

No. 45278-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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FINANCIAL ASSISTANCE, INC., a Washington Corporation,
Appellant,

v.

BYRON SLACK, MICHAEL BUCKNER and MAUREEN BUCKNER,
and the marital community composed of BYRON SLACK and JANE
DOE SLACK and the marital community composed of MICHAEL
BUCKNER and MAUREEN BUCKNER,

Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR CLARK COUNTY
THE HONORABLE DAVID E. GREGERSON

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	RESTATEMENT OF ISSUES	2
III.	RESTATEMENT OF THE CASE	3
	A. Factual Background.....	3
	1. Slack signed a lease with Michael and Maureen Buckner after their landlord required “somebody else . . . who could guarantee payment” sign the lease.....	3
	2. After the Buckners fell behind on their rent, they signed a promissory note reflecting the back rent owed and forged Slack’s signature on the note.....	5
	B. Procedural history	6
	1. After the trial court disclosed that it had previously represented Hazel Dell’s principal, neither party sought the trial court’s recusal. The trial court rejected Financial Assistance’s assigned claim for \$8,709.12 in back rent.....	6
IV.	ARGUMENT	9
	A. This court must reject Financial Assistance’s unpreserved and unsupported allegations of judicial bias.	9
	1. Financial Assistance waived its claim of judicial bias by proceeding to trial after the trial court disclosed it had previously represented Financial Assistance’s assignor.....	9

2.	Financial Assistance provides no support for its false allegations of bias. The trial court did not abuse its discretion by not sua sponte recusing itself.	13
B.	The trial court correctly rejected Financial Assistance’s claim against Slack, who signed the lease as a surety and cannot be held liable for the Buckners’ arrearages beyond the lease’s one-year term.	15
C.	The trial court properly found that the incomplete account ledger did not support Financial Assistance’s claim against Slack.	21
D.	Slack is entitled to his attorney’s fees under the lease.	23
V.	CONCLUSION	23

TABLE OF AUTHORITIES

STATE CASES

<i>Atlas Supply, Inc. v. Realm, Inc.</i> , 170 Wn. App. 234, 287 P.3d 606 (2012).....	23
<i>Berg v. Hudesman</i> , 115 Wn.2d 657, 801 P.2d 222 (1990)	16-17
<i>Brauhn v. Brauhn</i> , 10 Wn. App. 592, 518 P.2d 1089 (1974).....	10
<i>Bros. v. Pub. Sch. Employees of Wash.</i> , 88 Wn. App. 398, 945 P.2d 208 (1997)	14
<i>Buckley v. Snapper Power Equip. Co.</i> , 61 Wn. App. 932, 813 P.2d 125, <i>rev. denied</i> , 118 Wn.2d 1002 (1991)	10-12
<i>City of Walla Walla v. \$401,333.44</i> , 164 Wn. App. 236, 262 P.3d 1239 (2011)	19
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 828 P.2d 549 (1992)	14
<i>Fancher Cattle Co. v. Cascade Packing, Inc.</i> , 26 Wn. App. 407, 613 P.2d 178, <i>rev. denied</i> , 94 Wn.2d 1012 (1980).....	18
<i>Glesener v. Balholm</i> , 50 Wn. App. 1, 747 P.2d 475 (1987)	19
<i>Kenney v. Read</i> , 100 Wn. App. 467, 997 P.2d 455 (2000), <i>amended on denial of reconsideration</i> , 4 P.3d 862 (Wash. Ct. App. 2000)	16-18
<i>Kimball v. Otis Elevator Co.</i> , 89 Wn. App. 169, 947 P.2d 1275 (1997)	21

