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COURT OF APPEALS
PIERCE COUNTY

NO. 40182-7-II

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**DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON
BY  COUNTY

JAMES & DEBORAH COOPER, et al.

Appellants,

v.

FRANK & SHIRLEY RODARTE, Respondents

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON, PIERCE COUNTY

BRIEF OF APPELLANTS

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I. ASSIGNMENTS OF ERROR

1. The trial court erred in Finding of Fact 2.2 when it ruled that "James D. and Deborah A. Cooper were responsible for paying to the Pettits the property taxes described in Section IX of the March 1, 1986 Lease of Premises (Exhibit 1)." CP 573.

2. The trial court erred in Finding 2.20 when it ruled that "Defendants presented evidence and argument that Section VI concerning the "Renewal of Lease" was ambiguous. The Court finds that Section VI was unambiguous." CP 579.

3. The Court abused its discretion in denying the Defendants' motion in limine to exclude evidence that Defendants failed to pay property tax and granting the Plaintiff's motion to amend the pleadings at half time. RP 9-11.

4. The Court erred in Conclusion of Law 3.1 that the Defendants' failure to pay property tax constituted a material breach and ordering the Defendants evicted from the property.

5. The Court erred in Conclusion of Law 3.8 that the Respondents were the prevailing party and entitled to attorneys' fees and awarding said fees. CP 580.

II. ISSUES:

WHETHER SECTION VI OF THE LEASE WAS AMBIGUOUS WHEN (1) THE LEASE PROVIDED FOR AN OPTION TO PURCHASE THE PROPERTY AFTER THE TEN YEAR LEASE EXPIRED, (2) LESSEE EXERCISED THAT OPTION, (3) LESSOR FAILED TO SUB-DIVIDE THE PROPERTY AND (4) ALL PARTIES CONDUCTED THEMSELVES AS IF LEASE DID NOT MANDATE PAYMENT OF PROPERTY TAX AFTER OPTION WAS EXERCISED?

DID DEFENDANTS MATERIALLY BREACH THE LEASE AGREEMENT WHEN THE DEFENDANTS HAD SEPARATELY PURCHASED THE BUSINESS AND THE LEASE FROM PETTIT FOR PURCHASE AMOUNTS THAT FAR EXCEEDED THE AMOUNTS OF THE YEARLY PROPERTY TAX, IF OWED?

UNDER ER 401, DID THE TRIAL COURT ABUSE ITS DISCRETION BECAUSE IT ALLOWED TESTIMONY AND EVIDENCE THAT DEFENDANTS FAILED TO PAY PROPERTY TAX WHEN THE PLAINTIFF HAD NOT PLEAD THIS FAILURE AS A BASIS OF BREACH?

DID THE TRIAL COURT ABUSE ITS DISCRETION WHEN IT GRANTED PLAINTIFF'S MOTION TO AMEND UNDER CR 15 BUT THERE WAS NOT AN OPPORTUNITY FOR DEFENDANTS TO RAISE THE AFFIRMATIVE DEFENSES OF WAIVER AND ACQUIESCENCE/ESTOPPEL?

III. STATEMENT OF THE CASE:

A. Summary:

This case is before the Court of Appeals because the Trial Court ruled that a commercial lease provision was not ambiguous and that the Appellants had materially breached the unambiguous provision. CP 570-581. The Court ruled that the Defendants had breached the provision because they had failed to pay property tax. CP 575. This theory of breach had not been plead by

the Plaintiff.

B. The Parties:

The lawsuit before the court involves Plaintiff Frank Rodarte's claim that Defendants, James ("Jim") Cooper and other Cooper family members, breached a lease agreement. *Id.*

The lease agreement dates back to 1986 when the Plaintiff's brother and predecessor, Roger Rodarte, entered into a lease agreement with Cooper's predecessor, third party Robert ("Bob") Pettit. Pettit owned and operated Cascade Mobile Mix which he sold to Appellants Jim and Deb Cooper in 1990. CP 11-17.

The original lease between Roger Rodarte and Bob Pettit was for ten years and the original parties to the agreement did not allege that there was ever a breach. That is, from 1986 and 1996, Pettit made all lease payments to Roger Rodarte as the original Lessee. This is supported by Trial Exhibits 12, 13, the testimony of Roger Rodarte found at RP 68-9 and the testimony of Robert Pettit found at RP 33-34. Plaintiff/Respondent did not plead otherwise.

Evidence was presented that Pettit sold his business to Defendants Coopers in 1990 and they operated out of the property from that time until the Court's order of eviction in 2009. (This was alleged as a breach but Court did not find a breach and it is not an issue on appeal). All parties agree

that Pettit sold his interest in the lease to Coopers in 1998.

On the Lessor side, Roger Rodarte sold his property to his brother Frank Rodarte in 1999. Here is a diagram of the time frame.

<u>Lessor</u>	<u>Lessee</u>	<u>Year</u>
Roger Rodarte	Robert Pettit	1986 - 1998
Roger Rodarte	Jim and Deb Cooper	1998 - 1999
Frank Rodarte	Jim and Deb Cooper	1999 - 2009

Here is the same chart but with an indication of who was actually located and operating out of the leased premises even without a formal lease assignment, i.e., those years Cooper owned the business but not the lease and was operating out of the property.

<u>Lessor</u>	<u>Lessee</u>	<u>On Property</u>	<u>Year</u>
Roger Rodarte	Robert Pettit	Pettit	1986 - 1990
Roger Rodarte	Robert Pettit	Coopers	1990 - 1999
Roger Rodarte	Coopers	Coopers	1998 - 1999
Frank Rodarte	Coopers	Coopers	1999 - 2005
Frank Rodarte	Coopers	Coopers/Wrights	1999 - 2009

C. The Property: The property that is the subject matter to this litigation is roughly ten acres and was described in the Complaint. CP 2-3. In 1986,

Rodarte agreed to lease to Pettit the southernmost portion of the property.

CP 11-38.

