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NO. 72907-1

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COURT OF APPEALS, DIVISION 1  
OF THE STATE OF WASHINGTON

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KENT HILL PLAZA, LLC, a/k/a KENT EAST HILL  
PLAZA, LLC, a Washington limited  
liability company

Appellant,

vs.

LUCKY STAR ENTERPRISES, LLC, a Washington  
limited liability company,

Respondent.

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**BRIEF OF RESPONDENT**

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COURT OF APPEALS  
STATE OF WASHINGTON

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## ***I. INTRODUCTION***

This appeal follows the entry of a decree of specific performance and award of damages by the trial court. Lucky Star filed suit against Kent Hill following Kent Hill's refusal to comply with its obligations under a Lease entered into with Lucky Star. Kent Hill claimed that it was not required to perform certain work required within the Lease. Lucky Star claimed Kent Hill was required to comply with the Lease.

At the conclusion of a several day bench trial, the court held that the Lease terms were unambiguous, and that Kent Hill had the obligation to install a new HVAC system in conformance with the design and specifications of Lucky Star's architect, together with performing other work identified within the Lease. The trial court, further, ruled that Lucky Star was entitled to have the Lease specifically enforced, and awarded Lucky Star consequential damages, attorney fees and costs.

Kent Hill appeals the entry of the trial court's judgment. While raising a number of

generalized claimed errors, Kent Hill has not assigned error to any specific findings of the trial court.

## **II. STATEMENT OF CASE**

This cause arises out of a dispute involving a written Lease (herein "Lease") entered into between Kent Hill and Lucky Star in June, 2012. (*Ex 11*). Kent Hill and Lucky Star are both limited liability companies. (*Ex 1, 2*). Kent Hill's principals are three (3) businessmen, N. Gill, M. Dhillon, and J. Basra. (*FF 2*). Lucky Star's principals are M. Odum and C. Odum (*FF 1, Ex 2, RP 33-34*). Lucky Star is an operator of "work-out and sun tanning" facilities under a "Planet Fitness" franchise. (*FF 1, RP 34-35*).

Kent Hill is the owner of a commercial shopping center building located in Kent, Washington, which has a total area of close to 35000 square feet (*herein "Kent Property"*). (*Ex 1, 10, RP 151, 475*). Kent Hill's building is some 40 years old, and at all times herein relevant, was vacant. (*RP 114, 151, 323, 479*). In December, 2010, Kent Hill listed the Kent

Property for lease with realtor, Surinder Khela, who was then a representative of Coldwell Banker Danforth & Associates. (Ex 9, RP 112). On Kent Hill's behalf, Mr. Khela undertook to market the Kent Property for lease. (Ex 10, RP 113).

In or about March 2011, Lucky Star was then operating a Planet Fitness facility in Renton, and wished to expand to another location. (RP 201). To this end, Lucky Star contacted its realtor, Barry Kelly, to investigate the Kent Property, for possible lease. (RP 204). Thereafter, Mr. Kelly contacted Mr. Khela, and advised him that he represented Lucky Star (RP 113). Kent Hill and Lucky Star then commenced their lease negotiations, which continued for approximately 1 year until the Lease was signed. (FF 3).

Lucky Star wished to lease approximately 19,000 square feet, rather than the full area of the Kent Property (herein "the Premises"). (Ex 11, RP 151, 415). If a Lease Agreement was to be entered into, Kent Hill and Lucky Star were aware that a "demising wall" would need to be constructed, separating the Premises from the

remaining portion of the Kent Property. (FF 6, Ex 11, RP 415). In deciding on whether or not to lease a portion of the Kent Property, it was important to Lucky Star that Kent Hill make and pay for a number of improvements to the Premises. (FF 6). Lucky Star wished to pay for few tenant improvements and, at one point, walked away from the negotiations. (FF 6). Subsequently, Kent Hill offered Lucky Star a period of free rent, waterline, demising wall, and other work which would be done at Kent Hill's sole cost (FF 6). Additionally, it was important to Lucky Star that Kent Hill install an HVAC system in accordance with its plans and specifications. (FF 14).

In order to provide heating and cooling for its Planet Fitness facilities, Lucky Star utilizes an open ceiling design, with an HVAC system employing "concentric diffusers", coupled with large fans to distribute air, rather than a system of ducts. (FF 16, Ex 4, 5, 6, 7, and 41, RP 311). Lucky Star's rationale for utilizing this type of HVAC system is that it is efficient, insures aesthetic consistency, is well-designed, provides

comfort for its customers, was consistent with Planet Fitness guidelines, and is cost effective. (FF 14, 17, and 18). During the lease negotiations, the Kent Property had 7 rooftop RTU's, which everyone was aware needed to be replaced because they were inoperable. (FF 29, Ex 19, RP 331).

In Spring 2012, Kent Hill's principals, along with their realtor, Surinder Khela, toured Lucky Star's Renton fitness facility (RP 73, 459). The HVAC system for Lucky Star's Renton facility had been designed by its architect, Dan Mullin. (RP 36). Mr. Mullin had earlier designed in the "neighborhood" of 350 HVAC systems utilizing Planet Fitness guidelines, and taking into account the "unique and inherent challenges" of each project. (RP 310). On May 30, 2012, Mr. Mullin viewed the Kent Property to evaluate its then existing condition and characteristics. (RP 312). Mr. Mullin proposed designing an HVAC system similar to the design utilized for Lucky Star's Renton facility. (RP 313).

As a result of their lease negotiations, Lucky Star submitted the Lease to Kent Hill's agent, Surinder Khela, who, in turn, provided a copy to Kent Hill's principals. (Ex 11, RP 126). As relevant to this appeal, the Lease stated:

"1. Lease. ...The Shop will be delivered to Tenant in the condition specified in Exhibit B attached to this Lease and made a part of this Lease...