<i>Marriage of Duffy</i> , 78 Wn. App. 579, 897 P.2d 1279 (1995), <i>rev. denied</i> , 128 Wn.2d 1017 (1996).....	10, 12
<i>Marriage of Petrie</i> , 105 Wn. App. 268, 19 P.3d 443 (2001)	3, 16
<i>Mendez v. Palm Harbor Homes, Inc.</i> , 111 Wn. App. 446, 45 P.3d 594 (2002).....	16
<i>Miller v. Paul M. Wolff Co.</i> , __ Wn. App. __, 316 P.3d 1113 (2014).....	16
<i>Parentage of J.H.</i> , 112 Wn. App. 486, 49 P.3d 154 (2002), <i>rev. denied</i> , 148 Wn.2d 1024 (2003).....	14
<i>Rich v. Starczewski</i> , 29 Wn. App. 244, 628 P.2d 831, <i>rev. denied</i> , 96 Wn.2d 1002 (1981).....	13, 15
<i>Saunders v. Lloyd's of London</i> , 113 Wn.2d 330, 779 P.2d 249 (1989)	19
<i>State v. French</i> , 88 Wn. App. 586, 945 P.2d 752 (1997)	18
<i>State v. Perala</i> , 132 Wn. App. 98, 130 P.3d 852, <i>rev. denied</i> , 158 Wn.2d 1018 (2006)	9, 13-14
<i>Washington Builders Ben. Trust</i> , 173 Wn. App. 34, 293 P.3d 1206, <i>rev. denied</i> , 177 Wn.2d 1018 (2013).....	22
<i>Williams & Mauseth Ins. Brokers, Inc. v. Chapple</i> , 11 Wn. App. 623, 524 P.2d 431 (1974).....	10-11
<i>Wimberly v. Caravello</i> , 136 Wn. App. 327, 149 P.3d 402 (2006)	17

Wolfkill Feed & Fertilizer Corp. v. Martin, 103
Wn. App. 836, 14 P.3d 877 (2000)13

RULES AND REGULATIONS

CJC Rule 2.1112
ER 90421
RAP 9.11 1, 13-14
RAP 10.3.....15
RAP 18.1 23

OTHER AUTHORITIES

72 C.J.S. *Principal and Surety* § 82 (1987).....17
Restatement (Third) of Suretyship & Guaranty
§ 40 (1996)..... 20

I. INTRODUCTION

Before trial, the trial court disclosed to appellant Financial Assistance, Inc., that it had represented the principal of its assignor, a commercial landlord, more than a decade ago. Financial Assistance proceeded to trial without objection. Following trial, the trial court rejected Financial Assistance's claim that respondent Byron Slack was liable for delinquent rent incurred years after he signed a one-year lease to "guarantee payment" by his business acquaintances, Michael and Maureen Buckner. Financial Assistance now appeals alleging that the trial court harbored improper bias and erred by refusing to hold Slack liable for the delinquent rent.

Financial Assistance waived any objection to the trial court's alleged "bias" by failing to seek recusal after the trial court disclosed that it had previously represented the principal of Financial Assistance's assignor. Moreover, Financial Assistance provides absolutely no evidentiary support for its false allegation that the trial court's decision was "shrouded" in bias, and it has made no attempt to support that assertion on appeal under RAP 9.11.

Regardless, the trial court correctly refused to hold Slack liable under the lease, which he signed as a surety, and correctly

rejected Financial Assistance's incomplete ledger as proof of the delinquent rents owed. This court should affirm and award Slack his attorney's fees on appeal.

II. RESTATEMENT OF ISSUES

1. Did Financial Assistance waive its right to challenge the alleged bias of the trial court by failing to object or seek the trial court's recusal after the trial court disclosed that it had represented the principal of Financial Assistance's assignor over a decade ago?

2. Do Financial Assistance's assertions that the trial court's alleged bias "shrouded" its decision – unsupported by any reference to the record – establish a basis for reversing the trial court's judgment entered after a full trial?

3. Did the trial court correctly reject as inequitable Financial Assistance's claim against Slack – based on a lease he signed because the landlord (Financial Assistance's assignor) required "somebody . . . who could guarantee payment" – that sought to recover delinquent rent incurred two years after the lease's one-year term expired?

4. Did the trial court correctly reject as conclusive proof of the amount of delinquent rent the ledger offered by Financial

Assistance, which was incomplete and not supported by testimony from Financial Assistance's only witness at trial?

III. RESTATEMENT OF THE CASE

This restatement of the case is based on the trial court's unchallenged findings and the evidence presented at trial. *Marriage of Petrie*, 105 Wn. App. 268, 275, 19 P.3d 443 (2001) (unchallenged findings are "verities on appeal").

