DIVISION II COURT OF APPEALS CAUSE NO. 56396-7-II

SUPREME COURT CAUSE NO. 101610-7

SUPREME COURT
OF THE STATE OF WASHINGTON

YAN HONG ZENG

Respondent,

V.

CASIMIR SHELTON LLC

Appellant.

APPELLANT'SPETITON FOR REVIEW PURSUANT TO RAP 13.4

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I. IDENTITY OF PETITIONER AND INTRODUCTION

Casimir Shelton LLC (hereafter "Casimir") is the Petitioner and was the Appellant below. Casimir is the owner of a commercial property located in Shelton, Washington (the "Property"). The Property was leased to CM1, LLC (the "Tenant") which operated a licensed marijuana grow facility in the leasehold. The Lease contained a provision which required Casimir to be escorted by the Tenant in any site visit.

The provision was specially negotiated to protect the Tenant's marijuana grow license by ensuring that cannabis product would not be diverted, the specific purpose of these regulations. Both Casimir and the Tenant interpreted the Lease provision to allow the Tenant to require that Tenant's principal, Mr. Cheung, act as escort in any site visit after the Tenant received its grow license. The undisputed testimony was that (1) Mr. Cheung did not trust his employees to comply and, (2) once the grow license had been issued, Mr. Cheung was the sole escort selected by the Tenant.

The Respondent is a buyer of the Property under a Purchase and Sale Agreement. The appeal was taken from an Order from the Trial Court under CR 56 specifically enforcing the PSA.

The PSA contained a 30 feasibility review period. Respondent waited until near the end of the feasibility review period to request access. The Inspection right in the PSA the was subordinate to the rights of the Tenant, as to the Tenant's "security."

The Respondent requested access to conduct an inspection shortly

before the expiration of the feasibility period. Mr. Cheung was unavailable until after the expiration of the feasibility period. Respondent was unable to conduct an inspection before the expiration of the feasibility period. The Respondent asserted, and the Trial Court agreed, that the Lease did not allow the Tenant to specify that Mr. Cheung be the sole escort and ordered specific performance of the PSA.

II. THE COURT OF APPEALS DECISION

This Appeal is taken from the Opinion of Division II of the Court of Appeals attached hereto as Appendix 1 and, the denial of a Motion for Reconsideration after acceptance of reconsideration filed 12/12/22 attached hereto as Appendix 2.

The Court of Appeals framed the issues as follows:

> The issue here is whether CM1 had the "right" under the lease to (1) insist that Cheung be the escort for Zeng's property inspection even though it would delay the inspection until after the feasibility contingency expired, and/or (2) allow the inspection only at a time that was more than four days after Casimir's request. If CM1 had one of these rights, Casimir's hands really were tied when CM1 declined to provide access before the feasibility deadline because Casimir's obligation under the PSA to provide entry was subject to CM1's "rights."

Zeng v. Casimir-Shelton, LLC, No. 56396-7-II, 2022 WL 10248440, at *4. In the view of the Court of Appeals, the dispositive issue was the Tenant's rights under the Lease.

Contrary to the construction of the Lease by both of the parties to the Lease the Court of Appeals construed the Lease, at the request of a non-party to the Lease – the Respondent, to not allow the Tenant to limit the

escort to Mr. Cheung:

> Therefore, instead of taking the position that its "hands were tied" by CM1's refusal to provide entry until 11 days later, Casimir had an obligation under the PSA to insist under the terms of the lease that CM1 allow entry even though Cheung was unavailable.

At 9.

> There is no indication that CM1 could not have arranged for access during the feasibility period if Casimir had enforced the lease provision that another CM1 employee or agent could serve as the escort.

At 11. The Court of Appeals conferred the benefit of its interpretation of the Lease on a non-party, the Respondent. The Court of Appeals however offers no explanation as to how this was supposed to be accomplished in the face of: "CM1's refusal to provide entry until 11 days" after the request for entry was first made by the Respondent and long after expiration of the feasibility period.

The Court's ultimate decision:

> We conclude that although CM1 preferred to have Cheung serve as the escort, it did not have a *contractual right* to insist that only Cheung could serve as the escort when that preference interfered with Casimir's contractual right to enter the property.

Zeng v. Casimir-Shelton, LLC, No. 56396-7-II, 2022 WL 10248440, at *5.

As the Court noted at 11, CM1 – the Tenant, **refused to provide access** until after the expiration of the feasibility review period. The Court concluded the refusal of the Tenant to permit access to the Leasehold until was a default under the Lease by the Tenant. The Court of Appeals was construed the Lease at the request of a non-party to the Lease.

The only mechanism for enforcement of a non-monetary default in the Lease is a provision requiring a 60 day notice of default. Without compliance by the tenant, the only option available to Casimir would be to trespass.

The Court of Appeals relied on an interpretation of the Lease neither party to the Lease agreed with. Likewise, the interpretation of the parties was fully supported by undisputed extrinsic evidence. The Court instead adopted an interpretation of the Lease by the Respondent, a total stranger to the Lease and Lease transaction.

But, the Court did not find the Petitioner breached the Lease. It held the refusal to provide access would be a breach by the Tenant. The decision of the Court of Appeals essentially enforced the Lease against the Tenant, a non-party to this proceeding, at the request of a non- party to the Lease.

There is no question here that the enforceability of the Lease was the basis for decision:

> There is no indication that CM1 could not have arranged for access during the feasibility period ***if Casimir had enforced the lease provision that another CM1 employee or agent could serve as the escort.***

At 11 (emphasis added).

III. ISSUES PRESENTED FOR REVIEW

Issues No. 1:

Can a Court interpret a contract and declare conduct a default on behalf of a non-party, non-third party beneficiary?

Issue No. 2:

Can a Court interpret a contract inconsistent with the interpretation of the contract on which the parties to the contract agree?

Issue No. 3

Does this matter involve issues of substantial public interest?

