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

No. 337197

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III

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

Respondents-Plaintiffs,

v.

ALFRED W. BUCHELI,

Appellant-Defendant.

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**BRIEF OF RESPONDENTS WING CENTRAL'S ROADHOUSE  
GRILL, INC. and WC ROADHOUSE LLC**

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## I. INTRODUCTION AND SUMMARY OF ARGUMENT

By far the central issue on this appeal is the belief by Lessor Appellant Alfred W. Bucheli [“Bucheli”] that Tenant Respondents WC Roadhouse LLC [“Roadhouse”] was required to purchase meat from Bucheli’s butcher shop for the Roadhouse restaurant pursuant to Paragraph 5 of the Lease Option. Throughout his brief, Bucheli stated he would never have entered into the Lease Option on May 18, 2007 without this “guarantee”. When it was determined that he could not legally sell his meat to the Roadhouse without labeling and having it inspected by the USDA, his only defense was a claim of mutual mistake based on his subjective beliefs. The problem for Bucheli is that Washington follows the rule that “objective manifestations” in an agreement determine intent and not the “unexpressed subjective intent of the parties”. Intention is imputed from the words used and “subjective intent is generally irrelevant”. The courts do not interpret “what was intended to be written but what was written”. *Hearst Commc'ns, Inc. v. Seattle Times*, 154 Wn.2d 493, 503-504, 115 P.2d 262 (2005). In other words, by showing that the Lease Option language of Paragraph 5 does not express Bucheli’s subjective intentions, this Court does not even reach the defense of mutual mistake and Bucheli’s appeal fails.

Paragraph 5 of the Lease Option that is central to this appeal states:

5. MEAT PRODUCTS: Tenant agrees to purchase at **competitive rates** all meat products from Lessor (d/b/a Matterhorn Meats) **so long as they are available** through

Lessor, or Tenant shall pay Lessor a 20% surcharge of **available meat products** purchased elsewhere.

(Emphasis added.) The Roadhouse was able to show conclusively, that all the meat that Bucheli actually sold and delivered to the Roadhouse was illegal as unlabeled and some was illegal as uninspected by the USDA. It could not have been sold knowingly by the Roadhouse to its restaurant customers without committing a federal crime for every sale. It took Bucheli 8 years finally to concede this point in his declaration in opposition to the summary judgment motion for specific performance.

Bucheli, now 8 years later, argued that he did not know of the USDA requirements to label and inspect. This is analogous to a contractor who argues for rescission of his contract with a customer based on his or her lack of knowledge that he or she had to be licensed and bonded for the job in question and claiming mutual mistake. Bucheli now expects the Lease Option to be rescinded on the basis of mutual mistake because he did not know he needed to have some of his meat products inspected or have all his meats products labeled. Even if the Court considers that defense, he has the burden of proving it by clear, cogent and convincing evidence and any remedy is unclear. Meanwhile for 8 years, the Roadhouse has been a model tenant, paying its rent and other charges on time without late charge while complying with all other terms of the Lease Option.

Bucheli is 85 years old and has been a butcher for 68 years. He

owns and operates Matterhorn Meats in Yakima. In 2002, he purchased the subject restaurant property in Ellensburg and operated his own restaurant lounge called the Matterhorn Inn until 2007. He never made a profit and accrued over \$1 million in operating losses. In April of 2007, all his employees were apparently fired, and he needed “out of the mess.” He was in a “financial squeeze”, needed to pay his bills, and Jim [and Shannon] Rowe [the Roadhouse owners] were his “only option” at that “minute”. The Lease Option was signed on May 18, 2007.

On May 22, 2013, the Roadhouse exercised its option to purchase the leased property for the agreed price of \$1,377, 740. On July 31, 2015, the trial court granted the Roadhouse’s motion for summary judgment for specific performance, holding that the Roadhouse had not breached the Lease Option and dismissed Bucheli’s counterclaims. Bucheli timely filed this appeal, did not supersede the judgment, and paid Tenant Roadhouse’s reasonable attorney’s fees as prevailing party. WC Roadhouse LLC now owns the leased premises in question and continues to operate its restaurant called Wing Central’s Roadhouse Grill.

The trial court also found that the Roadhouse did not breach the Lease Option by not obtaining Bucheli’s written consent prior to replacing the stained carpet and old upholstery on customer booths. This issue was not appealed. Therefore, the Roadhouse prevailed in its motion on this issue.

The Roadhouse did try to advise Bucheli that he had USDA

inspection problems. One of the practical problems in communications between the parties has been that Lessor Bucheli has been represented by 6 different lawyers or law firms over the course of this Lease Option and litigation. Both Mr. Bucheli and his lawyers were advised by the Roadhouse that there were USDA inspection problems.

The only other appeal issue is whether the alleged failure by the Roadhouse to pay for \$2,556.56 of \$4,083.31 inventory (from the defunct Matterhorn Inn) in 2007 was a material breach. To satisfy a 10 day notice to cure, dated September 21, 2007, the Roadhouse paid \$1,526.75 of inventory listed as representing the inventory “that Tenant accepted as useable” per the lease. The additional \$2,556.56 wanted by Bucheli is less than 0.2% of the option purchase price. Bucheli never raised the inventory issue after September of 2007 in any notice or pleading, including answer or counterclaim. Moreover, to avoid any further issues on what was essentially a small claims matter the Roadhouse paid the \$2,556.56 in full plus 12%, waiving all its valid defenses such as the interpretation of the lease term that states payment is due for “that Inventory that Tenant accepts as useable”. In other words, there would be no breach because the \$1,526.75 paid should have been considered the amount accepted by tenant Roadhouse.

The Roadhouse requests that this Court affirm the order granting the summary judgment to the Roadhouse and award attorney’s fees and costs for having to defend this appeal.

## **II. RESTATEMENT OF ISSUES RELATING TO ASSIGNMENTS OF ERROR**

1. Did Appellant Bucheli sell, deliver and offer to sell and deliver illegal meat products, in that they were all without USDA required product and safe handling labels?

2. Was the Respondents Roadhouse excused from paying a 20% surcharge on meat products it purchased elsewhere because Appellant Bucheli did not have legal meat products available at all times material?

3. Can Paragraph 5 of the Lease Option in question be interpreted to require guaranteed purchases of meat products or any minimum meat purchases?

4. Are Appellant Bucheli's subjective beliefs and or expectations regarding his entitlement to guaranteed meat purchases relevant and admissible in interpreting Paragraph 5 of the Lease Option and do they fail to raise a genuine issue of material fact?

5. Can Appellant Bucheli's lack of knowledge of USDA inspection and labeling requirements after 68 years of experience as a butcher and nearly 50 years of operating his butcher shop in Yakima be

the basis for mutual mistake to be established by clear, cogent, and convincing evidence especially when it is the undisputed fact that owners Jim and Shannon Rowe of the Respondents Roadhouse had no such prior knowledge?

6. Even if Appellant Bucheli could establish the defense of mutual mistake, does he bear the risk of loss because of his limited knowledge of USDA regulations?

7. At best, is Appellant Bucheli's mistake unilateral for which he bears full responsibility?

8. Is there an equitable remedy available to Appellant Bucheli after he waited 8 years before actively asserting the affirmative defense of mutual mistake?

9. Eight years later should Appellant's 2007 unpaid inventory claim for \$2,556.56 be considered a material breach, especially when it was never asserted in any pleading or cross-claim or as an event of default for the exercise of any option to renew or to purchase and amounts to less than 0.2% of agreed purchase price of the leased premises?

10. Should the trial court's Order Granting Summary Judgment and Dismissing Counter Claims be affirmed?

11. Should Respondents Roadhouse be considered the

prevailing party and be awarded reasonable attorney's fees and costs for having to defend this appeal?

### **III. RESPONDENTS' RESTATEMENT OF CASE**

#### **A. Nature Of Proceedings.**

On July 31, 2015, The Honorable Susan Hahn, Yakima Superior Court granted Respondents Wing Central's Motion For Summary Judgment For Specific Performance And For Dismissal Of Defendant Bucheli's Counterclaims. CP 492-498. No supersedeas bond to stay the proceedings was filed pursuant to RAP 8.1 before or after Bucheli timely filed his Notice of Appeal. CP 510-512. As a result, the sale of the leased premises and improvements at issue herein closed according to the terms of the Lease Option and trial court's Order and Judgement, and the leased premises are now owned by Respondent WC Roadhouse, LLC-- <http://gis.co.kittitas.wa.us/compas/default.aspx?pid=211436>. Appellant Bucheli paid prevailing party attorney's fees. CP 509.

