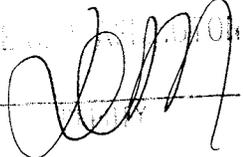


FILED  
COURT OF APPEALS

NO.40182-7-II

10 JUN 22 PM 12:48

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

STATE OF WASHINGTON  
BY 

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JAMES & DEBORAH COOPER, et al.

Appellants,

v.

FRANK & SHIRLEY RODARTE,

Respondents

---

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

No.: 07-2-11614-7

---

**BRIEF OF RESPONDENTS**

---

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## **I. INTRODUCTION**

This litigation for breach of contract and to quiet title was necessitated by the actions of two individuals not trained in the law, the first of whom gave an erroneous interpretation of a lease to his buyers, and the second of whom actually created and recorded legal documents purporting to sell and convey land belonging to Plaintiffs Rodartes. Before the Court is a 1986 Lease of Premises, both the lessors and lessees of which are the successors to the original parties. Rodartes, successor lessors, are the Plaintiffs/Respondents herein. Coopers/Wrights, successor lessees, and their companies are the Defendants/Appellants herein.

The first action was by Roger Pettit, the original lessee and not a party to this litigation, who offered as part of his sales presentation to the Coopers his own interpretation of the 1986 Lease when he sold the Coopers his business and in 1998 assigned his rights as lessee for a combined price of \$75,000.00. Mr. Pettit represented to Defendants Coopers that the only obligation the Coopers would have under the lease once they purchased was the payment of one dollar per year rent.

In 2005, the second action which necessitated eventual litigation occurred: the preparation and recording of two documents

by Defendant Deborah Cooper to sell Coopers' business and assign the 1986 lease of premises to Coopers' daughter and son-in-law for a combined price of \$280,000. Mrs. Cooper, who had no legal training and testified she didn't have legal assistance [RP Vol. II, page 133, line 22-25 through 133, line 2], prepared a document for the sale of the Cooper business to Coopers' daughter and son-in-law, and a second which purported to actually sell and convey the land, the recorded legal description of which was NOT limited to the land comprising 1986 leased premises. The legal description covered other land owned by Plaintiff Rodartes.

Rodartes discovered those recorded documents in 2007 in the process of attempting to refinance their mortgage and in tracking down missing tax statements.

Plaintiff served notice of default (May 22, 2007) for failure to comply with various lease terms including the requirement to pay taxes and gave the Coopers thirty three days to cure. The Coopers did not respond. On August 28, 2007 having received no response, the Rodartes via certified mail terminated the lease and the Coopers were given 30 days to vacate the premises.

This litigation followed to remove the faulty 2005 recorded documents, for damages for breach of lease, and to confirm the

termination of the lease.[ CP 1]

Judge Stolz on October 3, 2008 [CP 326] granted summary judgment in favor of the Rodartes ruling that the Cooper documents unlawfully clouded Rodartes' title and ordering Defendants Coopers/ Wrights to execute quit claim deed(s) to remove that cloud.

There are two Mr. Rodartes. The first was Roger Rodarte (not a party to the litigation) the original owner of the land and lessor under the lease. The second is his brother Frank Rodarte who subsequently purchased by deed [Ex 2] the property subject to the 1986 lease. James and Deborah Cooper are the parents of Larisa Wright who with her husband Eric Wright are named defendants

## **II. ASSIGNMENTS OF ERROR**

The Rodartes do not believe the trial court erred.

## **III. STATEMENT OF THE CASE**

On the first day of trial, Darol Tuttle, having not complied with PCLR 7(e) "Contested Pretrial Motions", raised a Motion in Limine requesting the Court disallow any testimony or evidence regarding the payment of taxes (RP 6, Ln 21), alleging surprise and alleging that Rodartes failed to raise taxes as an issue in the Complaint. The trial court reserved ruling stating more context of the nature of the case was needed before a ruling could be made (RP 19, Ln 10). After

receiving testimony and given that the original complaint did reference the notice of default which alleged non payment of taxes the trial court announced it would not exclude testimony concerning taxes (RP 63, Ln 5-8).

Frank Rodarte sent a Notice of Default to all Defendants on May 22, 2007, (Ex 22) citing default with reference to the payment of taxes, lease payments and payment of the transfer fee(s), and providing 33 days to cure or face eviction which was admitted without objection (RP 97, Ln 6). The exhibit put non-payment of taxes before the trial court. Counsel for the Coopers stipulated during trial that the Coopers did not pay any property taxes on the leased premises from 1998 to 2005 [RP 77, Ln 3-6].. More than 90 days later on August 28, 2007, (Ex 28) and before the litigation was filed [CP 1], the default not having been cured Plaintiffs terminated the lease effective in 30 days for breach and failure to cure.

The lingering illness and untimely death of Mr. Alvin (Skip) Mayhew, Jr., counsel for Defendants who filed the initial Answer to Plaintiffs' Complaint, drew out the normal discovery and trial schedule in the Pierce County Superior Court. Mr. Mayhew filed the Answer on November 15, 2007 [CP 46]. The Answer contained no counterclaims; it simply answered, numbered paragraph by numbered paragraph, the

6 Sections of the Rodarte family's Complaint.

Mr. Antoni Froehling entered his Notice of Appearance on behalf of Defendants on May 28, 2008. More than a year after the original Answer was due Mr. Froehling filed a Motion To Allow an Amended Answer and Counterclaim on October 6, 2008 [CP 331]. In their ANSWER AND COUNTER CLAIM Coopers claimed as their First Counterclaim [CP 336 Ln 8] that:

“During all times relevant to this cause of action, the lessee Pettit or his successors paid the full amount of taxes due...”

In their reply the Rodartes denied taxes due had been paid [CP 345, Para 7.8].

At trial Mr. Tuttle conceded that the notice of default and the non payment of taxes was included in the earlier summary judgment motion which he argued against before Judge Stolz [RP 18, Ln 5].

On February 5, 1996 (Ex 12) [RP 66, Ln 11] Mr. Pettit exercised his option to purchase asking what amount was owing for taxes and stating that if the property could not be subdivided that the lease continue under paragraph VI:

“In the event that an outright purchase cannot be accomplished it is my desire to continue with the new lease term as outlined in Section VI RENEWAL OF LEASE.”