A. Factual Background

- 1. Slack signed a lease with Michael and Maureen Buckner after their landlord required "somebody else ... who could guarantee payment" sign the lease.**

In the spring of 2004, Michael and Maureen Buckner approached the Hazel Dell Development Company and its principal Milton Brown about leasing a commercial space in Vancouver, Washington they could use to run their video surveillance business. (FF 1, CP 65; RP 11-12, 40-41; Ex. 1) The Buckners negotiated the lease with Hazel Dell's property manager, John Steiger. (RP 11) Hazel Dell was "reluctant to lease the space to the Buckners" because "[t]hey just didn't have much of a financial background or statement." (RP 12) Accordingly, Hazel Dell refused to lease the

property without “somebody else ... who could guarantee payment.” (RP 25; *see also* CP 51)

In response, the Buckners presented Byron Slack. (RP 12, 25) Slack had no role in negotiating the lease, but agreed to sign the lease as a favor to Michael Buckner, with whom he had other business deals. (FF 2-3, CP 66; RP 40; CP 51-52) Hazel Dell never spoke with Slack and did not know Slack’s relationship with the Buckners. (FF 3, CP 66; RP 18, 28, 35) Slack had no involvement with the Buckners’ surveillance business. (FF 3, 9, CP 66; RP 41)

On April 30, 2004, the Buckners and Slack signed the lease. (FF 1, CP 65; Ex. 1) The lease was for a one-year term and stated that if the Buckners held over that the lease would convert to month-to-month. (FF 4, CP 66; Ex. 1 at 1, 11; RP 41)¹ The lease contained a prevailing party’s attorney fee provision. (Ex. 1 at 11)

The Buckners stayed on after the lease’s one-year term expired in May 2005 and the lease converted to month-to-month. (FF 4, CP 66) The Buckners were current on all financial obligations on May 31, 2005. (FF 5, CP 66; RP 42) Neither Hazel

¹ The lease submitted by Financial Assistance is missing page six. Thus, the page numbers on the bottom corner of the lease do not match the page numbers of the exhibit after page five.

Dell nor the Buckners informed Slack that the Buckners had held over and that the lease was now month-to-month. (RP 32, 42) In January 2006, Slack had a dispute with the Buckners and fell out of contact with them. (RP 42-43)

2. After the Buckners fell behind on their rent, they signed a promissory note reflecting the back rent owed and forged Slack's signature on the note.

The Buckners subsequently fell behind on their rent payments. (FF 6, CP 66) Hazel Dell never informed Slack that the Buckners had fallen behind on their rent. (FF 8, CP 66; RP 45) In January 2007, Hazel Dell asked the Buckners to sign a promissory note in which they promised to pay Hazel Dell the back rent owed, \$4,893.75. (FF 6, CP 66; Ex. 4) Hazel Dell also asked that the Buckners present the note to Slack for his signature. (RP 30) The Buckners never did so, and instead forged Slack's signature on the note. (FF 6-7, CP 66; RP 44) The Buckners continued to struggle with rent payments and eventually terminated the tenancy. (RP 17-18) After they terminated the tenancy, Hazel Dell could not reach the Buckners. (RP 17)

B. Procedural history

- 1. After the trial court disclosed that it had previously represented Hazel Dell's principal, neither party sought the trial court's recusal. The trial court rejected Financial Assistance's assigned claim for \$8,709.12 in back rent.**

On July 28, 2009, Hazel Dell assigned the Buckners' rent payments to Financial Assistance for collection, which then totaled \$8,709.12. (Ex 2; RP 20-21) In October 2009, Financial Assistance sued Slack for the delinquent rent, which the Buckners failed to pay after the lease expired. (CP 1-2) Financial Assistance did not attempt to recover against Slack based on the promissory note to which the Buckners forged Slack's signature. (CP 1-2) Although the Buckners were named in the complaint, they were never served with the summons and complaint. (CP 6-7, 51; RP 51) The matter went to mandatory arbitration, after which Slack requested a trial de novo. (CP 38)

Clark County Superior Court Judge Daniel Stahnke denied Financial Assistance's motion for summary judgment (CP 30-31) and on June 24, 2013, a one-day trial was held before Clark County Superior Court Judge David Gregerson ("the trial court"). At the beginning of the trial, the trial court informed both parties that he had represented the principal of Hazel Dell, Milton Brown, "10, 12

years ago on a commercial lease situation not dissimilar to this.” (RP 4) The trial court told the parties that “[i]t doesn’t make a difference from my standpoint, but I didn’t want the parties to go forward unless they were made aware of that even though he’s not the actual named party since he was the assignor.” (RP 4) After conferring with counsel neither party objected to the trial court hearing the case. (RP 4-6) The court then took a 40-minute recess so that Financial Assistance could find its witness, Hazel Dell’s property manager Steiger. (RP 6; CP 45)