#### **B. Lease Option History**

On May 18, 2007, Appellant Lessor Alfred W. Bucheli [hereinafter "Bucheli"] agreed to a Lease Option agreement to lease the restaurant premises located at 101 West Umptanum Road, Ellensburg, Washington 98926 [hereinafter "Leased Premises"] to WC Roadhouse LLC. CP 148-167. Shannon Rowe (then known as Leahy) formed WC ROADHOUSE LLC to sign the lease and she later assigned the Lease Option to Wing

Central's Roadhouse Grill, Inc. to operate the restaurant. [collectively called herein "the Roadhouse"]. CP 311. Jim and Shannon Rowe signed personally as guarantors of payment and performance of the Lease Option. CP 162. Jim Rowe was the general manager in charge of all lease negotiation and operations of the Roadhouse while Shannon Rowe was in charge of office matters. CP 311 (Shannon Rowe. Decl. ¶ 2).

**1. Brief Description Of Legal Disputes.** Pursuant to Paragraph 23 of the Lease Option, the Roadhouse exercised its option to purchase the leased premises and improvements on May 22, 2013. CP 159, CP 177-179. The CPI adjusted purchase price was \$1,377,740.00, which price was not questioned by Bucheli. CP 221-222. (Bucheli Dep. 36: 21-25 – 37: 1-3). In response to the Roadhouse's request that Bucheli go forward with the sale, Bucheli claimed that he did not have to because one of the conditions before the option to purchase could be exercised was that the Roadhouse not be in default.

In his deposition of January 8, 2015, Bucheli claimed the Roadhouse was in default in three. The Roadhouse (1) failed to purchase meat pursuant to Paragraph 5, (2) the Roadhouse failed to obtain consent for "alterations", and (3) the Roadhouse did not pay Bucheli for inventory. CP 222 (Bucheli Dep, 37). Regarding the second claim, Judge Hahn ordered no consent was required and there was no breach. Bucheli chose not to make it an issue on appeal. CP 495. Regarding the third claim about unpaid inventory of \$2,556.56, materiality was not mentioned by

Bucheli in his response below and claimed breach was barely argued (three short sentences). CP 433. The materiality of the failure to pay \$2,556.56 is now one of the only two issues on appeal. Appellant's Brief at 26-27.

**2. For The First Eight Years Of The Lease Bucheli Claimed That The Roadhouse Breached Paragraph 5 Of The Lease Option, Now He Concedes No Breach But Claims The Lease Should Be Rescinded Because Of Mutual Mistake.**

**a. Bucheli First Claimed The Roadhouse Had No Right To Renew The Lease Option Because Of A Continuous Breach Of Paragraph 5.** In response to the Roadhouse's exercise of its first option to renew its lease with Bucheli, Bucheli's lawyer Patrick M. Andreotti, by letter dated March 19, 2010, asserted that the Roadhouse "had no right to exercise an option to renew the lease" and it would be terminated. He stated that the Roadhouse was in "continuous default" "for failing to comply with and perform its obligations pursuant to paragraph 5". CP 299-300 (Letter of P. Andeotti, dated 3/19/2020, J. Rowe Decl. ¶ 9, Exhibit C.). There was no mention of any other claims of default and no request for rescission based on mutual mistake.

**b. The Roadhouse Initially Purchased Meat Products From Bucheli Pursuant to Paragraph 5.** Any requirements for the Roadhouse to purchase meat products from Bucheli are set out in Paragraph 5 of the Lease Option, CP 150, as follows:

5. MEAT PRODUCTS: Tenant agrees to purchase **at competitive rates** all meat products from Lessor (d/b/a Matterhorn Meets) so long **as they are available through Lessor**, or Tenant shall pay Lessor a 20% surcharge of **available meat products** purchased elsewhere.

(Emphasis added.) Meat products actually sold by Bucheli to the Roadhouse in 2007 are shown on invoices in Exhibit 15. CP 243-245 (Bucheli Dep. 120:25 to 121:8 110:1-25), CP 192-202 (Exhibit 15). In September 2007, the Roadhouse quit buying meat products from Bucheli for a variety of reasons. CP 291, (J. Rowe Decl. ¶ 14).

**c. In Bucheli's First Answer, He Still Claimed The Roadhouse Was In Breach Alleging No Defense of Mutual Mistake.** In Defendant's Answer To Plaintiff's Complaint, Counter-Claim, And Defenses And/Or Affirmative Defenses, filed by Bucheli on September 27, 2012 CP. 510; CP52-63, Bucheli claims that the Roadhouse was a hold-over tenant and in breach of the Lease Option for not purchasing meat products according to Paragraph 5 and for not obtaining Bucheli's consent to replace stained carpet and old upholstery on customer booth, claiming a violation of Paragraph 11. CP 60-62. (Note no claim for damages for non-payment of the \$2,556.56 in inventory and no defense of mutual mistake were raised.)

**d. In Bucheli's Second Answer, He Still Claimed The Roadhouse Was In Breach, But Raised Mutual Mistake As An Alternative Counter-Claim.** The Roadhouse exercised its option to

purchase on May 22, 2013. CP 159, CP 177-179. When Bucheli refused to honor the option to purchase, the Roadhouse amended its complaint to add a claim of specific performance to enforce the option to purchase. CP 70-95. Again in the Counter-Claim contained in Bucheli's Answer To First Amended Complaint And Counter Claims, filed December 6, 2013 (CP 510) CP 96-103, the only claims for breach of the lease option were the "failing to purchase meat products that were available at competitive prices from Bucheli under paragraph 5 ... and the making [of] unauthorized alterations to property under paragraph 11 of the Lease." CP 101. The same two alleged breaches were also the bases for Bucheli's counter-claims for damages. CP 99-1001. (Again note no claim for damages for non-payment of the \$2,556.56 in inventory was raised although it is now raised in this appeal.)

In Bucheli's Answer, he does allege mutual mistake as an alternative to his counterclaims for breach, claiming the contract is voidable and should be "cancelled" or in the alternative should be reformed and allowed "restitution." CP 102. This is the first time on December 6, 2013 that the defense of mutual mistake is raised in any letter or pleading, and it is months after the Roadhouse had already exercised its option to purchase on May 22, 2013.

**e. For Eight Years, Bucheli Continued His Belief That He Did Not Have to Label His Meat Products When Selling To The Roadhouse.** The probable reason why Bucheli never actively pursued

anything but damages and lease termination for breach of Paragraph 5 was because Bucheli held fast to his beliefs that he did not have to comply with USDA requirement to label or inspect his meat products.

During his deposition on January 8, 2015, nearly two years after the Roadhouse exercised its option to purchase and nearly eight years after the commencement of the Lease Option, Bucheli was asked to view Exhibit 21 that showed examples of product and safe handling labels mandated by the USDA. CP 203, (A. Bucheli Dep. 151: 11-19, Exhibit 21). Showing how certain he was in his belief that he did not have to label his meat products, Mr. Bucheli responded as follows:

Q. [By Mr. Dunham] So is it your position that you don't have to – in 2007, you did not have to put a label on any of the meat products?

A. [By Bucheli] That is correct.

Q. And you didn't have to put a label describing where it came from, similar to [Exhibit 21]

the --

A. No.

Q. Do you even have a labeling machine?

A. No.

Q. Do you ever put labels on anything?

A. No.

Q. Even to retail customers?

A. Right.

Q. So no labels at all?

A. That's correct.

Q. And you don't believe that it was required for you to put labels on meat delivered to the Roadhouse?

A. Right.

Q. Then or today? Even today --

A. Even today.

CP 249-250 (Bucheli Dep. 151:11-25- 152:1-14), CP 203 (Exhibit 21, January 8, 2015). Mr. Robert Leifert, a recently retired USDA compliance inspector, was asked to review Bucheli's testimony. "Being an exempt or retail butcher does not exempt the butcher from label requirements." CP 261 (Leifert Decl. ¶6). As Mr. Leifert testified: "I do not know how to explain it any simpler than this: had the Roadhouse continued to purchase these unlabeled and uninspected meat products, it would have been purchasing adulterated and misbranded meat products. ... If the Roadhouse had continued with this knowledge, it would have been subject to criminal prosecution under 21 USC § 610." CP 262 (Leifert Decl. ¶6) [Leifert's Declaration has two ¶6's that appear on separate pages.] Although 21 USCS § 623 authorizes certain activities as being exempt from inspection requirements, subsection 623(d) specifically requires that "inspection-free articles" be labeled. A custom exempt butcher such as Mr. Bucheli is not exempt from labeling, which "apply to articles which

are exempted from inspection or not required to be inspected ....” 9 CFR §303.1(f).