Mr. Roger Rodarte, the then lessor, responded on February 20, 1996

(Ex 13, RP 67, Ln 11) by agreeing to continue the lease in accord with paragraph VI). Paragraph VI of the lease provided:

“Should lessor fail to complete the subdivision of the property required by this lease by the end of the lease, this lease shall renew automatically each year on the 1<sup>st</sup> 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) Dollars, payable on the 5 day of march of each succeeding year. (Ex 1, Pg. 2)

Mrs. Cooper testified that the Coopers were obligated to pay property tax on the leased premises [RP 124, Ln 1] but did not pay because Mr. Pettit told her they did not have to pay [RP 124, Ln 1-6]. The Coopers sold the business and lease they had acquired from Mr. Pettit for a total of \$75,000 [RP 140, Ln 17-21] to their daughter and son-in-law [RP 140, Ln 22; RP 141, Ln 1-4] for a total of \$280,000.00. After the Coopers sold their business to their daughter and son-in-law, Mrs Cooper had Pierce county redirect tax statements on one of three contiguous Rodarte parcels to her daughter's (Defendant Wright) home address. [RP 131 Ln 12](Ex 9). Mrs. Cooper testified that the reason she had the tax statement redirected was:

“So we would make sure that they (taxes) were paid so my children were protected.” [RP 136, Ln 10].

Mrs. Cooper received the notice of default (Ex 22) and notice of eviction (Ex 28) but took no action regarding either [RP 141, Ln 23 -

RP 142 Ln 1-8].

Defendant Mr. Wright testified that the lease assigned to him by the Coopers required him as lessee to pay a portion of the property taxes [RP 175 Ln 12 - Ln 25], [RP 177 Ln 1-4].

When asked if Mrs. Wright had ever had a discussion with her mother (Mrs. Cooper) that property taxes under the lease did not have to be paid she responded:

- A. About not having to pay taxes?
- Q. Not having to pay taxes.
- A. I don't believe so. We were always under the assumption that taxes needed to be paid.
- Q. Okay. Were you never told by your mother that she believed no taxes had to be paid on the lease premises?
- A. It's my understanding that my mon knew that taxes always needed to be paid on the leased premises.  
(RP 186 Ln3-9)

Mrs. Cooper testified that in 2005 she issued a check in the amount of \$25 (Ex 21) to Mr. Rodarte as lease payments of \$1 a year for 25 future years. [RP139, Ln 15-22].

At the conclusion of Rodartes' case, Plaintiffs' counsel moved to amend the Complaint pursuant to CR 15(b) to include a separate distinct allegation regarding property taxes. [RP 188, Ln 14 - RP 190, Ln 20]. After argument for and against, the court granted the motion [RP 198, Ln 8-20]. For the sake of clarity in this brief, Appellants/Defendants will collectively be referred to as Coopers, and

Respondents/Plaintiffs as Rodartes.

#### IV ARGUMENT

##### A. RESPONSE TO 1<sup>ST</sup> & 2<sup>ND</sup> ASSIGNMENTS OF ERROR

Coopers assigned error to two findings of fact: 2.2 [CP 573] and 2.20 [CP 579]. This Court articulated the standards on review in *Hegwine v. Longview Fibre Co., Inc.*, 132 Wash.App. 546 at 555, 132 P.3d 789 (Div. 2, 2006), quoted only in part by Coopers/Appellants' Brief:

"When a trial court has weighed the evidence in a bench trial, appellate review is limited to determining whether substantial evidence supports its findings of fact and, if so, whether the findings support the trial court's conclusions of law. [Cites omitted]. Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person that a finding is true. [Cite]. **We review only those findings to which appellants assign error; unchallenged findings are verities on appeal.** [Footnote and cite omitted] **On appeal, we view the evidence in the light most favorable to the prevailing party and defer to the trial court regarding witness credibility and conflicting testimony.** [Cite omitted] [Emphasis supplied]

**First Assignment of Error: Finding of Fact 2.2.** Finding of Fact 2.2 was that the Coopers were responsible for paying to the Pettits (from whom they were subleasing the leased premises) "the property taxes described in Section IX of the March 1, 1986 Lease of Premises (Exhibit 1)." [CP 573].

Substantial evidence presented to the trial court supports Finding of Fact 2.2. First, a written agreement between the Pettits and Coopers: an unrecorded 1990 “Business Purchase and Sale Agreement” (Ex 14) whereby Pettits subleased to Coopers. Page 2 of that agreement contains a section entitled Sublease, which provides:

“Purchaser’s [sic] agree to sublease the premise currently occupied by ‘Cascade Ready Mix’, located at 17 East Valley Hwy East, Sumner, WA 98390.

...

**b) Pro-Rated Taxes. Purchaser also agrees, in addition to the above monthly amount to pay 7.76% of the pro-rated share of the tax allocated to the total parcel plus any additional taxes which may be due and payable for improvements affecting the parcel being subleased by Purchaser.**

...

**d) Purchaser agrees to be bound by any terms of the master lease which affect him. Said master lease is currently held by Seller.**

**e) Payments under the terms of the sublease to be paid directly to the Seller.”**

The last paragraph of the Business Purchase and Sale Agreement states:

**“Entire Agreement. This document contains the entire and integrated agreement of the parties, and may not be modified except in writing, signed and acknowledgment by both parties.” [Emphasis supplied]**

This agreement was signed on March 9, 1990 before a notary public by Robert R. Pettit, Jr. and Lena M. Pettit, Sellers, and James D. Cooper and Deborah A. Cooper, Purchasers. [Ex 14, page 3].

Throughout the trial it was clear that all parties understood the sublease to be of the 1986 Lease of Premises. [e.g., CP Vol. II, page 119, lines 13 - 25; page 121, lines 14 through 23; page 122, lines 18 through 25 continuing on page 123, lines 1 through 12, and Appellants' Brief, page 3].

The Pro-Rated Taxes subsection mirrors language contained in SECTION IX of the 1986 Lease of Premises [Ex 1, page 3]:

**“Lessee shall pay 7.36% of all real property taxes levied on the parcel of property owned by Lessor, which includes the demised premises....Any increase in real property taxes due to improvements made upon the property by Lessee shall be the responsibility of Lessee...”** [Emphasis supplied]

No testimony was presented regarding whether the discrepancy between the 7.76% in the Pettit/Cooper agreement and the 7.36% in the 1986 Lease of Premises was a typographical error or deliberate. Either way, Coopers agreed in writing to pay to Pettits at least the amount of real estate taxes on the leased premises which Pettits were contractually obligated under Section IX of the Lease of Premises to pay to their lessors.

