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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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No. 39281-0-II

COURT OF APPEALS OF THE
STATE OF WASHINGTON, DIVISION TWO

KATALIN NYITRAI,

Appellant,

v.

STARLETA OLEA,

Respondent.

REPLY BRIEF OF APPELLANT

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ORIGINAL

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I. REPLY ARGUMENT

A. The Trial Court Never Weighed the Extrinsic Evidence, and Erred by Ruling as a Matter of Law based on Construction Against the Drafter

1. The Trial Court Treated the Case as Summary Judgment and Granted the Motion to Dismiss as a Matter of Law, without Weighing the Evidence

Ms. Olea does not challenge the statement of the rule stated in *Forest Marketing v. DNR*, 125 Wn. App. 126, 104 P.3d 40 (2005), and elsewhere, that the trial court must first attempt to determine the meaning of the contract based on weighing all extrinsic evidence prior to resorting to the rule of *contra proferentem*. Instead, she argues that the trial court did weigh the evidence. This claim is flatly contrary to the record before this Court:

- “This motion to dismiss is, I think, just like a summary judgment motion, and ought to be treated the same way.” VRP 66/4-6.
 - Of course, it is black-letter law that on summary judgment courts “do not weigh the evidence or determine the truth of the matter; the only question is whether there is a genuine issue for trial.” *Arreygue v. Lutz*, 116 Wn. App. 938, 940-41, 69 P.3d 881 (2003); accord, e.g., *Brogen & Anensen LLC v. Lamphiear*, 165 Wn.2d 773, 777, 202 P.3d 960 (2009).
- True to its expressed intent to treat this like summary judgment, the trial court surveys what it sees as the undisputed evidence, VRP 66/7-22, and then says: “And, then, the question is: Where

the leases are . . . internally inconsistent, is there a rule of law that goes without – without weighing the credibility of any – any witness? My understanding of the rule of law is without weighing credibility, if there are inconsistencies in a written agreement, they're construed against the drafter, and in this case, that's the Plaintiff. She drew them up. They're inconsistent, and she's the drafter, and that give the option to interpret to the Defendant, as a matter of law. So I'm granting the motion to dismiss." VRP 66-67/23-9.

- Thus, as the trial court decided the case, it expressly said it was doing so “without weighing the credibility of any witness,” but rather “as a matter of law.”
 - Ms. Olea’s argument that not weighing *credibility* is not the equivalent of not weighing *evidence* makes no sense whatsoever when viewed in the context of the fact that the only evidence of intent of the parties was the testimony of the parties themselves, which frequently conflicted, and therefore this evidence could not be weighed without determining credibility.
- The trial court in its Findings and Conclusions again expressly stated that it was ruling “without weighing credibility,” CP 17 (CL 3.1), and that “the court adopts the interpretation of the Defendant *as a matter of law.*” CP 17 (CL 3.2).

In the face of this record, Ms. Olea's assertions that the trial court "clearly weighed the evidence presented" is not accurate. *Brief of Respondent* at 6, 8.

2. Disputed Issues of Material Fact Preclude Granting the Motion

Ms. Olea argues that the court "found based on the uncontroverted evidence" that there was a basis for granting the Motion to Dismiss. *Brief of Respondent* at 6. But there was simply too much material disputed evidence before the trial court for it to decide the case "as a matter of law" based solely on the agreement of the parties that the leases were internally inconsistent and that they intended both leases to end at the same time. At a minimum, the court must still decide:

- **When that "same time" for termination would be.** Would it be November 30, 2007, as expressly stated in both leases, which both parties read before signing? Would it be November 30, 2006, as claimed by Ms. Olea? Or would it be three years from inception, as stated in the term provision of each lease (resulting in the Suite A Lease terminating November 14, 2006, and the Suite B Lease terminating August 31, 2007, *see, Brief of Appellant* at 15). All this is in dispute.

- **What happened in August, 2006.** Ms. Nyitrai testified that she had a potential lessor for the entire first floor of the building occupied by Ms. Olea, but when Nyitrai asked Ms. Olea to vacate, she was told by Ms. Olea that she had until November 2007 under the lease; and further, that Ms. Nyitrai checked the leases and found that to be true, so she gave up on leasing the entire first floor in 2006. VRP 19-20/15-7, 41-42/21-14; CP 101-04/11-18. Ms. Olea denies this in general terms. VRP 60/8-17. The trial court needs to resolve this significant disputed issue of material fact, and then determine its legal effect on the intent of the parties to the lease contracts.
- **Who really drafted the term provisions of each lease.** If the court cannot determine intent from the extrinsic evidence, it needs to decide credibility issues to figure out who drafted the term provisions of the leases. With respect to the Suite A Lease, Ms. Nyitrai testified that the crucial term provisions were dictated to her by Ms. Olea, but Ms. Olea denies that. *Brief of Appellant* at 5-6, 7, 17. With respect to the Suite B Lease, Ms. Nyitrai testified that the term provisions were blank when handed to Ms. Olea, that Olea or someone on her behalf filled them in, that they are not in Nyitrai's handwriting and

she didn't fill them in – and again, Ms. Olea denies this, although she concedes that she doesn't know who filled them in. *Brief of Appellant* at 5-7, 19.

