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No. 63217-5-1

COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON

BELLINGHAM BSC, a Washington limited liability company,

Appellant,

v.

AMBULATORY RESOURCE CENTRES OF
WASHINGTON, INC., ARC OF BELLINGHAM, LP;
SYMBION, INC.,

Respondents.

RESPONDENTS' BRIEF

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I. SUMMARY

Contrary to Appellant Bellingham BSC's story, there never was any genuine issue of material fact that Section 3 of the Fourth Amendment to the Lease – as drafted by the Landlord (Appellant's BSC direct predecessor) – ambiguously provided that (1) Respondent ARC (the Lessee) was entitled to a reduction in rent on May 1, 2009, and (2) the \$500,000 lump sum payment previously proposed had been negotiated off the table in favor of continued high rent from May 2004 through April 2009 in that same approximate amount. In fact, the Landlord's attorney admitted these two points: “Attached [is the] 4th Amendment . . . revising Section 3 to **eliminate the** [\$500,000] lump sum payment and providing for the **reduction of rent beginning on 5/1/09.**”¹

¹ CP 280: Declaration of Pat Rooney (Motion for Summary Judgment Atch. D) at ¶ 5; and CP 301: Exhibit 1 at S-140 (emphasis added).

How on earth can Appellant BSC now allege that there was a mutual – or even unilateral – mistake, when the Landlord’s own attorney’s words eliminated any doubt as to what Section 3 of the Fourth Amendment to the Lease actually states and what it was meant to accomplish? Therefore, the trial court was correct: given the clear and unambiguous language of the Fourth Amendment and the contemporaneous transmittal correspondence from the Landlord to the Tenant, the court needed no extrinsic evidence or new declarations from either BSC or Respondents to decide that granting Respondents’ Motion for Summary Judgment (“Motion”) was proper.

Accordingly, there was no error below.

**II. APPELLANT’S ASSIGNMENTS
OF ERROR ARE INCORRECT**

The trial court correctly ruled on all four of the assignments of error alleged by BSC. Nothing in its summary

judgment papers or its appeal brief should lead to reversal or remand by this Court.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

While Appellant BSC apparently subscribes to the shopworn tactic of trotting out as many appeal “issues” as one can imagine, of the nine listed in BSC’s Brief, not one leads to reversal or remand, as discussed below.

IV. STATEMENT OF THE CASE

The following facts before the trial court on Respondents’ Motion for Summary Judgment were both undisputed and supported by the contemporaneous documents. (*See* CP 100-115; 235-327.) On the other hand, Appellant BSC’s opposition papers provided no material or admissible information or documents to contradict those undisputed facts. Therefore, summary judgment was appropriate.

A. THE PARTIES AND THE LEASE.

1. The Original Lease's "Base Monthly Rent."

In May 1999, Respondent ARC of Bellingham, L.P. ("ARC Bellingham") purchased a surgery center and related practice from Northwest Washington Medical Bureau ("NWMB"). Contemporaneously, ARC Bellingham entered into a ten-year lease with NWMB dated May 13, 1999 (the "Lease") for a medical suite in which to operate the practice (the "Premises").²

For accounting purposes, a significant portion of the purchase price of the surgery center was loaded into relatively high, above-market rate monthly rent, as a form of seller financing.³ At the commencement of the Lease, ARC Bellingham paid NWMB \$20,795.00 in base monthly rent

² CP 262: Declaration of George Goodwin, Motion Attachment B, at ¶¶ 1-2.

³ CP 263: Goodwin Decl. at ¶ 3.

(“Base Monthly Rent”) subject to periodic adjustments based on the consumer price index (“CPI”).⁴

2. Subsequent Conveyances and Lease Amendment.

Joan Schwindt became the owner and Landlord of the Premises in 2003. The Lease was amended in 2004 by the “Fourth Amendment,” which is the only part of the Lease documentation at issue herein.⁵ In 2005, Schwindt sold her interest in the Premises (and thus the Lease, as well) to Appellant BSC. Thereafter, the problems started.