Second, further convincing evidence was before the Trial Court regarding the responsibility of the Coopers to pay the Pettits property taxes. In the Deposition of Robert R. Pettit, Jr., taken to perpetuate his testimony and admitted by agreement of the parties [*designated*

as Pettit Transcript per footnote 1, Brief of Appellants, at page 48, lines 21-25, page 49, lines 1-25, continuing to page 50, line1], the obligation of Coopers beginning in 1990 to pay Pettits the taxes was probed. Robert Pettit, Jr. was answering questions propounded by Jack Wetherall; "A" denotes Pettit's answers, "Q" denotes Wetherall's questions:

- "Q. Did you - **did you at any point in time tell the Coopers that they didn't have to pay taxes once they purchased the business?**
- A. The business or property?
- Q. Business.
- A. **Business. No, I did not.**
- Q. In fact, in the exhibit that's been presented to you [Ex 14], the sale of the business, didn't you go to the effort of writing into that document their obligation to pay the taxes?
- A. Hum...
- Q. Please take a look at it. It will be on page two under Sublease.
- A. (Witness complies).
- Q. That's - sir, that's the Lease Agreement. I'm talking now about the Sale Agreement where you sold the business to the Pettits. Thank you. Excuse me, to the Coopers.....
- Q. **Would you look at (b) under Sublease, Pro-Rata Taxes?**
- A. Okay.
- Q. **So at the time you sold the business to them, that you called to their attention their obligation to pay the taxes, correct?**
- A. That's correct, um hum."  
[Emphasis supplied]

In her testimony at trial regarding the 1990 Business Purchase

and Sale Agreement between Pettits and Coopers, handed to her and entered as Exhibit 14 [RP, Vol. 1, page 123, line 21] Deborah Cooper responded to questions thereon by Jack Wetherall as follows [RP, Vol. I, page 125, lines 20-24]:

“Q. Point to where in the agreement it says you don’t have to pay 7.36 percent of the taxes.”

A. It doesn’t say.

Q. In fact it says you have to, does it not?

A. Yes, under the terms of this lease.”

Finally, in the trial court’s Finding of Fact 2.1 [CP 571-572], to

which Appellants/Coopers *assigned no error and therefore is taken as a verity on appeal*, the judge found:

“Testimony was heard on the subject of alleged verbal or side agreements regarding the various written agreements submitted into evidence, including (1) that the March 1, 1986 Lease of Premises between Roger and Margaret Rodarte [hereinafter referred as “the Roger Rodartes”] and Robert Pettit, Jr. and Lena Pettit [hereinafter referred to as “the Pettits”] recorded with the Pierce County Auditor in Volume 315, page 017 on March 7, 1986 (Exhibit 1), (2) that unrecorded March 9 1990 Business Purchase and Sale Agreement between the Pettits and James D. and Deborah A. Cooper [hereinafter referred to as “the Coopers”] (Exhibit 14), (3) that Assignment of Lease of Premises between the Pettits and the Coopers recorded in Pierce County under recording No. 9809010062 (Exhibit 30)....

**None of the verbal or side agreements was proved.**

The following findings of fact are based on the specific terms of the written agreements.” [Emphasis supplied]

In the words of this Court in *Hegwine, supra*, 132 Wash.App. at 555, viewing the evidence in the light most favorable to [Rodartes]

as the prevailing party, there is substantial evidence to support [the trial court's] findings of fact and those findings support the trial court's conclusions of law, given:

- (1) the undisputed Finding of Fact 2.1 above that no “verbal or side agreements regarding the various written agreements” was proved,
- (2) the agreed terms of the 1990 unrecorded Business Purchase and Sale Agreement which obligated the Coopers to pay pro-rata taxes under the sublease to Pettits and stated it constituted the entire agreement between the Pettits and Coopers,
- (3) the statements under oath of Robert Pettit, Jr. that the Coopers were obligated to pay the real estate taxes, and
- (4) Deborah Cooper’s testimony at trial that the agreement said Coopers had to pay the taxes.

**Second Assignment of Error: Finding of Fact 2.20 and First Issue re Ambiguity of Section VI.**

Coopers’ counsel assigned error to Finding of Fact 2.20, which finding was specifically requested by counsel for Coopers [RP, Vol. 4, p. 262, In. 16-25; p. 232, In. 19]. The finding stated “Defendants presented evidence and argument that Section VI concerning the “Renewal of Lease” was ambiguous. The Court found that Section VI

was not ambiguous.” [CP 578] This finding says that the trial court reviewed evidence and heard argument, concerning whether Section VI was ambiguous, and concluded on that evidence, testimony and argument that it was not. Counsel for Coopers does not allege that the trial court did not hear or consider testimony and evidence regarding the meaning of Section VI.

There was substantial evidence supporting the trial court’s finding, as proposed by defense counsel. As noted above the trial court premised all its Findings of Fact on its 2.1 Finding that no “alleged verbal or side agreements regarding the various written agreements submitted into evidence were proved.” Appellants/Coopers **did not** assign error to this Finding of Fact 2.1. [CP 571-572] To illustrate the “substantial evidence” before the trial judge concerning the lack of ambiguity of Section VI of the 1986 Lease of Premises, it is helpful to quote exact text from that Lease. The rental, renewal, and tax provisions of the 1986 Lease of Premises are as follows [Ex 1, pages 1, 2-3, 4]:

“SECTION III  
RENTAL”

Lessee shall pay a minimum **rental** of Two Thousand Three Hundred Seventy-Eight and 76/100ths (\$2,378.76) Dollars per year during the term of this lease, **payable in advance in monthly installments** of One Hundred Ninety-Eight and 23/100ths (\$198.23) Dollars, due on the fifth (5<sup>th</sup>) day of each month,

commencing on the 5<sup>th</sup> day of March, 1986. Any monthly rental payment not paid within ten (10) days of the date it is due, shall result in Lessee paying a late charge equal to five (5%) percent of the monthly payment due.”

“SECTION VI  
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 1<sup>st</sup> 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) Dollars, payable on the 5<sup>th</sup> day of March of each succeeding year.”**

“SECTION IX  
TAXES, INSURANCE, AND PERMITS”

Lessee shall pay 7.36% of all real property taxes levied on the parcel of property owned by Lessor, which includes the demised premises. The taxes to be paid by Lessee to Lessor shall be computed on the land only portion of any real property taxes levied against the parcel owned by Lessor. Lessee shall pay one-half of the taxes owed by him to Lessor by April 30<sup>th</sup> of each year, and the remaining half by October 31<sup>st</sup> of each year. Any increase in real property taxes due to improvements made upon the property by Lessee shall be the responsibility of Lessee and Lessee shall pay for the taxes levied upon those improvements on the same schedule as provided above. In addition, Lessee shall pay all personal property taxes levied against any person property used by Lessee in his business before they become delinquent.