It follows clearly that the trial court could not decide this case on undisputed evidence. Disputed material facts exist, and the trial court will simply have to finish hearing the evidence and then do the hard work of weighing credibility and examining the reasonableness of the parties' respective positions.

3. Entry of Findings Does Not Change the Fact that the Trial Court Actually Ruled as a Matter of Law

Ms. Olea argues based on the general presumption that findings of fact on a Motion to Dismiss show that the trial court weighed the evidence. *See, Seattle-First National Bank v. Hawk*, 17 Wn. App. 251, 254, 562 P.2d 260 (1977). That presumption cannot stand here in the face of the trial court's clear expression that it was ruling without determining credibility and as a matter of law.

It is well established that in ruling on a CR 41(b)(3) Motion to Dismiss, the trial court may either rule as a finder of fact and make credibility decisions, or rule as a matter of law. *N. Fiorito Co. v. State*, 69 Wn.2d 616, 618-20, 419 P.2d 586 (1966); *Seafirst, supra*, 17 Wn. App. at 253. In determining which the court did, “reviewing courts should look to

the trial court's oral or memorandum decision for guidance.” *Fiorito, supra*, 69 Wn.2d at 620. When that is done here, it becomes absolutely clear that (in words the trial court itself selected) the court was ruling “as a matter of law” “without weighing the credibility of any witness.” A presumption is only a presumption – there is no reason that it should stand against plain facts in the record showing that the trial court treated this as summary judgment, and did not weigh the evidence.¹

B. The Trial Court Erred by Not Examining the Issue of Intent Prior to Applying the Rule of Construction Against the Drafter

The trial court clearly believed that, as a matter of law, all it had to do was to (erroneously) determine that Ms. Nyitrai was the drafter of the two disputed lease term provisions, and then mechanically apply the rule of construction against the drafter. This was reversible error, because the trial court skipped the step clearly required by law that it must first attempt to determine the intent of the parties based on the extrinsic evidence and the reasonableness of the parties’ respective interpretations. *See Brief of Appellant* at 11-13.

¹ How then do we explain the entry of “Findings of Fact”? It is regrettably not uncommon for trial courts to enter superfluous findings of fact on summary judgment or motions to dismiss, but these do not operate to change the fundamental nature of the ruling. Instead, such superfluous findings are simply disregarded by the reviewing court (aside from legal reasoning and conclusions). *E.g., Baneulos v. TSA Washington, Inc.*, 134 Wn. App. 607, 614, 141 P.3d 652 (2006); *State v. Pineda*, 99 Wn. App. 65, 79, 992 P.2d 525 (2000).

Ms. Olea attempts to distinguish *Forest Marketing, supra*, 125 Wn. App. 126, a case in which this Court refused to apply the rule of *contra preferentem* because the extrinsic evidence permitted determination of the intent of the parties, by asserting that the rule was not applied because the outcome would have been an unreasonable or absurd construction of the contract. *Brief of Respondent* at 7. This argument fails for at least two reasons: first, because that is not a proper characterization of *Forest Marketing*; and second, because the outcome Ms. Olea seeks is an unreasonable construction of the agreements.

What *Forest Marketing* actually says is this:

‘Determining the intent of the contracting parties is to be accomplished by viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of the respective interpretations advocated by the parties.

‘If, after viewing the contract in this manner, the intent of the parties can be determined, there is no need to resort to the rule that ambiguity be resolved against the drafter.’

Forest Marketing, supra, 125 Wn. App. at 132 (quoting, *Roberts, Jackson & Assoc. v. Pier 66 Corp.*, 41 Wn. App. 64, 69, 702 P.2d 137 (1985)). It bears repeating that the problem here is not what the trial court found after attempting to determine intent of the parties in light of extrinsic evidence, but that the trial court never even attempted to determine such intent.

Thus, the trial court never considered the reasonableness of the parties' respective positions. Nor did it ever consider the other key extrinsic evidence of intent, which was the evidence that when Ms. Nyitrai attempted to re-rent the premises in August 2006, she was told by Ms. Olea that this was not possible because her lease extended to November 30, 2007. Instead, it jumped to the mechanistic conclusion that it had to dismiss Nyitrai's case as a matter of law because she supposedly drafted the key lease provisions. That was reversible error.