B. BASE RENT CALCULATION UNDER THE FOURTH AMENDMENT.

The original term of the Lease was set to expire on April 30, 2009, at which time the 1999 seller-financing would have been paid off (through the high rent). The Fourth Amendment was entered into in 2004 between Respondent ARC Bellingham (Tenant) and Schwindt (Landlord) to

⁴ *Id.*

⁵ CP 266-277: Motion Attachment C.

(1) extend the term to December 30, 2013, (2) freeze the current Base Monthly Rent of \$20,795.00 from May 2004 through April 2009 (no CPI adjustments during that period), and (3) provide for a reduction in Base Monthly Rent to \$11,040.00 beginning in May 2009 (but adjusted with “catch up” CPI adjustments). It really is that simple: the Landlord could count on having the Tenant locked in for four additional years at a known rental rate, thus locking in a longer income stream, and the Tenant could count on a guaranteed future rent reduction in exchange for agreeing to stay at the Premises for four additional years.

1. The Initial Deal: \$500,000 for an immediate reduction in Base Monthly Rent in 2004.

The topic of changes to the rent structure arose in late 2003, when Respondent Symbion was considering a private offering of limited partnership units in the surgery center (the

“Syndication”). (Symbion is the ultimate parent company.)⁶

The above-fair market rate rent used to facilitate the original seller financing of the purchase of the Surgery Center – which would not end until May 2009 – would create a number of unfavorable internal accounting outcomes if ARC Bellingham were to go into the Syndication.⁷

George Goodwin, Vice President of Mergers and Acquisitions at Respondent Symbion, called Schwindt’s accountant, Rick Paulson (“Paulson”) (Schwindt being the successor Landlord to NWMB), and proposed to “buy down” the high Base Monthly Rent in the Lease.⁸ Paulson and Goodwin determined that a \$500,000 lump sum payment to Schwindt (essentially satisfying the remaining seller financing that had been amortized from May 1999 to May 2009) would

⁶ CP 263: Goodwin Decl. at ¶ 6.

⁷ CP 263: Goodwin Decl. at ¶ 6.

⁸ *Id.* See also CP 283-299.

provide the means to immediately buy the Lease down to the fair market rate prevailing in 2003-2004.⁹

Schwindt's attorney, Dennis Williams, sent an initial draft of the Fourth Amendment to Pat Rooney, Respondent Symbion's attorney. Williams' draft shows that the proposed \$500,000 lump sum payment was to result in an immediate reduction in Base Monthly Rent.¹⁰ That proposal soon changed, however, and the lump sum payment was later abandoned in favor of continuing to pay the original 1999 seller financing.

2. The Final Deal: A deferred reduction in Base Monthly Rent; no \$500,000 "buy-down."

While negotiations continued in early 2004, Rooney came up with an alternative to the \$500,000 "buy-down," which is obviously a large amount of up-front "present value" money. He instead suggested to Symbion that if (a) ARC Bellingham

⁹ *Id.*

¹⁰ CP 279-280: Declaration of Patrick Rooney, Motion Attachment D, at ¶ 2 and Exhibit 1 thereto at CP 297-299.

assigned the Lease to Respondent Ambulatory Resource Centres of Washington, Inc. (“ARC Washington”), its general partner, and (b) ARC Washington then continued to pay Schwindt at the current high rate through April 2009, but (c) ARC Washington subleased back to ARC Bellingham (as subtenant) at the lower fair market rate and absorbed the difference, then the large up-front lump sum payment of \$500,000 (representing “present value” dollars) could be avoided and the high rent rate (then) currently paid would no longer be a bar to Syndication.¹¹

Moreover, when the then-existing term of the Lease ended on April 30, 2009, the “loaded” high rent rate (reflecting the seller financing of the initial purchase of the Surgery Center in May 1999) would have been satisfied and the rent for next Lease extension term (2009-2013) could then be reduced to the

¹¹ CP 280: Rooney Decl. at ¶ 3. *See also* CP 312: Declaration of Kenneth Mitchell, Motion Attachment E, at ¶ 6.