24. Landlord's Work: Landlord shall improve the Premises per Exhibit B, Landlord's Work."

(Ex 11). Exhibit B to the Lease was titled "DESCRIPTION OF LANDLORD'S WORK", and, among other terms, provided:

"The Landlord, at its sole cost and expense, shall provide the following minimum improvements to the Leased Premises as part of Landlord's vanilla box delivery of Premises:

- A) New HVAC system per Tenant's architect drawings and specifications of 2.5 ton per 1,000 SF (47.5 ton), in good working condition, on a separate thermostat, and balance tested. HVAC system to be warranted for a period of ten (10) years...
- H) Landlord shall pay any impact fees in connection with Tenant's intended use, if any.

I) Landlord shall be responsible, at its sole cost and expense, to obtain any and all zoning and land use permits, special exemptions, variances, consents, authorizations and approvals for the use of the Leased Premises as a Planet Fitness center... (Emphasis Added).

(Ex 11).

Once received, Mr. Khela reviewed the proposed Lease with Kent Hill's principals, and recommended that the Lease be accepted. (RP 127). Mr. Khela, also, recommended that Kent Hill's principals should have an attorney review the Lease, which they did. (RP 127, 302, 407, 459). Kent Hill's principals read the Lease, and fully understood Kent Hill's obligations under the Lease. (RP 302, 459, 502-503, 508). While the Lease terms were not what Kent Hill really wanted, Kent Hill decided to compromise, and accept Lucky Star's Lease offer terms. (RP 505-506).

On June 21, 2012, Kent Hill accepted the Lease, which acceptance was followed by Lucky Star's acceptance June 29, 2012. (Ex 11). Lucky Star timely paid to Kent Hill its first month's rent, and security deposit in the amount of \$25,879.17. (FF 32, Ex 12). Kent Hill was fully

aware that Lucky Star would be providing the design and specifications for the HVAC system. (FF 13). The Lease terms were unambiguous. (FF 52). After the Lease was signed, Kent Hill's agent, Surinder Khela, was the main contact person between Kent Hill and Lucky Star. (RP 79, 100, 128, 243, 317, 408-409). Mr. Khela became entitled to payment of 25% of his commission when the Lease was signed, and the remaining 75% when Lucky Star took possession of the Premises (Ex 11).

Shortly after the Lease was signed, Lucky Star's architect prepared a schematic drawing, which clearly showed the location of each of the RTU's for the HVAC system he was designing for Lucky Star. (FF 26, Ex 13). Lucky Star provided a copy of the schematic drawing to Mr. Khela, who, in turn, provided a copy of the drawing to Mr. Dhillon, within one month of its date. (FF 26, 27). There then followed a several month period when Kent Hill and Lucky Star had little contact with each other. (FF 33).

On its part, Lucky Star's architect proceeded with preparation of architectural drawings and

specifications for the Premises, including the HVAC system. (Ex 14, 41). The HVAC system designed by Mr. Mullin met general design requirements, and ensured aesthetic consistency for Planet Fitness facilities. (FF 16, 17). Mullin's design sought to minimize conflict between the air supply system, lighting and fans, to ensure a clean ceiling look for the facility; and took into account the realities of the Kent Property itself. (FF 17, 18, RP 313). The HVAC system designed by Mr. Mullin was within industry standards, reasonable, and was the most efficient, economical, and aesthetically superior way to move air within the Premises, taking into account the open ceiling design of Planet Fitness facilities. (FF 23, 24, RP 315, 316). Mr. Mullin's proposed relocation of several of the rooftop RTU's was a "...normal practice on tenant improvement projects." (RP 313-314).

On its part, Kent Hill claimed that Lucky Star's proposed HVAC design was unreasonable. (FF 38). While Kent Hill obtained a bid from a Todd Lovinson, for installation of an HVAC system utilizing the existing locations of the RTU's, it

did not request Mr. Lovinson to provide a bid based upon the HVAC system designed by Lucky Star's architect. (FF 39). Nor did Mr. Lovinson possess the requisite expertise to address issues involving the structure or weight issues associated with replacement of the RTU's. (FF 39). Lastly, Mr. Lovinson provided no information as to either the efficiency or aesthetics of the proposed HVAC system Kent Hill wished to install. (FF 40).

Once prepared, Lucky Star's plans and specifications were submitted to the City of Kent for approval. (RP 313-314). By letter dated October 3, 2012, the City's Plan Examiner, Bill Zeitler, identified a number of plan changes and actions to be completed prior to the issuance of permits for Lucky Star's Planet Fitness facility. (Ex 22, RP 51). As relevant to this dispute, the City required that, prior to issuance of permits to Lucky Star, structural and seismic analysis (herein "Studies"), for both the HVAC system and building would need to be prepared by a "professional engineer". (Ex 22, 33). The Studies for the Kent Property were required in that Lucky Star's fitness facility

constituted a "change of use" in the occupancy of the Premises. (*Ex 22, 33, RP 54*). The Studies were required to be completed prior to the issuance of permits. (*RP 54*).

The Lease required Kent Hill to obtain the required Studies at its cost. (*FF 34, Ex 11*). After October 3, 2012, Kent Hill contacted one or more engineering firms to obtain bids to perform the Studies, but did not proceed to have the Studies completed. (*FF 35, 45, Ex 24, 28*). Several months prior to trial, Kent Hill retained Charles Williams, who was a structural engineer, to evaluate the Premises. (*RP 373*). In evaluating the Premises, Mr. Williams did not go upon the roof of the Premises, did not review Lucky Star's architect plans and specifications for the HVAC system, and was unaware of the City's permitting requirements. (*FF 41, RP 389-390, 395*). Mr. Williams' trial testimony lacked specificity, and did not preclude the installation of Lucky Star's proposed HVAC system. (*FF 42, 43, RP 394*).

In October, 2012, Kent Hill and Lucky Star's representatives met to conduct a walk through of the

Premises. (FF 36). At the time of the walk through, Kent Hill had not done any work to install the HVAC system. (FF 36). As to the structural and seismic analysis required by the City, Kent Hill claimed that it "made no sense" to perform the analysis prior to installation of the HVAC system. (FF 35). In truth and fact, the structural and seismic analysis could have been performed prior to installation of the HVAC system. (RP 54-55, 60). Further, even if the RTU's location did not change, the Studies required by the City would still need to be completed. (RP 60).