**f. Bucheli’s Current Argument Is That No One Told Him That He Had To Label And Inspect His Meat Products.** Disregarding his previous deposition testimony in January of 2015 that he did not have to label or inspect his meat products, Bucheli stated in his Declaration Of Fred Bucheli In Opposition To Motion For Summary Judgment, CP 320-419, filed on May 29, 2015, CP 511, at numerous places, that he did not know that he had to have any of his meat inspected or labeled and that Jim Rowe never told him of the USDA inspection and labeling requirements. For example, Bucheli stated:

He [Jim Rowe] never, [sic] said that I needed to label anything or that I could not legally sell to him. I never thought that I could not sell him meat products without labeling or that I was limited to selling certain quantities.

CP 322 (A. Bucheli Decl. ¶ 7). “Furthermore, the Plaintiffs never brought up this issue [labeling and inspecting]. CP 323 (A. Bucheli Decl. ¶ 10). “He [Jim Rowe] did not ask questions about whether I was labeling or marking meat ....” CP 324 (A. Bucheli Decl. ¶ 12). “They also never pointed me to any claimed free source of information about labeling and information.” CP 325-326 (A. Bucheli Decl. ¶ 18). “If at that time they would have said that they were buying from me if I were inspected and labeling, I probably would have done it, but that has never been the case.” CP 326-327 (A. Bucheli Decl. ¶ 20).

Furthermore, in Bucheli's opening brief, he repeats over and over that he would never have entered into the lease unless the Roadhouse promised to buy meat from him. Appellant's Open Brief at 2, 3, 7-8, 8, and 22. In his declaration, Bucheli states that he "insisted on Paragraph 5" "because it provided him with a guarantee source of revenue in addition to the rent." CP 321, 323 (A Bucheli Decl. ¶¶ 5-9). The original draft of the agreement was drafted by his attorney Michael D. Finney. *Id.* Bucheli testified during the negotiations that "I was clear that the only way I would lease to him [Jim Rowe] is if he would keep using the meat from my Yakima [butcher] shop." *Id.* A review of Paragraph 5 of the Lease Option shows no such guarantees.

**g. But Bucheli And His Attorneys Did Have Notice From The Roadhouse That He Either Knew Or Should Have Known That He Had A Serious USDA Compliance Problem.** 1. The first notice was oral and came in September of 2007. In Mr. Andreotti's letter of September 21, 2007 on behalf of Bucheli, he demanded that the Roadhouse produce invoices of meat purchases from other sources and payment of the 20% surcharge and claimed default. CP 297-298 (Letter of Patrick M. Andreotti, September 21, 2007, J. Rowe Decl. ¶ 9, Exhibit B.). The oral conversation in September 2007 raising the Roadhouse's concerns that Bucheli was not in compliance with USDA regulations was memorialized in the letter to attorney Andreotti of March 30, 2010. CP 410-411 (A. Bucheli Decl. Exhibit 8, Letter Dated March 30, 2010 to

Patrick Andreotti from Douglas Dunham).

2. **The second notice** came in an undated letter in March of 2008, from Jim Rowe to Fred Bucheli. CP 291-292, CP 308, (J. Rowe Decl. ¶ 15, attached Exhibit 24.). Mr. Rowe's concern was that the Roadhouse was exposed to substantial liability if the Roadhouse continued to sell unlawful meat products from Bucheli to the Roadhouse customers. *Id.* By undated letter received by Mr. Bucheli in March of 2008, Mr. Rowe advised,

Our lawyer says for liability purposes, we must use only products that are USDA approved or are legally exempt from USDA inspection. We also must follow all Health Department and food handling guidelines as well and were unsure if those or the USDA standards could be met with Matterhorn Meats selling to a restaurant as opposed to a [sic] over the counter customer.

CP 205 (D. Dunham, Decl., Exhibit 24, Jim Rowe's Undated Letter to Mr. Bucheli, March 2008); CP 254 (Bucheli Dep. 161:9-25; 161:1-19, Exhibit 24, January 8, 2015); CP 291-292 (Jim Rowe, Decl ¶ 15). Bucheli finally responded through his lawyer Michael D. Finney.

3. **The third notice** came when Bucheli's then lawyer, Michael D. Finney acknowledged the USDA inspection issue by stating that the USDA inspection was not the landlord's problem. Mr. Finney wrote:

Prior to signing the lease you were informed that if the name of the Matterhorn Restaurant were changed, it would no longer be an extension of Matterhorn Meats and that could cause a USDA inspection problem. You chose to change the name anyway [from the Matterhorn Inn to Wing

Central's The Roadhouse Grill]<sup>1</sup> so **the inspection hurdle is not the landlord's problem.**

(Emphasis added.) CP 309 (Bucheli Dep. 77:11-25 & 78:1-23, Exhibit 8, January 8, 2015); (D. Dunham, Decl. Exhibit 8).

4. Despite Mr. Finney's brush off, **the fourth notice** came when Bucheli's then lawyer Patrick M. Andreotti, by letter dated March 19, 2010, objected to the Roadhouse's exercise of its option to renew the lease for the Roadhouse's continuance default of Paragraph 5. CP 299-300 (Letter of P. Andreotti, dated 3/19/2010, J. Rowe Decl. ¶ 9, Exhibit C.). In the letter to Mr. Andreotti from Mr. Dunham, dated March 30, 2010, counsel for the Roadhouse stated as follows:

Further what we did not put in the letter but **spoke to you about before our letter of September 25<sup>th</sup> [2007] was the requirement that your client had to have USDA certification to sell wholesale to restaurants.** The inspections for selling over the counter retail butcher products do not qualify. **The meat sold to the Roadhouse Grill must have [Mr. Bucheli's] certification on the packages.** Although we did not put in the letter out of deference to your client, **our position then and now is that we do not believe that your client was able to legally sell his meat to the Roadhouse Grill or any other restaurant."**

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<sup>1</sup> Bucheli operated the restaurant prior to the Roadhouse for almost 5 years under the name Matterhorn Inn. Bucheli was upset that the Rowses changed the name to Wing Central's Roadhouse Grill. CP 323; (A. Bucheli Decl. ¶¶ 9 & 10). The only explanation for Mr. Finney's comment is that if the Rowses had left the name as the Matterhorn Inn, USDA inspectors would think the restaurant was still being operated by Bucheli and would not inspect the meat products. It certainly shows awareness by Bucheli's attorney that there could be a USDA inspection problem.

(Emphasis added.) CP 410-411 (A. Bucheli Decl. Exhibit 8, Letter Dated March 30, 2010 to Patrick Andreotti from Douglas Dunham). In no uncertain terms, Mr. Bucheli was advised that the Roadhouse believed that he could not legally sell his meat to “the Roadhouse or any other restaurant” “then and now”.

In spite of all these notices, nothing in the records suggests that Bucheli ever checked with the USDA himself to determine if there was a problem until his declaration dated May 29, 2015, where he stated “I have talked to the USDA and would have been willing to comply with the USDA requirements ....” CP 331-332 (A. Bucheli Decl. ¶ 37).

**h. Communications Were Complicated By Bucheli’s Choice To Be Represented By Six Lawyers Or Law Firms From The Beginning Of The Lease.** From 2007, Bucheli has had six different lawyers or law firms representing him. CP 293 (J. Rowe Decl. ¶ 16). One of Bucheli’s earlier attorneys, Patrick M. Andreotti, did have knowledge of the USDA compliance issues, but Bucheli terminated him because “I did not agree with some of the ways in which he was handling my case.” CP 327 (A. Bucheli Decl. ¶ 21).

**C. The Roadhouse Was A Model Tenant For Eight Years.**

Except for the two allegations of breach set out in the appeal, the Roadhouse and the Rowes have been model tenants. Other than not purchasing meat, they have been “perfect” tenants. CP 219 (Bucheli Dep. 33:11-12 & 18-25 January 8, 2015). Since the commencement of the

Lease Option in May of 2007 through the motion for summary judgment, over 8 years in duration, the Roadhouse has paid the rent on time. CP 219 (Bucheli Dep. 33:7-10 January 8, 2015). It has never been necessary for the Roadhouse to pay a \$300 late fee pursuant to Paragraph 2 of the lease. CP 219 (Bucheli Dep. 33:9-10 January 8, 2015). All property taxes, insurance and other charges required by the lease have been paid in a timely manner. *Id.* (33:13-17). In 2015, the Roadhouse paid \$5,667.81 in base rent per month. CP 220. (34:1-3). Bucheli received more annual income from the rent from the Roadhouse than he had made in all his other businesses in the last 10 years, and the Roadhouse was his chief source of income. *Id.* (34:4-10).