D. The Contract:

The original lease between the parties was a ten year lease with an option to purchase. CP 11-38. Specifically, Section II of the Lease states that the term of the lease is ten years. It is laid out below:

SECTION IV

The term of the lease shall be ten (10) years, commencing on the first day of March, 1986, terminating on the 28th day of February, 1986, terminating on the 28th day of February, 1996, unless sooner terminated under the provisions of the lease.

The lease also contained an option to purchase the leased premises. CP 11;

See also Section IV, Exhibit 1.

SECTION V OPTION TO PURCHASE

In the event Lessee has made all monthly payments on the premises for a period of ten years, and if Lessee is not in default of any other covenant of this lease, then at the end of the initial term of this lease (10 years), Lessee shall be entitled to purchase the property for one (\$1.00) dollar. Should this option be exercised, all lease payments shall apply to the purchase of the price, to-wit: Fifteen Thousand (\$15,000.00) Dollars including interest at Ten (10%) percent per annum over a ten year period. Should Lessee choose not to exercise this option, or if Lessee is in default of any covenant of this lease, including the covenant to pay rent, then all of the payments made by Lessee shall belong to Lessor and shall be charged as rent to Lessee.

CP 12.

The option to purchase was contingent upon Lessor, Rodarte, subdividing the property so that it could be purchased. See Section V. This, Section V, also provided that Lessor, Rodarte, was to subdivide the property at his own expense. *Id.*

SECTION VI SUBDIVISION OF THE PROPERTY

During the term of this lease, Lessor agrees to provide, at his own expense, a subdivision of the property which would comply with the applicable laws and ordinances of the County of Pierce and the State of Washington, relating to the division of large parcels of property into smaller parcels. Lessor agrees that any subdivision of the property shall not restrict Lessee's use of the property described herein, nor violate any covenant or condition of this lease. Any such subdivision shall include the parcel or property described in this lease and the subdivision shall not reduce in any way the dimensions of the property or location of the property leased by Lessee.

CP 12.

These lease provisions show that, at the end of the term, Pettit would have the right to purchase the property. In the alternative, should Rodarte fail to subdivide, Pettit would be entitled to lease the premises perpetually for one dollar per year under Section VI, laid out below:

SECTION VII RENEWAL OF LEASE

Should Lessor fail to complete the subdivision of the property required by this lease by the end of this lease, this lease shall renew automatically each year on the 1st day of March of each succeeding year following the end of the term of this lease. The annual rental for each succeeding year following the end of the term of this lease, shall be One (\$1.00) Dollar, payable on the 5th

day of March of each succeeding year.

CP 12.

E. The Complaint:

In 2007, Respondent sued Appellants, alleging that they had breached the lease agreement because they had violated SECTION XIV. CP 14-15. (The trial court did not find that this was true and it is not before the Court).

Plaintiff did not plead that Defendants had breached the Contract because they had failed to pay property tax. However, Plaintiff did plead as follows in its para. 4.14.

4.14 By certified letter mailed May 22, 2007 Frank Rodarte notified Cooper and Wright that they were in default of the lease and of Rodarte's intention to evict Defendants (terminate the lease) unless default was not cured within 33 days. More than 33 days have elapsed and the default has not been cured.

CP 6.

The Court granted Plaintiff's motion to amend because the Complaint contained paragraph 4.14, noting that "[a]lthough it was not well articulated in the initial Complaint, the initial Complaint does refer to the Notice of Default." RP 193.

F. The Trial:

The trial was heard by a pro tem Judge. On a motion in limine, the Appellants moved to exclude any testimony that related to any theory of breach that was not plead, in particular evidence related to the non-payment of property tax. RP 9-11. Counsel for Appellants argued that issues that had not been plead and "any evidence that does not conform to an element contained with the Complaint is irrelevant and [s]hould not be admitted under the Rules of Evidence." RP 17. Counsel went on to argue that the "plaintiff should be held and tied to his pleadings" because, if truly important, the Plaintiff had ample opportunity to amend its complaint. RP 18.

The Court did not rule. Rather, it reserved ruling to give the motion to exclude "context." RP 19. At trial, when Respondent began to solicit evidence and testimony as to the non-payment of property tax, Appellants objected and the Court noted the on-going objection. The Court allowed the testimony over Counsel's objection and noted the ongoing objection. See RP 30; 42; 63; 75; 92.

At half time, the Plaintiff moved to amend its pleadings to offer a cause for breach based upon the non-payment of property tax. The Court granted this motion based solely on the evidence that Plaintiff had argued

was not admissible.

G. Testimony

Roger Rodarte: Roger Rodarte was the lessor and an originator of the contract. He testified that he owned the parcel that is the subject matter of this case. RP 32. He had been approached by Mr. Robert Pettit because Pettit had a concrete company "on the north side of my property -- not my property, another gentleman's property, -- and he was doing a concrete business." Id. "He approached me about leasing a piece of property on the south side and I said that would be okay." RP 33.

Mr. Rodarte confirmed that the lease contained an option for Pettit to purchase the property. RP 35. However, Roger Rodarte was not clear minded about his own rights to re-acquire the property in the event that Pettit ceased doing business. Rodarte testified as follows:

After the ten years, Robert Pettit had stated that he was going to sell the property because he had hoped to move to Montana in the future and was going to give me the option to buy the property, being I had a construction company on the site and I could utilize the concrete company, which I in turn did sidewalk work and driveways and curbs and gutters in my business. So I hoped to purchase the property if he ever sold it. So that was kind of an agreement so I felt I would never have to subdivide it. I would end up owning my own property back, terminating the lease.

RP 38.

Roger Rodarte was clear minded about the money that was owed him. He stated that between 1986 and 1996, Pettit paid to him property tax under the provisions of the contract. RP 41. He stated that, in some years between 1986 and 1996, Pettit had gotten behind in paying taxes, and Roger Rodarte sent Pettit reminder letters about making his tax payments. RP 41. Pettit always paid Roger Rodarte tax payments directly to him, i.e., not to the county's tax office. RP 41.