Lessee shall pay for all necessary permits, licenses, or other fees required to operate his business from the demises [sic] premises, or to construct or make any improvements thereon.”

[Emphasis supplied]

Immediately prior to the end of the original 10 year term of the Lease of Premises, February 5, 1996, the Robert Pettit, Jr.'s wrote to their Lessors, Roger and Margaret Rodarte, forwarding a check for overdue taxes in the amount of \$200.00, and expressing their desire to:

"...exercise the option to purchase the property for \$1.00".

I further request that you will furnish me with a deed for the property described in this lease and that you comply with Section V Subdivision of property requirement.

**In the event that an outright purchase cannot be accomplished at this time then it is my desire to continue with the new lease term as outlined in Section VI RENEWAL OF LEASE.** " [Ex 12]

Roger and Margaret Rodarte replied via letter dated February 20, 1996 [Ex 13]:

"...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'.**"

[Emphasis supplied].

These letters constituted an agreement to renew the lease on a yearly basis per the express language of Section VI of the 1986 Lease of Premises. Section III dealt with the RENTAL - **the amount of rent, date payable, and fine for late payment.** Section VI provided for automatic 1 year renewals, and specifically **changed the**

**amount and due date of the rent.** Rather than the \$198.23 due monthly,

“[t]he **annual rental** for each succeeding year following the end of the term of this lease, shall be One (\$1.00) Dollars, payable on the 5<sup>th</sup> day of March of each succeeding year.”

That sentence ends the entire Section VI. There is no further sentence. Thus, nothing in Section VI Renewal of Lease changed any other Section of the 1986 Lease of Premises. Only “rental” was referred to, the Section III provision. The Section VII Restrictions of Use, Section VIII Assignment and Sublease, Section IX Taxes, Insurance, and Permits, Section X Non-Liability of Lessor, Section XI Utilities, Section XII Use of Water and Water Rights, Section XIII Access to Property, Section XIV Sale of Business, Section XV Default, Section XVI Binding Effect, Section XVII Costs and Attorneys Fees were left untouched.

Coopers’ Amended Answer and Counterclaim included five counterclaims, the second, third, fourth and fifth of which were claims under Sections XII and Section XIII regarding access, landfill and water rights ( CP 338-339). Coopers also requested attorneys’ fees under Section XVII (CP 341). It is clear Coopers and their counsel believed those Sections of the 1986 Lease of Premises were still in effect.

The morning of trial, before testimony was heard, counsel for Coopers struck their second through fifth counterclaims on their own volition, not because they now believed those Lease sections were no longer in force, but instead because: “Judge, I can’t get my experts here.” [RP, Vol. 1, page 11, lines 17-24.]

Counsel for Coopers assert in the Assignment of Error 2 that Section VI was ambiguous. Washington courts have consistently held that:

“...contract language subject to interpretation is **construed most strongly against the party who drafted it, or whose attorney prepared it.** Underwood v. Sterner, supra; *Wise v. Farden*, 53 Wash.2d 162, 332 P.2d 454 (1958); Restatement, Contracts § 236(d) (1932). [**Emphasis** supplied]

*Guy Stickney, Inc. v. Underwood*, 67 Wash.2d. 824, 410 P.2d 7 (1966)”. *Accord, Rouse v. Glascam Builders, Inc.*, 101 Wn.2d 127, 137, 677 P.2d 126 (1984).

In the Declaration of Robert Pettit, dated 07/17/2008, [CP 277-281], Mr. Pettit declared under penalty of perjury: “Most of the provisions in the lease were my idea.” [(Paragraph 7, CP 278). And in his Deposition [Transcript of Pettit Deposition, page 41, lines 20 - 23]

“Q. [Wetherall] In your Declaration you indicated that most of the provisions of the lease were your idea. Is that your testimony as of today as well?  
A. [Pettit] Yes, it is.”

Thus, if, as Coopers assert, there is ambiguity regarding

whether the Section VI Renewal lowering of the annual rental payment to \$1.00 leaving out any mention of taxes meant that no further taxes would *ever* be due to lessor after 1996, that ambiguity should be resolved against the person who devised the terms.

And at paragraph 9 of that Declaration [CP 279], Pettit stated:

“I viewed myself as an owner so I thought it only fair that I pay taxes. I would have had to pay taxes if Roger could have subdivided the parcel so it wasn’t fair that I didn’t have to pay taxes until the time Roger subdivided....”

In *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990), also cited by Appellants, the court adopted a “context rule for interpreting written contracts” *Berg*, at 667, 671:

“Determination of the intent of the contracting parties is to be accomplished by **viewing the contract as a whole**, the subject matter and the 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 respective interpretations advocated by the parties.**” [Emphasis supplied].

The Court continued, *Berg*, 115 Wn.2d at 668:

“In discerning the parties’ intent, subsequent conduct of the contracting parties may be of aid, **and the reasonableness of the parties’ respective interpretations may also be a factor in interpreting a written contract.**”

And at 115 Wn.2d at 672:

“**When a provision is subject to two possible**

**constructions, one of which would make the contract unreasonable and imprudent and the other of which would make it reasonable and just, we will adopt the latter interpretation.** *Dickson v. United States Fid. & Guar. Co.*, 77 Wn.2d 785, 790, 466 P.2d 515 (1970). [Emphasis supplied]

Pettit, the original lessee who freely acknowledged that most of the provisions were his idea, thought it was only fair that he should pay the property tax until the property was subdivided, at which point he could request to exercise his option and purchase the subdivided property pursuant to Sections IV and V of the 1986 Lease of Premises. As set forth above, Section IX of that Lease of Premises, restated in the Sublease section, (b) Pro-Rata Taxes, of the 1990 Pettit/Cooper Business Purchase and Sale Agreement, contemplated by their express written provisions that:

“Any increase in real property taxes due to improvements made upon the property by Lessee shall be the responsibility of Lessee and Lessee shall pay for the taxes levied upon those improvements...”

[Ex 1, page 3; Ex 14, page 2].