**D. Bucheli Had 68 Years Of Experience As A Butcher With Some Familiarity With The USDA Regulations While The Roadhouse Owners Had No Experience.**

Mr. Bucheli is 85 years old, had been a butcher and sausage maker for 68 years, and had owned a butcher shop in Yakima called Matterhorn Meats for almost 50 years, from 1966. CP 331 (A Bucheli Decl. ¶ 3) On the other hand, at the time they entered into the lease option with Bucheli, the Rowes had never operated a full service restaurant. CP 291 (Jim Rowe Decl. ¶ 13). This was a new undertaking for the Rowes, who were unfamiliar with USDA requirements for purchasing and selling meat products. CP 291 (Jim Rowe Decl. ¶ 14).

**E. The Lease Premises Had A Negative Reputation Before The Roadhouse Began Operations.**

The Rowe's were very aware of the negative history of restaurants at the lease location. They were also aware that Mr. Bucheli's restaurant called the Matterhorn Inn had shut down around the middle of April of 2007. CP 283-284 (Jim Rowe, Decl. ¶ 2 &3). They knew the last four restaurants located at the leased Premises had not been successful: first, a "Red Robin" lost its franchise; second, a place called "Safari Burger" with a maze of animal head upholstery (the upholstery that the Roadhouse replaced without prior written permission) on its booths failed; third, a place called "Tanum Place" had ceased operation before Mr. Bucheli purchased the premises in 2002, and finally, the Matterhorn Inn was operated for almost 5 years by Bucheli unsuccessfully. CP 283-284 (Jim Rowe, Decl.).

**F. The Primary Reason Bucheli Needed To Lease Or Sell The Restaurant Property Was Bucheli's Poor Financial Circumstances – His Matterhorn Inn Never Made A Profit In 5 Years.**

According to his 2007 1040 IRS tax return, Bucheli had accrued a net operating loss of \$1,102,506, including the loss for that year. CP 176. The Matterhorn Inn had never made a profit from 2002. CP 216-217 (Bucheli Dep. 26:12 – 25 & 27:1-10, January 8, 2015).

Appellant Bucheli ran the restaurant lounge under the name "Matterhorn Inn" from 2002 until April 22-24, 2007, when the business effectively closed when all the employees were apparently fired by Bucheli's manager. CP 212-213 (Bucheli Dep. 22:7-25 & 23:1-10,

January 8, 2015). Mr. Bucheli had no plans to reopen but only “wanted to know how [he could] get out of the mess [he was] in.” CP 213 (Bucheli Dep. 23:11-16 January 8, 2015).

Mr. Bucheli reported all his income as a sole proprietor. He reported all his income from the Matterhorn Inn, Matterhorn Meats (his butcher shop), and his small cherry orchard next to his butcher shop on his individual IRS 1040. CP 214 (Bucheli Dep. 24:5-16, Exhibit 4, January 8, 2015). In 2006 (the full year just prior to the Lease Option), he reported gross income from all his businesses on Schedule C of his 2006 1040 return to be \$182,331 while he reported wage expenses from the Matterhorn Inn alone to be \$205,766. CP 170; CP 214-215 (Bucheli Dep. 24:21-25 & 25:1-5, 19-25, January 8, 2015). He admitted that he could not have lasted much longer at the Matterhorn Inn. CP 216 (Bucheli Dep. 26:1-7, January 8, 2015). Although he was reluctant to do so, Bucheli entered in the lease option with Jim Rowe, because Rowe was the first person who wanted it, and because Bucheli “was in a financial squeeze” and “had to pay [his] bills....” CP 218 (Bucheli Dep. 31:5-16 January 8, 2015). Jim Rowe was his “only option” at that “minute”. Id. 31:15-16.

**G. Bucheli’s Meat Business Was Subject To The Federal Meat Inspection Act And The Meat Products He Sold And Delivered To The Roadhouse Were Illegal.**

**1. Bucheli Held Himself Out As A Custom Exempt Butcher.**

Bucheli considered himself a “custom exempt” butcher. CP 242 (A

Bucheli Decl. 106: 15-24). A custom exempt butcher is not subject to USDA inspections when selling to his own over the counter retail customers or his own restaurant customers. See 9 CFR Ch. III, §303.1 (d)(1). When selling to hotels, restaurants, and institutions not owned by him (HRI), the USDA has different rules for HRI sales.

**2. Federal Meat Inspection Laws And Regulations Apply To Bucheli's Butcher Shop.** In 1973, the State of Washington designated itself as one of the states to apply federal meat inspections to all operations and transactions intrastate. 9 CFR Ch. III, § 331.2 [35 FR 19667, Dec. 29, 1970]. All meat products “entering any official establishment and all products prepared, in whole or in part, therein, shall be inspected, handled, stored, prepared, packaged, marked, and labeled as required ...” by regulations. 9 CFR Ch. III, §302.3 [35 FR 15556, Oct, 3, 1970]. Regulation of meat products is essential to the public interest. 21 USCS § 602 Congressional statement of findings. A custom exempt butcher is not exempt from labeling. 21 USCS § 623(d); 9 CFR §303.1(f) (Labeling applies to meat products that “are exempted from inspection or not required to be inspected”).<sup>2</sup> The failure to apply labels is called “misbranding”. 21 USCS § 601 (n). There are two required labels: product labels and safe handling labels, the requirements of which are set

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<sup>2</sup> A Footnote 3 of Appellant's Opening Brief at 12, Bucheli states that he could sell meat to the Roadhouse legally but was only limited to 25% of his total sales. What he is overlooking is that all his meat still had to be labeled whether it is within the 25% limitation or not. None of his meat products were labeled and all meat were illegal.

out in the regulations. 9 CFR §317.2(c)(1)-(6) and 9 CFR §317.2(l)(1)(i) (35 FR 15580, Oct. 3, 1970). Examples of required product and safe handling labels are found on Exhibit 21 of Mr. Bucheli's deposition. CP 203, (D. Dunham, Decl., Exhibit 21).

Only 25% of an exempt butcher's sales shall be sold to restaurants, hotels or institutions. 9 CFR Ch. III, §303.1(d)(2)(iii)(b).<sup>3</sup> Even though custom exempt, when selling to hotels, restaurants, and institutions like the Roadhouse, products that were "cured, cooked, or smoked," like bacon and ham were required to pass USDA inspection regardless of the 25% permissible amount that could be sold to restaurants. CP 262 (Leifert Decl. lines 7-14). Meat actually sold to the Roadhouse shown in Exhibit 15 included, bacon, ham and Cajun [sausage]. The bacon was cured, and the ham and Cajun were cooked. CP 239, (Bucheli Dep. 97: 3-18, January 8, 2015). USDA regulations permit the sale of cured, cooked and smoked

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<sup>3</sup> The importance of this 25% limitation is as follows: assuming Bucheli remained an exempt butcher and legally could only sell 25% of his total sales to the Roadhouse, then only 25% of his sales would be "available" under Paragraph 5 of the Lease Option assuming the meat was properly labeled. For example, in 2008, the first full year, after the Lease Option commenced, Bucheli had total meat sales to retail customers of \$19,866.70, which means he could sell an additional \$6,622.23 to the Roadhouse in 2008. The Roadhouse could have purchased \$552 of meat products per month assuming they were offered at competitive rates and they were labeled. (Bacon and ham would still have to be USDA inspected.) Assuming the Roadhouse bought none of the \$552.00 worth of meat products from Bucheli, which was its right, it would have had to pay only \$110.00 per month based on Paragraph 5's 20% surcharge. But because none of the meat was labeled and certain meat was not inspected as required, none of the meat offered was available regardless of the 25% allowance. Even if he properly labeled his meat, there is no way that he could have required the Roadhouse to buy \$2,000 worth of meat per month as he testified he expected CP 332 (A Bucheli Decl. ¶ 39) and remain a custom exempt butcher.

meat products such as bacon and ham when selling to the butcher's own retail customers or customers of his own restaurant 9 CFR, Ch. III, § 303.1 (d)(2)(i) (a) through (e), but not when selling to restaurants, hotels or institutions such as the Roadhouse that he does not own. 9 CFR CH III, § 303.1(d)(iii)(f).