It was established at trial that, at the end of the ten year term in 1996, Pettit had asked for a final accounting to make sure he was caught up with all back tax payments and rent. RP 67. Further, Robert Pettit had exercised his option to purchase the property in writing by a letter to Roger Rodarte dated February 5, 1996. Pettit Transcript, 70.¹

The most important take away from Roger Rodarte's testimony is that he did not expect nor did he receive any payments for property tax *after* 1996. TR 68. This is important because Pettit remained the lessor until 1998. Thus, between 1996 and 1998, there existed a period in which the original parties to contract conducted themselves after the ten year term expired.

¹ The Pettit Transcript was admitted at trial as testimony from a preservation deposition. Further, all of the exhibits were stipulated and admitted at trial. The Pettit transcript was designated as a transcript for this appeal and noted as such but was not numbered sequentially as part of the trial "Report of Proceedings." Thus, reference herein will be "Pettit Transcript", followed by the page number to include the admitted and attached exhibits.

If there was any ambiguity about the parties intent, Roger Rodarte stated several times in his testimony that the *only* obligation after the ten year time period expired was the obligation to pay one dollar per year.

Roger Rodarte's Answer to cross exam question:

A. I would agree that he [Pettit] was getting property on a lease for ten years and then after that he had no interest and he no further payments after ten years. He would pay one dollar per year. That's the way I looked at that lease agreement.

Q. Then the only obligation to you would be the one dollar per year, correct?

A. That is correct.

RP 54.

And again, Roger Rodarte testified that "if we would have subdivided the property, there was a lease agreement that stated -- all I can say is he was paying one dollar per year after that fact and he would not purchase the property, he would end up paying one dollar per year . . . " RP 55.

Most importantly, Roger Rodarte acknowledged that he neither sent Cooper any request for money nor did he ever sue him for non-payment of taxes. RP 69.

Robert Pettit: Another key fact in the testimony of both Pettit and Roger Rodarte was that their relationship was good. Roger Rodarte agreed with this at RP 68. Pettit, in his testimony, described his relationship with Rodarte

as "neighborly" and even "friendly." Pettit Transcript 11-12.

Pettit confirmed that the Lease was intended to be a purchase agreement. Pettit Transcript 14. He described the purchase price and confirmed that the lease payments were actually amortized interest payments with an option to purchase at the end of the ten year term. Pettit Transcript 17; 19-20.

Pettit specifically addressed the property tax provision during the time period between 1986 and 1996. Pettit testified that "we set it up so that just like I were purchasing a home, I would be paying the property taxes for that piece of property during this contract period." Pettit Transcript 17-18. In particular, the initial purchase price was \$15,000 but amortized for ten years at ten percent for monthly lease/purchase payments of \$198.23 per month. Exhibit admitted and found at Pettit Transcript 71.

Pettit was clear minded about the intent of the parties as to the renewal provision as it related to property tax. He specifically stated that, in the event that Pettit was unable to purchase the property because Rodarte could not subdivide, then no property tax would be due and owing. RP 22.

From his direct examination.

Q. Okay. And when you were conceptualizing the lease and asking Skip Mayhew [attorney who drafted the lease] to include sections,

did you at that time envision any built-in penalties to Roger Rodarte had he failed to subdivide the property?

A. Well, I guess that a dollar a year would be some sort of a penalty because he would - he wouldn't have the right to the land anymore and - - and all he'd be getting is a dollar a year and he'd still have to be paying the taxes on it.

Q. Okay. That last part of that question - - the last part of your answer is what I want to drill down on here for a minute. Now, Section IX talks about taxes, insurance and whatnot. During the first ten years did you make payments to Roger Rodarte for taxes?

A. I did. Yes, I did.

Q. After the first ten years did you make payments to Roger Rodarte for taxes?

A. No, I didn't.

Q. Why not?

A. Well, it just didn't call for it in this agreement. It just called for, you know my obligation here after ten years, a dollar a year thereafter.

Q. Is it your testimony that Roger Rodarte would have to pay property tax after 1996, had he failed to subdivide the property?

A. Yes, it is.

RP 21-22.

Pettit also confirmed that during the time period between 1996 and 1998 when he was still the Lessee and Roger Rodarte remained the Lessee, he did not make, nor was he asked to make any payments to Roger Rodarte for property tax.

On Jack Wetherall's Cross Examination:

Q. Okay. I want to make sure we're not confusing dates. Up to 1996 they had an obligation to pay taxes.

A. In 1996 I had the obligation.

* * *

Q. The question is up to 1996, after you had sold the business, the Coopers had the obligation to pay taxes on the property, did they not?

A. No, they didn't.

Pettit Transcript 57

Q. Okay. Now, let's move forward from 1990 through 1996. We're now into 1997. If I understand your testimony, no one is required to pay taxes on that property?

A. That's correct.

Pettit Transcript 58.

During his testimony, Pettit produced a letter that he had written to the Coopers at the time he sold the property to them. The letter was entered as an exhibit and is dated May 26, 1998. See Pettit Transcript 75. In the letter, Pettit explains to the Coopers that he is assigning them all of his interest in the lease. He explains that he has met his obligations under the lease. He specifically writes "my only obligation and yours as the new owners would be an annual fee of \$1 for the lease, payable to the Rodartes." Id.

The Court should note that the Coopers paid twenty five thousand dollars to purchase the lease and that they made a ten thousand dollar down

payment and the rest financed at ten percent (10%). According to the 1996 letter from Pettit to Rodarte in which he asks for an accounting of property taxes, Pettit's obligation for property tax was \$91.76 for 1994 and \$92,94 for tax year 1995.

Most importantly, Pettit confirms that he *did not* pay property tax after 1996. Pettit Transcript 22.

Brad Deakins: Mr. Deakins testified that is the "comptroller" for Frank Rodarte's affairs. RP 73. He testified that he had determined that the property that is relevant overlaps three separate tax parcel numbers. RP 74. He further determined that one of Frank Rodarte had not received tax property statements for three years from one of the parcels. RP 78.