new “unloaded” fair market rate.¹² (Simple math demonstrates that the \$500,000 would essentially be amortized and paid between 2004 and 2009, by keeping the high rent in place, as the trial court noted. *See* Hearing Transcript at p. 25, ll. 5-11.) This modification was approved and Rooney proposed this scenario to Schwindt via Williams, her attorney.¹³

Williams asked Rooney if the Fourth Amendment should state that at the end of the then-current term (April 30, 2009), the Base Monthly Rent should be set either at the then-fair market value or \$11,040.00, which Williams represented to be the fair market rate as of January 1, 2004, plus any applicable CPI increases between 2004 and 2009.¹⁴ Rooney countered that a pre-determined sum certain stated in the Fourth Amendment (\$11,040, plus applicable CPI increases) would provide everyone

¹² CP 280: Rooney Decl. at ¶ 3.

¹³ *Id.*

¹⁴ CP 280: Rooney Decl. at ¶ 4.

with more certainty than having to later enter into new negotiations for an unknown, more subjective figure.¹⁵ (Williams did not dispute any of this in his declaration. [CP 136-141].)

Schwindt accepted. Therefore, the next iteration of the Fourth Amendment that *Williams* – the Landlord’s attorney – *prepared* shows quite clearly that (a) the \$500,000 lump sum payment/immediate rent reduction proposal was eliminated, in favor of it continuing to be amortized over five years by the high rent, and that (b) monthly rent would be “reduced” beginning on May 1, 2009.¹⁶ In fact, the correspondence from Williams to Rooney that enclosed the new draft so states: “Attached [is the] 4th Amendment . . . revising Section 3 to eliminate the lump sum payment and providing for the reduction of rent beginning on 5/1/09.”¹⁷

¹⁵ *Id.*; CP 312-313; Mitchell Decl. at ¶¶ 8-10.

¹⁶ CP 303: *see* strike-throughs and new language.

¹⁷ CP 280: Rooney Decl. at ¶ 5 and CP 301 (emphasis added).

Thus, Mr. Williams' own words reflect exactly the unambiguous meaning of the Fourth Amendment as written (and as understood by Respondents): on May 1, 2009, rent would go down to \$11,040. By contrast, they completely contradict the unsupported position now taken by Appellant BSC. (*See* CP 358-403: Complaint at ¶ 2.11.)

BSC disingenuously argues (Brief at pp. 15, 21) that the new rent rate was to be either \$11,040 or fair market rate, citing Williams' May 12, 2004 letter (CP 140). However, the "or" was clearly eliminated in Williams' May 18 letter and accompanying draft. (CP 301-303.) Thus, there was no "mutual mistake."¹⁸

Moreover, Williams' May 12 letter relied on by BSC proves that the \$11,040 was in fact the fair market rate: "The rent payment of \$11,040 was computed as the fair market rental

¹⁸ Obviously, the \$500,000 was never paid in a lump sum in 2004. If Appellant's position was true, shouldn't the Landlord have noticed sometime between 2004 and 2009 and complained about an overdue one-half million dollars?

value as of January 1, 2004.” Thus, if the CPI adjustments between that date and May 2009 were added to that “computed [] fair market rental value,” then one would logically arrive at the FMV rent on May 1, 2009, just as provided for by the Fourth Amendment drafted by the Landlord’s attorney.

3. How the new calculation works under the Fourth Amendment.

It is undisputed that since the final version of the Fourth Amendment was entered into, the Tenant actually has continued to pay \$20,795.00 Base Monthly Rent through April 2009. Thereafter, as the clear language of the Fourth Amendment states, a “reduced Base Monthly Rent [would be paid] commencing on May 1, 2009.”

Section 3 of the Fourth Amendment expressly mandates that the specific amount of the new *initial* “reduced Base Monthly Rent” would easily be calculated on May 1, 2009 as follows, using the unambiguous language therein. First, one

starts with the new Base Monthly Rent of “\$11,040.00.”