To sell meat products without required USDA inspections and without labels are both federal crimes. CP 261-263 (R. Leifert, Decl. ¶¶ 6 & 9). 21 USCS § 610. A person violating this statute faces “imprisonment for not more than one year, or a fine of not more than \$1,000, or both”. 21 USCS §676. Significantly, § 610 does not distinguish between seller nor buyer. In other words, if the Roadhouse in turn knowingly sold uninspected and unlabeled meat products it received from Mr. Bucheli to its customers, it was violating § 610 as well.

**H. Free USDA Inspection Services Were Available To Lessor Bucheli.**

Had Bucheli applied for an establishment number, he was entitled up to 8 hours per day (40 hour work week) during the normal work days of USDA inspection without cost to him. 9 CFR Ch III, §307.5(c), (R. Leifert, Decl. ¶ 7). Further, if he did want to have all his meat inspected, he could have limited his free inspections to bacon and ham only; however, he still would have had to label all his meat.

**I. Paragraph 3 Of The Lease Option Prevents The Tenant From Unlawful Use Of The Premises.**

In agreeing to Paragraph 3 of the Lease Option, the Roadhouse agreed “to abide by all laws, statutes, regulations, and charters of applicable lawful authority.” CP 149-150. Criminally violating federal meat regulations by knowingly buying illegal meat products from Bucheli and worse selling the meat to the Roadhouse restaurant customers would be a lease violation.

#### IV. ARGUMENT

##### A. Standards Of Review

The Appellate Court reviews “a summary judgment order de novo engaging in the same inquiry as the trial court.” *Keck v. Collins*, 181 Wn. App. 67, 78, 325 P.3<sup>rd</sup> 306 (2014), affirmed 184 Wn.2d 358, 357 P.3<sup>rd</sup> 1080 (2015). Summary Judgment is appropriate if the pleadings, affidavits, depositions and admissions on file demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c); *Yakima Fruit & Cold Storage Co. v. Cent. Heating & Plumbing Co.*, 81 Wn.2d 528, 530, 503 P.2d 108 (1972). “The motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion.” *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). In “viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party.” *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29,

948 P.2d 816 (1997). “[S]ubstantial evidence’ means evidence in sufficient quantum to persuade a fair-minded, rational person of the truth of a declared premise.” *Helman v. Sacred Heart Hosp.*, 62 Wn.2d 136, 147, 381 P.2d 605, 96 A.L.R.2d 1193 (1963). “The purpose of a summary judgment is to avoid a useless trial when no genuine issue of material fact remains to be decided.” *Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wn.2d 255, 262, 956 P.2d 312 (1998). The burden is on the party moving for summary judgment to demonstrate there is no genuine dispute as to any material fact. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

**1. When the Roadhouse Met Its Initial Burden Of Showing No Genuine Issue Of Material Fact That Bucheli’s Sale Of Meat Products Were Illegal, Inquiry Shifted To Bucheli To Show A Genuine Issue Of Disputed Material Fact.** In its Motion for Summary Judgment, the Roadhouse conclusively proved that Bucheli did not have lawful meat available to sell to the Roadhouse pursuant to Paragraph 5 and therefore there was no breach of lease. Having established the initial burden of showing the absence of an issue of material fact, then inquiry shifted to Bucheli to prove the presence of a genuine issue of material fact. *Burton v. Twin Commander Aircraft, LLC*, 171 Wn.2d 204, 222-223 254 P.3<sup>rd</sup> 778 (2011). (Plaintiff non-moving party failed to make a sufficient showing of the “existence of an essential element” on which he has the burden of proof of trial). In his declaration in opposition to the

Roadhouse's motion for summary judgment, Bucheli admitted for the first time in 8 years that his meat products violated USDA regulations but believed he was blameless. In his Response below and in his Appellant's Brief here, he claims that the trial court erred because she did not consider his affirmative defense of mutual mistake, but he raised this defense for the first time eight years after the commencement of the lease.

**2. Bucheli Has A Heightened Burden To Establish The Defense Of Mutual Mistake Which Must Be Considered.** To establish the defense of mutual mistake, Bucheli "must show by clear, cogent and convincing evidence that the mistake was **independently made by both parties**. (Emphasis added.) *Chem. Bank v. Wash. Public Power Supply Sys.*, 102 Wn.2d 874, 898-899, 691 P.2d 524 (1984). Here the Rowes did not have independent knowledge of Bucheli's mistake of law.

As Division III has pointed out when reviewing a summary judgment order involving a heightened burden of proof, as is the case here, this court "must view the evidence presented through the prism of the substantive evidentiary burden." *Kofmehl v. Baseline Lake, LLC*, 167 Wn. App. 677, 694, 275 P.3d 328, (2012). In other words, even if the court viewed that there may be some issue regarding mutual mistake, is it reasonable that a trial court could find it established when viewed by Bucheli's higher burden under these facts? The answer is clearly that it would not be reasonable.

**3. Bucheli Should Not Be Permitted To Contradict His**

**Deposition Testimony To Create A Genuine Issue Of Material Fact.**

A declaration that attempts to defeat a summary judgment motion by establishing a material dispute of fact must not contain unreasonable inferences. “A summary judgment motion will not be denied on the basis of an unreasonable inference. *Scott v. Blanchet High Sch.*, 50 Wn. App. 37, 47, 747 P.2d 1124 (1987), review denied, 110 Wn.2d 1016 (1988)” *Marshall v. Ac&S, Inc.*, 56 Wn. App. 181, 184, 782 P.2d 1107 (1989) In *Marshall*, the Court granted summary judgment of dismissal based on the expiration of the statute of limitations in an asbestosis case. The plaintiff’s affidavit stated that he discovered the illness within the statute of limitations but his medical records clearly showed that discovery was beyond the statute of limitations. The affidavit statement that plaintiff discovered the illness within the statute of limitations was held not to be reasonable. The court went on to state:

When a party has given clear answers to unambiguous [deposition] questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony.

*Id.* The Court held that Marshall’s contradictory affidavit did not raise a genuine issue of material fact. See also *Hanson Indus., Inc. v. Kutschkau*, 158 Wn. App. 278, 291, 239 P.3d 367 (2010) (“A party to litigation cannot create a material issue of fact by submitting a declaration contradicting his own deposition.”) When confronted with the law and testimony of USDA

inspector Leifert, Mr. Bucheli could not deny that he in fact unlawfully sold meat products to the Roadhouse and has changed his position radically by saying he was mistaken and therefore entitled to rescission of the lease – 8 years later.

**B. Extrinsic Evidence Of Bucheli's Subjective Beliefs Or Expectations During The Lease Negotiations Are Irrelevant To Interpret The Intent Of Paragraph 5 And Should Not Be Used To Vary Or Modify The Lease Language.**

The Roadhouse was entitled to receive legal meat products sold and delivered by Bucheli pursuant to Paragraph 5 of the Lease Option if available and priced at competitive rates. Bucheli did not sell legal meat products to the Roadhouse in 2007 and refused to acknowledge that the sale and delivery of his meat products to the Roadhouse were in violation of USDA regulations until he filed his declaration on May 29, 2015 in opposition of the Roadhouse's motion for summary judgment. CP 320-419. Asserting the defense of mutual mistake in his opening brief, Bucheli repeats over and over that he would never had entered into the lease unless the Roadhouse promised to buy meat from him. See Appellant's Open Brief at 2, 3, 7-8, 8, and 22. In his declaration, Bucheli states that he "insisted on Paragraph 5" "because it provided him with a guarantee source of revenue in addition to the rent." CP 321, 323 (A Bucheli Decl. ¶¶ 5 9). Bucheli testified that during the negotiations "I was clear that the only way I would lease to him [Jim Rowe] is if he would keep using the meat from my Yakima [butcher] shop." *Id.* Paragraph 5 of the Lease

Option does not support Bucheli's subjective beliefs:

5. MEAT PRODUCTS: Tenant agrees to purchase at **competitive rates** all meat products from Lessor (d/b/a Matterhorn Meats) **so long as they are available** through Lessor, or Tenant shall pay Lessor a 20% surcharge of **available meat products** purchased elsewhere.

