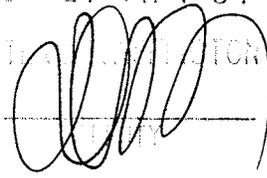


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COURT OF APPEALS

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STATE OF WASHINGTON

BY \_\_\_\_\_



**NO. 40182-7-II  
DIVISION II, COURT OF APPEALS  
OF THE STATE OF WASHINGTON**

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JAMES & DEBORAH COOPER, et al.

Appellants,

v.

FRANK & SHIRLEY RODARTE, Respondents

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

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**RESPONSE BRIEF OF APPELLANTS**

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## II. ARGUMENT

THE TRIAL COURT ERRED IN FINDING 2.20 WHEN IT RULED THAT THE SECTION VI WAS UNAMBIGUOUS BECAUSE THE PARTIES HAD CONDUCTED THEMSELVES AS IF THE LESSEE'S ONLY OBLIGATION AFTER 1996 WAS TO PAY ONE DOLLAR PER YEAR.

The crux of this appeal is simply the uncontroverted fact that, after the lease term expired in 1996, the parties conducted themselves for more than eleven years as if the entire obligation of the Lessees was *only* to pay one dollar per year for rent, i.e., "a net rent lease." Yet, the trial court inexplicably concluded that the conduct of the parties for more than a decade was irrelevant because, in its opinion, the lease was unambiguous; the lease was not a net rent lease but an ongoing obligation by Lessee to pay the Lessor's tax.

Appellant will not repeat the testimony here in its Response Brief but the record was laid out in the Appellant's Brief at page 10-11 and showed that the original Lessor and Lessee, Roger Rodarte and Pettit, agreed that Lessee would pay a rental amount that included a percentage of property tax as a total rent often called a "Net Rent". See RP 54, 55, 41 and Pettit Transcript 70.

Further, the testimony showed that, in 1996, the parties conducted a final accounting and reduced this to writing in a letter from Rodarte to Pettit in February, 1996. This letter demonstrated to the Court that Rodarte asked for and received final net rent payments in 1996.

February 20, 1996

Lena and Robert Pettit  
P.O. Box 770  
Ennis, Mt. 59729

I am furnishing you with the information that you have requested. In regards to your request that we comply with Section V of the Lease Agreement is temporarily not possible therefore, we request that we should agree on Section VI "Renewal of Lease". Please note the prorate (.17) for 1996. The levy rate is an estimate.

Year	Land Value	x Levy Rate	x Percentage	x Prorate	AmL Due
1994	\$80,300	15.5262	7.38%		\$91.78
1995	\$80,300	15.7263	7.38%		\$92.94
1996	\$80,300	15.9264	7.38%	17%	\$18.00
Total Amount Due:					\$200.70
Paid Amount:					\$200.00
Amount Owing					\$0.70

Sincerely,

*Roger Rodarte*  
*Margaret Rodarte*  
Roger and Margaret Rodarte

*CP 96, Letter Sent From Lessor to Lessee Regarding Final Accounting.*

Yet, Respondents hang their hat on testimony by Frank Rodarte in which he, as a successor and suddenly in 2007 testifies that, in his opinion, the Lease provided otherwise. Also, another successor, Larissa Wright, began to pay property tax on one of three possible tax parcel numbers in 2005.

*Berg v. Hudesman*, 115 Wash.2d 657, 667, 801 P.2d 222 (1990) stands for the proposition that Courts are not to replace their interpretation of contracts for those of the parties and should glean the meaning of the contract from the elements presented in the opinion. However, the pro tem Judge in the instant

case did not do this. If he had, there is no rational way one could view the conduct of the parties and conclude that the Lease was unambiguous. Roger Rodarte and Robert Pettit were uniform in their view and that was that the Lease was a “net rent lease” that reduced to one dollar annually after 1996. Larissa Wright acted as if the Lease required her to pay the tax agency directly after 2005. Frank Rodarte, who had never requested a higher rent until 2007, viewed the Lease differently, upset that Wright had paid directly to the tax agency.

The Court clearly erred when it called the contract unambiguous and ignored the conduct of the parties.

THE TRIAL COURT ERRED IN FINDING OF FACT 2.2 WHEN IT RULED THAT THE APPELLANTS WERE RESPONSIBLE FOR PAYING TO THE PETTIS THE PROPERTY TAXES DESCRIBED IN SECTION IX OF THE MARCH 1, 2986 LEASE BECAUSE THE COURT BECAUSE THE LEASE IS A NET RENT LEASE.