III STATEMENT OF THE CASE

The case involved two separate contracts, a Purchase and Sale Agreement and a Lease. The Petitioner was the seller under the Purchase and Sale Agreement. Respondent is the buyer. The property at issue was leased to a tenant, the holder of a cannabis production license. The Petitioner is the Lessor. The Respondent is neither a party to nor a third party beneficiary of the Lease.

The Respondent requested access for an inspection under the PSA. The provision of the PSA governing inspection is at ¶ 23 (b):

> Seller shall permit Buyer and its agents, at Buyer's sole expense and risk, to enter the Property at reasonable times *subject to the rights of and after legal notice to tenants,* to conduct inspections … *Buyer shall schedule any entry into the property with Seller in advance and shall comply with Seller's reasonable requirements including those relating to the* ***security,*** *confidentiality and disruption of Seller's tenants.*

CP 39. Emphasis added.

The Tenant is in an industry which is highly regulated in the public interest. In focusing on just the provisions in the regulations relating to visitor access, the Court overlooked both the purpose of those regulations and the consequences to the Tenant if the regulations were not observed.

These have a direct bearing on whether the interpretation of the Lease by the parties to the Lease was reasonable.

The security regulations in WAC 314-55-083 are comprehensive and go way beyond just requiring every visit and visitor be documented and escorted. The cannabis is tracked and documented literally from seed to end-user:

> WAC 314-55-083(4) requires that licensees track the movement of marijuana from the time it is grown until the time it is sold at retail.

Dank's Wonder Emporium, LLC v. Washington State Liquor & Cannabis Bd., 22 Wash. App. 2d 1020 (2022). This is a Division II case.

These regulations exist for specific purposes: "To prevent diversion and to promote public safety, marijuana licensees must track marijuana from seed to sale." *Sunshine Tiki Hut, LLC v. Washington State Liquor & Cannabis Bd.*, No. 55380-5-II, 2022 WL 3043209, at *7 (Wash. Ct. App. Aug. 2, 2022). Again, this Is Division II.[1] Cannabis is a federally illegal substance for which there is still an active black market. Any product passing outside the system enters the black market and diverts tax revenue.

The regulations relating to visitor access are clearly intended to "prevent diversion and protect the public." They are part of a comprehensive plan governing every aspect of the cannabis industry. Failure to comply with the regulations is not just a licensing violation, it is a potentially criminal act. *U4IK Gardens, LLP v. State*, 18 Wash. App. 2d

[1] The decision was authored by Justice Maxa, also the author of the opinion here.

1029, review denied sub nom. *U4IK Gardens LLP v. State Liquor Control Bd.*, 198 Wash. 2d 1028, 498 P.3d 960 (2021)

> Violations of chapter 69.50 RCW trigger the Board's authority to undertake seizure and forfeiture actions. RCW 69.50.505. RCW 69.50.505(2)(c) authorizes the Board to seize property *without process* if "[a] board inspector or law enforcement officer has probable cause to believe that the property is directly or indirectly dangerous to health or safety." (Reviser's note omitted.) In the event of a seizure under RCW 69.50.505(2), "proceedings for forfeiture shall be deemed commenced by the seizure." RCW 69.50.505(3). The statute then provides for a forfeiture procedure under which a party can obtain a hearing. RCW 69.50.505(3)-(5).

Id. Again, Division II.

> The operative term of the Lease provides:
>
> Landlord may not enter premises without notice ***and escort*** by the Tenant or their employee or agent at any time.
>
> All entries require a signature in the visitor's log and ID badge to be worn at all times as required in WAC 314-55 *et. seq.*

(¶ 12.1 at CP 31) Emphasis added. Mr. Larry Cheung, the tenant's principal, testified by Declaration:

> I was personally involved in the negotiation of the Lease. The provision of the Lease relating to access by the Landlord - § 12.1 was part of the Lease negotiations. The provision vests control over when the Leasehold can be accessed in the hands of the tenant to ensure that requirements of WAC 314-55 would be met once the LLC obtained its grow license.

CP 273. Mr. Chueng goes on:

> After the license was issued, the LLC required that I be present during any site visit under § 12.1 of the Lease. I was present during all of the site visits by the Owner's broker during the effort to sell the property by the Owner, including the site visit by the Buyer/Plaintiff. For a variety of reasons,

> I have not and would not authorize entry into the leasehold without my presence.

CP 273-274.

This Court noted in its opinion that:

> Regarding CM1's insistence on having Cheung serve as the escort for any entry, Samec stated in a declaration: "My understanding is that the owner is concerned about making sure that the access procedure in the WAC is fully complied with and does not want to leave compliance in the hands of his employees. In addition, the owner is concerned about theft." CP at 261.

Zeng v. Casimir-Shelton, LLC, No. 56396-7-II, 2022 WL 10248440, at *3 (Wash. Ct. App. Oct. 18, 2022). This Court also noted: "Casimir's broker toured the property at least six times after the cannabis license was issued, and Cheung insisted on being present for every tour. Zeng v. Casimir-Shelton, LLC, No. 56396-7-II, 2022 WL 10248440, at *1 (Wash. Ct. App. Oct. 18, 2022). The undisputed course of dealing after the Tenant obtained its license was that access would not be available without Mr. Cheung acting as the escort required under the Lease.

In its opinion, this Court stated:

> And there was evidence from Cheung that CM1 had concerns about access to the property because of compliance with cannabis regulations.

Zeng v. Casimir-Shelton, LLC, No. 56396-7-II, 2022 WL 10248440, at *6 (Wash. Ct. App. Oct. 18, 2022). The opinion itself states: "Cheung negotiated for the inclusion of this provision to ensure that the requirements of WAC 314-55, the regulations regarding cannabis businesses, would be met once CM1 obtained its cannabis grow license." *Zeng v. Casimir-*

Shelton, LLC, No. 56396-7-II, 2022 WL 10248440, at *1 (Wash. Ct. App. Oct. 18, 2022). The testimony of Mr. Chueng was:

> The provision vests control over when the Leasehold can be accessed in the hands of the tenant to ensure that requirements of WAC 314-55 would be met once the LLC obtained its grow license.