These written provisions, together with Pettit’s Declaration under oath, fortify the trial judge’s conclusion that Section VI was unambiguous and pertained **only** to the annual rental after the initial 10 year period, and did not disturb or change the lessee’s obligation to pay taxes under Section IX. Using the *Berg, supra*, Court’s

instruction regarding the “reasonableness” of an interpretation and holding: **“When a provision is subject to two possible constructions, one of which would make the contract unreasonable and imprudent and the other of which would make it reasonable and just, we will adopt the latter interpretation”**, the trial judge could reasonably conclude that the only interpretation of Section VI Renewal of Lease which would yield “reasonable and just” results would be Rodartes’ interpretation. Specifically that Section VI changed ONLY the annual rental. This is because the only restriction on use by lessee is the Section VII RESTRICTIONS ON USE “Lessee shall not use the demised premises for any unlawful or immoral purpose” [EX 1, page 3] restriction. Had the trial court found, as urged by Coopers, that Section VI was ambiguous and that after 1996 no further real estate taxes would be owed, and the sole responsibility of lessee would be to pay Rodartes \$1.00 per year, an untenable, unjust and unreasonable result would have occurred. Lessees, for \$1.00 per year, renewable ***automatically*** would not only be free from the obligation to pay the ever-increasing Pierce County real estate taxes on the underlying real property, but would also be able to construct any “legal” building they wished, completely without the advice and consent of their landlord/lessor, and the **lessor** Rodartes would be

responsible for paying the associated taxes to Pierce County.

The trial judge had all the documents, testimony and evidence before him. He listened to arguments of counsel re ambiguity. He was aware that Coopers Amended Answer and Counterclaim had made claims under Sections XII, XIII and XVII, most of them withdrawn because witnesses couldn't be produced. The trial judge's finding, based on everything presented to him, was that Section VI Renewal of Lease changed only the annual rent, and was not ambiguous in that regard.

The interpretation of contract language against the drafter is enhanced further by this Court's above-noted demand that on appeal, the evidence is taken in the light most favorable to the prevailing party. The trial court, in ruling the contract was not ambiguous, considered the course of dealing between the parties, including:

(1) the original lessee, Pettit, knew he had to pay property taxes, actually paid them to Roger Rodarte, and inquired in 1996 as to any unpaid balance [Ex 12];

(2) Pettit required Coopers to acknowledge in writing by their signature to the 1990 Business Purchase and Sale Agreement [Ex 14] when Coopers acquired the Pettit business that Coopers would pay the pro-rata taxes. [RP, Vol. I, page 125, lines 20-24; Transcript of

Deposition of Pettit, pg. 48, lines 21-15 continuing to Page 50, line 1];

(3) In his Deposition to perpetuate his testimony, on query from Rodartes' counsel Wetherall regarding the provision for real estate taxes after the original 10 year lease expired in 1996:

"Q. [Wetherall] Well, show me in the agreement where It says that at the end of ten years the obligation to pay taxes goes away, but other obligations on the part of Roger continue. It's not in there, is it?

A. [Pettit] I don't see anything like that in there.

Q. Do you have anything in writing from you to Roger saying at the end of ten years I no longer have to pay any taxes?

A. No.";

(4) When the Coopers sold their business they required the Wrights to acknowledge that the Wrights would comply with all terms of the 1986 lease, which included the payment of taxes;

(5) Mrs. Cooper acknowledged that she paid taxes on what she thought was the leased premises in 2005, 2006, 2007;

(6) Mrs. Cooper redirected the tax bills so that her children would receive the tax billing; and

(7) Mrs. Wright testified that she knew, and that her mother knew all along that taxes had to be paid.

Response to Appellants' argument re tax provisions

Appellant Coopers' argument before this Court concerns real estate taxes. Coopers argue, alternatively, that no real estate taxes

were owed by lessee or sublessee after March 1996, that Coopers were unaware that the issue of breach for failure to cure their default regarding tax payment was before the court, that no evidence regarding payment of taxes should have been allowed, that non-payment of taxes was not a material breach calling for eviction, and that no attorneys fees should have been awarded to Rodartes. By so asserting Coopers ignore that it was their refusal to cure when notified of a breach which brought the issue of taxes before the trial court.

Rodartes put before the Court Rodartes' proper termination of the lease via the requirements of Section XV. Default. Under the precise language of Section XV of the 1986 Lease, if lessees defaulted in the performance of any term of the contract and failed to cure within 30 days after Notice of their Default, then lessees would have breached the lease.

No taxes owing under Section VI. The only Section of the 1986 Lease before this Court in Section VI. The Coopers did not assign error to Finding of Fact 2.1 wherein the trial court found none of the verbal or side agreements proffered in testimony from witnesses were proved; the written agreements were not intended as being something other than what they purported to be.

Coopers asset the trial court did not determine the purpose of

the contract (the lease, Section VI), the circumstances surrounding it, the intent of the parties, course of dealings, and the reasonableness of their interpretations using the “context rule” adopted in *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990). Only Section VI is at issue, and the Coopers request this Court review that Section *de novo* to ascertain its meaning.

The trial court did just that, weighing testimony from the original and successor lessors, testimony from the original and successor lessees, recorded and unrecorded documents, surveys, tax statements and evidence introduced, and concluded Section VI of the 1986 Lease of Premises meant only what it explicitly stated: rent would be reduced to \$1.00 year; other Sections of the Lease would remain in place.

#### Purpose of Contract/Meaning or Intent of Section VI

Coopers argue “[t]he objective of the contract was to sell the parcel to Pettit.” [page 20 of Appellants’ Brief], but offer no reason why the property wasn’t simply subdivided and sold in 1986. More importantly, the trial court specifically found the lease was not something other than what it purported to be: a lease with option to purchase if and when subdivision of the property was possible. As Coopers did not take exception to that finding, it is taken as a verity

that lease was indeed a lease, not a sale agreement.

Counsel for Coopers represents that as “an economic incentive” to Roger Rodarte to subdivide by 1996, “Pettit offered” the provision that following 1996, lessees would no longer be responsible for real estate taxes if Roger Rodarte did not subdivide. Coopers’ counsel states “the trial court never considered this”. That is not true. Pettit’s theory of economic incentive and/or penalty were contained in the Declaration of Robert Pettit as well as his Deposition and both were before the trial court.

But there was also considerable testimony and certified copies of deeds and surveys showing that both original lessors and Pettits, knew the Rodarte property could not be subdivided in 1986 and might not be able to be subdivided in the future. An “economic incentive” or “penalty” in the form of lessors having to forever pay all real estate taxes on the leased premises would have no meaning or force if lessors could not, as opposed to would not, subdivide.

In his Deposition, Robert Pettit testified:

“Q. [Tuttle] You had just talked about the transaction and agreement and you used words like purchase and loan –

A. [Pettit] Right.

Q. [Tuttle] - and you, know, interest. But the document ended up being a lease. Can you describe for me the background? What was the purpose of a Lease Agreement?