At trial Steiger and Slack testified about the circumstances surrounding the signing of the lease. (RP 11-48) Financial Assistance also presented a ledger purporting to track the Buckners’ arrearages. (Ex. 3) The trial court admitted the ledger based on Financial Assistance’s ER 904 submission. (RP 15-16) The ledger, however, was incomplete and missing a page. (Ex. 3; FF 9, CP 66) Steiger testified that he did not monitor the account ledger or otherwise keep track of tenant payments and charges. (RP 16-17)

The trial court rejected Financial Assistance’s claim against Slack, concluding that it “should be barred by Laches, Estoppel, Waiver or other grounds in equity” because there was no evidence that Slack was “actively involved in the ongoing business” or

“availing himself of the benefits of the lease holdover” and because he was never informed of the Buckners’ arrearages or given an opportunity to cure them before Financial Assistance sued him. (CL 1, CP 66; FF 8-9, CP 66) The trial court reasoned that “[w]hen the landlord continued to accept rent from only the Buckners, communicated only with the Buckners, and apparently tried to work out a concession on arrearages (the promissory note) in an effort to keep them as tenants, it did so without a written contract securing the continued security of Mr. Slack’s prospective legal liability. . . . If plaintiff’s position were taken to its logical conclusion . . . Mr. Slack would be exposed to infinite perpetual liability with no cutoff.” (CP 53-54) The trial court could not “imagine support in law or equity for such an outcome.” (CP 54)

The trial court also rejected the ledger Financial Assistance alleged established the amount owed by the Buckners, concluding it “lacked any detail as to the charges and credits such that the Court cannot find that the Plaintiff proved its damages by the preponderance of the evidence.” (CL 2, CP 66) The trial court rejected Steiger’s testimony in support of the ledger because it “was, at best, vague and without sufficient personal knowledge as to the

claimed charges and method of accounting debits and credits.” (CP 54)

The trial court entered a memorandum decision after trial (CP 51-55), and findings of fact and conclusions of law on July 26, 2013. (CP 65-67) The trial court awarded Slack his attorney’s fees under the attorney’s fee provision in the lease. (CL 4, CP 67) Financial Assistance appeals. (CP 68-69)

IV. ARGUMENT

A. This court must reject Financial Assistance’s unpreserved and unsupported allegations of judicial bias.

1. Financial Assistance waived its claim of judicial bias by proceeding to trial after the trial court disclosed it had previously represented Financial Assistance’s assignor.

As Financial Assistance concedes, “[a] litigant who proceeds to trial knowing of a reason for potential disqualification of the judge waives the objection and cannot challenge the court’s qualifications on appeal.” (App. Br. 13-14 (quotation removed); see also *State v. Perala*, 132 Wn. App. 98, 113, ¶ 27, 130 P.3d 852, rev. denied, 158 Wn.2d 1018 (2006)) Financial Assistance waived any challenge to the trial court’s alleged bias by proceeding to trial after the trial court’s disclosure.

“Once a litigant learns of grounds for disqualification of the judge hearing a matter, she must move promptly to object.” *Marriage of Duffy*, 78 Wn. App. 579, 582, 897 P.2d 1279 (1995), *rev. denied*, 128 Wn.2d 1017 (1996). “Were the rule otherwise a litigant, notwithstanding his knowledge of the disqualifying factor, could speculate on the successful outcome of the case and then, having put the court, counsel and the parties to the trouble and expense of the trial, treat any judgment entered as subject to successful attack.” *Brauhn v. Brauhn*, 10 Wn. App. 592, 597-98, 518 P.2d 1089 (1974); *Buckley v. Snapper Power Equip. Co.*, 61 Wn. App. 932, 939, 813 P.2d 125, *rev. denied*, 118 Wn.2d 1002 (1991)) (a litigant “may not, after learning of grounds for disqualification, proceed with the trial until the court rules adversely to him and then claim the judge is disqualified”) (quoting *Williams & Mauser Ins. Brokers, Inc. v. Chapple*, 11 Wn. App. 623, 626, 524 P.2d 431 (1974)). Despite the trial court’s disclosure that it had represented the principal of Financial Assistance’s assignor, Financial Assistance did not seek the trial court’s recusal. It has waived any claim of potential bias.

