucheli contradicted his deposition testimony.⁷ Mr. Bucheli has continued to claim that Wing Central's was in default for not purchasing meat. CP 413. He still claims that Wing Central's was in default of the Lease for failure to purchase meat and to pay for inventory, but has added mutual mistake as a claim. CP 101-102.

No part of the trial court's record shows that Mr. Bucheli sold the restaurant to Wing Central's or the terms of the sale. Mr. Bucheli has

⁶ Wing Central's does not produce any writing in which they brought up the labeling as an issue before the lawsuit. Their March 30, 2010, letter only raises the issue of "inspection." CP 410-411.

⁷ Brief of Respondents, 27-29.

never argued a theory of unilateral mistake that Wing Central's continues to raise.⁸

II. ARGUMENT

A. Wing Central's may not raise the issue of alleged delay in rescinding the agreement on appeal when they did not raise it as an issue or affirmative defense in the trial court.

The court should not consider issues of claimed delay that Wing Central's did not raise before the trial court.⁹ "Failure to raise an issue before the trial court generally precludes a party from raising it on appeal." *New Meadows Holding Co. v. Washington Water Power Co.*, 102 Wn. 2d 495, 498, 687 P.2d 1212 (1984). "This rule affords the trial court an opportunity to correctly rule upon a matter before it can be presented on appeal." *Id.* The rule does not apply when the question raised affects the right to maintain the action. *Id.*

In part E of its argument, Wing Central's heading states, "Recession is not available for every case of mutual mistake and should not be available to Bucheli who waited eight years before requesting it."¹⁰ Wing Central's never pled waiver, laches, estoppel or any other legal

⁸ Brief of Respondents, 43-44.

⁹ The delay issue is raised in the Brief of Respondents, 37-38.

¹⁰ Brief of Respondents, 37 (format altered from original).

theory related to delay that prevented Mr. Bucheli from bringing his claim for rescission based upon a mutual mistake. (CP 104-107).

Wing Central's never argued before the trial court that delay was any basis for refusing to consider mutual mistake. Their new delay argument against the remedy of rescission was not even considered by the trial court because it dismissed the mutual mistake claim. The court should not consider the issue of claimed delay on Mr. Bucheli's remedy when it decides whether a mutual mistake occurred because Wing Central's did not raise, argue or brief laches or any other defense related to delay in the trial court. "Mere delay, lapse of time and acquiescence do not defeat the remedy unless so long continued that in a particular case its changed condition would make it inequitable to allow recovery." *McKnight v. Basilides*, 19 Wn.2d 391, 401, 143 P.2d 307 (1943). Laches is grounded on equitable estoppel and before it will be applied there must be some special circumstance that would render the maintenance of the action inequitable. *Id.* (quoting *Bowe v. Provident Loan Corporation*, 120 Wn. 574, 580, 208 P. 22 (1922)). Laches depends on the equities of the case. *McKnight*, 19 Wn.2d at 401.

B. Evidence regarding why Mr. Bucheli entered the lease is relevant and admissible.

Mr. Bucheli's discussions with Jim Rowe of Wing Central's up to entering the Lease and Mr. Bucheli's desire to enter the lease only if Wing Central's bought meat are relevant and admissible. The court determines the "intent of the contracting parties by viewing the contract as a whole, its subject matter, and objective, the circumstances surrounding its making, the subsequent acts and conduct of the Parties, and the reasonableness of the interpretations advocated by the Parties." *Wimberly v. Caravello*, 136 Wn. App. 327, 336, 149 P.3d 402 (2006) (citing *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990)). "Context evidence is not admissible to import into a writing an intention not expressed. It is admissible solely to clarify the meaning of the written words used." *Wimberly*, 136 Wn. App. at 336. Evidence that "illuminates the situation of the parties and the circumstances under which they executed the agreement . . . is admissible." *Id.*; *Berg*, 115 Wn.2d at 669.