Kent Hill's principals (none of whom were qualified as experts in structural engineering) claimed that installation of Lucky Star's HVAC system would cause the roof to leak, or be expensive. (FF 44, RP 490). The attitude of Kent Hill's principals, on the issue of receipt and review of Lucky Star's architectural plans and specifications, was both flippant, and not credible. (FF 46). As to its claims that the "roof membrane" would be disrupted, or that the installation costs of Lucky Star's proposed HVAC

would be excessive, Kent Hill failed to provide competent evidence supporting its claims. (FF 48, 49).

Throughout the October 2012 through January 2013 time period, Lucky Star repeatedly sought to have Kent Hill carry out its lease obligations. (FF 37, Ex 29, 31, 32, 34, and 36). In response to Lucky Star's requests, Kent Hill claimed that it met its lease obligations; that it was not required to install the HVAC system designed by Lucky Star's architect; nor perform the Studies required by the City. (FF 37, Ex 30, 36). At all relevant times, Lucky Star was willing and able to perform its lease obligations, and did nothing to delay Kent Hill as to the performance of its obligations. (FF 51, CP 37).

Kent Hill's refusal to install the HVAC system per the architect's drawings and specifications, coupled with its refusal to perform the Studies required by the City, prevented Lucky Star from moving forward in taking possession of the Premises, obtaining requisite permits, and opening the Planet Fitness facility for business. (RP 254). As a

result of Kent Hill's actions, and lack of action, Lucky Star suffered substantial lost profits. (FF 54).

On March 13, 2013, Lucky Star filed suit against Kent Hill, seeking specific performance of the Lease, award of damages caused by Kent Hill's breach, and attorney fees. (CP 1). On April 11, 2013, Kent Hill filed their Answer and Affirmative Defenses. (CP 6). Kent Hill's answer did not plead affirmative defenses of "bad faith" on Lucky Star's part, or that installation of Lucky Star's proposed HVAC system would constitute "economic waste". (CP 6).

On July 24, 2014, Kent Hill filed a counterclaim against Lucky Star, alleging that Lucky Star had "...interfered with defendant's completion of Landlord's Work described in Exhibit B of the Lease...", and that Kent Hill would have completed such work but for Lucky Star's interference. (CP 22). On October 14, 2014, Judge Richard F. McDermott, dismissed Kent Hill's Counterclaim. (CP 37).

This cause subsequently came on for bench trial before, Judge Sean P. O'Donnell, on October 14, 15, and 20, 2014. During the trial, some 41 Exhibits were admitted, and each was reviewed carefully by the trial judge. (CP 53). Following trial, the court entered comprehensive Findings of Fact and Conclusions of Law. (CP 53). The trial court found that Kent Hill had breached its lease obligations; granted to Lucky Star a decree of specific performance directing Kent Hill to fulfill its lease obligations; and awarded Lucky Star its consequential damages and attorney fees and costs. (CP 56). Kent Hill subsequently filed the present appeal.

### **III. ARGUMENT**

#### **A. Standard of Review.**

As the record reflects, this cause involves Lucky Star's claim for specific enforcement, award of its consequential damages, and attorney fees resulting from Kent Hill's breach of its obligations. (CP 1). At the end of trial, the court entered comprehensive Findings of Fact and Conclusions of Law, together with Judgment. (CP 53

and 56).

In reviewing a decision of the trial court, this court follows a number of basic rules. Where the trial court has considered the evidence, an appellate court's review is limited to determining whether or not the trial court's findings of fact are supported by substantial evidence, and whether the findings support the conclusions of law. *Tacoma v. State*, 117 Wash.2d 348, 361, 816 P.2d 7 (1991). "Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise." *Holland v. Boeing Co.*, 90 Wash.2d 384, 390-91, 583 P.2d 621 (1978) (citing *In re Welfare of Snyder*, 85 Wash.2d 182, 532 P.2d 278 (1975)). It is the rule that the trial court finds facts, not this court. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn. 2d 570, 575, 343 P.2d 183 (1959). As to resolution of issues involving conflict testimony and credibility of witnesses, this court defers to the trial court. *Boeing Co. v. Heidy*, 147 Wash.2d 78, 87, 51 P.3d 793 (2002). This court need only consider evidence favorable to the prevailing party. *Bland v. Mentor*,

63 Wash.2d 150, 155, 385 P.2d 727 (1963). Kent Hill has the burden to show that the trial court's findings are not supported by substantial evidence. *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 115 Wash.2d 364, 369, 798 P.2d 799 (1990). To this end, unchallenged findings of fact are treated as true on appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wash.2d 801, 828 P.2d 549 (1992).

An action seeking to compel a party to specifically perform their contractual duties is equitable in nature. *Crafts v. Pitts*, 161 Wash.2d 16, 23-24, 162 P.3d 382 (2007). Specific performance is a suitable remedy to enforce a lease provision. *Crafts v. Pitts*, @ 24-25. In equitable actions, the trial court has broad discretionary powers to determine the appropriate remedy, and the appeals court reviews such remedy under an "abuse of discretion standard". *Cornish College of the Arts v. 1000 Virginia Ltd. P'ship*, 158 Wash. App. 203, 221, 242 P.3d 1 (2010), review denied, 171 Wash.2d 1014, 249 P.3d 1029 (2011). An abuse of discretion occurs when the trial court's decision is manifestly unreasonable or is exercised on untenable grounds or

for untenable reasons. *Gildon v. Simon Prop. Group, Inc.*, 158 Wash.2d 483, 494, 145 P.3d 1196 (2006).

**B. Kent Hill's Opening Brief Fails To State An Assignment Of Error For Each Finding Of Fact, Or Cite The Record In Support Of It's Argument.**

Kent Hill's Opening Brief is notable for the fact that it contains numerous unsupported factual, and conclusory averments, without required citation to the record. Kent Hill's "*Statement Of The Case*" is really nothing more than a sequential restatement of the trial court's Findings of Fact (AB 8-25; CP 53). Neither Kent Hill's assignments of error, nor its argument in support of such assignments, identify a single Finding of Fact, which it claims are erroneous. (AB 7). Throughout the Argument portion of its Opening Brief, Kent Hill repeatedly argues a claimed fact is true, without supporting the claim with citation to the record. Once Kent Hill has stated a claim, it then proceeds to simply cite legal authority, which it asserts supports the claimed fact. (AB 25-46).