A. [Pettit] Well, you know, I wanted to buy the land, **but because he [Roger Rodarte] couldn't give me a, you know, a Deed initially, then we agreed to kind of a lease, a lease option to purchase, just like I guess when you purchase a house or a piece of property. And the payments were –were set up with interest at 10% interest. And - and this ten-year period, during this ten-year period he would try to get a subdivision of that piece, give me a Deed, and where I would be the outright owner. And we set it up so that just like if I were purchasing a home, would be paying the property taxes for that piece of property during this contract period."**

And on cross-examination by Wetherall, Pettit Transcript page 42, lines 14 - 21:

"Q. [Wetherall] Okay. I know we're going back 23 years to March 3rd of 1986, but at the time this document was written you fellows put in a provision that said what would happen if he couldn't or didn't subdivide. What discussions did you have about why he might not at the end of ten years be able to subdivide?

A. [Pettit] I think we talked about **things out of our control, like just is it, you know, legal to do that down, you know, in that part of the county."**

The trial court learned from testimony from Roger Rodarte [RP 29, lines 6-10 and 17-22; RP 37, lines 19-25] supported by a certified copy of a 2000 Survey of the property by Warren T. Lay [Ex 8] and a certified copy of an out-take on a 1924 deed to Pierce County [Ex 17], and further explained to the trial court by Rodartes' counsel Wetherall in response to an objection by Tuttle [RP 30, lines 4-15], that the reason Roger Rodarte could not subdivide and give a deed to Pettit

in **1986 or 1996**, was that there was a **60 foot deeded road** called the “Sumner Dieringer Highway, recorded under in 1924 in favor of Pierce County, as document 711122, which ran through the leased premises and contiguous Rodarte property. No subdivision could be made, and thus no deed provided, in 1986 or 1996 because that deeded road (not an easement) had not been acquired or vacated and by the specific terms of Section V Subdivision of Property, “the subdivision shall not reduce in any way the dimensions of the property or location of the property leased by Lessee.” [Ex 1, page 2], which would have been impossible unless the road were vacated. Pettit’s attorney, in the legal description attached as Exhibit A to the 1986 Lease of Premises [Ex 1, page 7], made no reference to the 60 foot road, as would have been proper. So the leased premises included the section of 60 foot road without excepting it, and a subdivision was to have created a like-size piece of property without the road. The Statutory Warranty Deed from Roger and Margaret Rodarte to Frank and Shirley Rodarte recorded December 30, 1999 [Ex 2] correctly called out the exception for that 60 foot deeded road. No testimony was given by Pettit as to why his attorney Mayhew did not include the legal description of the road in the 1986 Lease.

Therefore before the trial court was testimony from the *original*

lessor Roger Rodarte, and the *original lessee* Robert Pettit, Jr., a certified copy of the out-take of the 1924 deed to Pierce County, and a certified copy of the Warren T. Lay Survey showing the deeded road. Thus, there was “substantial evidence” before the trial court to support a the judge’s conclusion that the lease was a lease, and not a purchase and sale agreement. This because neither the original lessor nor lessee knew if it would ever be possible to get rid of that 60 foot wide road running through the leased premises, thus allowing lessor to go forward with subdividing.

The idea that charging all future real estate taxes to the lessor as an “economic incentive” or “penalizing” him for not subdividing, is not reasonable since both parties knew of the road and had used a lease instead of a deed for that very reason. This is corroborated by Pettit’s testimony [Pettit Transcript, page 20, Lines 17-23]:

“Q. [Wetherall] Why did Roger Rodarte fail to subdivide?

A. [Pettit] I never did get an exact reason. He just - at the end of ten years he said it’s temporality not possible.

Q. [Wetherall] What efforts did he make to subdivide the property, if you know?

A. [Pettit] I don’t recall him making any efforts. I specifically never asked him what he was doing to do this.”

And Pettit Transcript at page 45, lines 9-14]:

“Q. [Wetherall] Did you approach anyone at Pierce

County or at the City of Auburn or anyone else to find out whether a subdivision of that property would be possible?

A. I never discussed that with any - anyone there.

There is substantial evidence from which the trial judge could conclude the intent of the parties was to enter into a lease, with the possibility at some future date that a deed could be given.

Brief of Appellants puts considerable time into both the testimony of Pettit and Coopers regarding no lessee obligation to pay any real estate taxes, ever, following 1996. But the trial judge heard testimony to the contrary from both Roger Rodarte, and even Robert Pettit. On re-direct, Roger Rodarte testified that in 1996 the *only* change to the 1986 Lease was the rent payment of \$1.00 per year [RP 70, lines 13-25, and page 71, lines 1 - 2]:

“Q. [Wetherall] He (counsel Tuttle) then turned the page to you and said, ‘What was the new lease amount,’ and you said ‘one dollar.’ Do you recall that?

A. [Roger Rodarte] Yes.

Q. [Wetherall] Let’s go back one step. The part that wasn’t read to you, in paragraph 6, after the – he read ‘Property required by this lease, by the end of the term of this lease.’ The next sentence says, “This lease shall renew automatically each year on the first day of March.” **Was that your understanding, that the whole lease would renew each year?**

A. [Roger Rodarte] Yes. For one dollar per year.

Q. [Wetherall] **Were there any changes other than the rent**, as far as you knew, after the 1996 term had expired?

A. [Roger Rodarte] **No.**”

And Robert Pettit, Jr. testified [Pettit Transcript, page 47, lines 18-25]:

“Q. [Wetherall] Well, show me in the [1986 Lease of Premises] agreement where it says that at the end of ten years the obligation to pay taxes goes away, but other obligations on the part of Roger continue. It’s not in there, is it?

A. [Pettit] I don’t see anything like that in there.

Q. [Wetherall] Do you have anything in writing from you to Roger saying at the end of ten years I no longer have to pay any taxes?

A. [Pettit] No.”

Appellants argue in their Brief, page 26, paragraph (4) that Pettit devised the language, cleverly inserting a penalty to his advantage, but this flies in the face of reason and drafting:

1. If Pettit envisioned and carefully negotiated this tax penalty, then he should have enunciated that tax penalty provision in Section VI renewal of lease.

2. As Pettit created the language, the meaning and extent of Section VI if, ambiguous, is specifically interpreted against Pettit.

3. All other sections of the lease were to continue after 1996, according to Pettit, Roger Rodarte and Coopers, who asserted counterclaims and damages based on 3 of the other lease sections. Appellants cited no evidence or testimony for the unique proposition that Section IX was supposed to be deleted, but all the other Sections kept.

4. As argued above, making the lessor responsible for

continuing real estate taxes including those on buildings built by lessee over which lessor had no control, is unreasonable and unjust.