Larissa Wright: Ms. Wright was a Defendant and is the daughter to Defendants Jim and Deborah Cooper. The Coopers made an abortive attempt to sell their business to her and her husband, Eric Wright, in 2005. RP 131. Ms. Wright testified that during the time period she operated the business out of the property, she had contacted the tax agency responsible for the property taxes and directed the statements to go to her for payment. RP 185. This was in 2005. She testified that she did not because she had purchased the business from her parents and assumed "we made the purchase of the business that it also include the property." RP 184. She was asked to

clarify and she testified that she didn't "remember how that was approached. But after purchasing a portion of that business, we were trying to do what was right and make sure we had everything in our name and make sure taxes were paid." RP 185.

Frank Rodarte: Frank Rodarte testified that he purchased the property from his brother in 1999. RP 115. He purchased the property for three hundred and fifty thousand dollars (\$350,000.00) RP 86. Frank Rodarte further testified that, when he purchased the property, he was aware of the lease to Defendants. RP 87. Frank Rodarte admitted that he did not make any claim, notify the defendants or file any lawsuit in 1999 in which he alleged that the Coopers had breached the lease because they had not paid property tax. RP 115. In fact, in 1999, he testified that he had even contacted an attorney to advise him about acquiring the property but was told he would have to "pay them a bunch of money: but he could not afford to pay the Coopers at the time. RP 115.

There is no evidence that, other than the 2007 Notice of Default, he had ever notified the Coopers that they owed property tax. He further testified that he had verified the Complaint but could not explain why he had not plead the failure to pay property tax as a basis for breach. RP 108.

Frank Rodarte testified that when he learned that Larissa had directed

the property tax payment on one of his tax parcel numbers to herself for payment, he was upset. RP 109, 104. He felt it was unethical and directed his attorney to notify the Defendants that they were in breach of the lease agreement. Id. This was in 2007.

Q. Did you instruct my office to prepare and send to the Coopers and the Wrights a letter notifying them they were in default under the lease?

A. Yes, I did. I was upset.

Q. Well, why were you upset?

A. Because it was all a shenanigan. They went behind our back to pay the taxes and they didn't even pay in one the right parcel. It just seemed so unethical and wrong. I was even surprised that the county would allow them to do that.

On cross, Frank Rodarte testified that his attorney sent a Notice of Default to the Defendants because they had begun to pay property tax in 2005 and the Notice of Default contended that they had breached for *failure* to pay property tax.

Frank Rodarte testified that he felt Ms. Wright's actions were unethical because she was paying on the wrong tax parcel number. RP 108.

IV. ARGUMENT

SECTION VI OF THE LEASE WAS AMBIGUOUS BECAUSE (1) THE LEASE ALSO PROVIDED FOR AN OPTION TO PURCHASE AFTER THE FIRST TEN YEARS OF THE LEASE EXPIRED, (2) LESSEE EXERCISED THAT OPTION, (3) LESSOR FAILED TO SUB-DIVIDE

THE PROPERTY AND (4) ALL PARTIES CONDUCTED THEMSELVES AS IF SECTION DID NOT MANDATE PAYMENT OF PROPERTY TAX AFTER OPTION WAS EXERCISED

On appeal from a bench trial, conclusions of law are reviewed *De novo*. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). Findings of fact are reviewed to determine whether they are supported by substantial evidence and, if so, whether the findings support the conclusions of law. *Hegwine v. Longview Fibre Co.*, 132 Wn.App. 546, 555, 132 P.3d 789 (2006). "Substantial evidence is evidence 'in sufficient quantum to persuade a fair-minded person of the truth of the declared premise.'" *J.E. Dunn Nw. Inc. v. Dep't of Labor & Indus.*, 139 Wn.App. 35, 43, 156 P.3d 250 (2007) (quoting *Holland v. Boeing Co.*, 90 Wn.2d 384, 390-91, 583 P.2d 621 (1978)).

It is well established that a Court's purpose in interpreting a written contract is to ascertain the parties' intent. *U.S. Life Credit Life Ins. Co. v. Williams*, 129 Wash.2d 565, 569, 919 P.2d 594 (1996). To aid in ascertaining the contracting parties intent, the Court adopted the "context rule" in *Berg v. Hudesman*, 115 Wash.2d 657, 667, 801 P.2d 222 (1990). *See also Diaz v. Natl. Car Rental Sys., Inc.*, 143 Wash.2d 57, 66, 17 P.3d 603(2001). Under the context rule, extrinsic evidence is admissible to assist the court in ascertaining the parties' intent and in interpreting the contract. *Williams*, 129

Wash.2d at 569, 919 P.2d 594. The court may consider (1) the subject matter and objective of the contract, (2) the circumstances surrounding the making of the contract, (3) the subsequent conduct of the parties to the contract, (4) the reasonableness of the parties' respective interpretations, (5) statements made by the parties in preliminary negotiations, (6) usages of trade, and (7) the course of dealing between the parties. *Berg*, 115 Wash.2d at 666-68,801 P.2d 222. Such evidence is admissible regardless of whether the contract language is deemed ambiguous. *Id.* Extrinsic evidence cannot be considered: (a) to show a party's unilateral or subjective intent as to the meaning of a contract word or term; (b) to show an intention independent of the instrument; or (c) to vary, contradict, or modify the written word. *Hollis v. Garwall, Inc.*, 137 Wash.2d 683, 695, 974 P.2d 836 (1999). "Extrinsic evidence is to be used to illuminate what was written, not what was intended to be written." *Hollis*, 137 Wash.2d at 697, 974 P.2d 836. "Unilateral or subjective purposes and intentions about the meanings of what is written do not constitute evidence of the parties' intentions." *Lynott v. Nat'l Union Fire Ins. Co.*, 123 Wash.2d 678, 684, 871 P.2d 146 (1994).

In the instant case, the trial court should have determined (1) the purpose of the contract; (2) the circumstances surrounding the contract; (3) the intent of the parties as shown by their subsequent conduct; (4) the reasonableness of the parties interpretations; and (5) the course of dealings.

It was error for the trial court to simply rule that the contract was unambiguous and disregard the *Berg* factors.

(1) The subject matter and objective of the contract

The trial court failed to read the renewal provision of the contract in the context of the objective of the contract. The objective of the contract was to sell the parcel to Pettit. Although drafted as a lease, the lease payments were amortized as if it were a purchase price of fifteen thousand dollars at ten percent interest annum and granted to Pettit an option to purchase.