Ms. Olea's argument that *Forest Marketing* would not apply to her own "reasonable" construction of the leases ignores: (1) the fact that the trial court **never undertook** this part of the *Berg v. Hudesman* extrinsic evidence analysis in the first place; and (2) that her own position **does** lead to absurd consequences, because she claims that she intended both leases to be 36 months, *Brief of Respondent* at 2 ¶¶ 4 & 6, & p. 6, but she admits that she intended both leases to end on the same date (VRP 52/14-19; *Brief of Respondent* at 2 ¶ 5), which leads to an impossibility. If both leases were 36 months then they would end on vastly different dates (November 14, 2006 and August 21, 2007), neither of which correspond to the date she actually vacated (November 30, 2006) or to the date specified in both leases for termination (November 30, 2007).

C. The Findings Regarding Who Was the Drafter Are Not Supported by the Record

We argued carefully in our opening brief that a reasonable finder of fact could find that Ms. Nyitrai was not the sole drafter of the term provision in the Suite A Lease because of evidence that the terms were dictated to her by Ms. Olea, and that she was not the drafter of the term provision of the Suite B Lease because she didn't write in that provision. *Brief of Appellant* at 16-20. There is *no response to these arguments* in the Brief of Respondent, so this Court should view them as established.

In the unlikely event that this Court decides (contrary to what the trial judge said) that the trial court's findings were based on credibility of the witnesses, it still needs to reverse and remand for proper findings as to who was the drafter of the agreements.² There is no credible evidence that the parties did not jointly draft the term provisions of the Suite A Lease ("We filled it in together."). VRP 14/9. Ms. Nyitrai testified that Ms. Olea told her three years and 2007, so she put these down for the term ("So I followed exactly what she told me to put down."). VRP 13-14/24-15; CP 84/15-18, 85-86/16-4. Ms. Olea denied this with respect to "2007" but not with respect to the "three years" provision, and she suggested that "2007"

² These arguments need not be considered if this Court rules (as it should) that the trial court ruled on the Motion to Dismiss as a matter of law, without weighing the evidence.

was a “digit error.” VRP 58/18-24, 60-61/22-1. She never denies participating in the drafting of the term provision, or that she dictated the “three years” term. Therefore, the evidence does not support a finding that Ms. Nyitrai was the sole drafter of the Suite A Lease term provision – the only reasonable conclusion on this record is that they were joint drafters, and therefore *contra preferentem* could not apply. *Drumheller v. Bird*, 170 Wash. 14, 23, 15 P.2d 260 (1932); 5 Corbin on Contracts § 24.27 at 291 (J. Perillo, ed. rev. 1998); *and see*, cases cited *Brief of Appellant* at 18.

The finding that Ms. Nyitrai drafted the Suite B Lease is likewise not supported by credible evidence in the record. As summarized at page 19 of our opening brief, Ms. Nyitrai testified that she gave that lease to Ms. Olea with the term provision blank, that Olea or somebody for her filled it out, and that it was not in her handwriting. VRP 14/6-15; CP 88/3-14, 88/20-23. While Ms. Olea denied that she filled or somebody on her behalf filled it out, she admitted she did not know who did fill it out. VRP 51-52/25-1. This does not support a finding that Ms. Nyitrai filled it out – there is simply no credible evidence in the record to that effect. Since there is not, it would be reversible error to base a dismissal on a finding that Ms. Nyitrai was the drafter of the Suite B Lease.

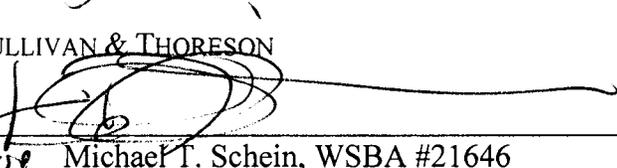
II. CONCLUSION

Ms. Olea is resting her entire appeal on the supposition that the trial court weighed the evidence of intent prior to applying the rule of construction against the drafter, despite the fact that the trial court very clearly stated it was treating the motion like summary judgment, not weighing the evidence, and ruling as a matter of law. The summary dismissal of Ms. Nyitrai's case must be reversed because the trial court failed to weigh all extrinsic evidence in a sincere effort to determine the actual intent of the parties prior to applying the rule of construction against the drafter. In addition, the trial court prematurely and improperly found that Ms. Nyitrai was the sole drafter of the disputed term provisions.

The judgment below should be reversed, the case remanded for continuation of the trial, with attorney fees to abide the outcome (except that Ms. Olea's fees for this appeal should be deemed per se unreasonable).

Dated this 7th day of November, 2009.

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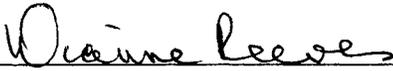
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CERTIFICATE OF SERVICE

I, Diane Reeves, legal assistant to Sullivan & Thoreson, hereby certify that on the date set forth below I caused a copy of the within REPLY BRIEF OF APPELLANT to be delivered by U.S. Mail, first class postage prepaid, to counsel of record for the Respondent at the following address:

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DATED this 9th day of November, 2009.



Diane Reeves

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