Financial Assistance argues that waiver does not apply because it did not have “reasonable time with which to conduct a

meaningful independent investigation to uncover the potential bias.” (App. Br. 14) But Financial Assistance cites no authority to support this argument. Litigants are bound by their decision to proceed to trial even where the disclosure occurs at the beginning of, or during, trial. *Buckley*, 61 Wn. App. at 939 (“[A] litigant who for the first time *during trial* learns of grounds for disqualification must promptly make his objection”) (emphasis added) (quoting *Chapple*, 11 Wn. App. at 626).

Moreover, the record flatly contradicts Financial Assistance’s claim that it did not have “reasonable time with which to conduct a meaningful independent investigation.” The court recessed after its disclosure and Financial Assistance conferred with its attorney before choosing not to object. (RP 5-6; CP 45) If Financial Assistance thought it needed more time to conduct “a meaningful independent investigation,” it should have asked the court for a continuance. It did not.

Even if the trial court “neglected to disclose the details of [his] relationship” with Financial Assistance’s assignor, including “the negative aspects of it,” Financial Assistance still waived any allegations of bias. (App. Br. 11) A judge is not required to disclose “details” regarding grounds for disqualification, only “information

that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.” CJC Rule 2.11 Comment 5. The trial court did just that by disclosing to both parties that he had represented the principal of Financial Assistance’s assignor, “10, 12 years ago on a commercial lease situation not dissimilar to this.” (RP 4) Being fully aware of the grounds for potential disqualification, Financial Assistance cannot complain on appeal that it did not know its “details.” *Marriage of Duffy*, 78 Wn. App. at 582 (“[A] litigant who proceeds to trial knowing of *potential bias* by the trial court waives his objection and cannot challenge the court’s qualifications on appeal.”) (emphasis added); *Buckley*, 61 Wn. App. at 939 (“A litigant who proceeds to a trial or hearing before a judge despite knowing of a reason for *potential disqualification* of the judge waives the objection and cannot challenge the court’s qualifications on appeal.”) (emphasis added).

2. Financial Assistance provides no support for its false allegations of bias. The trial court did not abuse its discretion by not sua sponte recusing itself.

The record provides absolutely no support for Financial Assistance’s unspecific allegation that the trial court’s decision was “shrouded” in bias. (App. Br. 11-13) Financial Assistance presumably realizes as much because *it fails to cite the record even once to support its allegations of bias*. Nor has Financial Assistance attempted to support its allegations of bias by supplementing the record under RAP 9.11. This court should reject Financial Assistance’s false allegations of bias and its argument that the trial court abused its discretion by not recusing himself.

“The trial court is presumed . . . to perform its functions regularly and properly without bias or prejudice.” *State v. Perala*, 132 Wn. App. 98, 111, ¶ 19, 130 P.3d 852 (2006) (quoting *Wolfkill Feed & Fertilizer Corp. v. Martin*, 103 Wn. App. 836, 841, 14 P.3d 877 (2000)). Thus, “[b]ias or prejudice on the part of a judge is never presumed and must be affirmatively shown by the party asserting it.” *Rich v. Starczewski*, 29 Wn. App. 244, 246, 628 P.2d 831, *rev. denied*, 96 Wn.2d 1002 (1981); *Perala*, 132 Wn. App. at 111, ¶ 19 (“The party moving for recusal must demonstrate prejudice

on the judge's part.") (quoting *Parentage of J.H.*, 112 Wn. App. 486, 496, 49 P.3d 154 (2002), *rev. denied*, 148 Wn.2d 1024 (2003). "Recusal lies within the discretion of the trial judge, and his or her decision will not be disturbed without a clear showing of an abuse of that discretion." *Perala*, 132 Wn. App. at 111, ¶ 18.

Financial Assistance cites *nothing* in the record to support its allegations of bias. Financial Assistance alleges that while in private practice the trial judge was discharged by the principal of Financial Assistance's assignor, Milton Brown, causing the trial court to be biased in this action against Financial Assistance. (App. Br. 11-12) Financial Assistance fails to support its allegations with a single citation to the record and it has made no attempt to supplement the record under RAP 9.11. This court must reject Financial Assistance's false allegations of bias, which have absolutely no support in the record. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (refusing to consider arguments that were "not supported by any reference to the record"); *Bros. v. Pub. Sch. Employees of Wash.*, 88 Wn. App. 398, 409, 945 P.2d 208 (1997) ("The appellant bears the burden of producing a record from which the appealed issues can be

decided.”); RAP 10.3(a)(6) (argument must include “references to relevant parts of the record”).