Wing Central's Brief of Respondents supports Mr. Bucheli's position that his intent for entering the Lease is admissible. Wing Central's brief states, "Washington Case Law often states that the 'truest test of materiality is whether the contract would have been entered into had the parties been aware of the mistake.'" (Brief of Respondent, 37,

citing *Simonson v. Findell*, 101 Wn.2d 88, 92, 675 P.2d 1218 (1984)). Therefore, by Wing Central's argument, Mr. Bucheli's statement that he would not have entered the Lease without the promise that he could sell meat to Wing Central's is relevant.

Wing Central's characterization that Mr. Bucheli is offering subjective beliefs is inaccurate. Mr. Bucheli's Declaration explains that Mr. Bucheli and Mr. Rowe discussed how Mr. Bucheli had been supplying meat products from his shop to his restaurant for sale to customers. CP 321. Mr. Bucheli's uncontradicted testimony was that he always told Mr. Rowe that the restaurant was not for sale when Mr. Rowe tried to purchase the restaurant. CP 321. During their discussions when Mr. Rowe was trying to purchase the restaurant, Mr. Bucheli "was clear that the only way [he] would lease to him [was] if he would keep using the meat from my Yakima shop." CP 321. Mr. Bucheli estimated he sold approximately \$2,000 per month of meat, bacon, sausage, smoked meat, poultry and turkey from the restaurant. CP 321. As a result of Wing Central's failure to buy meat since he leased the restaurant in May 2007, therefore, he has lost approximately \$24,000 per year in meat sales per year.

Mr. Rowe wanted an option to purchase. (CP 322). Mr. Bucheli agreed because Mr. Rowe said he was going to buy meat products from him. (CP 321). Mr. Rowe gave Mr. Bucheli a note on which he wrote

“agreement to purchase meats from Matterhorn at market price. Pay C.O.D. on delivery [.]” CP 322, 335.¹¹

Mr. Rowe incorrectly claims that Mr. Bucheli is attempting to introduce his unexpressed, subjective intent to try to prove the meaning of the Lease.¹² On the contrary, Mr. Bucheli is admitting the uncontradicted prior statements from Mr. Rowe that show the intent of the lease was to require Wing Central’s to purchase meat from Mr. Bucheli if it was available and that no one thought it was illegal to do that.

The court does not need to speculate about what would happen if Wing Central’s opened a vegan restaurant because it never became a vegan restaurant.¹³ It has always offered the same meat products that Mr. Rowe agreed to purchase from Mr. Bucheli. CP 330-331.

C. The meaning of Paragraph 5 of the Lease was a question of fact.

Wing Central’s incorrectly claims that the meaning of “so long as they are available” is a question of law. “Generally what the party intends is a question of fact.” *Anderson Hay & Grain Co., Inc. v. United Dominion Indus., Inc.*, 119 Wn. App. 249, 255, 76 P.3d 1205 (2003), *review denied*, 151 Wn.2d 1016, 88 P.3d 964 (2004). In determining the

¹¹ Format altered. Punctuation corrected.

¹² Brief of Respondents, 29.

¹³ Brief of Respondents, 29.

Parties' intent the court considers "the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of the respective interpretation advocated by the parties." *Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250, 254, 510 P.2d 221 (1973) (quoted in *Berg* 115 Wn.2d at 667). A contract provision is not ambiguous because the parties suggest opposite meanings. *Stranberg v. Lasz*, 115 Wn. App 396, 402, 63 P.3d 809 (2003). Whether a contract provision is ambiguous is a question of law subject to de novo review. *Id.* The Restatement (Second) of Contracts states, "The parol evidence rule does not preclude the use of prior or contemporaneous agreements or negotiations to establish that the parties were mistaken."

RESTATEMENT (SECOND) OF CONTRACTS § 152 cmt. a. (1981).

Mr. Bucheli's evidence regarding the discussions leading up to the contract, and his intent in entering the contract are admissible and relevant. "Admissible extrinsic evidence does not include (1) evidence of a parties' unilateral or subjective intent as to the meaning of a contract word or term, (2) evidence that would show an intention independent of the contract, or (3) evidence that varies, contradicts or modifies the written language of the contract." *Bort v. Parker*, 110 Wn. App. 561, 573, 42 P.3d 980, *review denied*, 147 Wn.2d 1013, 56 P.3d 565 (2002).