(Bold emphasis added.) Paragraph 5 sets forth no guarantees, no mandatory minimum meat purchase requirements, and no mandatory period of time for meat purchases. The option to purchase in Paragraph 23 could have been exercised "at any time" CP 32, meaning that it could have been exercised immediately after commencement of the lease with no penalties and with no meat purchases. There are no restrictions on the type of restaurant the Roadhouse could open. For example, the Roadhouse could have opened a fish, pizza, or even a vegan restaurant requiring little or no orders of meat and not have violated the Lease Option. Any meat offered for sale to the Roadhouse by Bucheli was conditioned that it be sold at competitive rates and be available, and still the Roadhouse had the option to purchase meat elsewhere as long as it paid a 20% surcharge if the same meat was available through Bucheli.

In presenting his subjective beliefs that he would not have entered into the lease option if Paragraph 5 did not guarantee a certain amount of meat purchases, Bucheli is offering extrinsic evidence about Paragraph 5. *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990). "But extrinsic evidence is relevant only to determine the meaning of specific

words and terms used, not to show an intention independent of the instrument or to vary, contradict, or modify the written words.” *Oliver v. Flow Int’l Corp.*, 137 Wn. App. 655, 660, 155 P.3<sup>rd</sup> 140 (2006) (the court found Oliver’s testimony regarding negotiations was an improper attempt to insert new obligations into the contract and an improper use of extrinsic evidence.). Bucheli’s beliefs and expectations that he would have never entered into the Lease Option if the Roadhouse had not promised to purchase his meat products and that he felt Paragraph 5 meant that he had a guaranteed source for his butcher shop are subjective. As in *Oliver*, Bucheli’s testimony regarding the negotiations leading to the Lease Option are “an improper use of extrinsic evidence”. *Id* at 661.

The construction of lease is a legal question. *Brown v. Safeway Stores*, 94 Wn.2d 359, 366, 617 P.2d 704 (1980) (“well settled”). One of the rules of lease interpretation applies here, in that “if the provisions of a lease be doubtful, in that they are reasonably capable of more than one interpretation, the court will adopt that interpretation which is the more, or most, favorable to the lessee. *Blume v. Bohanna*, 38 Wn.2d 199, 203, 228 P.2d 146, 149 (1951). More importantly, in trying to determine the intent of the parties to an agreement, Washington looks at the “objective manifestations” in an agreement to determine intent rather than “subjective intent”. *Hearst Commc’ns, Inc. v. Seattle Times*, 154 Wn.2d 493, 503-504, 115 P.2d 262 (2005). Intention is imputed from the words used and “subjective intent is generally irrelevant”. *Id*. The courts do not interpret

“what was intended to be written but what was written”. *Id.* See *Condon v. Condon*, 177 Wn.2d 150, 162-163, 177 Wn.2d 150 (2013) Mr. Bucheli may have wanted a guarantee but no such language was in Paragraph 5 of the Lease Option. Should this Court, as the court below did, agree that Bucheli’s subjective beliefs and expectations cannot be considered to modify the express language of Paragraph 5, then there is no breach by the Roadhouse because Bucheli had no legally available meat to sell. As a result, if this Court finds that Bucheli’s subjective expectations are irrelevant, then there is no need for further analysis because the same subjective expectations and beliefs are the basis of Bucheli’s claim for mutual mistake.

**C. In The Alternative, No Guarantee Of Meat Purchases Should Be “Implied” In The Language Of Paragraph 5.**

Assuming that it is recognized that the language of Paragraph 5 does not set forth any guarantees of meat purchases according to its terms, the next logical argument of Bucheli is that Paragraph 5 contains an implied covenant requiring the guaranteed purchase of a minimum quantity of meat by the Roadhouse from Bucheli regardless of the circumstances. Generally, “implied covenants are not favored” in law. *Oliver v. Flow Int'l Corp.*, at 660-661. Before courts will imply a covenant, five requirements must be satisfied:

“(1) the implication must arise from the language used or it must be indispensable to effectuate the intention of the parties; (2) it must appear from the language used that it was

so clearly within the contemplation of the parties that they deemed it unnecessary to express it; **(3) implied covenants can only be justified on the grounds of legal necessity;** (4) a promise can be implied only where it can be rightfully assumed that it would have been made if attention had been called to it; (5) there can be no implied covenant where the subject is completely covered by the contract.”

(Emphasis added.) *Id.* citing *Brown v. Safeway Stores*, 94 Wn.2d 359, 371, 617 P.2d 704 (1980), which quoted from *Fuller Mkt. Basket, Inc. v. Gillingham & Jones, Inc.*, 14 Wn. App. 128, 134, 539 P.2d 868 (1975).

In *Oliver v. Flow Int’l Corp.*, *supra.*, Oliver sold his invention to Flow International Corp. for \$150,000 and was to be paid royalties for 17 years. Flow never obtained a patent or marketed the invention or paid royalties. The Oliver court pointed out that

a term is implied in order to supply consideration, **without which there would not be a valid contract.** Here, the contract was supported by \$150,000 in consideration that was in no way dependent on future sales.

(Emphasis added.) *Oliver v. Flow Int’l Corp.*, at 661.

The Roadhouse paid base monthly rent pursuant to the Paragraph 2 CP 21, starting at \$3,000 per month in the beginning, CP 21, and \$5,667.81 in 2015. CP 220. (A Bucheli Decl. 34:1-3). The Roadhouse also paid all taxes, assessments, and utilities pursuant to Paragraph 6 CP 22-23, and lessor’s insurance pursuant to Paragraph 8. CP 24-25. Clearly, the Lease Option was supported by independent consideration and there is no legal necessity (the third *Oliver* requirement for implied contracts) to imply any term of guaranteed meat purchases.

The facts in *Brown v. Safeway Store*, 94 Wn.2d 359 are similarly instructive. In *Brown v. Safeway*, tenant Safeway had an unrestricted lease right to assign or sublet the lease. The lease required Safeway to pay \$4,278 per month or 1 ½ percent of its monthly gross sales, whichever was greater. After paying the greater percentage rent for a time, Safeway sublet the grocery property to Uwajimaya and continued to pay the minimum rent. Safeway moved to larger space ½ mile away and reopened its grocery store. Lessor Brown claimed that Safeway could not move because Safeway agreed to pay 1 ½ percent of its gross which prevented Safeway from moving. Also Brown argued that by subletting to a Tenant which was not primarily a grocery store, Brown was denied “comparable gross sales and customer traffic.” *Id* at 370. The court found that there were no express lease restrictions to prevent assigning or subletting the lease by Safeway, and therefore, Safeway did not breach the lease by vacating the premises and subletting the property. *Id* at 372.

**D. The Elements Of Mutual Mistake Simply Are Not Met Under The Facts Of This Case.**

The only mistake in this case was the mistaken belief by Bucheli that he could sell meat products legally to the Roadhouse. Without question Bucheli illegally sold unlabeled and uninspected meat products to the Roadhouse in 2007 and maintained that he did not have to label or inspect any of his meat products when selling to the Roadhouse until

several years after the Roadhouse exercised its option to purchase on May 22, 2013.

The elements of mutual mistake are the following:

1. “A mistake not in accord with the facts.” *Simonson v. Fendell*, 101 Wn.2d 88, 91, 675 P.2d 1218 (1984). Bucheli’s mistaken belief that he did not have to label or inspect his meat product sold to the Roadhouse was not a mistake in accord of the facts. Both parties certainly expected that any meat sold to the Roadhouse would be legal, and Bucheli could have corrected his mistake and sold legal meat at any time. None of the mutual mistake cases cited by Bucheli involved contracts with continuing obligations and performances such as the lease option here. All involved mistakes that could not be corrected at any time. For example, in *Chem. Bank v. Wash. Public Power Supply Sys.*, 102 Wn.2d 874, 691 P.2d 524 (1984) all parties mistakenly assumed that the municipalities had statutory authority to issue bonds, which they did not. In *Simonson v. Fendell*, 101 Wn.2d 88, 91, 675 P.2d 1218 (1984), the parties “independently believed that the business was solvent”, but it was not solvent because of an error in the financial statements. Finally, in *Denaxas v. Sandstone Court of Bellevue*, 148 Wn.2d 654, 668, 63 P.3d 125 (2003), the mistake was in the correct square footage and legal description. Bucheli implicitly admitted

that nothing prevented him from complying with USDA requirements had he known. CP 331. (A. Bucheli Decl. ¶ 37) Had he applied, he could have had USDA inspections at no cost to him. CP 263 (R. Leifert, Decl. ¶ 7), see 9 CFR Ch III, §307.5(c)

2. The belief must be held at the time the contract was made. *Simonson v. Fendell*, supra. This was the first time the Rowes had ever owned a full service restaurant and they were unfamiliar with USDA rules and regulations. They certainly did not have the knowledge to believe that Bucheli was not complying with USDA regulations or that he was operating under a mistake of law before May 18, 2007.