On the basis of undisputed testimony, the Tenant specifically negotiated provisions in the Lease which would allow the Tenant to control access to the premises by the Landlord specifically to forestall a potential violation of the licensing statute. The undisputed testimony was that the Tenant designated a specific individual to provide access after the license was acquired because the Tenant did not trust its employees to ensure compliance to avoid the severe consequences of non-compliance.

This was the body of extrinsic evidence available to construe the Lease. It was wholly undisputed because, Respondent was neither a party to the Lease, involved in the negotiation of the Lease or in its course of performance after the Tenant took occupancy of the leasehold. Respondent was a complete stranger to the Lease in every respect.

This Court framed the issues as follows:

> The issue here is whether CM1 had the "right" under the lease to (1) insist that Cheung be the escort for Zeng's property inspection even though it would delay the inspection until after the feasibility contingency expired, and/or (2) allow the inspection only at a time that was more than four days after Casimir's request. If CM1 had one of these rights, Casimir's hands really were tied when CM1 declined to provide access before the feasibility deadline because Casimir's obligation under the PSA to provide entry was subject to CM1's "rights."

Zeng v. Casimir-Shelton, LLC, No. 56396-7-II, 2022 WL 10248440, at *4 (Wash. Ct. App. Oct. 18, 2022). The Court's ultimate decision:

> We conclude that although CM1 preferred to have Cheung serve as the escort, it did not have a *contractual right* to insist that only Cheung could serve as the escort when that preference interfered with Casimir's contractual right to enter the property.

Zeng v. Casimir-Shelton, LLC, No. 56396-7-II, 2022 WL 10248440, at *5 (Wash. Ct. App. Oct. 18, 2022). The right that is at issue here is not a right belonging to the Respondent. The Respondent was neither a party to nor a third party beneficiary of the Lease. The Court could not conceivably answer its own question without conferring rights under the Lease on a non-party.

This Court stated: "Casimir should have insisted that CM1 allow entry during the feasibility period even though Cheung was unavailable." Zeng v. Casimir-Shelton, LLC, No. 56396-7-II, 2022 WL 10248440, at *7 (Wash. Ct. App. Oct. 18, 2022). The Court apparently gave no consideration as to exactly how Petitioner was supposed to gain access to the Leasehold in the face of the refusal of the Tenant to allow access except in the presence of Mr. Chueng. In the Court's view, the refusal to allow access was a tenant default of the access provisions in the Lease. However, that does not allow the Petitioner to exercise self- help or to breach the peace by entering the premises over the objection of the Tenant.

The Petitioner's remedy for a non-monetary default is specified in the Lease:

> 11.2.3 Failure to Perform. Tenant's failure to observe or perform any of the covenants, conditions or provisions of this Lease to be observed or performed by the Tenant, where such failure continues for a period of 60 days (except as otherwise provided in this Lease) after written notice thereof by Landlord to Tenant.

The only legal remedy available to the Petitioner would not have gotten the Respondent into the leasehold for an inspection before the Feasibility Review Period expired.

IV. APPLICABLE AUTHORITY AND DISCUSSION

1. Considerations Governing Acceptance of Review

Rap 13.4 provides:

> (b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

A. The decision is in conflict with multiple decisions of Courts at every level.

Issue No. 1 asks the Court to address whether a non-party can enforce or claim rights under a contract. In *Dekrypt Cap., LLC v. Uphold Ltd.,* 20 Wash. App. 2d 1043, 2022 WL 97233 (2022), albeit an unpublished opinion, Division I identified the controlling authority as follows:

> Several traditional principles of state law allow a contract to be enforced by or against nonparties. Arthur Andersen, 556 U.S. at 631, 129 S.Ct. 1896.

Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 129 S.Ct. 1896, 1902, 173 L.Ed.2d 832 (2009) identified the specific traditional principles of state law which allow a contract to be enforced by or against nonparties through assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, and waiver and estoppel.

None of these legal theories was asserted by the Respondent at any point in these proceedings. None of these legal theories was the basis for decision of the Court of Appeals. So, the conclusion of the Court of Appeals is in conflict with a decision of the US Supreme Court recognized as providing the controlling standard under Washington law.

In *Gervais v Hamilton,* Cause No. 55456-9-II, 2022 WL 4090342, authored by Justice Veljacic, a concurring Justice in this case, declined to enforce a fee provision in the Lease:

> It is well-settled that "a contractual attorney fee provision cannot authorize the recovery of fees from a nonparty." *4518 S. 256th, LLC v. Karen L. Gibbon, P.S.*, 195 Wn. App. 423, 447, 382 P.3d 1 (2016). Division One of this court has stated that "it 'would be both unfair and contrary to law' to enforce [an attorney fee] provision against the nonparty who was a 'stranger[ ]' to that agreement." *Id.* (quoting *Watkins v. Restorative Care Ctr., Inc.*, 66 Wn. App. 178, 195, 831 P.2d 1085 (1992)). "Similarly, because ***a contract does not confer benefits on nonparties***, it would also be contrary to law to award attorney fees to [a nonparty] based on [an agreement they were not a party to]." *Karen L. Gibbon, P.S.*, 195 Wn. App. at 448-49.

Gervais v. Hamilton, No. 55456-9-II, 2022 WL 4090342, at *5 (Wash. Ct. App. Sept. 7, 2022) (emphasis added). The opinion is relevant here because it identifies some of the prior decisional law on the subject.