It is a basic rule of appellate procedure that, if a party claims that the trial court's findings are not supported by the evidence, the party must

state a separate assignment of error for each such finding, present argument and cite to the record support for that argument. *RAP 10.3(a)(6), 10.3(g), 10.4(c); Inland Foundry Co., Inc. v. Dep't of Labor & Indus., 106 Wash. App. 333, 340, 24 P.3d 424 (2001).* A trial court's findings of fact are deemed correct on appeal where Kent Hill does not assign error to those findings. Kent Hill has not assigned error to any of the trial court's findings. Therefore, they are verities on appeal. *In re Marriage of Petrie, 105 Wn.App. 268, 275, 19 P.3d 443 (2001).* To this end, this court should disregard Kent Hill's unsupported claimed error and argument. *McKee v. Am. Home Products. Corp., 113 Wn.2d 701, 705, 782 P.2d 1045 (1989)* ("We will not consider issues on appeal that are not raised by an assignment of error or are not supported by argument and citation of authority.").

**C. The Trial Court Correctly Ruled That The Lease Terms Were Unambiguous, and Kent Hill Had Agreed To Install Lucky Star's Proposed HVAC System.**

The trial record contains no factual or legal support for Kent Hill's conclusory assertions that

the Lease is "...to indefinite to specifically enforce", and thus there was no "meeting of the minds...", and that "...the parties' never agreed on specifications for the new HVAC system...". (AB 25-26). Other than a passing mention to the Lease terms (Ex 11), or Lucky Star's Schematic Drawing of the HVAC system (Ex 13), Kent Hill fails to cite any portion of the trial record in support of its argument. It is the rule that this court will not consider conclusory arguments, which do not cite the record or authority. RAP 10.3(a)(6), 10.3(g), 10.4(c); West v. Thurston County, 168 Wn. App. 162, 275 P.3d 1200 (2012). To this end, Kent Hill's Assignment of Error No. 1 should be disregarded by this court.

Within the Lease, Exhibit B, Kent Hill agreed to complete a number of specific improvements to the Premises. (Ex 11). The Lease, within Exhibit B is titled, "DESCRIPTION OF LANDLORD'S WORK", and provided:

*"The Landlord, at its sole cost and expense, shall provide the following minimum improvements to the Leased Premises as part of Landlord's vanilla box delivery of troubles:*

A) New HVAC system per Tenant's architect drawings and specifications of 2.5 ton per 1,000 SF (47.5 ton), in good working condition, on a separate thermostat, and balance tested. HVAC system to be warranted for a period of ten (10) years...

(Ex 11). The Lease language relating to Kent Hill's duties to install a "...New HVAC system per Tenant's architect drawings and specifications..." is clear and unambiguous. (FF 52). Without citation to the record, Kent Hill attempts to avoid the requirement of installing the HVAC system designed by Lucky Star's architect by arguing that Kent Hill had not "contemplated" that the location of the RTU would be moved. (AB 30-31). Kent Hill, further, argues that its only obligation was to replace "the HVAC units with new units per architect's drawings and specifications..." (AB 30). Kent Hill's argument ignores and misquotes the express terms of the Lease relating to Kent Hill's obligation to install the HVAC system per Lucky Star's "architect drawings and specifications". (AB 26).

Washington follows an objective manifestation test for contracts, which looks to the objective

acts or manifestations of the parties rather than the unexpressed subjective intent of any party. *U.S. Life Credit Life Ins. Co. v. Williams*, 129 Wash.2d 565, 570, 919 P.2d 594 (1996). It is the rule that the parties must objectively manifest their mutual assent in order for a contract to be created. *Yakima County Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wash.2d 371, 388, 858 P.2d 245 (1993). Herein, by each signing the Lease (in the presence of a Notary Public), Kent Hill and Lucky Star objectively manifested their mutual assent to its terms. It is the general rule that the existence of mutual assent or a meeting of the minds is a question of fact. *Multicare Med. Ctr. v. Department of Social & Health Serv.*, 114 Wash.2d 572, 586 n.24, 790 P.2d 124 (1990).

In *Hearst Commc'ns Inc. v. Seattle Times Co.*, 154 Wash.2d 493, 503-504, 115 P.3d 262 (2005), the court stated a number of guiding rules to be followed in interpreting a contract:

"...We impute an intention corresponding to the reasonable meaning of the words used. *Lynott v. Nat' l Union Fire Ins. Co. of Pittsburgh, Pa.*, 123 Wash.2d 678, 684, 871 P.2d 146 (1994). Thus, when

interpreting contracts, the subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used. *City of Everett v. Estate of Sumstad*, 95 Wash.2d 853, 855, 631 P.2d 366 (1981). We generally give words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent. *Universal/Land Constr. Co. v. City of Spokane*, 49 Wash.App. 634, 637, 745 P.2d 53 (1987). We do not interpret what was intended to be written but what was written. *J.W. Seavey Hop Corp. of Portland v. Pollock*, 20 Wash.2d 337, 348-49, 147 P.2d 310 (1944), cited with approval in *Berg*, 115 Wash.2d at 669, 801 P.2d 222."

Even though the court considers a contract as a "whole", the court "...gives parties intent as expressed in the instrument's plain language controlling weight..." *W. Plaza, LLC v. Tison*, 180 Wn. App. 17, 22, 322 P.3d 1 (2014) review granted, 336 P.3d 1165 (2014). In basic terms, Kent Hill's position is that it had the right to design and install its own HVAC system, and requests the court to rewrite the Lease terms to support this position. However, a court cannot simply re-write a contract under the guise of construing the contract. *Clements v. Olsen*, 46 Wash.2d 445, 448,

282 P.2d 266 (1955). Under the Lease, Lucky Star had the right to submit a design for the HVAC system, Kent Hill did not have the right to design its own system. (FF 52, Ex 11). If the terms of a contract are plain and unambiguous, the intention of the parties shall be ascertained from the language employed. *Cornish Coll. of the Arts v. 1000 Va. Ltd. P'ship, supra @ 231.*

When the foregoing rules are applied to the Lease, it is clear that Kent Hill and Lucky Star objectively manifested their mutual assent to the Lease, and Kent Hill agreed to install a new HVAC system in accordance with Lucky Star's "...architects drawings and specifications...". (Ex 11). As set out in Exhibit B of the Lease, Kent Hill's obligation to complete required improvements, or take other actions, were unambiguous, and the trial court so found. (FF 54; Ex 11).