Further, as Appellants set forth in their brief, citing both *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695 and 697, 974 P.2d 836 (1999) and *Lynott v. Nat'l Union Fire Ins. Co.*, 123 Wn.2d 678, 684, 871 P.2d 146 (1994), extrinsic evidence may be used as follows:

- a) Extrinsic evidence cannot be considered to show a party's unilateral or subjective intent as to the meaning of a contract word or term or to "vary, contradict, or modify the written word."
- b) "Extrinsic evidence is to be used to illuminate what was written, **not what was intended to be written**";
- c) "Unilateral or subjective purposes and intentions about the meanings of what is written do not constitute evidence of the parties' intentions."

Thus, on *de novo* review of the meaning of Section VI of the lease, Pettit's unilateral or subjective purposes and intentions about the meaning of Section VI does not constitute evidence of the parties' intentions; likewise, Pettit's unilateral or subjective intent as to the meaning cannot be considered to "vary, contradict, or modify the written word", and Pettit's statements 24 years after the lease was written that he intended to have an "economic inducement" or "penalty" that no taxes would be payable forever after 1996 failing subdivision, cannot be used to illuminate what was intended to be written. This is especially the case as Appellants assert Pettit cleverly

created the language himself, but did not spell it out in the lease.

Appellants' brief at 24 states:

"...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."

But the lease was an agreement and bargain between two sets of individuals not party to the litigation. Pettit having devised the language now says it meant something other than the precise language he created. As drafter, the language is construed against him. Further, at his Deposition, Pettit was made aware by counsel Wetherall of the possibility of liability to Coopers, who apparently relied on his bald statement to them that no real estate taxes were due Rodartes, even though there was no written language in the 1986 Lease of Premises which so stated. [*Pettit Transcript*, page 51 and 52]:

"Q. [Wetherall]. Did you at the time you assigned that lease to (Coopers) tell them that they didn't have to pay property taxes?

A. [Pettit] I didn't tell them - I don't think I - I have a letter that I wrote them telling them their obligation under this agreement, but I don't think I said you do not have to pay taxes. I can't recall, but I do have the letter.

...

Q. [Wetherall] Mr. Pettit thank you. You've produced the letter dated May 26<sup>th</sup> signed by you. I believe this is a copy. It's Exhibit No. 6 to your deposition.

...

Q. [Wetherall] ...The letter says quote/unquote: My only

obligation and yours as the new owners would be an annual fee of one dollar for the lease, payable to the Rodartes.

...

Q. [Wetherall] I should advise you that the basis - a portion of the basis of Plaintiffs' Complaint is the failure to pay taxes, In the event that the Coopers lose this litigation, your representation in your earlier Declaration that you have no interest in this lawsuit and have no interest in its outcome may become very different. Has anyone explained that to you?

A. [Pettit] No.

The trial court had this testimony before him when he was weighing the credibility of the witnesses.

Conduct of the Parties Litigant regarding Payment of Taxes.

Coopers ask the Court to look at the conduct of the parties regarding taxes after 1996. There was testimony from both Deborah Cooper and Larissa Wright, as lessees, that lessees were obligated to pay taxes. Mrs. Cooper testified that in 2005 when the Coopers were selling their business and assigning their lease to the Wrights (Coopers' daughter and son-in-law), Mrs. Cooper contacted Pierce County and arranged for tax statements on one parcel owned by the Rodartes to be re-directed directly to the Wrights. [RP, 143, lines 2-25; RP 145, lines 1-25]. And Larissa Wright testified [RP 185, line 25 through 186, line 11]:

"Q. [Wetherall] ...Did you have any discussions with your mother about not having to pay taxes on the

property at any point in time?

A. [Larissa Wright] About not having to pay taxes?

Q. [Wetherall] Not having to pay taxes.

A. [Larissa Wright] I don't believe so. We were always under the assumption that taxes needed to be paid.

Q. [Wetherall] Okay. Were you never told by your mother that she believed no taxes had to be paid on the lease premises?

A. [Larissa Wright] It's my understanding that my mom knew that taxes always needed to be paid on the leased premises."

Coopers' counsel stipulated [RP 76, lines 14-15] that "Coopers did not pay property tax for all of that time period between '98 or '99 to 2005". Appellants' brief states at page 27 that "[a]fter 1996, there were no demands for payment until 2007." The Trial court could therefore notice and consider the meaning of the voluntary payments in 2005, 2006, and 2007.

Respondents, Frank and Shirley Rodarte, acquired title to the real property from his brother on 12/20/99 [Ex 2]. Mr. Deakins who was controller of Rodarte Construction and responsible for paying taxes, testified at trial [RP 78 at line 8 - 10] that he became aware of missing tax statements for one of three contiguous parcels comprising 10 acres owned by the Rodartes

"[i]n an interval audit just verifying parcels and numbers. Mr. Rodarte owns various other parcels, as well. In auditing them I came to realize that they had not received a billing for parcel number 2022 for three years."

Continuing in his Declaration at paragraph 7 [CP 140], Mr. Deakins stated that he contacted Pierce County to find out why Rodartes didn't receive the real estate tax bill and was advised those statements were being mailed to someone named Eric and Larissa Wright. It was following the discovery of these unknown names that Rodartes tracked down the previously unknown documents created by Deborah Cooper, executed by Coopers and Wrights and recorded in 2005, purporting to sell Rodartes' property. On finding those documents, on 5/22/2007 Frank and Shirley Rodarte sent a Notice of Default to Coopers, their business, Wrights and their business, alleging as one element the failure to pay taxes. [Declaration of Frank Rodarte in support of Motion for Summary Judgment, CP 193-211, paragraph 6 at 195, paragraphs 11 and 12 at 197]. This lawsuit was commenced following Coopers' failure to cure after 90 days and termination of the lease.

Thus, the course of dealing for the parties litigant, is that from 2001 - 2007, Wrights paid taxes for 3 years, Coopers paid none, and Rodartes sent a Notice of Default regarding taxes in 2007.

In weighing the testimony and evidence in the light most favorable to Rodartes as prevailing party including the testimony and conduct Larissa Wright and deferring to the trial judge the weighing

of the credibility of the witnesses and the totality of the evidence, it can be seen that there was substantial evidence by which the trial judge and this Court can determine that the “course of dealing” between the parties did not establish that either lessor or lessee believed no real estate taxes were due under the 1986 Lease of Premises, Sections VI and IX.