Second, that figure is adjusted by applying the Consumer Price Index formula contained in Section 4.3 of the Fourth Amendment: by using a “beginning date for the adjustment [of] January 1, 2004” and then applying any positive CPI adjustments between January 1, 2004 and May 1, 2009. By this calculation, the “amount so determined shall constitute the “reduced Base Monthly Rent commencing on May 1, 2009.””¹⁹

The unsupported story cobbled together by BSC on summary judgment (the Tenant allegedly still owes \$500,000 but also receives no rent reduction) failed to give meaning to the clear and unambiguous wording of the first and second sentences of Section 3, which expressly require the reduction of the initial Base Monthly Rent effective May 1, 2009. Indeed, BSC’s flawed “interpretation” – that rent will never be lower than \$20,795, even if the seller financing was fully paid – flies

¹⁹ CP 280-281: Rooney Decl. at ¶¶ 7-9 and CP 303 (emphasis added).

in the face of the Landlord's own expressly-manifested intention at the time of contracting: "Attached [is the] 4th Amendment . . . revising Section 3 to *eliminate the lump sum payment* and providing for the reduction of rent beginning on 5/1/09." If rent could never be lower than \$20,795, how could there ever be a "reduction of rent"?

C. CPI INCREASES WERE "FROZEN" FROM JANUARY 1, 2005, THROUGH JANUARY 1, 2009.

The final effects of the Fourth Amendment expressly provided for by the parties at the time of contracting were that Base Monthly Rent was fixed as of its execution date and future CPI increases were "frozen" from January 1, 2005 through January 1, 2009. This is because Lease Section 4.3 – which dealt with CPI increases – was amended: "Section 4.3 of the Lease is hereby amended *in its entirety* to read as follows: *Commencing January 2009...*monthly rent exclusive of

additional rent shall be adjusted pursuant to the change in the Consumer Price Index. . .”²⁰

The parties did provide, in the amended Section 4.3, that the CPI adjustment could not lower the Base Monthly Rent below \$11,040.00, however, should the economy somehow result in a negative CPI between 2004 and 2009: “In no event will the new Base Monthly Rent be less than the Base Monthly Rent in effect immediately prior to the adjustment date.” That “adjustment date” was to be May 1, 2009, as noted in the third sentence of Section 3: “This amount [\$11,040] shall then be adjusted in accordance with Section 4.3 below. . . .”

Again, the language of the Fourth Amendment is clear and unambiguous, and it was properly determined by the trial

²⁰ Emphasis added. The strike-throughs in Appellant’s Brief, at pp. 13-14 confuse the facts as shown in the actual documents themselves. The Base Monthly Rent as of May 24, 2004 remained static thereafter (other non-Base charges were added [“additional rent”] for other non-CPI expenses, etc., pursuant to the Lease) until May 1, 2009, at which time the parties would look to the CPI during the period of January 1, 2004 through January 1, 2009 and then make any “backwards looking” adjustment per Section 3.

court as a matter of law.²¹ Therefore, its grant of summary judgment is supported by the record and well-settled contract law.

V. ARGUMENT

In the court below, as here, Appellant threw in as many immaterial “issues” as possible in its briefing, hoping that such a laundry list of irrelevance might cause the trial court to hesitate to grant summary judgment. However, when examined, not one “issue” was remotely a “genuine issue of material fact,” as required by CR 56(c), as the trial court correctly recognized.

First, the attorneys for the Landlord and Tenant worked directly with each other, negotiating terms to be included in the Fourth Amendment.²² Thus, Respondents (the Tenant) were entitled to rely on Williams’ communications as Schwindt’s

²¹ See transcript.

²² See CP 279-309: Rooney Decl. (Motion Attach. D) and its Exhibits.

agent with authority to bind her as Landlord to the finalized Fourth Amendment. On the other hand, BSC was a stranger to the deal (which renders its witnesses' later subjective beliefs irrelevant).

Second, while Schwindt (the former Landlord) may have (innocently or otherwise) represented to Appellant BSC (the new Landlord) that the Fourth Amendment meant something other than what the unambiguous terms therein clearly state, as she and Williams seemed to imply in their declarations, that is not a "fact" in any way material to the analysis of the trial court or this Court. That is something solely between Schwindt and BSC (and their respective attorneys) to sort out later in some other lawsuit.