In the light most favorable to Mr. Bucheli, the evidence shows that the Parties intended that Wing Central's would buy from Mr. Bucheli the meat that he sold and that if Wing Central's bought meat from another source that it would pay him a 20% surcharge as a penalty.¹⁴ Wing Central's agrees with Mr. Bucheli that he did not know that he had to be inspected or use labels to sell meat.¹⁵ The also thought that they could buy meat from Mr. Bucheli.¹⁶ Instead of addressing the Parties' intent from the discussions, however, Wing Central's makes irrelevant arguments about Mr. Bucheli's financial condition and speculates as to why Mr. Bucheli sold the restaurant.

Why Mr. Bucheli sold and the understanding of the parties are all factual issues that are for a trial. Wing Central's argues that a financial squeeze¹⁷ forced Mr. Bucheli to sell as his only option. Mr. Bucheli not say this. This argument is not helpful on summary judgment because Mr. Bucheli denies it. Wing Central's also attempts to lead the court to

¹⁴ Brief of Appellant, 19.

¹⁵ "The only mistake in this case was the mistaken belief by Bucheli that he could sell meat products legally to the Roadhouse." (Brief of Respondents, 34).

¹⁶ "Both parties certainly expected that any meat sold to Roadhouse would be legal" (Brief of Respondents, 35).

¹⁷ Brief of Respondents, 3

conclude something negative of Mr. Bucheli by claiming that he had 6 different lawyers¹⁸. Nothing about this is relevant to summary judgment.¹⁹

Wing Central's does not dispute and ignores all of the evidence that shows that Jim Rowe, Wing Central's owner, induced Mr. Bucheli into a lease when he promised to buy all of his meat from Mr. Bucheli. CP 321-323. Wing Central's has never even responded to Mr. Bucheli's statement that during the discussions with Mr. Rowe Mr. Bucheli was clear that "the only way [he] would lease to [Mr. Rowe] is if he would keep using the meat from my Yakima shop." (CP 321).

Mr. Bucheli signed the Lease on May 18, 2007. CP 324. On September 21, 2007, Mr. Bucheli's attorney sent a letter to Shannon Rowe,²⁰ the owner of Wing Central's about their default for failure to buy meat. CP 326, 396-97. Wing Central's did not respond with any claim of inspections or labeling issues until March 30, 2010, after almost three of not buying meat. CP 327, 410.²¹

¹⁸ Brief of Respondents, 18

¹⁹ It has been a pleasure to represent Mr. Bucheli. He explained why he had so many lawyers in his declaration if it is of interest to the Court. CP 327.

²⁰ CP 74.

²¹ Wing Central's claims they raised the inspection issue in 2008. However, the undated letter they claim that they sent, but wrote the date on later, said that they must use "only products that are USDA approved or are legally exempt from USDA Inspection." C.P. 292, 308. Mr. Bucheli is exempt from inspection to a certain amount.

In 2011, Mr. Rowe told Mr. Bucheli that they were not purchasing his meat because Mr. Bucheli did not sell the cuts or brands that they wanted. CP 325. Wing Central's also claimed in its answers to interrogatories that they were not purchasing meat because Mr. Bucheli would not give them a price list. CP 326, 381-383.

At no point prior to the lawsuit did the Plaintiffs communicate that they would buy meat from Mr. Bucheli if he had the meat labeled and inspected. CP 326. In fact, it was not until February 2011, almost 4 years after the Lease was signed, that Wing Central's received emails from Robert Leifert of the USDA regarding Mr. Bucheli's obligation to have is meat inspected. CP 326, 388-394. Their emails show that Wing Central's had no idea that labeling was an issue for until 2012. CP 388-394.

Wing Central's incorrectly cites *Brown v. Safeway Stores*, 94 Wn.2d 359, 366, 617 P.2d 704 (1980) to support its position that "[t]he construction of [sic] Lease is a legal question."²² *Brown* dealt with the issue of whether a party was entitled to a jury trial. It is pre *Berg*. In *Berg*, the court reaffirmed the Washington rule that ambiguity in the meaning of the contract language had to be present before the evidence of surrounding circumstances was admissible. *Berg*, 115 Wn.2d at 669. Additionally, *Berg*, approved the context rule. *Id.* at 669. In quoting to

²² Brief of Respondents, 31

J.W. Seavey Pop Corp. v. Pollock, it noted that parol evidence was admissible when considering the issue of mistake. 115 Wn.2d at 669. (quoting 20 Wn.2d 337, 348-49, 147 P.2d 310 (1944)).