Even taking Financial Assistance’s allegations as true, they still fail to establish that the trial court harbored bias against it. Financial Assistance concedes that the trial court “did not overtly express [its] animosity,” but instead alleges that the trial court’s animosity “was shrouded in and formed the basis for his decision.” (App. Br. 12) Financial Assistance must affirmatively demonstrate the trial court’s bias; it cannot be presumed based on its unspecific allegation that the trial court’s bias was “shrouded” in its decision. *Rich*, 29 Wn. App. at 246 (“Casual and unspecific allegations of judicial bias provide no basis for appellate review”). Moreover, Financial Assistance provides no support for its allegation that the trial court was biased against it, when the alleged source of bias was animosity against its assignor’s principal. (App. Br. 12) The trial court did not abuse its discretion by not recusing itself.

B. The trial court correctly rejected Financial Assistance’s claim against Slack, who signed the lease as a surety and cannot be held liable for the Buckners’ arrearages beyond the lease’s one-year term.

Slack signed the lease as a surety, because the lessor Hazel Dell required “somebody else . . . who could guarantee payment”

sign the lease with the Buckners. (RP 25) The trial court did not abuse its discretion by rejecting as inequitable Financial Assistance's attempt to extend Slack's liability as a surety beyond the one-year term of the lease.² *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 460, 45 P.3d 594 (2002) ("Equity includes the power to prevent the enforcement of a legal right when to do so would be inequitable under the circumstances."). Applying the appropriate standard of review³, this court should reject Financial Assistance's appeal.

Washington courts apply the "context rule" in determining parties' contractual intent. *Kenney v. Read*, 100 Wn. App. 467, 474-75, 997 P.2d 455 (2000), *amended on denial of reconsideration*, 4 P.3d 862 (Wash. Ct. App. 2000) (citing *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990)). Under the

² Because Financial Assistance did not seek to recover against Slack based on the promissory note, this court need not address the legal impact of the Buckners' forgery of Slack's signature.

³ This court "review[s] a conclusion of law based on findings of fact to determine whether the trial court's findings are supported by substantial evidence, and if so, whether those findings support the conclusions of law." *Miller v. Paul M. Wolff Co.*, ___ Wn. App. ___, ¶ 8, 316 P.3d 1113, 1116 (2014). This court "review[s] the application of equity for an abuse of discretion." *Mendez*, 111 Wn. App. at 460. Because Financial Assistance has not challenged any of the trial court's findings, they are verities on appeal. *Marriage of Petrie*, 105 Wn. App. 268, 275, 19 P.3d 443 (2001).

context rule, a court determines the parties' intent by considering the entire contract and the circumstances surrounding the contract:

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

Kenney, 100 Wn. App. at 474-75 (quoting *Berg*, 115 Wn.2d at 667).

“Extrinsic evidence is admissible as to ‘the entire circumstances under which the contract was made,’ to help the court ascertain the parties’ intent.” *Wimberly v. Caravello*, 136 Wn. App. 327, 336, ¶ 28, 149 P.3d 402 (2006) (quoting *Berg*, 115 Wn.2d at 667). The context rule applies to surety contracts. *Kenney*, 100 Wn. App. at 475 (citing 72 C.J.S. *Principal and Surety* § 82 (1987)).

Applying the context rule, Slack signed the lease as a surety. The Buckners, not Slack, approached Hazel Dell about leasing commercial space for their surveillance business, and negotiated the lease without any participation from Slack. (FF 3, CP 66; RP 11 (Hazel Dell negotiated the lease with “[t]he Buckners totally”), 40-41) Slack signed the lease only after Hazel Dell required “somebody else . . . who could guarantee payment.” (RP 25; *see also* RP 12

(Hazel Dell was reluctant to lease to the Buckners because “[t]hey just didn’t have much of a financial background or statement.”)) It is undisputed that Slack had no role in running the Buckners’ business. (FF 3, 9, CP 66; RP 11, 41) Hazel Dell’s property manager conceded at trial that he simply “assumed” Slack was a business partner despite never having any contact with him. (RP 25, 28, 35; FF 3, CP 66) Thus, the trial court did not need to “rely upon purely unsupported facts” to conclude that Slack signed the lease as a surety. (App. Br. 15)