Moreover, BSC was never involved in the negotiations for the Fourth Amendment and Respondents never made any representation to it about the Lease terms. Consequently, BSC's amorphous and unsupported arguments along the lines of "unclean hands," fraud, or inequitable conduct are as wildly

misguided as they are contradicted by the undisputed facts in the record.

Third, the concept of “prepayment” as alleged below and here (Brief at p. 16) is a red herring. Nowhere did Respondents ever allege that they made any prepayments of rent, either in a lump sum or in installments.²³ To the contrary, ARC has – since the Fourth Amendment was negotiated and signed – continued to pay the Lease’s high monthly rent from 2004 to April 2009, thus eliminating the amortized seller financing, in order to obtain a guaranteed “reduction of rent beginning on 5/1/09.”²⁴

A. APPELLANT CANNOT SATISFY THE STANDARD OF REVIEW

While this Court reviews summary judgment motions *de novo*, it still engages in the same inquiry as the trial court.

²³ Prepayment of rent is a term of art in landlord-tenant law, as Appellant knows: it is an early payment of all or a portion of a debt in a lump sum, which landlords usually like to avoid since they are counting on a reliable income stream over time. *See*, in fact, the estoppel certificate filed by Appellant: no prepayment more than one month in advance. Incrementally paying the same high monthly rent each month for four years is not a “prepayment.”

²⁴ CP 301.

See, e.g., Jones v. Allstate Ins. Co. 146 Wn.2d 291, 300 (2002).

Therefore, the Court should affirm the trial court's grant of Respondents' summary judgment motion if it is supported by *any* grounds in the record. *LaMon v. Butler*, 112 Wn.2d 193, 200-01 (1989). *See also Mountain Park Homeowners Ass'n v. Tydings*, 125 Wn.2d 337, 344 (1994) (appellate courts will affirm summary judgment on any grounds supported by the record and the pleadings); *Piper v. Dep't of Labor & Indus.*, 120 Wn. App. 886, 890 (2004) (appellate courts may affirm a trial court on any theory supported by the record). This is true even if the critical facts for affirmance were not explicitly considered by the trial court (although they were here). *See, e.g., State v. Norlin*, 134 Wn.2d 570, 582 (1998).

Moreover "[a] trial court judgment may be affirmed on any grounds supported by the pleadings and the proof, even if the trial court's specific reason for granting the judgment was in error." *Niven v. E.J. Bartells Co.*, 97 Wn. App. 507, 513

(1999), citing *Tropiano v. City of Tacoma*, 105 Wn.2d 873, 876-877 (1986). However, there was no error here, as the record is replete with the requisite undisputed facts to support the order and the language of the Fourth Amendment is unambiguous. On the other hand, not one of Appellant BSC's arguments is shored up by the record or the Fourth Amendment.

B. RESPONDENTS MET THE SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate where the pleadings and affidavits establish that there is no genuine issue of material fact, such that the “moving party is entitled to judgment as a matter of law.” *Jones*, 146 Wn.2d at 300-01. While it is true that all facts, and inferences from the facts, are considered in the light most favorable to the non-moving party (*id.* at 300), it is also true that this is limited to admissible evidence and material facts.

“A material fact is one upon which the outcome of the litigation depends.” *Barrie v. Hosts of Am., Inc.*, 94 Wn.2d 640, 642 (1980). And where, as here, reasonable minds could reach but one conclusion from the material facts contained in the Fourth Amendment, those “fact issues may be decided as a matter of law. . . .” *See Sherman v. State*, 128 Wn.2d 164, 184 (1995).

As the trial court noted, this standard was met by Respondents’ Motion.²⁵

C. THE TRIAL COURT PROPERLY APPLIED THE CORRECT STANDARD FOR CONTRACT INTERPRETATION

“It is the duty of the court to declare the meaning of what is written, and not what [Appellant wishes had been] intended to be written.” *U.S. Life Credit Ins. Co. v. Williams*, 129 Wn.2d

²⁵ Hearing Transcript at pp. 31-32.