Under *Berg* and the Washington Context Rule, all of the expressed facts and circumstances regarding the Lease are admissible. The Lease does not contain an integration clause; therefore, it is a question of fact as to the meaning of Paragraph 5.

The Court of Appeals does not need to consider the straw man arguments by Wing Central's that the lease contains and implied guarantee that Wing Central's would buy meat or that Mr. Bucheli argues for an implied term. (Brief of Respondents 32).²³ The uncontradicted evidence is that Mr. Rowe wrote "agreement to purchase meats from Matterhorn at market price. Pay C.O.D on delivery [.]"²⁴ CP 322, 335. Mr. Bucheli never said that Wing Central's guaranteed to buy meat. The dispute is what the intent of Paragraph 5 under the Lease was, not some argument about a "guarantee" that Mr. Bucheli has never stated he has.

Mr. Bucheli does not argue for any implied term; he argues that the terms used in the contract required Wing Central's to purchase meat

²³ According to Black's Law Dictionary "guarantee" means "The assurance that a contract or legal act will be duly carried out." (10th ed. 2014).

²⁴ Punctuation in original.

because it was available, but for the fact that neither Party knew it had to be inspected or labeled. The written language in the Lease was that Wing Central's had promised to buy "so long as [the meat is] available through lessor or tenant shall pay lessor a 20% surcharge of available meat products purchased elsewhere." CP 150. If he was not able to sell meat under the applicable USDA standards, Mr. Bucheli and Wing Central's made a mistake of law in their contract that the court should remedy through rescission or restitution.

D. Mutual mistake applies to any contract, whether its terms are executory or not.

Wing Central's incorrectly attempts to argue that Mr. Bucheli's authority for mutual mistake is applicable because it did not involve "continuing obligations and performances such as the lease option here."²⁵ Additionally, Wing Central's claim that Mr. Bucheli's Washington authority is inapplicable because they "[a]ll involved mistakes that could not be correct at any time []"²⁶ is groundless.

Wing Central's does not cite any authority from any jurisdiction that a mistake of law does not apply if performance under the contract has yet to occur or because the mistake can be corrected. Contrary to Wing

²⁵ Brief of Respondents, 35.

²⁶ Brief of Respondents, 35.

Central's unsupported position in its Brief of Respondents, Washington law allows reformation of an executory contract in the event of a mutual mistake. *E.g.*, *Geoghegan v. Dever*, 30 Wn.2d 877, 890, 194 P.2d 397 (1948)(reformation of description in executory contract). Furthermore, mutual mistake applies to allow a party to correct a mutual mistake. *Id.*; *see also Chapman v. Milliken*, 136 Wash. 74, 82, 239 P.4 (1925). No part of the RESTATEMENT (SECOND) OF CONTRACTS § 152 (1981) limits its applicability to situations in which no future performance is required or in which the problem cannot be corrected in the future. *See id.* On the contrary, the RESTATEMENT (SECOND) OF CONTRACTS § 158 allows restitution in the event of mutual mistake to remedy the mistake.

Avoidance of a contract ideally involves a reversal of any steps that the parties may have taken by way of performance, so that each party returns such benefit as he may have received. This is not, however, possible in all cases. Occasionally a party who has performed may be entitled to recover on the contract for the part that he has performed under the rule on part performances as agreed equivalents.

RESTATEMENT (SECOND) OF CONTRACTS § 158 (1981).

Wing Central's agrees that both parties to the contract "expected that any meat sold to the Roadhouse would be legal[.]"²⁷ Mr. Bucheli

²⁷ Brief of Respondents, 35.

agrees with this statement. Because both parties thought Mr. Bucheli could sell meat to Wing Central's, mutual mistake applies.