**B: ASSIGNMENT OF ERROR 4 and ISSUE 2 - MATERIALITY OF BREACH BY COOPERS FAILURE TO PAY TAXES**

Appellants argue that Coopers failure to pay taxes did not “materially breach the lease agreement” because of the dollar amounts Coopers paid to Pettits for purchase of Pettit’s business and later assignment of the lease. It is unclear to Respondents why amounts paid to Mr. Pettit, not a party to this litigation, should have any impact on the plain meaning of the language of the 1986 Lease as between the subsequent lessor and lessee who were not party to any negotiations or payments between the Coopers and Mr. Pettit.

There are several problems with such a tying of events. First the failure to pay taxes was only one reason the litigation was commenced, the clouding of title was another. Plaintiff incurred significant cost as a result of Coopers failure to voluntarily remove the cloud upon Rodartes title and pay taxes to cure the Cooper default. Under the terms of Section XV Default of the Lease of as set out

herein above, the breach was not failing to pay the taxes, but failing to cure within 30 days after receiving notice of that default which necessitated the eviction and this litigation. There is no logical relationship between the failure to cure and any amounts paid Mr. Pettit. Breach occurred when no response and no cure was received within 30 days. The lease was terminated more than 90 days after the Notice of Default. Section XV is clear. First a notice of default must be sent providing 30 days to cure; then breach occurs if no cure is made.

Coopers' Amended Counterclaim and Answer alleged that Roger Rodarte failed to perform the subdivision and in Coopers' Response to Motion for Summary Judgment [CP at 298] Coopers state Roger Rodarte breached by his failure to subdivide. However, Pettits sent no Notice of Default with 30 days to cure to Roger and Margaret Rodarte. Moreover, because of "things out of our control..." [*Pettit Transcript*, page 42, lines 19-21], being a 60 foot wide road deeded to Pierce County in 1924, a Lease of Premises, not a deed was entered into in 1986, with a specific section VI for renewal of the lease if the subdivision was not completed in 1996. Roger Rodarte's possible inability by 1996 to subdivide was recognized by both parties in 1986 and provision was made for how to proceed.

Under the plain and ordinary language of the lease, the failure to subdivide in 1996 was not a default or breach. No notice alleging default or breach was sent by Pettits to Rodartes. The Pettits and Roger Rodartes in writing agreed to carry on in 1996 with annual renewals of the lease under Section VI [Ex 12 and 13].

Appellants asserted that The ONLY REMAINING affirmative duty Coopers had under the lease was payment of taxes. The materiality of the failure to pay taxes must be taken in this context, that it was their only affirmative duty other than \$1.00 per year. The amount of the taxes is not material taken in this context. The failure to cure after opportunity to cure is a material breach. And as quoted by Appellants in their Brief, "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)". Coopers received the "reasonable time to cure" - being given more than 90 days instead of the 30 days set forth in Section XV, "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) - page 28 of Appellants' Brief.

Rodartes provided three times the amount of days to cure, and then exercised their alternative remedy to terminate the lease in

accordance with Section XV.

Appellants at page 31 of their brief state that Respondents Frank Rodartes had already received their benefit and the failure to pay property taxes was incidental to this benefit and insignificant in comparison. They point to no benefits received by the Frank Rodartes under the 1986 Lease of Premises other than \$25.00 for 25 years of use of the property.

Coopers assert at page 30 of their Brief that the Frank Rodartes "received full payment". Of what? Instead, they compare how much the Coopers had to pay, not to Frank and Shirley Rodarte, but to the Pettits.

Furthermore, the trial court heard testimony from Eric Wright, Deborah Cooper and Jim Cooper that the Wrights paid to the Coopers more money than the Coopers paid to the Pettits. [RP 140, Ln 17 - 141, Ln 14] They made a profit. The argument that the amount of taxes owed to their landlord/lessor the Frank Rodartes should be compared to the amount of money they paid to third-party Pettit for the business and assignment is a non sequitur.

On appeal Coopers ask this court to rewrite the specific terms of the 1986 Lease, by replacing the specific remedy negotiated, bargained for, and agreed in Section XV. Lessor could choose

between 2 remedies following lessee's failure to cure within 30 days following notice of default: lessor could reenter without demand or further notice and relet the premises, or terminate the lease effective 30 days after written notice. Rodartes elected to terminate and did terminate the lease.

Coopers ask this Court to reverse the trial court's ruling that failure to pay property tax yearly was a material breach justifying eviction. It is particularly egregious that Coopers ask the Court to substitute payment of taxes for termination apparently because of the relatively small dollar amount of unpaid taxes when compared to what the Coopers paid Mr. Pettit to buy a business and sub lease property. One can only wonder at the failure to cure such an immaterial default after more than 90 days that thus caused the breach of contract.

**V: RAP 18.1 Attorney fees and Costs on Appeal**

The lease below allowed attorney fees to the prevailing party [Ex1, Section XVII]. The Rodartes prevailed below. By filing before this court the Coopers have required the Rodartes to incur additional costs and attorney fees. If deemed the prevailing party on appeal Rodartes request permission to file within 10 days after filing of an award their affidavit regarding attorney fees and expenses.

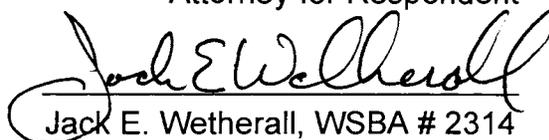
**VI Conclusion:**

For the reasons and upon the law set forth above, the trial court did not abuse its discretion and should be affirmed.

Dated this 22<sup>nd</sup> day of June, 2010



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COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

FILED  
COURT OF APPEALS  
10 JUN 22 PM 12:48  
STATE OF WASHINGTON  
BY 

James & Deborah Cooper, et al.,  
Appellants,

vs.

Frank & Shirley Rodarte,  
Respondents

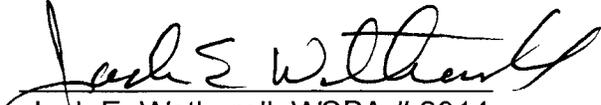
NO. 40182-7-II

CERTIFICATE OF SERVICE

[RAP 18.5; CR 5(b)(2)]

I certify under penalty of perjury under the laws of the State of Washington that I mailed a true and correct copy of the Brief of Respondents and the within Certificate of Service to Darol Tuttle, WSBA #26067, Appellants' attorney, at Froehling Tuttle, PSC, 122 E. Stewart Avenue, Puyallup, WA 98372-3007, via priority mail, postage prepaid, on June 21, 2010, pursuant to CR 5(b)(2) and RAP 18.5.

Dated this 21st of June, 2010.

  
Jack E. Wetherall, WSBA # 2314  
Attorney for Respondent

CERTIFICATE OF SERVICE of  
BRIEF OF RESPONDENTS