565, 571 (1996) (emphasis added). That is exactly what the trial court did.²⁶

“In determining the mutual intention of contracting parties, the unexpressed, subjective intentions of the parties are irrelevant; the mutual assent of the parties must be gleaned from their outward manifestations.” *Saluteen-Maschersky v. Countrywide*, 105 Wn. App. 846, 854 (2001). Additionally, one party’s unexpressed beliefs are meaningless when attempting to ascertain the mutual intentions of both contracting parties. *See, e.g., Diamond B Constructors, Inc. v. Granite Falls School District*, 117 Wn. App. 157, 161-62 (2003).

“Mutual intent may be established directly or by inference—but any inference must be based exclusively on the parties’ objective manifestations.” *Id.* Indeed, the contemporaneous correspondence and drafts of the former Landlord’s own attorney prove that the parties’ intent at the

²⁶ *Id.*

time is consistent with Respondents' position: eliminate the lump sum payment proposal and instead reduce the rent in May 2009 when the amortized seller financing had been paid off.

Moreover, the issue was properly decided on summary judgment, as contract interpretation is always for the court to decide, as a matter of law, without the need for an expensive trial. *See, e.g., Kelly v. Aetna*, 100 Wn.2d 401, 407 (1983) (“interpretations of contracts are questions of law”). Specifically, “[t]he courts must read a contract as the average person would read it and should not give a contract a strained or forced construction. Words should be given their ordinary meaning.” *McInturff v. Dairyland Ins. Co.*, 56 Wn. App. 773, 775 (1990) (emphasis added), citing *E-Z Loader Trailers, Inc. v. Travelers Indem. Co.*, 106 Wn.2d 901, 907 (1986), and *Corbray v. Stevenson*, 98 Wn.2d 410, 415 (1982). As the Washington Supreme Court has held, “[t]he contract will be given a

practical and reasonable interpretation that fulfills the object and purpose of the contract rather than a strained or forced construction that leads to an absurd conclusion, or that renders the contract nonsensical or ineffective.” *Washington Pub. Util. Dist. Utilities Sys. v. Public Util. Dist. No. 1 of Clallam County*, 112 Wn.2d 1, 10-11 (1989).

Here, to accept Plaintiff’s “interpretation” – if indeed the Court could rationally choose to accept that there is a real issue of interpretation of the unambiguous language in the contemporaneous correspondence and the Fourth Amendment itself – would require “a strained or forced construction that leads to an absurd conclusion, [which] renders the [Amendment] nonsensical or ineffective.” *Id.* (emphasis added). Indeed, Plaintiff’s position that \$500,000 is still owing and the Base Monthly Rent after May 1, 2009 can never be lower than \$20,795 (Complaint [CP 358-403] at ¶ 2.11) is defeated by the express language of the Landlord’s attorney – “eliminate the

lump sum payment” – and the final version of the Fourth Amendment: “reduced Base Monthly Rent commencing on May 1, 2009.” Its position is, quite simply, unreasonable.

D. THERE WERE NO DISPUTED FACTS AND THERE WAS NO MUTUAL MISTAKE

In Washington, there is no mutual mistake unless the party asserting it proves by clear, cogent, and convincing evidence – in order to avoid the parol evidence rule – that both parties were mistaken. *See In re Marriage of Schweitzer*, 132 Wn.2d 318, 328 (1997). Moreover, “[(1) t]he mistake must relate to a basic assumption on which both parties relied when making the contract[(2)] a party may invoke the mistake doctrine only if the party did not bear the risk of mistake[(3) a] party with constructive knowledge of the circumstances giving rise to the alleged mistake does not hold a belief not in accord with the facts.” *Dexnaxas v. Sandstone Court*, 148 Wn.2d 654, 668 (2003) (emphasis added and citations omitted;

approving summary judgment dismissal of mutual mistake claim). Here, Appellant BSC cannot prove any of the three (conjunctive) elements, and the failure to prove any one is fatal to its claim.

First, only BSC (a stranger to the contract and its negotiations) is (allegedly) under an (unreasonable) assumption that \$500,000 was to be paid back in 2004. But it obviously was not supposed to be paid, according to the Landlord's own attorney and the contract itself. Additionally, at the time of contracting, the Landlord's attorney represented to Respondents that he understood the Fourth Amendment clearly states that the rent is to be reduced "beginning on 5/1/09."