Each of the cases cited by Kent Hill in support of its argument that Kent Hill and Lucky Star had "no meeting of the minds" are distinguishable to the present cause. In *Sea-Van*

*Investment Associates v. Hamilton*, 125 Wn. 2d 120, 881 P.2d 1035 (1994), a potential real estate purchaser brought suit for specific performance and/or damages. In *Sea-Van*, the parties failed to attach to their agreement a copy of a promissory note, or deed of trust, and failed to identify the type of deed to be utilized to convey title, time of closing, and the payment of taxes. *Sea-Van* @ 125. In Washington, it has long been the rule each of the foregoing terms are essential to the formation of a contract for the sale of land. *Hubbell v. Ward*, 40 Wash.2d 779, 785, 246 P.2d 468 (1952). Contrary to the facts in *Sea-Van*, Kent Hill and Lucky Star did include with the Lease all material terms as to Kent Hill's obligations. (Ex 11).

*Haire v. Patterson*, 63 Wn. 2d 282, 386 P.2d 953 (1963), involved an action for specific performance of an earnest money agreement for purchase and sale of real estate. In *Haire*, the trial court modified the contract terms, and essentially made a new agreement for the parties. *id* @ 287. In the present cause, the trial court

did not make a new agreement, or direct that the parties enter into a future contract containing terms to which they had not agreed. The *Haire* decision is clearly distinguishable from the present proceeding.

In *Keys v. Klitten*, 21 Wn. 2d 504, 151 P.2d 989 (1944), the action involved a claim of specific performance or an earnest money agreement and accounting. In *Keys*, the parties anticipated that they would enter into a future lease agreement, which terms were not mentioned in the earnest money agreement. The court held that an agreement to enter into a future agreement would not be enforced, if the terms of the agreement were left open to future negotiation. *id* @ 520. The facts in *Keys* are clearly distinguishable from those involved this cause.

Kent Hill wrongly assumes Lucky Star will argue that the parties are bound by a stipulation signed by their attorneys to the effect that the Lease is valid and enforceable in all respects. (AB 31). There is no need to argue that the parties are bound by the stipulation. As evidenced

by the record, the trial court's findings are based upon substantive evidence. Kent Hill's bald assertion that there was no "meeting of the minds" disregards the Lease's unambiguous language, and is unsupported by the record. As to its Assignment of Error No. 1, this court should disregard Kent Hill's argument.

**D. The Trial Court Correctly Found That Lucky Star Did Not Violate An Implied Duty Of Good Faith.**

The record does not support Kent Hill's argument that Lucky Star's proposed HVAC system was not reasonable; inconsistent with industry standards; or that Lucky Star "acted in bad faith". (AB 32, 38). As it has done throughout its opening brief, Kent Hill's argument in support of Assignment No. 2 is based upon conclusory statements, without supporting citation to the record. Again, it is the rule that this court will not consider conclusory arguments that do not cite authority. *RAP 10.3(a)(6), 10.3(g), and 10.4(c); West v. Thurston County, supra.* As a result of the failure of Kent Hill to meet its basic obligation to cite the record and authority in support of

claims, Kent Hill's Assignment of Error No. 2 should be not be considered.

The record is clear in establishing that Lucky Star did not violate a duty of good faith in exercising its right to have its architect design a new HVAC system. At the time the Lease was signed, Kent Hill and Lucky Star were well aware that the rooftop RTU needed to be replaced. (FF 29). Prior to signing, Kent Hill's principals each read the Lease, reviewed the Lease with their attorney, and were aware that the architect's drawings had not yet been prepared. (FF 9, 13). As to Lucky Star's proposed HVAC system, the trial court held that it did not violate a duty of good faith. (CL 9).

On its part, Lucky Star wished to insure that the new HVAC system was efficient, well-designed, would serve the needs of its customers, and meet the general design requirements of Lucky Star's franchisor, Planet Fitness. (FF 14, 15). The type of HVAC system utilized by Lucky Star was based upon "concentric" design, rather than "ducts" to distribute air within Lucky Star's facility. (FF

17) Lucky Star's architect, Dan Mullin, designed an HVAC system which met Lucky Star's needs, maximized and provided for a more equal distribution of air flow, and took into account variables associated with the Premises (FF 16, 17, 18). Mr. Mullin's design involved moving the location of several of the roof top RTU's. (FF 19).

Lucky Star's right to design, and to establish certain specifications for the HVAC system included both non-discretionary and discretionary terms. (Ex 11). The *nondiscretionary* portions of the "Landlords Work" relating to the HVAC system were:

- 1.) Kent Hill was required to install a "New HVAC system";
- 2.) The HVAC system was to be "2.5 ton 1,000 SF (47.5 ton)";
- 3.) The HVAC was to be "in good working condition";
- 4.) The HVAC system was to be "on a separate thermostat, and balance tested";
- 5.) The HVAC system was "... to be warranted for a period of ten (10) years";
- 6.) The installation of the HVAC system was to be completed at Kent Hill's "sole cost and expense"; and
- 7.) The HVAC system was to be designed by Lucky Star's architect. (Ex 11).

Items 1 through 7 do not provide for the exercise of discretion on the part of either Lucky Star or Kent Hill. The discretionary authority granted to Lucky Star related to the requirement that Kent Hill was to provide a "New HVAC system per Tenant's architect's drawings and specifications..." Under the Lease, Lucky Star had the discretion to design the HVAC system within the above limitations. (Ex 11).