The language about not conferring benefits on behalf of a third party in *Karen L. Gibbon, P.S.*, 195 Wn. App. at 448-49, first appeared in *Touchet Valley Grain Growers, Inc. v. Opp & Seibold Gen. Const., Inc.*, 119 Wash. 2d 334, 342–43, 831 P.2d 724, 728 (1992) ("Truss–T nonetheless seeks benefit of a contract to which it is not a party."). The *Touchet* Court declined to enforce a subrogation waiver on behalf of a non-party to the contract. See also, *Watkins v. Restorative Care Ctr., Inc.*, 66 Wash. App. 178, 195, 831 P.2d 1085, 1094 (1992), as amended on denial of reconsideration (June 29, 1992) ("It would be both unfair and contrary to law to enforce the attorney fees provision negotiated between the Pavloffs and RCC against the Watkins, who were strangers to the agreement.")

"***A contract does not confer benefits on a third party***" was the basis for decision in an unpublished opinion authored by Justice Veljasic.

> Similarly, because ***a contract does not confer benefits on nonparties,*** a court could not award attorney fees to Hamilton and Heritage Bank based on the lease agreement.

Gervais v. Hamilton, No. 55456-9-II, 2022 WL 4090342, at *5 (Wash. Ct. App. Sept. 7, 2022) (emphasis added). This is admittedly an unpublished opinion, but relevant because its author was also a concurring justice here.

The basis for decision by the Court of Appeals:

> We conclude that although CM1 preferred to have Cheung serve as the escort, it did not have a *contractual right* to insist that only Cheung could serve as the escort when that preference interfered with Casimir's contractual right to enter the property.

Zeng v. Casimir-Shelton, LLC, No. 56396-7-II, 2022 WL 10248440, at *5. The Court of Appeals was construing the Lease at the request of a non-party.

In concluding that the Tenant could not select Mr. Cheung as the escort, the Court of Appeals was enforcing the Lase on behalf of a non-party, conferring the benefit of its' interpretation of the Lease on a non-party. The decision cannot be reconciled with established law on the issue.

2. Issue No. 2: Can a Court interpret a contract inconsistent with the interpretation of the contract on which the parties to the contract agree?

Washington Court's have held:

> A contract provision is ambiguous if the provision's "meaning is uncertain or is subject to two or more reasonable interpretations. Id. However, "[a] contract provision is not ambiguous merely because the parties to the contract suggest opposing meanings." GMAC v. Everett Chevrolet, Inc., 179 Wn. App. 126, 135, 317 P.3d 1074 (2014).

Logic would suggest that the converse is equally true, that where the parties to a contract agree on the interpretation, the contract is unambiguous.

However, Petitioner has been unable to locate any Washington decisional law on the question of whether a contract whose interpretation is agreed on by the parties is ambiguous is apparently an issue of first impression in Washington.

The closest you get is the following:

> In construing a contract, the intention of the parties must control (Crofton v. Bargreen, Wash., 332 P.2d 1081), and the interpretation which the parties to a contract have placed on it will be given great, if not controlling, weight. Fancher v. Landreth, 51 Wash.2d 297, 317 P.2d 1066; 12 Am.Jur., Contracts, 787, § 249.

Kennedy v. Weyerhaeuser Timber Co., 54 Wash. 2d 766, 768, 344 P.2d 1025, 1026 (1959). Logically, if the parties agree on the interpretation of the contract, that interpretation should be controlling. Nevertheless, since discerning the intent of the parties is the primary objective of judicial interpretation of contracts, this issue is unquestionably a "significant issue of law."

The Court in *Prager's, Inc. v. Bullitt Co.*, 1 Wash. App. 575, 582, 463 P.2d 217, 221 (1969) stated:

> The practical application of the contract, when acted on by both parties, frequently provides an excellent means of understanding the manner in which the parties intended the ambiguous language or contract to be interpreted or construed.

This Court was looking to course of performance evidence specifically because the parties did not agree on the interpretation of the contract at issue. The Court's discussion of why course of performance evidence is useful is instructive:

> Language is often an unreliable instrument because words do not define themselves and clauses in contracts do not automatically apply themselves to performance. The meaning of words, terms and clauses consists of ideas induced in the minds of the contracting parties. Often, by the time the contract reaches the state of litigation, words, terms and clauses once thought to be clear have ceased to convey the same meaning to the parties. Thus, the process of interpretation of words and phrases and the construing of contracts must take place in light of the entire context of the transaction prior to litigation.

Id at 581-82.

There was no dispute between the actual parties to the Lease as to what was intended under the operative language in the Lease – it conferred

the authority on the Tenant to determine who would act as escort for the purpose of protecting the Tenant's grow license. Whatever the Court of Appeals thought the language should mean, it should never be able to supersede the common understanding of the parties.

Otherwise, the Court is just re-writing the contract:

> It is elementary law, universally accepted, that the courts do not have the power, under the guise of interpretation, to rewrite contracts which the parties have deliberately made for themselves. The expressions of the various courts on the subject are tersely stated in 12 Am.Jur. 749, Contracts, § 228, as follows: 'Interpretation of an agreement does not include its modification or the creation of a new or different one. A court is not at liberty to revise an agreement while professing to construe it. Nor does it have the right to make a contract for the parties—that is, a contract different from that actually entered into by them. Neither abstract justice nor the rule of liberal construction justifies the creation of a contract for the parties which they did not make themselves or the imposition upon one party to a contract of an obligation not assumed.

Chaffee v. Chaffee, 19 Wash. 2d 607, 625, 145 P.2d 244, 252 (1943).

But, this is exactly what the Trial Court and the Court of Appeals did. Both substituted their conception of what the Lease required for that interpretation on which the actual parties to Lease agreed and had consistently acted upon.

3. Issue No. 3: Does this matter involve issues of substantial public interest?

There are actually 2 components to this. First, there is the issue of the suggestion that Casimir insist on access by the Court of Appeals. But, the Court also noted that the Tenant was refusing to provide access. The Court of Appeals appears to suggest that Casimir engage in act which would

be ultimately futile in obtaining access. Was the Court suggesting that Casimir engage in a breach of the peace or trespass? Is that consistent with the public interest?