Second, the Landlord obviously bore the risk of mistake, in that the Landlord's attorney drafted the contract that eliminated the proposed payment and reduced the rent in 2009, admitted in his correspondence that the assumptions now raised were not to be included in the contract, and gave the Landlord

the advice to sign it. Besides, any reasonable landlord would have complained five years ago about a missing one-half million dollar payment, if BSC's story were true.

Third, the plain unambiguous language of the contract – as well as Williams' own correspondence (“Since we have discussed and agreed upon the revisions. . . .”)²⁷ – gave constructive notice to the Landlord that the “mistake” – if there ever really was one – was flatly contradicted by the contract itself: the words “reduced Base Monthly Rent commencing on May 1, 2009” could not be clearer. Moreover, it is obvious from comparing the May 12 letter and draft (CP 302-305) against the May 18 letter and final draft (CP 301-303) that the parties negotiated away both the \$500,000 payment and the “or fair market rate.” Accordingly, “mutual mistake” was not a ground for defeating Respondents' well-taken and fully-supported Motion.

²⁷ CP 301.

E. “UNILATERAL MISTAKE” WAS NEVER RAISED BELOW

Appellant BSC never briefed the issue of “unilateral mistake” below, as is made evident from the lack of citations to the record. Moreover, BSC’s Appellate Brief cites no law for its novel proposition that a stranger to the contract negotiations (BSC was not involved in the discussions between Schwindt’s attorney and Respondents’ attorney) can later allege that its failure to understand the signed contract that it later purchased from the drafting party can affect an original party to the Contract. This lack of case law is not surprising, given the absurdity of the position, and “[w]here no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that [BSC’s] counsel, after diligent search, has found none.” *McCormick v. Dunn & Black*, 140 Wn. App. 873, 886 (2007) (citation and quotations omitted).

“An appellate court may refuse to review any claim of error that was not raised in the trial court . . . RAP 2.5(a)(3).” *Marriage of Olson*, 69 Wn. App. 621, 625 (1993).²⁸ This Court should decline to do so here, especially since Appellant’s new “unilateral mistake” argument also makes no factual or legal sense, given the Landlord’s attorney’s admission that “4th Amendment . . . revis[ed] Section 3 to *eliminate the lump sum payment* and providing for the *reduction of rent beginning on 5/1/09*.”²⁹

F. THERE WERE NO DISPUTED FACTS AS TO THE MEANING OF SECTION 4.3

BSC now seems to be arguing that the Fourth Amendment – drafted by the Landlord – should be construed

²⁸ See also *State v. Houvener*, 145 Wn. App. 408, 420 (2008): “A party may not generally raise a new argument on appeal that the party did not present to the trial court. *In re Det. of Ambers*, 160 Wn.2d 543, 557 n. 6, 158 P.3d 1144 (2007). While the reviewing court has the discretion to address the issue, we are not bound to do so and usually refuse. *Id.*” (Internal quotation omitted; emphasis added.)

²⁹ CP 301.

against the Tenant.³⁰ However, it cannot cite any authority for this, because there is none.³¹ See, e.g., *Lynette v. Nat'l Union Fire Ins. Co.*, 123 Wn.2d 678, 690 (1994) (ambiguities in a contract are construed against the drafter).

In opposing summary judgment below, Appellant crafted a declaration for Schwindt,³² to the effect that despite her attorney's clear words and the Fourth Amendment's unambiguous language, she now believes that the Fourth Amendment would not reduce Base Monthly Rent in May 2009, even though her attorney obviously knew it did and Section 3 so expressly mandates. Regardless, her declaration did not suffice, as the trial court correctly held, because she never spoke with or wrote to Respondents on that subject.³³

³⁰ Brief at 26.

³¹ *McCormick*, 140 Wn. App. at 886.

³² CP 187-189: Declaration of Schwindt.