In Washington, a duty of good faith and fair dealing is implied in every contract. *Badgett v. Sec. State State Bank*, 116 Wn. 2d 563, 807 P.2d 356 (1991). "However, the duty of good faith does not extend to obligate a party to accept a material change in the terms of its contract." *id* @ 569. "As a matter of law, there cannot be a breach of the duty of good faith when a party simply stands on its rights to require performance of a contract according to its terms." *id* @ 570. The implied duty "arises only in connection with terms agreed to by the parties," and "requires only that the parties perform, in good faith, the obligations

imposed by their agreements." *id* @ 569. The duty of good faith does not require a party to accept any additional obligations other than set out in the agreement. *id* @ 569-570. Whether a party breaches their duty of good faith or other contract obligations, is a question of fact. *Frank Coluccio Const. Inc. v. King County*, 136 Wn.App. 751, 766, 150 P.3d 1147 (2007).

Although a duty of good faith is implied in all existing contracts, there is no "free-floating", or one size fits all duty of good faith and fair dealing that is unattached to an existing contractual provision. *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 177, 94 P.3d 945 (2004). The duty of good faith varies in the context of which it arises. *Restatement (Second) Of Contracts*, #205 cmt. d. The implied duty of good faith requires the parties to cooperate with each other so that each may obtain the full benefit of performance, consistent with the parties' justified expectations. *Badgett*, @ p. 569. On the other hand, bad faith performance involves conduct that violates community standards

of decency, fairness, or reasonableness.  
Restatement #205 cmt. a. (1979).

In *Goodyear Tire & Rubber Co. v. Whitman Tire, Inc.*, 86 Wash.App. 732, 738, 935 P.2d 628 (1997), citing *Amoco Oil Co. v. Ervin*, 908 P.2d 493, 498 (Colo.1995) this court, Division 3, affirmed the rule that:

*"The duty of good faith and fair dealing applies when one party has discretionary authority to determine certain terms of the contract, such as quantity, price, or time....The covenant may be relied upon only when the manner of performance under a specific contract terms allows for discretion on the part of either party...However, it will not contradict terms or conditions for which a party has bargained."*

*Rekhter v. Dep't of Social & Health Serve.*, 180 Wash.2d 102, 113, 323 P.3d 1036 (2014). The duty of good faith extends only to performance of agreed-upon obligations under the contract. *id @ 113.* If a contract gives a party unconditional authority to determine a term, there is no duty of good faith and fair dealing. *Johnson v. Yousoofian*, 84 Wash.App., 755, 762, 930 P.2d 921 (1996).

At trial, the court considered the issue of whether or not Lucky Star had exercised its limited discretion to have the HVAC system installed per its "architect's drawings and specifications", fairly and reasonably. The trial court concluded that Kent Hill had failed to demonstrate Lucky Star's HVAC design was not submitted either in good faith, or that its design "...was egregious in cost, impractical or impossible to achieve, or a significant departure from industry standards." (CL 12). Other than to simply claim Lucky Star violated a duty of good faith, Kent Hill wholly fails to identify any evidence in the record to support this claim. For the foregoing reasons, Kent Hill's Assignment of Error No. 2 should be rejected.

**E. The Trial Court Correctly Held That Kent Hill Had Agreed To Install The HVAC System Per Lucky Star's Plans and Specifications.**

There exists nothing in the trial record to support Kent Hill's claimed Assignment of Error No. 3 that "The trial court erred in allowing Lucky Star to require Kent Hill to make changes to the exterior of the building." (AB 7). Kent Hill's

argument in support of its Assignment of Error No. 3 is based upon nothing more than conclusory assertions, without required citation to the record. Kent Hill's argument in support of this Assignment makes little logical sense, is not supported by the record or applicable law. (AB 40-41). Again, it is the rule that this court will not consider conclusory arguments that do not cite authority. *RAP 10.3(a)(6), 10.3(g), 10.4(c); West v. Thurston County, supra.* On this basis alone, this court should decline to consider Kent Hill's argument in support of its Assignment of Error No. 3.

Kent Hill's argument to the effect that "*Lucky Star had no right to make changes of exterior of the building*" is created "*out of thin air*". (AB 39-41). There is nothing in the record supporting Kent Hill's claim that Lucky Star did not have the right to require changes "*...to the exterior of the building.*" (AB 40). Contrary to Kent Hill's argument, the trial court found that the Lease terms were unambiguous "*even accounting for the reference to a 'vanilla box' delivery*".

(FF 52). For the foregoing reasons, this court should reject Kent Hill's claim that Lucky Star did not have the right to require it to install a new HVAC system per Lucky Star's plans and specifications.

**F. The Trial Record Contains No Substantive Evidence Supporting Kent Hill's Claim That Lucky Star's HVAC Designed Unreasonable Economic Waste.**

Kent Hill's Assignment of Error No. 4 is based upon its claim that "*Relocating the HVAC units would involve unreasonable economic waste.*" (AB 41). In support of this Assignment, without any citation to the record, Kent Hill asserts that "*The evidence showed that the cost of relocating the HVAC units would be "clearly disproportionate" to the difference in value of the Premises, if any.*" (AB 42). As in the case with each of the arguments made in support of its earlier assignments of error, Kent Hill's argument in support of Assignment No. 4 consists of conclusory statements, and without citation to any portion of the record. It is the rule that this court will not consider conclusory arguments that do not cite authority. *RAP 10.3(a)(6), 10.3(g); West v. Thurston County,*

*supra.*

The trial court found that the evidence did not support Kent Hill's assertion that Lucky Star's proposed HVAC system was "unreasonable". (FF 38). In support of its claim that Lucky Star's proposal was unreasonable, Kent Hill presented the testimony of Todd Lovinson, an HVAC contractor, and Charles Williamson, a civil and structural engineer. (FF 39). Mr. Lovinson testified that he did not submit a bid based upon Mr. Mullin's plans and specifications for the HVAC system. (FF 40, RP 353-354). Mr. Williams' testimony was general in character, "...not tied to the specific requirements of the Property..." (FF 42). Mr. Williams testified that he had not reviewed Lucky Star's HVAC plans and specifications, nor was he aware of the permitting requirements for the building. (FF 41). On the issue of the estimated costs associated with installation of Lucky Star's proposed HVAC system, the trial court found the testimony of Kent Hill's principals (Dhillon, Basra, and Gill) to not be credible. (FF 47).