If the refusal of the Tenant was in fact a default under the Lease, as the Court of Appeals clearly concluded, Casimir's sole remedy was a 60 day notice of default. Unless, of course, the Court of Appeals was suggesting that Casimir should have engaged in self help. Once again, what the Court suggested Casimir do, invoke its remedies under the Lease. Would have been a futile act.

Second, the Court of Appeals stated:

> [T]here was evidence from Cheung that CM1 had concerns about access to the property because of compliance with cannabis regulations. The implication from these statements is that more preparation was required for entry into a cannabis production/processing facility than an ordinary business.

There are no "other" businesses subject to this kind of regulation. Which are unique to the cannabis industry, intended to prevent diversion of product. *Sunshine Tiki Hut, LLC v. Washington State Liquor & Cannabis Bd.*, No. 55380-5-II, 2022 WL 3043209, at *7 (Wash. Ct. App. Aug. 2, 2022). Again, this is a Division II opinion.[2] In characterizing as unreasonable the steps the tenant took to protect the public the Court of Appeals simply ignored its own prior decision about the significance of these regulations.

[2] The decision was authored by Justice Maxa, also the author of the Couret of Appeals opinion here.

V. CONCLUSION

RAP 13.4 sets forth a set of specific criteria governing acceptance of review of a Court of Appeals decision. The first is whether the decision is in conflict with a decision of the Supreme Court. The decision was to enforce a Lease against a party on behalf of a non-party.

The decision is in conflict with a US Supreme Court decision holding that the mechanisms for enforcing a contract on a non-party under state law are limited. *Arthur Andersen LLP v. Carlisle,* 556 U.S. 624, 129 S.Ct. 1896, 1902, 173 L.Ed.2d 832 (2009). That opinion was endorsed by the Court in *Dekrypt Cap., LLC v. Uphold Ltd.*, 20 Wash. App. 2d 1043, 2022 WL 97233 (2022). It is inconsistent with *Touchet Valley Grain Growers, Inc. v. Opp & Seibold Gen. Const., Inc.*, 119 Wash. 2d 334, 342–43, 831 P.2d 724, 728 (1992). The decision is in conflict with 2 Division I cases: *4518 S. 256th, LLC v. Karen L. Gibbon, P.S.*, 195 Wn. App. 423, 447, 382 P.3d 1 (2016). *Watkins v. Restorative Care Ctr., Inc.*, 66 Wn. App. 178, 195, 831 P.2d 1085 (1992)). The decision is in conflict with a recent unpublished opinion in Division II, citing to the Division I cases as controlling law.

Whether a contract whose meaning is agreed on by the parties is ambiguous is a question of first impression. This should be resolved by finding that where the parties agree on the meaning of contractual terms a

Court should not be allowed to replace that meaning with it's own interpretation.

The decision involves regulations which exist to protect the public interest. What steps a licensee is reasonably entitled to take to implement these regulations is a matter of public interest.

The undersigned certifies that the text of this Petition, not including certifications and Footers, contains 4920 words.

Dated this 25th day of April, 2022

Brain Law Firm PLLC

/s/ Paul E. Brain WSBA # 13438
Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2023, I caused to served on Respondent's Appellant's Reply brief pursuant to an email service agreement.

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct:

Dated this 8th day of January, 2023

/s/ Paul E. Brain

APPENDIX 1

Filed
Washington State
Court of Appeals
Division Two

October 18, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

YAN HONG ZENG, Respondent, v. CASIMIR-SHELTON, LLC, a Washington limited liability company, Appellant.	No. 56396-7-II UNPUBLISHED OPINION

MAXA, J. – Casimir-Shelton, LLC (Casimir) appeals the trial court's grant of summary judgment and order of specific performance of a purchase and sale agreement (PSA) in favor of Yan Hong Zeng (Zeng).

Casimir owned a building and leased it to CM1, LLC, which operated a cannabis business in the building. The lease expressly provided that any entry by Casimir onto the property required an escort by either the tenant, its employee, or its agent. Larry Cheung, one of CM1's principals, later insisted on being the only escort for any entry.

Zeng entered into a PSA with Casimir to buy the building. The PSA contained a feasibility contingency regarding all aspects of the property, including its physical condition. The PSA would terminate unless Zeng gave notice within 30 days that the contingency was satisfied. The PSA also stated that Casimir would permit Zeng to enter the property to conduct inspections, subject to the rights of the tenant.

Zeng requested an inspection of the building with less than five days left in the feasibility period. Casimir requested access from CM1, but Cheung informed Casimir that he would not be available to serve as the escort for an inspection until several days after the feasibility period expired because he was out of town. Casimir did not challenge Cheung's insistence that he be the only escort, and instead told Zeng that she would not be able to inspect the building during the feasibility period. Zeng did not waive the feasibility clause, so the PSA expired by its terms.

Zeng sued Casimir for specific performance of the PSA. The trial court granted Zeng's summary judgment in favor of Zeng and ordered specific performance of the PSA. The court also awarded Zeng her reasonable attorney fees under the PSA.

We hold that the trial court did not err in granting Zeng's summary judgment motion because the lease did not give CM1 the right to require that Cheung be the escort and that four days or less was a reasonable time to arrange for an inspection with a different escort. Accordingly, we affirm the trial court's order granting summary judgment and specific performance in favor of Zeng and the award of Zeng's attorney fees.

FACTS

Background

Casimir owned property in Shelton on which a cannabis production facility was located. In October 2019, Casimir entered into a lease agreement with CM1 regarding the property. The lease stated that CM1 would use the property for a cannabis producer/processor business. Paragraph 12.1 of the lease provided that the "[l]andlord may not enter premises without notice and escort by the Tenant or their employee or agent at any time." Clerk's Papers (CP) at 230. Cheung negotiated for the inclusion of this provision to ensure that the requirements of WAC 314-55, the regulations regarding cannabis businesses, would be met once CM1 obtained its

cannabis grow license. The lease did not state a time within which CM1 would be required to allow entry after a request.