If Wing Central's wanted to continue to honor its contract with Mr. Bucheli, it would have informed him of its information from the USDA and allowed Mr. Bucheli to correct his mistaken belief about his meat not being subject to inspection or not being subject to inspection and labeling before 2013 when it answered interrogatories. Wing Central's failure to inform Mr. Bucheli of its information shows that it had no interest in buying anything from him, legal or not. It is a question of fact about whether Wing Central's refused to buy meat because it was not legal or because it did not want to pay Mr. Bucheli for meat that it was not buying from him.

E. The Court of Appeals should not decide the issue of whether rescission is appropriate when the trial court has not ruled on a remedy in the event of a reversal.

The court should not rule on remedies if Mr. Bucheli prevails and this matter is remanded to the trial court. A theory that is not presented to the trial court will not be considered on appeal. *Barnes v. Seattle School Dist. No. 1*, 88 Wn.2d 483, 489, 563 P.2d 199 (1977). Furthermore, an appellant court will not consider allegations of fact without support in the

record. *Lemond v. State Dept. of Licensing*, 143 Wn. App. 797, 807, 180 P.3d 829 (2008).

Wing Central's did not submit any evidence before the trial court that the remedy of rescission should be prohibited. It asks the court to consider a link on the Kittitas County website to try to introduce other evidence that was not offered at the trial court. This is improper and should not be considered by the court. Mr. Bucheli never had a chance to present evidence on this issue of rescission. Furthermore, Wing Central's should not present evidence to this court that was not in the record before the trial court.

Whether Mr. Bucheli has the ability to repurchase his restaurant and at what price, should be determined by the trial court after evidence is allowed on remand. The court may decide to award reformation and restitution as Mr. Bucheli requested. CP 102.

F. Mr. Bucheli did not bear the risk of loss as a matter of law.

Mr. Bucheli did inadvertently confuse the seller and the purchaser in *Car Wash Enterprises, Inc. v. Kampanos*; nevertheless, its reasoning and analysis supports Mr. Bucheli's position. In Mr. Bucheli's Appellant's Brief, there was an inadvertent juxtaposition of the seller and purchaser when he stated that the seller of the Car Wash was the person who was the sophisticated business person. (Brief of Appellant, 22). In fact, the

purchaser was the sophisticated buyer. Nevertheless, the case and its analysis still favor Mr. Bucheli. *See Car Wash Enterprises, Inc. v. Kampanos*, 74 Wn. App. 537, 547, 874 P.2d 868 (1994).

In *Car Wash Enterprises, Kampanos*, the seller, attempted to impose the risk of loss under RESTATEMENT (SECOND) OF CONTRACTS § 154 (1981) on *Car Wash* services. *Id.* The contract did not allocate risk. *Id.* Because the contract did not allocate the risk of loss, Kampanos, the party asserting the claim that Car Wash Enterprises had the risk of loss was responsible to prove the risk of loss.

The Brief of Appellant was not accurate in referring to Car Wash Enterprises as the seller. The principals that it cites, however, are still correct and apply to this case. Because the seller did not prove that the purchaser was aware that he only had limited knowledge, the seller did not prove the purchase for the risk of mistake. *See Id.* at 547.

Wing Central's failed to assert any evidence that Mr. Bucheli had limited knowledge and failed to find the mistake because of it. As Wing Central's argues frequently in the Brief of Respondents, Mr. Bucheli

thought what he was doing was correct the entire time that he dealt with them.²⁸

Wing Central's wants the court to speculate that Mr. Bucheli's attorney knew there would be a problem with inspections and labels when the lease was signed. In support of its position, it claimed that Mr. Bucheli had "plenty of notice of the Roadhouse's concerns about the legality of its meat problems going clearly back to September of 2007."²⁹ As Wing Central's admits, however, its only claimed support for what it told Mr. Bucheli's attorney in September 2007, is a letter that Wing Central's attorney wrote on March 30, 2010, claiming they had a discussion in 2007 when Wing Central's raised the issue that Mr. Bucheli was required to have USDA certification to sell to its restaurant. (CP 410).³⁰ Mr. Bucheli alleged that Wing Central's did not raise the inspection issue until March 2010. CP 327, 410. Furthermore, no evidence exists that at the time the Lease was entered that either party knew inspection or labeling was required.