The trial court disregarded Pettit's testimony that indicated that he bargained for title to the property so that he could sell it as part of his business. That testimony was clear. RP 21-22.

Q. Okay. And when you were conceptualizing the lease and asking Skip Mayhew [the attorney who drafted the lease] to include sections, did you at that time envision any built-in penalties to Roger Rodarte had he failed to subdivide the property?

A. Well, I guess that a dollar a year would be some sort of a penalty because he would - he wouldn't have the right to the land anymore and - - and all he'd be getting is a dollar a year and he'd still have to be paying the taxes on it.

Q. Okay. That last part of that question - - the last part of your answer is what I want to drill down on here for a minute. Now, Section IX talks about taxes, insurance and whatnot. During the first ten years did you make payments to Roger Rodarte for taxes?

A. I did. Yes, I did.

Q. After the first ten years did you make payments to Roger Rodarte

for taxes?

A. No, I didn't.

Q. Why not?

A. Well, it just didn't call for it in this agreement. It just called for, you know my obligation here after ten years, a dollar a year thereafter.

Q. Is it your testimony that Roger Rodarte would have to pay property tax after 1996, had he failed to subdivide the property?

A. Yes, it is.

The reason Pettit offered for this provision is actually quite clever. In the event that Pettit could not own the property, Pettit would not have received the benefit of his bargain. Thus, the further non-payment of property tax was a penalty to Rodarte for failing to perform. Put differently, the intent of the parties was to give Rodarte an economic incentive to perform and subdivide the property.

Pettit also confirmed that during the time period between 1996 and 1998 when he was still the Lessee and Roger Rodarte remained the Lessor, he did not make, nor was he asked to make any payments to Roger Rodarte for property tax.

On Cross Examination:

Q. Okay. I want to make sure we're not confusing dates. Up to 1996 they had an obligation to pay taxes.

A. In 1996 I had the obligation.

* * *

Q. The question is up to 1996, after you had sold the business, the Coopers had the obligation to pay taxes on the property, did they not?

A. No, they didn't.

There can be no doubt that Pettit had envisioned the contract as containing a penalty to Rodarte if he failed to subdivide the property. The penalty was that Roger Rodarte, not Pettit, would be required after 1996 to pay all property tax fully. Put somewhat differently, the objective was to give Roger Rodarte an economic incentive to subdivide so that Pettit would have title. The trial court never considered this because it ruled that the words of the contract were clear without examining the context.

(2) The circumstances surrounding the making of the contract

The trial court also failed to appreciate the context of the original contracting parties. Roger Rodarte and Robert Pettit got along well. Further, Roger Rodarte and Defendants Coopers got along well. It was not until Frank Rodarte purchased the property did conflict begin.

Frank Rodarte testified that he bought subject to the lease but clearly considered the lease to Coopers as a problem because, at the time he purchased the property in 1999, he had contacted an attorney for advice

about the lease. Clearly, Rodarte considered the bargain between his predecessor, Roger Rodarte, and Pettit to be so poor a bargain that he would not have made it. Yet, he purchased the property subject to that bargain.

The trial court erred by not considering and honoring the relationship and the bargain that the *original* parties to the contract had rather than giving such deference to Frank Rodarte's chagrin in 2009 when he needed more land for his construction company.

The trial court also simply missed the nuances of Roger Rodarte's testimony. Recall that Roger Rodarte's testimony confirmed that the lease contained an option for Pettit to purchase the property. RP 35. Yet, Roger Rodarte testified as follows:

After the ten years, Robert Pettit had stated that he was going to sell the property because he had hoped to move to Montana in the future and was going to give me the option to buy the property, being I had a construction company on the site and I could utilize the concrete company, which I in turn did sidewalk work and driveways and curbs and gutters in my business. So I hoped to purchase the property if he ever sold it. So that was kind of an agreement so I felt I would never have to subdivide it. I would end up owning my own property back, terminating the lease.

RP 38.

The trial court failed to understand but should have seen that the likely reason Roger Rodarte failed to subdivide the property is because he had secretly hoped that Robert Pettit would sell the concrete business to him.

However, as established, Pettit sold the business instead to Copper in 1990 before the ten year term expired. It is rational to conclude that Roger Rodarte had no motivation to cooperate in subdividing the property because he harbored some internal, unspoken intent to own Pettit's land and his business. TR 48.

Be that as it may, the circumstances show that Robert Pettit made a good and particular bargain. The Court took no time to understand the bargain and only a reversal will enforce the original agreement of the parties.

(3) The subsequent conduct of the parties to the contract

The salient and undeniable facts of this case are simply that the parties conducted themselves as if property tax was *not* owed after 1996. This fact, that all parties behaved as though the Coopers *did not* owe property tax to Rodarte, was so obvious to the litigants, it is likely the real reason that this theory was not originally plead in the complaint.

Roger Rodarte testified that in 1996, he and Pettit had conducted a ten year accounting to settle up. This was evidenced by letters to and from Rodarte and Pettit in which amounts outstanding for *past* property tax are listed and Pettit exercises his option to purchase. See Pettit Transcript at 70-71.

Pettit testified that he made no further property tax payments to Roger

Rodarte after 1996. Roger Rodarte agrees that he received no further property tax payments and testified that he made no further claims or requests for payments. Pettit Transcript 57. This is true for the time period that Roger Rodarte and Pettit remained lessors and lessees during the 1997 and 1998 time period.

Roger Rodarte also agreed that he did not make requests of Defendants Coopers to make property tax payments during the time he remained the Lessor until 1999, when he sold his property to Frank Rodarte.

Pettit was so confident of his understanding regarding the property tax provision, he advised Coopers in writing that after 1996, their only obligation was to pay an annual rental amount of one dollar per year. Pettit Transcript, 70.

Most importantly, Frank Rodarte himself made no request for property tax until 2007. Thus, between 1999 and 2007, Frank Rodarte did not claim those property taxes were owed to him. It was not until the bizarre actions of Larissa Wright regarding the tax statement on one of the parcels does Frank Rodarte see an opportunity to take by litigation that which he could not afford to purchase.