The lease agreement did not specify a particular person who would be the escort for entry onto the property under paragraph 12.1. But once the grow license was issued, Cheung insisted that he be present during any site visits. Cheung would not authorize entry onto the premises without his presence. Casimir's broker toured the property at least six times after the cannabis license was issued, and Cheung insisted on being present for every tour.

In November 2020, Casimir entered into a PSA with Zeng to buy the property. Paragraph 23 of the PSA contained a feasibility contingency:

> Buyer's obligations under this Agreement are conditioned upon Buyer's satisfaction; in Buyer's sole discretion, concerning all aspects of the Property, including its physical condition. . . . This Agreement shall terminate and Buyer shall receive a refund of the earnest money unless Buyer gives notice that the Feasibility Contingency is satisfied to Seller before 5:00 PM on the Feasibility Contingency Date.

CP at 237. The feasibility contingency date was 30 days after mutual acceptance of the PSA. Zeng signed the PSA on November 3 and Casimir signed on November 11.[1]

Regarding access to the property, paragraph 23(b) of the PSA stated,

> Seller shall permit Buyer and its agents, at Buyer's sole expense and risk, to enter the Property at reasonable times *subject to the rights of and after legal notice to tenants*, to conduct inspections concerning the Property . . . . Buyer shall schedule any entry onto the Property with Seller in advance and shall comply with Seller's reasonable requirements including those relating to security, confidentiality, and disruption of Seller's tenants.

CP at 238 (emphasis added).

[1] The parties dispute as to when the PSA was mutually accepted. Casimir's broker stated that mutual acceptance was on November 11, and Zeng's broker stated that it was on November 15. However, Zeng signed and initialed the PSA on November 4 and Casimir initialed and signed on November 11, and there is no reference to November 15 in the PSA. Therefore, for summary judgment purposes the 30 day feasibility period expired on December 11.

On December 7, a few days before the 30 feasibility period expired, Zeng's broker Stanley Lam contacted Casimir's broker Faustine Samec about arranging an inspection of the property. At 11:22 PM that night, Lam texted Samec and requested an inspection on December 9. The next morning, Samec texted Cheung and requested access for Zeng to conduct an inspection. Cheung informed Samec that he was not available to provide access until December 19 because he was out of town.

Samec told Lam that the inspection could not take place because the tenant was out of town. Lam pointed out that under the lease, any CM1 employee could be the escort. Samec told Lam that Cheung insisted that he be there during any inspection, so her hands were tied. Samec stated that if she had known about the request for the inspection earlier she could have worked something out. Lam replied, "My buyer did not know the tenant needs a lot of time for inspection. Usually 24 or 48 hour." CP at 268.

Lam then asked about extending the feasibility period. Casimir indicated that it would not extend the feasibility period unless some of the earnest money would become nonrefundable or more earnest money was provided. The only other alternative was to waive the inspection. Casimir also informed Zeng that it had received an unsolicited all cash offer to purchase the property that Casimir intended to accept if Zeng did not waive the feasibility contingency.

Zeng did not agree to provide additional consideration to extend the feasibility period. The feasibility period expired without Zeng giving notice that the feasibility contingency had been satisfied. Therefore, the PSA terminated under the terms of paragraph 23.

Zeng filed a lawsuit against Casimir, seeking specific performance of the PSA. Casimir filed a summary judgment motion, and Zeng filed a cross-motion for summary judgment.

Regarding CM1's insistence on having Cheung serve as the escort for any entry, Samec stated in a declaration: "My understanding is that the owner is concerned about making sure that the access procedure in the WAC is fully complied with and does not want to leave compliance in the hands of his employees. In addition, the owner is concerned about theft." CP at 261.

Casimir submitted the declaration of Michael Sahlman, one of its principals, who stated,

> In most commercial leases, the tenant is obligated to provide access to the Landlord within a defined period of time after being given such notice as is required in the lease, typically 24 or 48 hours. That is not the case here. The tenant was a marijuana grow operation strictly regulated in Washington. These regulations limit access and the form of the Lease placed the timing of access in control of the tenant.

CP at 259. Casimir also submitted the declaration of Cheung, who stated that paragraph 12.1 of the lease "vests control over when the Leasehold can be accessed in the hands of the tenant to ensure that requirements of WAC 314-55 would be met once [CM1] obtained its grow license." CP at 273.

The trial court granted Zeng's motion for summary judgment and ordered specific performance of the PSA. The court found that the PSA "did not require the presence of the tenant's owner, or any other specific individual, in order for [Zeng's] inspection to take place" and that Zeng "made a timely request for access to the property in order to conduct an inspection." CP at 296. Therefore, Casimir's denial of access was not on a valid basis and was a breach of the PSA.

Casimir appeals the trial court's grant of summary judgment in favor of Zeng.

ANALYSIS

A. SUMMARY JUDGMENT STANDARD

We review a trial court's decision on a summary judgment motion de novo. *Lavington v. Hillier*, 22 Wn. App. 2d 134, 143, 510 P.3d 373 (2022). We view the evidence and apply all

reasonable inferences in the light most favorable to the nonmoving party. *Id.* Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.*; CR 56(c). There is a genuine issue of material fact only if reasonable minds could disagree on the conclusion of a factual issue. *Lavington*, 22 Wn. App. 2d at 143.

B. OBLIGATION TO PROVIDE ACCESS

Casimir argues that the trial court erred in granting summary judgment in favor of Zeng based on the court's finding that Casimir breached the PSA. We disagree.

1. Contract Provisions

Under paragraph 23(b) of the PSA, Casimir had a contractual obligation to permit Zeng to enter the property at reasonable times. However, that entry was expressly made "subject to the rights of . . . tenants." CP at 238.