The trial court erred when it ruled that the Coopers were obligated to pay Rodarte’s property tax because the Lessor, Roger Rodarte, had already received all of the net rents he was entitled to receive. This fact cannot be argued otherwise because the original Lessor, Roger Rodarte, not only behaved as if he was not entitled to further payment or rent, he agreed explicitly in his testimony.

Again, his testimony is laid out below:

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.

Yet, the trial judge substituted Rodarte's view with his own and ruled that there was an ongoing responsibility by Lessees to pay Lessor's taxes.

Strangely, this was characterized at trial as an obligation to pay the taxes directly to the tax agency, i.e., not a net rent provision paid to Lessor. This simply contradicts the facts and course of conduct between the parties.

The substantial evidence at trial demonstrated that the lease was a net rent lease in which the lessees pay an addition amount of rent *to the Lessor* for property tax. If the lease is a "double net" lease, the lease provides for rent payments for tax and insurance and a "triple net" lease includes these plus maintenance fees common to the premises. The Court is no doubt aware that these provisions are common in commercial leases.

The Court's conclusion that the Lease required a perpetual obligation to Lessee to pay directly to the tax agency was not supported by substantial evidence at trial because, as the Respondent's themselves point out, the Leased premises did not have its own tax parcel number. This is important because it is theoretically possible that the lease could have called for Lessees to take responsibility for their own taxes. This, of course, assumes that the Lessees can pay on its own parcel number. If this were the case, however, between 1986 and 1996, Pettit would have paid his taxes himself and not considered it

part of the rent to Rodarte. Rodarte would not have had to account for final taxes in 1996 because the Lease would have provided that Pettit pay his own taxes, not part as rent, but as taxes to the tax agency.

The Court's ruling is erroneous because when the term expired in 1996, the **total rent, i.e., the net rent**, reduced to one dollar annually. This is why Roger Rodarte did not ask for any additional rent after 1996. This is why Pettit did not pay any further rent and instructed Coopers to do the same. This is also why Frank Rodarte did not ask for any additional rent when he bought the main parcel from his brother in 1998. When a young woman, Larissa Wright, suddenly started to pay taxes as a new business person on one of Frank Rodarte's tax parcels mistakenly, did the Plaintiff see an opportunity to seize the leased parcel.

The trial court did not reach this far into its analysis but one might ask why the parties would agree to reduce the net rent to one dollar per year after 1996? Respondents constantly point out that the property to include the lease premises contained three tax parcel numbers. Recall also that the Lease was supposed to be a purchase agreement. The rental payments were amortized purchase agreements plus a percentage of property tax. The Lease contained an option to purchase and Pettit exercised that option.

The purchase, however, was contingent upon Roger Rodarte's performance. That is, Rodarte had to subdivide the property in order for the Lease Parcel to have its own tax parcel number so that Pettit could not only

own the property but also to pay taxes on his own tax parcel number. In the event Rodarte failed to do so, the net rent provision would continue forever but reduce to one dollar per year.

Another way to describe this is to point out that, had Rodarte performed, Pettit would not have owed Rodarte anything. He would not pay him taxes or rent. Pettit would certainly not owe him *more* if he did *not* perform.

Respondents' analysis is, therefore, facile. It simply attempts to leverage an ambiguity in the Lease, disrupt the status quo for that existed since 1986 and seize additional real estate with no appreciation or understanding of the meaning and intent of the overall contract.

In conclusion, the trial court erred because it substituted its own interpretation for that of the parties and confused a "net rent lease" that expired in 1996 with an ongoing obligation of Coopers to pay property tax to the tax agency. This Court should reverse because substantial evidence supports the opposite; to wit: 1) all of the payments were from Lessee to Lessor; 2) Lessor did not demand further payments after 1996 and 3) if it were a lease *other than* a net type lease, there would have been a separate tax parcel for Lessees to pay taxes directly.

**THE TRIAL COURT ERRED BECAUSE IT ALLOWED EVIDENCE THAT VIOLATED ER 401 AND THIS CONFUSED THE ISSUE OF NET RENT.**

The trial court came to the wrong conclusion because it conducted an undisciplined trial. There should be no real dispute that the Rules of Evidence exist to reduce the chance of error. Evidence that is not relevant to a legal

issue should be excluded because there is too great of a chance that superfluous evidence and testimony not only wastes limited judicial resources, it causes important and otherwise clear issues to become confused.

Appellants had raised this on appeal, assigning error to the trial judge's denial of the motion in limine upon the grounds that evidence that proved an element of a cause of action that was not before the court lacked logical relevancy. Respondents *did not* object to the motion per se at the trial as untimely. As stated at trial, the issue was proper as a motion in limine because Appellants were first notified that Plaintiff intended to raise the present evidence when the Plaintiff filed its trial brief. RP 9, l. 17-24.