Clearly, the uncontroverted actions of the parties indicate that neither party sincerely believed that the renewal provision of the contract required

payment of property tax.

(4) The reasonableness of the parties' respective interpretations

The original parties really do not have different interpretations of the provision. If Roger Rodarte disagreed with Pettit's interpretation about the post 1996 property tax requirement, he would have sent a request for payment as he had in the past. That aside, Pettit's interpretation is not only reasonable, it shows a somewhat sophisticated business decision that was, arguably, poorly drafted.

Pettit carefully negotiated a good bargain. When he entered into the lease with Roger Rodarte, it can be assumed that he did so with the mind of selling the land and the business and then retiring.

It is equally easy to assume, that having title to the property was important to Pettit. Pettit cleverly imagined a contract in which Roger Rodarte suffered an economic penalty if he failed to subdivide. The economic penalty that Pettit envisioned was the property tax. Pettit specifically testified to this and stated that in the event that Roger Rodarte could not perform, then Pettit would at least have a perpetual lease and Rodarte would be penalized in the sense that he, Roger Rodarte, would have the responsibility of paying all of the property tax. Pettit contrasted this to the ten year contracting period between 1986 and 1996 when, like buying a

home, Pettit agreed to pay the property tax.

The trial court's ruling guts the intent of the parties and also the bargain that Pettit made. Ruling that the language was unambiguous, the trial court never really understood the business decision behind the language and this was clearly error.

(5) The course of dealing between the parties

The late addition of the property tax claim was unfair, in part, because it contradicted the ways in which the parties had dealt with each other. Between 1986 and 1996, Roger Rodarte testified that he had reminded Pettit when he was late for payments to include property tax payments. Roger Rodarte and Robert Pettit were on good and even friendly terms. After 1996, there were no demands for payment until 2007. The Court's ruling completely disregarded this course of dealing. It gave credibility to Frank Rodarte's litigious posture when the trial court should have validated the past course of dealings between the parties. Again, this course of dealings was one in which notices were sent when the payments were due at least annually.

For these reasons, the Court should overrule the Trial Court's ruling that the renewal provision of the lease was unambiguous but that the overall intent of the parties can be determined by looking at the above listed factors.

The Court should then rule that the clear intent of the parties was to vest title with Pettit. The trial court's findings to the contrary should be vacated and its ruling reversed.

DEFENDANTS DID NOT MATERIALLY BREACH THE LEASE AGREEMENT BECAUSE THE DEFENDANTS HAD SEPARATELY PURCHASED THE BUSINESS AND THE LEASE FROM PETTIT FOR PURCHASE AMOUNTS THAT FAR EXCEEDED THE AMOUNTS OF THE YEARLY PROPERTY TAX, IF OWED

The legal effect of a contract is a question of law that appeal courts review de novo. *Keystone Masonry v. Garco Constr.*, 135 Wash.App. 927, 932, 147 P.3d 610 (2006). A party is barred from enforcing a contract that it has materially breached. *Bailie Communications, Ltd. v. Trend Bus. Sys.*, 53 Wash.App. 77, 81, 765 P.2d 339 (1988) (" 'A material failure by one party gives the other party the right to withhold further performance' The breaching party has a reasonable time to cure, after which the injured party may either sue for total breach or rescind and obtain restitution." (quoting RESTATEMENT (SECOND) OF CONTRACTS § 241 cmt. e (1981))). A material breach is one serious enough to justify the other party's abandoning the contract because the contract's purpose is defeated. *Park Ave. Condo. Owners Ass'n v. Buchan Devs., L.L.C.*, 117 Wash.App. 369, 383, 71 P.3d 692 (2003). Whether a breach is material depends on the circumstances of each particular case. *State v. Kessler*, 75 Wash.App. 634, 641, 879 P.2d 333

(1994).

The trial court did not make a finding as to the contract's purpose but did conclude that Appellant's materially breached. It is appellant position that material breach cannot be determined without first grasping the intent or purpose of the contract.

As stated above, the parties intended to draft a lease that culminated in a transfer of title from Roger Rodarte to Bob Pettit. Roger Rodarte, however, failed to perform first when he did not subdivide the property. This action first foiled the contract intent, i.e., to complete the purchase and sale.

Assuming that the contract purpose is established, the Defendants did not materially breach the contract because the purpose of the contract, a purchase and sale of property, is not foiled by the failure to pay property tax. Indeed, Rodarte foiled the intent because he failed to subdivide so that Pettit could take title of his portion of the property.

It is well established in Washington that a party is barred from enforcing a contract that it has materially breached. *Bailie Communications, Ltd. v. Trend Bus. Sys.*, 53 Wash.App. 77, 81, 765 P.2d 339 (1988). In determining whether a breach is material, Washington has adopted section 241 of the Restatement (Second) Of Contracts. *Rosen v. Ascentry Technologies, Inc.*, 143 Wn.App. 364, 177 P.3d 765 (Wash.App. Div. 1 2008).

In determining whether a failure to render or to offer performance is material, the following circumstances are significant:

(a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;

(b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;

(c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;

(d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;

(e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

American Law Institute, Restatement (Second) of Contracts § 241 (1981)

The extent to which the injured party will be deprived of the benefit which he reasonably expected

Rodarte, if an injured party, is not deprived of a benefit which he reasonably should have expected. In fact, Rodarte testified that he was not at all aware that he was entitled to payment of property tax as discussed above.

The primary benefit of the contract was the purchase price plus interest that was paid to the Lessor (or Seller) between 1986 and 1996. Respondent received full payment and, had original Lessor performed by subdividing, Respondent would be entitled to absolutely nothing. Though structured as a lease, the benefit to which he was entitled was the purchase

price plus interest which he had already received. If Roger Rodarte had performed, he would be entitled to no further benefit at all. Thus, the Defendants non-payment of property tax does not contravene the contract purpose.