The right of the tenant, CM1, regarding entry onto the property was stated in paragraph 12.1 of the lease: "Landlord may not enter premises without notice and escort by Tenant or their employee or agent at any time." CP at 230. The lease did not specify that only Cheung could serve as the escort. And the lease was silent regarding when CM1 was required to allow Casimir to enter the premises once Casimir requested entry.

The issue here is whether CM1 had the "right" under the lease to (1) insist that Cheung be the escort for Zeng's property inspection even though it would delay the inspection until after the feasibility contingency expired, and/or (2) allow the inspection only at a time that was more than four days after Casimir's request. If CM1 had one of these rights, Casimir's hands really were tied when CM1 declined to provide access before the feasibility deadline because Casimir's obligation under the PSA to provide entry was subject to CM1's "rights."

2. Contract Interpretation

The primary purpose of contract interpretation is to ascertain the intent of the parties at the time of the contract formation. *Viking Bank v. Firgrove Commons 3, LLC*, 183 Wn. App. 706, 712, 334 P.3d 116 (2014). Courts give words their ordinary meaning unless the entire agreement clearly demonstrates otherwise. *Id.* at 713. Under the context rule, we can examine the context surrounding a contract's execution, "including the consideration of extrinsic evidence to help understand the parties' intent." *Id.* We can use extrinsic evidence to help determine the meaning of specific terms and words, but not to demonstrate a party's intention outside the contract or to contradict or modify the written words. *Id.*

A contract provision is ambiguous if the provision's "meaning is uncertain or is subject to two or more reasonable interpretations. *Id.* However, "[a] contract provision is not ambiguous merely because the parties to the contract suggest opposing meanings." *GMAC v. Everett Chevrolet, Inc.*, 179 Wn. App. 126, 135, 317 P.3d 1074 (2014). And we will avoid reading an ambiguity into a contract when it is avoidable. *Id.*

Under the Uniform Commercial Code (UCC), a course of performance between the parties "may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement." RCW 62A.1-303(d). A "course of performance" is

> a sequence of conduct between the parties to a particular transaction that exists if:
>
> (1) The agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and
> (2) The other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection.

RCW 62A.1-303(a).

"[T]he express terms of an agreement and any applicable course of performance . . . must be construed whenever reasonable as consistent with each other." RCW 62A.1-303(e). "If such a construction is unreasonable: (1) Express terms prevail over course of performance." RCW 62A.1-303(e).

The UCC does not apply to real estate leases, which instead are governed by the common law. *Olmsted v. Mulder*, 72 Wn. App. 169, 177, 863 P.2d 1355 (1993). However, this court has applied the UCC's course of performance analysis by analogy to a contract governed by the common law. *Spradlin Rock Prods., Inc. v. Pub. Util. Dist. No. 1 of Grays Harbor County*, 164 Wn. App. 641, 658-59, 266 P.3d 229 (2011). As in *Spradlin Rock* Products, we also apply the UCC course of performance provisions by analogy to the interpretation of Casimir's and CM1's lease.

3. Right to Designate a Specific Escort

Casimir argues that paragraph 12.1 of the lease must be interpreted as giving CM1 the right to designate a particular person – specifically Cheung – to serve as the escort when Casimir requested entry. We disagree.

Paragraph 12.1 did not expressly state that CM1 had the right to designate a particular person to serve as the escort for entry onto the property and certainly did not expressly state that CM1 had the right to insist that only Cheung serve as the escort. Instead, the lease gave CM1 the more general right to have an escort present when Casimir entered the property. And the escort was required to be "the Tenant *or* their employee *or* agent." CP at 230 (emphasis added).

The ordinary, unambiguous meaning of paragraph 12.1 is that CM1 had the right to have an escort for any entry by Casimir, and that escort could be either its principals (including Cheung) or its employees or its agents. This provision cannot reasonably be interpreted as

giving CM1 the *contractual right* to designate only Cheung as the escort. We reject Casimir's suggestions to the contrary.

First, Casimir suggests that CM1 had the right to designate a particular escort because Cheung specifically negotiated this provision to ensure that the requirements of WAC 314-55 would be met once CM1 obtained its cannabis grow license. But Cheung negotiated the right to have an escort present, not the right to have a particular escort present. Cheung could have, but did not, negotiate a provision stating that only he could be the escort.

Second, Casimir suggests that CM1 had the right to designate a particular escort because paragraph 12.1 gave CM1 control over selecting the escort. Under the lease, CM1 clearly had the right to choose the escort. But paragraph 12.1 stated that CM1 must select the escort from one of three categories: CM1's principals, employees, or agents. So while CM1 could choose Cheung to act as an escort, it had no contractual right to make him the *only* escort. In addition, nothing in the lease gave CM1 the right to delay entry onto the property if a particular person was not available.

Third, Casimir suggests that the use of Cheung as the only escort was established by the parties' course of performance. He points out that Cheung was the only person who served as an escort once CM1 obtained its cannabis license. But as noted above, the agreement's express terms and any course of performance generally must be construed as consistent with each other. RCW 62A.1-303(e). Here, designating Cheung as the escort was consistent with paragraph 12.1, which allowed CM1 to have an *either* a CM1 principal, a CM1 employee, or a CM1 agent present when Casimir entered.

We conclude that although CM1 preferred to have Cheung serve as the escort, it did not have a *contractual right* to insist that only Cheung could serve as the escort when that preference

interfered with Casimir's contractual right to enter the property. Therefore, instead of taking the position that its "hands were tied" by CM1's refusal to provide entry until 11 days later, Casimir had an obligation under the PSA to insist under the terms of the lease that CM1 allow entry even though Cheung was unavailable.

4. Timing of Allowing Entry

Casimir argues that the lease is ambiguous as to *when* CM1 was required to allow Casimir to enter property after a request, and that ambiguity creates a question of fact that cannot be resolved on summary judgment. We disagree.