3. The mistake must relate to a basic assumption on which both parties relied when making the contract. *Denaxas v. Sandstone Court of Bellevue*, 148 Wn.2d 654, 668, 63 P.3<sup>rd</sup> 125 (2003). Paragraph 5 does not establish a basic assumption, because meat purchases are conditional and not required. Bucheli claims he would not have leased to the Roadhouse without Paragraph 5 and his subjective expectations. But as the undisputed facts establish, Bucheli was facing a financial squeeze, needed to pay his bills, had never made a profit in 5 years, and Jim Rowe was the only interested party at that moment. If he had not leased to the

Roadhouse, he would have had the same problem with the next tenant and that tenant might have refused to agree to a Paragraph 5. Financially, he was not in a position to dictate terms.

4. “It must have a material effect on the agreement.” *Id.* 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.” *Simonson v. Fendell*, at 92. Had Bucheli and the Roadhouse actually been aware of the USDA compliance requirements, they would have obviously entered into the lease, because Bucheli would have easily complied rather than face criminal prosecution and compliance could easily have been accomplished. Thus, the mistake was not material.

5. Unless the party claiming mutual mistake bears the risk of mistake. *Id.* This element will be discussed more fully below.

**E. Rescission Is Not Available For Every Case Of Mutual Mistake And Should Not Be Available To Bucheli Who Waited 8 years Before Requesting It.**

Even if this Court should find there was a mutual mistake, such finding “does not entitle one to rescission. Equity will grant rescission only where there is a clear bona fide mutual mistake regarding a material fact.” *Simonson v. Fendell*, at 92. As pointed out in *Simonson*, the “general principal is that rescission contemplates restoration of the parties

to as near their former position as possible or practical.” *Id.* at 93. In *Simonson*, the court found that Fendell had offered to tender back the assets earlier satisfying the requisites of rescission, which offer was turned down. The trial court’s decision not to order rescission was affirmed. Here it is simply not practical to grant rescission 8 years later. The parties cannot be restored to their original positions. For one thing, Bucheli would be getting back something he did not have before, a profitable restaurant with a good reputation. It is simply too difficult to determine what relief would be available after 8 years of performance of the lease.

Rescission is further complicated and impractical by the fact that Respondent WC Roadhouse LLC now owns the lease premises. <http://gis.co.kittitas.wa.us/compas/default.aspx?pid=211436> No supersedeas bond was filed pursuant to RAP 8.1 before or after Bucheli timely filed his appeal, and as a result, the sale of the property closed according to the terms of the Lease Option and trial court’s Order and Judgement Granting Plaintiffs’ Motion for Specific Performance. CP 492-499. Frankly, this appeal makes no sense, because should the Court find mutual mistake and order rescission, then the Roadhouse would have to deed back the restaurant premises to Bucheli and Bucheli would have to return the \$1,377,740 option price. This result is not equitable or

practical.

**F. Bucheli Bears The Risk Of Mistake And Therefore His Defense of Mutual Mistake Should Fail.**

Bucheli has been a butcher for 68 years and has operated his butcher shop in Yakima since 1966, almost 50 years. He certainly was generally knowledgeable about his industry's USDA regulations and the Rowes were not.

In Appellant's Opening Brief at 22, Bucheli cites Restatement (Second) of Contracts § 154 (1981), which sets out the rules regarding when a party bears the risk of mistake.

Bucheli only cites one case in support of his argument that he should not bear the risk of mistake, but he totally misreads the case and the case does not support his position. If anything, the facts of the case are more favorable to the Roadhouse that Bucheli bears the risk of loss. At page 22 of Appellant's Opening Brief, Bucheli states:

the court held that the seller of a car wash who was a sophisticated businessman and who had reason to believe that prior owners operated a service station on the property did not bear the risk of the parties' mistaken belief that the property's soil was not contaminated.

*Car Wash Enters. v. Kampanos*, 74 Wn. App. 537, 547, 874 P.2d 868 (1994). The problem for Bucheli is that contrary to the above statement in his brief, it was the buyer (not seller) Car Wash that sued the seller

Kampanos successfully for contribution for the costs of having to remove contaminated soil found on the property after the sale. Despite the fact that the owner of buyer Car Wash was a sophisticated business person and had reason to believe there had been a service station on the property, the court found that the buyer Car Wash did not have the limited knowledge such that Car Wash should bear the risk of loss pursuant to Restatement of Contracts § 154 and found that the seller Kampanos did. *Id.* at 547-548. Because Kampanos owned the property for 7 of 11 years and the underground gas storage tanks were actually in use, Kampanos was found to benefit from the tanks. Kampanos was held responsible for 7/11ths of the cleanup costs. Bucheli simply read the case wrong. At the beginning of the lease option, the Rowses were much less sophisticated business persons than the owner of Car Wash and they certainly had no special knowledge of USDA requirements.

The Restatement (Second) Contracts § 154 (2<sup>nd</sup> 1981) sets out the rules for determining assigning risk of mistake:

A party bears the risk of a mistake when

(a) the risk is allocated to him by agreement of the parties,  
or

(b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as

sufficient, or

(c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.

As between the Rowes and Bucheli, Bucheli with his 68 years of experience cannot and would not deny that he had some knowledge of USDA regulations, certainly “limited knowledge with respect to the facts to which the mistake relates”. He obviously believed his limited knowledge was sufficient. Comment c of Section 154 calls it “conscious ignorance”. See *Scott v. Petett*, 63 Wn. App. 50, 58, 816 P.2d 1229 (1991). One court found that the willingness of a party “to enter a contract notwithstanding limited knowledge of certain facts shows that those facts were not essential elements of the contract.” *CPL, L.L.C. v. Conley*, 110 Wn. App. 786, 791, 40 P.3<sup>rd</sup> 679 (2002).

In the alternative, the Court could also allocate the risk to Bucheli on the grounds that “it is reasonable in the circumstances to do so.” Restatement (Second) Contracts § 154(c).

**G. Bucheli And His Lawyers Had Sufficient Notice That He Had A USDA Problem In Selling Meat Products To The Roadhouse And He Did Nothing To Comply With USDA Requirements.**

At his deposition on January 8, 2015, Bucheli stated with unequivocal certainty that he was not required to label his meat products nor have his cured and cooked meat products inspected. CP 243-245

(Bucheli Dep. 120:25 to 121:8 110:1-25), CP 192-202 (Exhibit 15, January 8, 2015); (Bucheli Dep. 151:11-25- 152:1-14, CP 203 (Exhibit 21, January 8, 2015). It was only after he reviewed the Roadhouse's Motion For Summary Judgment and the Declaration of retired USDA inspector Robert Leifert, that Bucheli stated in his declaration in opposition at numerous places that he did not know that he had to have any of his meat inspected or labeled and that Jim Rowe never told him of the USDA inspection and labeling requirements. The point here is that Bucheli had plenty of notice of the Roadhouse's concerns about the legality of his meat products going clear back to September of 2007. Either he or his lawyers chose to ignore the problem, or the problem was lost in the shuffle as Mr. Bucheli moved through his six lawyers or law firms. The Roadhouse cannot be faulted for not trying to tell Mr. Bucheli there was a USDA problem. The several letters of Jim Rowe and counsel clearly refute Mr. Bucheli's declarations regarding that he was never being told about the USDA inspection and labeling concerns.

Regardless to whether Mr. Bucheli personally knew that he had a labeling and inspection problem or that only his lawyers knew, the law in Washington is clear that "[t]he knowledge of an attorney is imputed to the client." *Tatham v. Rogers*, 170 Wn. App. 76, 109-110, 283 P.3d 583 (2012). This is true even where the attorney suppressed important information from the client. *Yakima Fin. Corp. v. Thompson*, 171 Wash. 309, 317, 17 P.2d 908 (1933), citing *Schmidt v. Olympia Light & Power*

Co., 46 Wash. 360, 90 Pac. 212 (1907).

To say that the Rowes never told Bucheli that he had a USDA problem simply is not credible and not in accord with the facts. *Marshall v. Ac&S, Inc.*, 56 Wn. App. 181, 184, 782 P.2d 1107 (1989). (Plaintiff's deposition that his discovery of his asbestosis condition was within the statute of limitations was proven wrong by his medical records.)