Adequate compensation

The Appellants did not materially breach because the Respondent had already received his benefit and the failure (or not) to pay property taxes was incidental to this benefit and insignificant in comparison. When considering whether there can be adequate compensation, the Court should consider values. Each year, the property tax due was about one hundred dollars. Brad Deakins testified that it the total due over the course of performance was \$1,6421.00. RP 80.

Coopers had paid fifty thousand dollars for their business and twenty five thousand for the property. RP 119. Frank Rodarate paid \$350,000 to purchase the property. RP 86. Both parties conducted successful businesses out of the property. The idea that the small amount of property tax that Respondents try to argue was due is material, is hard to fathom. In comparison, the property tax issue is insignificant, a non-issue.

Candidly, it is hard to believe Respondents felt otherwise. Appellants believe that the property tax issue was a red herring and did not include it in

the Complaint because it was relatively unimportant in terms of the economics of the case. It was introduced at trial to create confusion.

Frank Rodarte himself essentially agrees with this when he testified that it was the *payment* of tax that caused him to initiate this controversy. Thus, he was not at all seeking adequate consideration because of the breach. Rather, he indicated that he contacted an attorney because Larissa Wright was *paying* his property tax on one of three parcels. He could not intelligently explain why he had not included a theory of breach for non-payment of taxes in his complaint. Appellants suggest that Frank Rodarte knew that there was no obligation to pay taxes and even if there was, the amount due would not be adequate compensation to him considering the otherwise huge business interests for each parties.

The extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

The Appellants acted in good faith and fair dealing. The Defendants Coopers relied on the representation of Robert Pettit as contained in his letter to him that their only obligation was to pay a yearly rental amount of one dollar per year. They paid large amounts to purchase this business and to purchase an interest in real property only to have that taken from them by the Court's ruling. There can be no rational argument made in this case that Defendants acted in bad faith.

For these reasons, the Court should reverse the trial court's ruling the Defendants failure to pay property tax yearly to Respondents was material breach justifying an eviction from the property. If the Court rules that there was a breach, considering the purpose of the lease, the remedy is merely payment of the unpaid property tax, not eviction from the property.

UNDER ER 401, THE TRIAL COURT ABUSED IT'S DISCRETION BECAUSE IT ALLOWED TESTIMONY AND EVIDENCE THAT DEFENDANTS FAILED TO PAY PROPERTY TAX WHEN THE PLAINTIFF HAD NOT PLEAD THIS FAILURE AS A BASIS OF BREACH

The issue raised on appeal is grounded in ER 401 and ER 403. ER 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probably or less probable than it would be without the evidence."

Under ER 401, evidence is not considered relevant unless the fact offered is "of some consequence in the context of the other facts and the applicable substantive law." *State v. Sargent*, 40 Wn.App. 340, 698 P.2d 598 (1985). This has been described as "logical relevance" and "legal relevance." Tegland, Karl, *Courtroom Handbook on Washington Evidence*, 2009 ed., p. 191.

The issue on appeal is directly related to CR 15(b). This rule is laid out below:

(b) Amendments To Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

The purposes of Rule 15 are to "facilitate a proper decision on the merits" and to provide each party with adequate notice of the basis of the claims or defenses asserted against him. *Pierce County Sheriff v. Civil Serv. Comm'n*, 98 Wash.2d 690, 695, 658 P.2d 648 (1983). Leave to amend should be freely given "except where prejudice to the opposing party would result." *Caruso v. Local Union No. 690 of International Brotherhood of Teamsters*, 100 Wn.2d 343, 351, 670 P.2d 240 (1983).

CR 15(b) has two parts. The first contemplates cases in which evidence comes into evidence without objection. The second part governs cases in which the non--moving party has objected to evidence. There should be no doubt that Appellants objected repeatedly and this is not a

consent or implied consent case.

The factors a court may consider in determining prejudice include the timing of a motion to amend pleadings--in terms of the progress of the litigation. *Caruso*, 100 Wash.2d at 349-50, 670 P.2d 240. Similarly, the fact that the material in the amended pleading could have been included in the original pleading will not preclude amendment, absent prejudice to the nonmoving party. *Caruso v. Local Union 690 of Int'l Bhd. of Teamsters*, supra. In all cases, "the touchstone for denial of an amendment is the prejudice such amendment would cause the nonmoving party." *Del Guzzi Constr. Co., Inc. v. Global Nw. Ltd., Inc.*, 105 Wn.2d 878, 888, 719 P.2d 120 (1986).

There is no case in Washington that examines the relation between ER 401 and CR 15(b). It is Appellants position that evidence presented to prove a legal theory that was not explicitly plead is not admissible under ER 401 until and unless the Court first grants a motion to amend. In the instant case, the trial court abused its discretion because it allowed Plaintiff to amend and add a new cause of action at the conclusion of its case in chief based on otherwise irrelevant and, therefore, inadmissible evidence. In essence, the Appellant asks this Court to clarify the proper implementation of ER 401 when a CR 15(b) motion is contemplated. Can the chicken truly come before the egg?

The Appellants believe that it is better when Plaintiffs hatch their chickens from eggs, not thin air. Further, Appellants suggest that Plaintiffs do not need help from trial courts to hatch their eggs. As the Court well knows, the law is complicated. There are scores of causes of actions available to prospective plaintiffs and plaintiffs sometimes manage to create new causes regularly. In the instant case, the Plaintiff alleged just one cause of action relevant to this appeal and it was breach of contract. The contract, like most contracts, had several provisions. There are scores of ways in which the Defendants *could have* breached the contract. The Plaintiff, the master of his case, chose one. The Plaintiff alleged that Defendants breached the contract because they had failed to pay a monetary penalty of five thousand dollars in the event that the lease was assigned at the same time the business was sold. That is it. Nothing more. The trial court found that the Defendants had not breached this provision of the contract and it is therefore not relevant to this appeal.

Thus, the trial court should have limited, under ER 401, the admission of facts that tended to prove or disprove elements of this theory of breach. Appellants at trial moved in limine to exclude evidence that were not supported by the pleadings. The Court denied the motion but did not amend the pleadings. Rather, the Court just let all evidence come in to give the Appellants' motion "context." Appellants continually objected and the Court

recognized Appellants continuing objection.