²⁸ Wing Central's details a part of Mr. Bucheli's deposition in which it states, he was "[s]howing how certain he was in his belief that he did not have to label his meat products[.]" Brief of Respondents, 12.

²⁹ Brief of Respondent, 42.

³⁰ On March 10, 2008, Mr. Bucheli sent a letter to Mr. Rowe informing him that he would charge him the 20% surcharge for not buying meat. CP 331, 413.

G. The court erred by refusing to rule that the unpaid inventory created a question of fact on default under the Lease.

The court confused the remedy for a breach of the Lease with the issue of whether a material issue of fact existed on breach of the Lease. Wing Central's relies on *Grant v. Morris*, 7 Wn. App. 134, 138, 498 P.2d 336 (1972) to claim that the alleged failure to pay for \$2556.56 of inventory was not material. In *Grant v. Morris*, the court of appeals did not reverse the trial court's refusal to award rescission as a remedy for a breach because it agreed with the trial court that the amount was not material. *Id.*

Whether an amount is damage is material a question of fact for trial. Every failure to perform as required by contract, even a small failure, is a breach that gives rise to its damages. RESTATEMENT (SECOND) OF CONTRACTS § 236 cmt. a(1981). Under the Restatement, except as stated in § 240, "it is a condition of each parties' remaining duties to render performances to be exchanged under and exchange of promises that there be no uncured material failure by the other party to render any such performance due at an earlier time." RESTATEMENT (SECOND) OF

CONTRACTS § 237 (1981).³¹ The RESTATEMENT (SECOND) OF CONTRACTS § 241 (1981) considers 5 factors in order to determine whether a failure to render performance is material:

- (a) the extent to which the injured party will be deprived of the economic benefit which he reasonably expected;
- (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
- (c) the extent to which the party failing to perform or to offer to perform will offer forfeiture;
- (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
- (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

The Lease stated, “Provided that Tenant is not in default Tenant shall have the option to purchase the leased premises, together with all improvements situated thereon and all equipment” CP 159. “A material breach is one that ‘substantially defeats’ a primary function of an agreement[.]” 224 *Westlake, LLC v. Engstrom Properties, LLC*, 169 Wn. App. 700, 724, 281 P.3d 693 (2012). A material breach excuses the other parties’ performance. *See id.*

³¹ RESTATEMENT (SECOND) OF CONTRACTS §240 (1981) deals with performances exchanged under an exchange of promises that can be apportioned into corresponding pairs of parts performances.

The contract between Mr. Bucheli and Wing Central's required that Wing Central's not be in default to purchase the property. It did not require a level of materiality in order to prevent Wing Central's ability to purchase. Wing Central's only paid the amount necessary to pay for the remainder or inventory after the summary judgment hearing. Accordingly, whether Wing Central's failure to pay for the amounts owed for inventory up to the time of the hearing was a breach of the Lease that allowed Mr. Bucheli to refuse to sell to them was a question of fact for trial.

III. CONCLUSION

Based upon the above, Mr. Bucheli respectfully requests that the court enter relief as requested in his Brief of Appellant. Mr. Bucheli also requests fees and costs on appeal as requested in the Brief of Appellant.³²

Respectfully submitted this 11th day of March, 2016.

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³² Brief of Appellant, 26 n.5.

CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury under the laws of the state of Washington that on the date stated below I served a copy of this document in the manner indicated:

Richard T. Cole P.O. Box 638 Ellensburg, WA 98926	<input checked="" type="checkbox"/> First Class U.S. Mail <input type="checkbox"/> Email <input type="checkbox"/> Hand Delivery <input type="checkbox"/> FedEx Next Day
Doug Dunham Crane Dunham PLLC 2121 Fifth Ave. Seattle, WA 98121-2510	<input checked="" type="checkbox"/> First Class U.S. Mail <input type="checkbox"/> Email <input type="checkbox"/> Hand Delivery <input type="checkbox"/> FedEx Next Day

DATED at Yakima, Washington, this 11th day of March, 2016.


Tyler Hinckley
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