The lease provisions regarding Casimir's entry onto the property are sparse. Initially, the lease does not expressly state that Casimir has the right to enter on request. But paragraph 12.1 essentially assumes such a right as long as there is notice and an escort is present.[2] And Casimir does not argue that it had no contractual right to enter after notice.

In addition, paragraph 12.1 does not state a time within which CM1 must allow Casimir to enter following a request. The declarations of Sahlman and Cheung both state that the lease gave CM1 control over when the property could be accessed. But those statements are inconsistent with paragraph 12.1, which is completely silent regarding the timing of access.

A reasonable time for performance may be implied where the contract imposes an obligation but does not specify a time for its performance. *Byrne v. Ackerlund*, 108 Wn. 2d 445, 455, 739 P.2d 1138 (1987). What is reasonable depends on "the nature of the contract, the positions of the parties, their intent, and the circumstances surrounding performance." *Pepper & Tanner, Inc. v. KEDO, Inc.*, 13 Wn. App. 433, 435, 535 P.2d 857 (1975). What constitutes a

[2] The only express right of entry provided in the lease is in paragraph 7.2, which stated that Casimir could enter to provide maintenance and repairs if CM1 failed to do so.

reasonable time generally is a question of fact. *Smith v. Smith*, 4 Wn. App. 608, 612, 484 P.2d 409 (1971). However, in some cases involving undisputed facts a court can determine a reasonable time as a matter of law. *Jarstad v. Tacoma Outdoor Recreation, Inc.*, 10 Wn. App. 551, 558, 519 P.2d 278 (1974).

The parties submitted minimal evidence regarding what would be a reasonable time for allowing access. Sahlman stated that commercial leases typically provide that access must be allowed within 24 or 48 hours after notice, although this lease did not contain such a provision. Lam – Zeng's broker – stated that a tenant usually needs 24 or 48 hour notice. The reason Sahlman gave for not including a 24 or 48 hour provision in the lease was because CM1 was operating a cannabis facility, which is strictly regulated under Washington law. And there was evidence from Cheung that CM1 had concerns about access to the property because of compliance with cannabis regulations.

The implication from these statements is that more preparation was required for entry into a cannabis production/processing facility than an ordinary business. However, the only regulation to which Casimir refers is WAC 314-55-083, which requires only that nonemployee visitors display an identification badge issued by the cannabis licensee and that a log be kept providing specific information for all visits. These requirements are not difficult or complicated, and clearly would not require more than the typical 24 to 48 hour notice before providing access.

More significantly, CM1 never took the position that it required more than four days' notice to allow access. The only reason Cheung gave for not allowing prompt access was that he was out of town, not that more time was needed to arrange an inspection. There is no indication that CM1 could not have arranged for access during the feasibility period if Casimir had enforced the lease provision that another CM1 employee or agent could serve as the escort.

We conclude as a matter of law that four days was a reasonable time for performance of the obligation to allow entry.

5. Other Issues

Casimir argues that the inability to obtain an inspection before the feasibility deadline was Zeng's fault because she waited until the end of the feasibility period to request an inspection. Casimir also argues that any breach of the PSA was the tenant's fault. We reject both arguments.

Casimir emphasizes that Zeng failed to follow industry practice by not conducting an inspection early in the feasibility process. However, the plain language of the PSA gave Zeng 30 days to conduct an inspection. And the PSA did not specify that Lam had to make a request for an inspection within a certain period of time. In any event, this case turns on a determination of a reasonable time for performance of Casimir's obligation to allow access. Because the reasonable time was four days or less, Zeng's request was timely.

Casimir also argues that any breach of the PSA was caused by CM1. But this argument is immaterial. Casimir had an obligation under the PSA to permit Zeng to enter the property to conduct an inspection, subject to CM1's rights. Because CM1 had no contractual right to refuse to allow an inspection within four days, Casimir breached the PSA regardless of whether CM1's refusal was wrongful. The PSA could have but did not make Casimir's obligation to provide entry subject to CM1's cooperation or permission. That obligation was subject only to CM1's *rights* under the lease.

6. Summary

Casimir had an obligation under the PSA to allow Zeng to inspect the building, subject to the tenant's rights. As discussed above, CM1 did not have a right under the lease to insist that

only Cheung serve as the escort for an inspection. And CM1 did not have a right under the lease to require more than four days' notice before allowing access. As a result, Casimir should have insisted that CM1 allow entry during the feasibility period even though Cheung was unavailable. The failure to do so breached the PSA.

C. ATTORNEY FEES ON APPEAL

Both parties request that we award them reasonable attorney fees. Paragraph 41(c) of the PSA provides that the prevailing party in any lawsuit is entitled to recover attorney fees. Zeng is the prevailing party on appeal. Therefore, we award attorney fees to Zeng.

CONCLUSION

We affirm the trial court's order granting summary judgment and specific performance in favor of Zeng and the award of Zeng's attorney fees.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

MAXA, J.

We concur:

CRUSER, A.C.J.

VELJACIC, J.

APPENDIX 2

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

Filed
Washington State
Court of Appeals
Division Two

YAN HONG ZENG,

Respondent,

v.

CASIMIR-SHELTON, LLC, a Washington limited liability company,

Appellant.

No. 56396-7-II

December 12, 2022

ORDER DENYING
MOTION FOR RECONSIDERATION

Appellant Casimir-Shelton, LLC moves for reconsideration of the opinion filed October 18, 2022 in this case. Respondent objects and requests attorney fees incurred in opposing the motion. Following consideration, the court denies the motion and grants respondent's request for attorney fees. Accordingly, it is

SO ORDERED.

PANEL: Jj. Maxa, Cruser, Veljacic

FOR THE COURT:

Maxa, J.

MAXA, J.

BRAIN LAW FIRM PLLC

January 08, 2023 - 2:49 PM

Filing Petition for Review

Transmittal Information

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Appellate Court Case Number:	Case Initiation
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