Appellants do not dispute that CR 15 allows judges discretion to amend pleadings to promote justice. However, the CR 15 rule and its governing case law assumes or should assume that the trial court does not erroneously allow irrelevant evidence under 401 into the record that is subsequently used to support a half-time motion to amend. To rule otherwise, is essentially to boot strap Plaintiff's cause of action, doing the Plaintiff's job for him.

The Appellants ask this Court to agree that CR 15(b) motions to amend may not be based on evidence that violate ER 401. Put differently, the Appellants asks this Court to rule that ER 401 prohibits the admission of evidence that does not prove an element of a cause of action until it is plead, either by the parties or *after* the motion to amend the pleadings is actually granted. There is nothing in this ruling that would disallow future litigants from moving to amend under CR 15(b) even over the non-moving party's objection but will require the moving parties to bring their motion to amend *before* the evidence is offered. To rule otherwise is to put trial courts in an impossible position of allowing or disallowing evidence because the litigants *might* bring a motion to amend.

THE TRIAL COURT ABUSED ITS DISCRETION BECAUSE IT GRANTED PLAINTIFF'S MOTION TO AMEND UNDER CR 15 BUT THERE WAS NOT OPPORTUNITY FOR DEFENDANTS TO RAISE THE AFFIRMATIVE DEFENSES OF WAIVER AND ACQUIESCENCE / ESTOPPEL

The standard of review when reviewing a trial court's CR 15 ruling is abuse of discretion. *Herron v. Tribune Pub'g Co., Inc.*, 108 Wash.2d 162, 165, 736 P.2d 249 (1987). In the instant case, the trial court abused its discretion because it disregarded and minimized the prejudice to the Appellants. Further, the trial court abused its discretion because its ruling violated CR 12(b).

The Appellants were prejudiced by the Court's ruling because, had the issue of property tax been raised before in its pleadings before trial, Appellants would have included the defenses of Waiver or Estoppel/Acquiescence. These are affirmative defenses that are required by Civil Rule 12(b) to be raised in the Defendants' Answer, i.e., in "responsive pleadings." CR12(b).

The affirmative defense of Acquiescence is a variety of "estoppel". *Nugget Properties, Inc. v. Kittitas County*, 71 Wn.2d 760, 431 P.2d 580 (Wash. 1967). Equitable estoppel may apply where an admission, statement,

or act has been detrimentally relied on by another party. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 19, 43 P.3d 4, 19, (2002).

Civil Rule 12 (b) requires that all defenses be plead in writing as part of the Defendant's answer.

CR 12 DEFENSES AND OBJECTIONS

* * *

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or third party claim, shall be asserted in the responsive pleading

CR 12

This, that the Civil Rules mandate that defenses shall be raised in written pleadings, has been affirmed by the Washington State Supreme Court in 2008. See, *Oltman v. Holland America Line USA, Inc.*, 163 Wn.2d 236, at 244, 178 P.3d 981 (Wash. 2008).

However, in the case before the Court, the Appellants', i.e., Defendants' Answer, only responded to what was plead in the Complaint and not to the new cause of action that was raised at half-time motion. CP 331-341. Thus, the trial court's ruling created a hopeless procedural entanglement because the new but improperly plead cause of action allowed at trial, did not give Appellants the opportunity to properly plead, prepare and present its defenses under CR12(b).

It is reasonable to imagine the real prejudice to the defense, Appellants would have conducted their preparation to include discovery differently had they known that Estoppel or Waiver was at stake. For example, one of the elements of Estoppel is reliance on an implied promise. Appellants did not prepare to offer testimony and evidence about the business expenses they occurred simply because they relied on the universal assumption that they had a right to operate out of the property, i.e., that they had met all of the requirements of the lease. Clearly, this kind of testimony would have dramatically changed the complexity, tenor and length of the trial.

This Court should agree that the trial court's handling of the trial was simply unfair. It was unfair in the sense that it assisted the Plaintiff's case by readily allowing evidence that later supported the addition of a late cause of action but failed to account for the obvious and necessary defenses that should be raised affirmatively in the written Answer to the Complaint.

Thus, the Court should reverse the Court's ruling that allowed Plaintiff to amend its pleadings after its case in chief because this ruling did not allow Appellants to adequately plead and prepare important affirmative defenses.

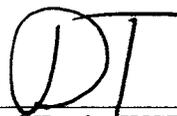
IX. RAP 18 ATTORNEYS' FEES:

The Appellants also asks the Court to reverse the trial court's ruling that Respondent was the prevailing party. The Lease contained an attorney's fee provision. Thus, the Court should reverse and rule that Appellants are the prevailing party and award fees and costs for the trial and this appeal.

X. CONCLUSION:

For the reasons stated above, the Court should reverse the trial court and vacate the Judgment against the Defendants and award attorneys' fees.

DATED this 1st day of June, 2010

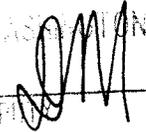
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Darol Tuttle, WSBA #26067
Attorney for Appellants

FILED
COURT OF APPEALS

10 JUN -1 PM 1:39

STATE OF WASHINGTON

BY 

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

James & Deborah Cooper, et al.)	
Appellants)	NO. 40182-7-II
)	
vs.)	DECLARATION OF
)	SERVICE
Frank & Shirley Rodarte)	
Respondents)	
_____)	

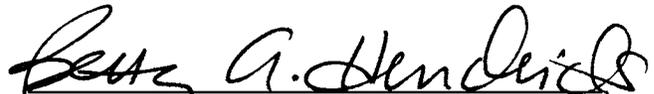
I declare under penalty of perjury under the laws of the state of Washington as follows:

I personally had ABC - Legal Messengers, Inc. on June 1, 2010, pick up for delivery to:

Jack Wetherall
Attorney at Law
155 108th Avenue NE, Suite 700
Bellevue, WA 98004

a true copy of the following: Brief of Appellants.

Dated this 1st day of June, 2010.


BETTY A. HENDRICKS

DECLARATION OF SERVICE

ORIGINAL