³³ Likewise, John Woodley (CP 217), Jeff Lewison (CP 190), Steve Bordner (CP 118), and Don Lewison (CP 142) did not arrive on the scene until 2007, long after the Fourth Amendment was signed, and thus their "understanding" of the Lease is irrelevant. Further, they would not be allowed to testify at trial due to BSC's failure to list them as

“Unexpressed impressions are meaningless when attempting to ascertain the parties’ mutual intentions.” *Lynette v. Nat’l Union Fire Ins. Co.*, 123 Wn.2d 678, 684 (1994) (emphasis added), quoting *Dwellely v. Chesterfield*, 88 Wn.2d 331, 335 (1977). “[W]here language used is unambiguous, an ambiguity will not be read into the contract. The court must ascertain the intention of the parties and strive to give effect to that intention and the construction must be reasonable so as to carry out, rather than to defeat, the purpose for which it was given.” *Felton v. Menan Starch Co.*, 66 Wn.2d 792, 797 (1965) (citations omitted). That happened here.

As the Washington Supreme Court held in *Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250, 254 (1973):

Determination of the intent of the contracting parties is to be accomplished by viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract,

witnesses by the disclosure date. (CP 102.) See *Physicians Ins. Exch. v. Fisons Corp.*, 122 Wn.2d 299, 355-56 (1993). Accordingly, their declarations are doubly irrelevant.

the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.”³⁴

“[A]dmissible extrinsic evidence does *not* include [e]vidence of a party’s unilateral or subjective intent as to the meaning of a contract word or term.” *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695-697 (1999). *See also DePhillips v. Zolt Const. Co., Inc.*, 136 Wn.2d 26, 32-33 (1998) (same); *Lehrer v. DSHS*, 101 Wn. App. 509, 512-16 (2000) (unambiguous language is not modified by the subjective understanding of one party; summary judgment granted). *See also Mortenson Co. v. Timberline Software*, 140 Wn.2d 568, 579-80 (2000) (preclusive effect of integration clause). As a result, the court below correctly decided that there was no reason for a trial in this case.

BSC further argues (Brief at 26-28) that even though the Landlord’s attorney expressly said that he had revised the

³⁴ Citing *Jacoby v. Grays Harbor Chair & Mfg. Co.*, 77 Wn.2d 911 (1970); *Ramsey v. Sedlar*, 75 Wn.2d 901 (1969); *Schauerman v. Haag*, 68 Wn.2d 868 (1966); *Dickson v. Hausman*, 68 Wn.2d 368 (1966). (Emphasis added.)

“4th Amendment . . . Section 3 to **eliminate** the [\$500,000] lump sum payment,” the \$500,00 should still be paid. This is ostensibly because it has now seen the May 12 correspondence from the initial negotiations that referenced the later-eliminated payment and it might be nice to have that money because Appellant never really examined the Lease in detail and thus apparently made a bad deal with Schwindt. But that is neither a material fact nor a legal reason for an appeal of an unambiguous contract.

G. THE TRIAL COURT PROPERLY AWARDED ATTORNEYS’ FEES TO RESPONDENTS, AS SHOULD THIS COURT

Section 10 of the 1999 Lease provides that “[i]n the event of any litigation between the parties hereto arising out of this Lease, or the Premises, the prevailing party therein shall be allowed all reasonable attorney’s fees expended or incurred in

such litigation to be recovered as part of the costs therein.”³⁵

Under the facts here, they were properly awarded to Respondents by the trial court, and this Court should award Respondents their fees and costs on appeal.

VI. CONCLUSION

For all of the reasons stated above, the appeal should be denied and the trial court’s judgment upheld.

DATED this 13th day of July, 2009.

MILLER NASH LLP


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Attorneys for Respondents
Ambulatory Resource Centres of
Washington, Inc.; ARC of
Bellingham, LP; and Symbion, Inc.

³⁵ CP 315-323: Motion Attachment F.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing
RESPONDENTS' BRIEF was served on counsel for Appellant
by Hand Delivery at the address and on the date shown below:

Bruce Babbitt
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999 Third Avenue, Suite 1900
Seattle, Washington 98104

DATED this 14th day of July, 2009.



Beatrice Lange

SEADOCS:398931.1

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