Nor did Respondents respond to the ER 401 argument raised on appeal in their Reply Brief. As such, there is no explanation why the Plaintiff's failed to articulate their theory regarding property tax in writing in their Complaint. Nor is there argument that the testimony and evidence that tends to prove an issue not yet before the court is relevant.

The trial in this case illustrates the need for guidance on ER 401 when the cause is not pled. Appellants suggests that trial court should not allow superfluous evidence because it confuses otherwise clear issues. This is exactly what occurred at trial when all matter of testimony regarding "tax" was allowed into evidence when it was not relevant.

For example, consider the testimony of young Larissa Wright to which Respondent refers on page 34 of its brief. There, Respondent argues that the

parties conducted themselves as if there was an obligation to pay property tax under the lease to the tax agency because young Larissa Wright affirmed this at trial. However, view carefully her testimony pasted below:

25 Q. There isn't. Did you have any discussions with your  
Rodarte v. Cooper - 11/17/09  
Larissa Wright - Direct by Mr. Wetherall

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1 mother about not having to pay taxes on the property  
2 at any point in time?  
3 A. About not having to pay taxes?  
4 Q. Not having to pay taxes.  
5 A. I don't believe so. We were always under the  
6 assumption that taxes needed to be paid.  
7 Q. Okay. Were you never told by your mother that she  
8 believed no taxes had to be paid on the lease  
9 premises?  
10 A. It's my understanding that my mom knew that taxes  
11 always needed to be paid on the leased premises.

As pointed out above, the original lease did not require Lessee to “pay taxes”. Taxes are paid to government agencies, not to Lessors. The Lease required Lessee to pay rent, a net rent that included a reimbursement for property tax but reduced to one dollar per year in 1996. But, more troubling, is Mr. Wetherall’s positioning of the inquiry to Ms. Wright. She is asked about

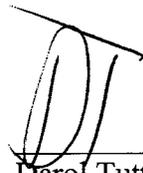
“taxes.” A new business owner, of course, must pay state and city business and occupation tax, county personal property tax and county property tax as well as social security taxes for employees and possibly federal capital gain and income taxes. Counsel for Plaintiff does not clarify the “taxes” to which he refers and Ms. Wright most likely assumed he was referring to all possible taxes. The trial Judge was misled by this broad and misleading questioning of Ms. Wright. While consistent with the Plaintiff’s theory that Lessee needed to pay taxes to tax agencies *after 1996* rather than directly to Lessor as required *before 1996*, the point is that this evidence should not have been before the Court at all. It should not have been before the Court because it was not pled, the Defense had ongoing objections and Plaintiff had not yet even moved to amend its Complaint. Thus, all of the testimony Plaintiff offered went to prove its theory about property tax that was not yet before the Court.

As stated above, ER 401 contemplates that evidence offered must have a logical relevancy to the issue. If the offered evidence it is not logically relevant to a disputed issue currently before the Court, the evidence is inadmissible because confusion ensues. In this case, confusion ensued because the trial Judge allowed hour after hour of testimony about “tax” and confused “net rent” with a Lessor’s separate obligation to pay property tax. Candidly, considering the stakes for the Defendants, they were not only entitled to a Complaint against them that was clear minded and articulated, they were also entitled to a clean trial. This did not happen and the Appellants ask this Court for relief.

### III. 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 20<sup>th</sup> day of July, 2010

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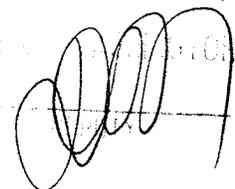
Darol Tuttle, WSBA #26067  
Attorney for Appellants

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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.	)	CERTIFICATE OF
	)	SERVICE
Frank & Shirley Rodarte	)	
Respondents	)	
_____	)	

The undersigned certifies under penalty of perjury under the laws of the state of Washington that I am now and at all times herein mentioned, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused the following documents:

Response Brief of Appelants

to be served upon designated counsel of record in the manner noted below:

Jack E. Wetherall	<input checked="" type="checkbox"/>	via U.S. Mail
Attorney at Law	<input type="checkbox"/>	via Legal Messenger
155 108th Avenue NE, Suite 700	<input type="checkbox"/>	via Hand Delivery
Bellevue, WA 98004-5912		

DATED this 20th day of July, 2010, at Puyallup, Washington.

  
\_\_\_\_\_  
BETTY HENDRICKS