Kent Hill's principals testified, without any evidentiary basis, that it would cost an estimated \$200,000 to install Lucky Star's proposed HVAC system. (FF 50). Lucky Star obtained a bid for installation of its proposed HVAC system in the amount of \$56,440.00, which Kent Hill refused to accept. (Ex 17; RP 243-244). Based upon the Lease term and rentals to be paid to Kent Hill, the cost of installation of Lucky Star's proposed HVAC system "...was not an unreasonable cost for this ten year multi-million dollar lease." (FF 50). Kent Hill had the burden to present competent evidence to support a claim of economic waste, which it did not do. *Prier v. Refrigeration Eng'g Co.*, 74 Wash.2d 25, 30, 442 P.2d 621 (1968).

Kent Hill's reliance upon *Jacob v. Youngs, Inc. v. Kent*, 230 N.Y. 239, 129 NE 889, 23 A.L.R. 1429 (1921); *Eastlake Const. Co., Inc. v. Hess*, 102 Wn. 2d 30, 686 P.2d 465 (1984); and *Weaver v. Fairbanks*, 10 Wn. App. 688, 519 P.2d 1403 (1974) is misplaced. Each cited case is distinguishable from the present facts.

In *Jacob*, a contractor had failed to comply with one of the specifications for the plumbing work, and installed the wrong type of pipe. By the time the error had occurred, the pipe "...was then encased within the walls...". *Jacob* @ p. 239. Judge Cardozo, writing for the court, held that in a suit for defective construction, in most cases, the cost of replacement is the measure of damages, unless grossly out of proportion to the benefit to be gained, in which case the measure is the difference in value. *Jacobs* involved an damage claim, rather than specific performance.

In *Eastlake*, a building contractor sued for a balance owed on a construction contract, and the owner counterclaimed for damages resulting from the contractor's defective performance. In *Eastlake*, the court set forth "the proper measure of the owners' damages for breach of a construction contract resulting in both remediable and irreparable defects," and adopted the rule in *Restatement (Second) of Contracts* § 348 (1981). *Eastlake* @ 386. *Eastlake* was not a specific performance case.

Likewise, Kent Hill's reliance upon *Weaver v. Fairbanks*, does not support its assignment of error. In *Weaver*, a real estate broker sued a seller to collect his commission when the seller refused to make repairs required by an earnest money agreement. *Weaver* @ 688-689. The sale price of the property was \$17,500.00, with the estimated cost to repair a latent defect of \$500.00. *Weaver* @ 689. In *Weaver*, the seller did not claim that the estimated cost of repair was unreasonable, or otherwise excessive. Rather, the seller claimed that there was no express language in the earnest money agreement imposing upon them an obligation of repairing the defects. *id* @ 693. In *Weaver* @ 693, the court stated:

*"... where the cost of repairs is not so extensive as to cause a loss to defendant of the benefit of his bargain (as finding of fact 10 indicates), then defendant would have no reason, either in law or in equity, for refusing to complete the sale."*

*Weaver* was not a specific performance case. In truth, the record contains no evidence to support Kent Hill's claim of economic waste is without support in the record, and the same should be

rejected by this court.

**G. Surinder Khela Was, and Remained Kent Hill's "Agent".**

Kent Hill's Assignment of Error No. 5 asserts that *"The trial court erred in holding that the acts or occurrences involving Surinder Khela after the Lease was signed were imputed to Kent Hill."* (AB 7, 43-46). There exists no evidence in the record which supports Kent Hill's Assignment of Error No. 5. Kent Hill's argument completely fails to identify any knowledge on Mr. Khela's part, which the trial court "imputed" to Kent Hill. (AB 43-46).

Mr. Khela was the real estate broker with whom Kent Hill had listed the Kent Premises for lease. (Ex. 9, RP 112). Kent Hill's argument that Mr. Khela had ceased to be its agent, following signing of the Lease, is neither supported by the record or applicable law. As to Kent Hill's obligation to pay a real estate commission to Mr. Khela's firm, the Lease provided:

17. Real Estate Commissions: ...  
Landlord will pay a commission equal to 5 percent (5%) of the total base rent payable during the initial Lease Term.

Such commission to be paid by Landlord  
25% upon lease execution and 75% upon  
Tenant's occupancy." (Emphasis Added)

(Ex 11). While Mr. Khela became entitled to payment of 25% of the commission amount upon signing of the Lease, Kent Hill's payment of the remaining 75% was wholly dependent "upon Tenant's occupancy" of the Premises. (Ex 11). There exists no basis supporting Kent Hill's claim that Mr. Khela "was no longer acting as Kent Hill's agent" following signing of the Lease (AB 43).

Mr. Khela remained involved in the transaction because of his concern that the Lease transaction was "falling apart", and he needed to "help bridge the gap" between Kent Hill and Lucky Star. (RP 131). Both Mr. Khela's testimony, and his actions tend to show that, following the Lease signing, he continued to act as Kent Hill's agent. After the Lease was signed, in July 2012, Lucky Star provided Mr. Khela with a copy of a schematic drawing showing the proposed location of the HVAC units. (FF 26, 27, RP 273, Ex 13). Mr. Khela testified that he provided a copy of the schematic drawing to one of Kent Hill's principals. (FF 27, RP 133).

Mr. Dhillon acknowledged that he received a copy of the schematic drawing within one month after the Lease was signed. (*FF 27, RP 294*). Based upon the testimony of Mr. Khela and Mr. Dhillon, together with Exhibits 15 and 16, the trial court found that Kent Hill received a copy of the schematic drawing in July 2012. (*FF 30*).

In submittal of documents and information to Kent Hill, Lucky Star dealt with Mr. Khela. (*RP 231, 234, 239, 240, Ex. 23*). Mr. Khela typically forwarded to Kent Hill documents and information received from Lucky Star. Additionally, Mr. Khela obtained bids relating to installation of HVAC units, and completion of the Studies. (*RP 131, Ex 18, 23, 24, 25, 26, 27, 28*). On its part, Kent Hill worked with Mr. Khela to attempt to move the transaction forward. (*RP 408-409*).