**H. Bucheli Is Not Entitled To Relief For His Own Unilateral Mistake Of Law**

If a mistake of law has been established by Bucheli, it more logically would be classed a unilateral mistake since the Rowes had no prior knowledge of USDA laws restricting their meat purchases. The defense of unilateral mistake is set out in the Restatement (Second) ¶ 153 (1981).

Although unilateral mistakes may be grounds for equitable relief, such relief is only available if the other party had knowledge of the mistake being made. Comment a. to Restatement (Second) §153 Contracts (2d 1981). See *Gill v. Waggoner*, 65 Wn. App. 272, 276, 828 P.2d 55 (1992). In *Gill*, the insurance company was bound by its mistake regarding the amount of the settlement and the injured party was not aware of the mistake. The *Gill* court rejected the requirement of the Restatement (Second) Contracts §153 to determine if the person asserting mistake should bear the risk of mistake under §154. The court states that Washington cases "require only that a party seeking to enforce an

agreement not be chargeable with knowledge of the unilateral mistake.” *Gill v. Waggoner*, 65 Wn. App. at 279. Clearly the Rowes are not chargeable with any knowledge of Bucheli’s mistake. As a result, there is no available remedy to Bucheli for his unilateral mistake.

This is not a case where Bucheli is faced with an extreme hardship, impossibility of performance, or a bad bargain because of a mistake. In fact, Bucheli stated that he had talked to the USDA “and would have been willing to comply with any USDA requirements that are necessary to sell meat, sausage, bacon, poultry, or anything else to the Plaintiffs [the Roadhouse] if they had discussed this with me earlier.” CP 331-332; (A. Bucheli Decl. ¶ 37).

**I. The Roadhouse Paid \$2,556.56 Plus Interest To Settle A Very Small Claim, Waiving Its Defenses To Avoid Further Litigation, And Bucheli’s Claim Is Not Genuine And Not Material.**

The second issue on appeal is whether the court should have held that the failure to pay \$2,556.56 of \$4,083.31 in 2007 was a material breach and therefore a default which should have prevented the Roadhouse from exercising its option to purchase. In Exhibit B of the Lease Option, the Roadhouse agreed to pay for “Inventory that Tenant accepts as useable ...”. CP 167. Bucheli presented the Roadhouse with a 4 page typewritten list of inventory from the Matterhorn Inn which totaled \$4,083.31 . CP 180-183. By letter dated September 21, 2007, Bucheli, through his lawyer Patrick M. Andreotti, sent a 10 day notice to cure

because the Roadhouse had not paid for the inventory. CP 313, 316 (Shannon Rowe, Decl. ¶ 6, Exhibit B, Andreotti Letter - 9/21/2007).

In response to this notice, the Roadhouse paid the \$1,526.75 as the amount of the inventory it accepted as useable. The \$1,526.75 was accepted and no further Notice of Default based on any claim that the \$1,526.75 paid was insufficient was ever brought by Bucheli.

As pointed out in the Respondent's Restatement Of Case above, Bucheli never pled this issue in his two answers and never requested damages in any counterclaim. The inventory issue was discussed in three short sentences in Bucheli's Memorandum in opposition to the Roadhouse's Motion for Summary Judgment and materiality was not even mentioned until this appeal. CP 433.

Although the Roadhouse had substantial issues with Bucheli's claim that additional sums for the inventory were even lawfully owed, it paid as stated in the trial court's order that Bucheli's "claim that Plaintiffs failed to pay for inventory in the maximum amount of \$2,556.56 is not material" and "Plaintiffs have offered to pay and tendered the amount to avoid further proceedings plus 12%". CP 495. If this case is reversed, Bucheli could not get any more under any circumstance than he has already been paid, whether justified or not.

When compared to the purchase price of the premises of \$1,377,740, the inventory claim owed by Bucheli is 0.185% or less than 0.2% of the option purchase price. In *Grant v. Morris*, 7 Wn. App. 134,

138, 498 P.2d 336 (1972), the Court of Appeals held that the trial court “properly concluded” that defects costing \$5,000 were not material to a \$525,000 transaction. The *Grant* court also found that the failure to bring the rescission in a reasonable time was circumstantial evidence of intent to waive the right to claim rescission.

At page 13 of Bucheli’s Memorandum In Response in opposition to the summary judgment, Bucheli points out that even if a breach is not material, he would still be entitled to damages. CP 432. However, a non-material breach will not defeat the option to purchase. *McEachren v. Sherwood & Roberts*, 36 Wn. App. 576, 581, 675 P.2d 1266 (1984); 23 Richard A. Lord, *Williston on Contracts* § 63:3, at 438 (4th ed. 2002). Simply put, the issue is *de minimis* and should not be considered as presenting a genuine issue of material fact.

**J. The Roadhouse Is Entitled To Attorney’s Fees As Prevailing Party Pursuant To Paragraph 18 Of The Lease Option And RAP 18.1.**

Paragraph 18 of the Lease Option provides for recovery of “all court costs and reasonable attorney’s fees” to be paid to the prevailing party. CP 157. RCW 4.84.330 provides that in actions involving contract or lease, where the contract or lease specifically provides for attorney’s fees and costs, the prevailing party is entitled to an award of reasonable attorney’s fees based on a contract or lease. *Gold Creek N. Ltd. P’ship v.*

*Gold Creek Umbrella Ass'n*, 143 Wn. App. 191, 206, 177 P.3d 201 (2008). Should the Court find that Mr. Bucheli's refusal to go forward with the Roadhouse's exercise of the option to purchase was not justified and the granting of specific performance to the Roadhouse was justified, the Court of Appeals should award the Roadhouse its attorney's fees and costs for having to defend this appeal.

One of the two claims of default raised by Bucheli in the pleadings below was the claim that the Roadhouse did not obtain Bucheli's prior written consent prior to making "alterations".<sup>4</sup> CP 61 & 101. The trial court found that written consent was not required. CP 495. Bucheli chose not to appeal this issue. On this issue, the Roadhouse has already prevailed.

Finally, consistent with RAP 18.1, the Roadhouse requests the Court of Appeals to affirm the attorney's fee award below and award the Roadhouse its reasonable attorneys' fees and costs incurred in this appeal

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<sup>4</sup> At the beginning of the lease in 2007, the Roadhouse replaced the carpet in the bar area, which was approximately 1/6 of the total restaurant carpet area because of stains in the carpet. The Roadhouse also replaced the upholstery on the customer booths that were covered with a busy collection of animal heads that were part of the décor of a previous restaurant called "Safari Burgers" – two restaurants before the Matterhorn Inn. CP 187-189. Bucheli claimed that the failure to obtain prior written consent was one of the reasons that the Roadhouse was in default at the time of the exercise of the option to purchase. The Roadhouse argued that these replacements were within the repair and upkeep provisions of Paragraph 7, which did not require Lessor's consent.

from August 21, 2015 when Bucheli filed his Notice of Appeal through these appellate proceedings.

## VI CONCLUSION

**P**

The Roadhouse's positions are simple: first, Bucheli's subjective expectations or intent that he was entitled to guaranteed meat purchases are not relevant under the law. The Roadhouse did not breach Paragraph 5 because Bucheli did not have any legal meat available and therefore no 20% surcharge was owed. Even if the court finds that there was a mistake, the Roadhouse had no independent knowledge of USDA regulations and any claim of mistake was not mutual. The Roadhouse did raise concerns about USDA compliance early on and was advised it was "not the landlord's problem". Second, the claim that failure to pay an additional \$2,556.56 for the inventory in 2007 is a material breach is frivolous, especially when it was never pled or alleged in any answer or counterclaim or claimed as an event of default when the Roadhouse exercised its option to purchase.

For the foregoing reasons, the Court of Appeals should affirm the the trial court's Order and Judgment Granting Plaintiffs' Motion For

Specific Performance And For Dismissal of Defendant's Counterclaims  
and award the Roadhouse its reasonable attorneys' fees and costs.

Respectfully submitted this 9th day of February, 2016.

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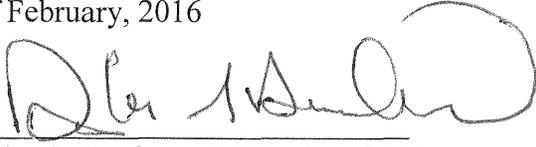
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**CERTIFICATE OF SERVICE**

I certify that on February 9<sup>th</sup>, 2016 the foregoing BRIEF OF RESPONDENTS was filed in the Court of Appeals, Division III and mailed to counsel via first class postage prepaid.

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DATED this 9<sup>th</sup> day of February, 2016

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