Mr. Khela's testimony that he provided a copy of the schematic drawing to one of Kent Hill's principals was not hearsay, and admissible. *ER 801(c)*. If Mr. Khela continued to be Kent Hill's agent, his testimony detailing his actions seeking to "bridge the gap" between Kent Hill and

Lucky Star, would be considered to be an admission by a party opponent, and not hearsay. *ER 801(d)(2)*.

Kent Hill's reliance upon *RCW 18.86.070* does not support its argument. In relevant part, *RCW 18.86.070*, provides:

"1) The agency relationships set forth in this chapter commence at the time that the broker undertakes to provide real estate brokerage services to a principal and continue until the earliest of the following:

(a) Completion of performance by the broker;"

Mr. Khela's performance was not complete, nor would he receive the remaining portion of his commission, until Lucky Star had taken occupancy of the Premises. (*Ex 11*).

Likewise, Kent Hill's reliance upon *Cogan v. Kidder, Mathews & Segner, Inc.*, 97 Wash.2d 658, 648 P.2d 875 (1982) is misplaced. In *Cogan*, the seller's agent found a buyer, and an earnest money agreement was signed. Before closing, the agent requested an extension of the closing on behalf of the buyer's assignee without disclosing its dual agency to the seller. The trial court found that the agency relationship between the seller and

agent did not terminate when a binding and enforceable contract was entered into, because the agent continued to work toward closing and the earnest money agreement expressly provided that the commission would be earned "if and when the sale closes". *id* @ 663-64; *Ward v. Coldwell Banker/San Juan Properties, Inc.*, 74 Wash.App. 157, 161-62, 872 P.2d 69 (1994). Kent Hill's claim that Mr. Khela did not remain its agent should be rejected.

**H. Kent Hill Has Presented No Argument In Support Of Its Claimed That The Trial Court Erred In Awarding Damages to Lucky Star.**

Kent Hill's Assignment of Error No. 6 states "The trial court erred in awarding damages to Lucky Star." (AB 7). Within its Opening Brief, Kent Hill failed to make any argument in support of this claimed assignment of error. It is the rule that an appellant waives an assignment of error, if they failed to present argument or citation to authority in support of that assignment. *RAP 10.3(a)(6), 10.3(g), 10.4(c); Cowiche Canyon Conservancy v. Bosley, supra.* The trial court's award of damages to Lucky Star is fully supported by the record. (*FF 53, 54*). In that it failed to include any argument

in support of its claimed error on award of damages, Kent Hill's Assignment of Error No. 6 should be deemed waived.

**I. The Trial Court Correctly Awarded Lucky Star Its Attorney Fees and Costs.**

While Kent Hill's Assignment of Error No. 7 states "The trial court erred in awarding attorney's fees to Lucky Star", its Opening Brief contains no argument in support of this assignment. (AB 7). It is the rule that an appellant waives an assignment of error, if they failed to present argument or citation to authority in support of that assignment. RAP 10.3(a)(6), 10.3(g). *Cowiche Canyon Conservancy v. Bosley, supra*. In that it failed to include any argument in support of its claimed error on award of attorney fees, Kent Hill's Assignment of Error No. 7 should be deemed waived. At trial, Lucky Star was the prevailing party, and the court's award of attorney fees and costs to it was entirely appropriate. (CL 14, Ex 11).

**J. Lucky Star Should Be Awarded Its Attorney Fees And Costs On Appeal.**

Pursuant to *RAP 18.1*, Lucky Star requests that it be awarded its attorney fees and costs incurred in this appeal. In Washington, attorney fees are recoverable by the prevailing party, if permitted by contract, statute, or some recognized inequity. *Panorama Vill. Condo. Owners Ass'n Bd. of Directors v. Allstate Ins. Co.*, 144 Wash.2d 130, 143, 26 P.3d 910 (2001). The Lease contains provision for an award of attorney fees and costs:

"10. Default. ...The prevailing party in any litigation or other proceeding to enforce such party's rights under this Lease will be entitled in such litigation or proceeding to an award of the costs of such litigation, including attorney's fees and costs."

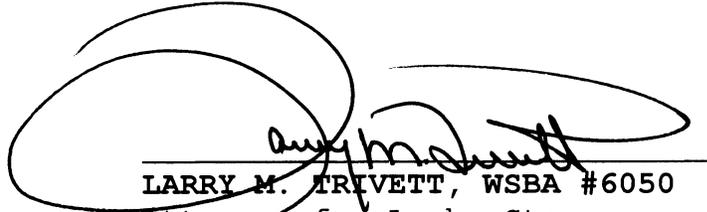
(*Ex. 11*). At trial, Lucky Star was the prevailing party, and the trial court properly awarded Lucky Star its attorney fees and costs. (*CL 14*).

Based upon the Lease terms, this court should, also, award Lucky Star attorney fees and costs as a result of Kent Hill's present appeal. *Cornish Coll. of the Arts v. 1000 Va. Ltd. P'ship*, *supra* @ 231.

**IV. CONCLUSION**

In all respects, the trial court's Findings of Fact are supported by substantive facts, and its Conclusions of Law are based upon applicable law. The trial court's Judgment should be affirmed in all respects, and Lucky Star should be awarded its attorney fees and costs on appeal.

**RESPECTFULLY SUBMITTED** this 2nd day of July,  
2015.



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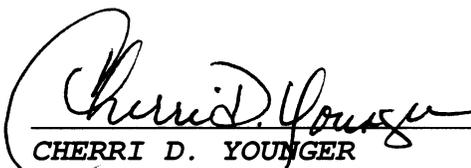
**DECLARATION OF SERVICE**

On said day below, I emailed and deposited in the U.S. Mail a true and accurate copy of the following document: Brief of Lucky Star in Court of Appeal Cause No. 72907-1, to the following:

Mr. Douglas S. Tingvall  
RE-LAW  
8310 154<sup>th</sup> Ave. SE  
New Castle, Washington 98059-9222

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

Signed at Marysville, Washington this 2nd day of July, 2015.

  
\_\_\_\_\_  
CHERRI D. YOUNGER