As an uncompensated surety, Slack was a “favorite[] of the law” and could “not [be] held liable beyond the express terms of [his] agreement.” *Kenney*, 100 Wn. App. at 474, 477; *Fancher Cattle Co. v. Cascade Packing, Inc.*, 26 Wn. App. 407, 410, 613 P.2d 178, *rev. denied*, 94 Wn.2d 1012 (1980). “Any material change in a surety’s obligation without the surety’s consent will discharge the surety’s obligation.” *Kenney*, 100 Wn. App. at 474 (quoting *State v. French*, 88 Wn. App. 586, 598–99, 945 P.2d 752 (1997)).

The trial court correctly concluded that in his limited capacity as a surety Slack could not be liable for arrearages incurred by the Buckners years after the lease term expired and after Hazel Dell worked exclusively with the Buckners as their tenants. *See*

Glesener v. Balholm, 50 Wn. App. 1, 8, 747 P.2d 475 (1987) (lessees could not be liable for damages caused by assignee after assignee and lessor established “a separate tenancy relationship”); *Saunders v. Lloyd’s of London*, 113 Wn.2d 330, 339, 779 P.2d 249 (1989) (insurer’s “established course of conduct” of accepting late payments estopped it from denying coverage based on late payments).

The trial court’s unchallenged findings established that Slack was never involved in running the Buckners’ surveillance business and that he never received any benefits from the Buckners’ decision to holdover. (FF 3, 9, CP 66; RP 41) After the Buckners held over, Hazel Dell “continued to accept rent from only the Buckners [and] communicated only with the Buckners.” (CP 53)⁴ When the Buckners fell behind on their rent obligations, Hazel Dell worked exclusively with them in an attempt to work out the arrearages, and never informed Slack of the arrearages. (FF 8, CP 66; CP 53; RP 18, 28-29, 32) The trial court rightly rejected Financial Assistance’s interpretation of the lease’s “holdover” provision (App. Br. 16),

⁴ This court may rely on the trial court’s memorandum decision as a supplement to the trial court’s formal findings. *City of Walla Walla v. \$401,333.44*, 164 Wn. App. 236, 255, ¶ 33, 262 P.3d 1239 (2011).

which would have extended Slack's surety liability into the future indefinitely regardless whether he was actually involved in the business or informed of any delinquencies in rent. (FF 9, CP 66; CL 1, CP 66; CP 53-54)

Had Hazel Dell provided Slack any notice that the Buckners were delinquent on their rent, he could have prevented further arrearages by working out an accommodation, or limited his damages by paying the rent owed and seeking recovery against the Buckners. (CP 53; *see also* Restatement (Third) of Suretyship & Guaranty § 40 comment e (1996)) Because Slack was never notified that the Buckners were delinquent, he had no reason to "terminate" the month-to-month tenancy, which he did not even know still existed years after he signed the one-year lease. Thus, Slack could not have "[a]t any time . . . provided notice to [Hazel Dell] to terminate the lease." (App. Br. 18) Although Financial Assistance asserts that Slack received notices mailed to the leased premises (App. Br. 17), it is undisputed that Slack never in fact saw those notices and that Hazel Dell made no efforts to speak directly with Slack prior to suing him, despite having his personal contact information and despite its claimed assumption that he was a full partner in the business. (FF 8, CP 66; RP 18, 25, 28, 35)

The trial court correctly rejected as inequitable Financial Assistance's attempt to recover from Slack arrearages he had no role in creating and which he was never given an opportunity to prevent or cure. This court should affirm.

C. The trial court properly found that the incomplete account ledger did not support Financial Assistance's claim against Slack.

Should this court affirm the trial court's decision that Slack cannot be liable for the Buckners' arrearages, it does not need to consider Financial Assistance's argument that the trial court erred in rejecting proof of its damages. *Kimball v. Otis Elevator Co.*, 89 Wn. App. 169, 175, 947 P.2d 1275 (1997) (where defendant is found not liable error relating to damages is harmless). Regardless, the trial court correctly rejected as proof of the Buckners' delinquencies the ledger offered by Financial Assistance, which was incomplete and unsupported by testimony from someone with personal knowledge of its entries. As with any evidence, the trial court was free to give the ledger the weight it deemed appropriate after admitting it under ER 904. ER 904(d) ("This rule does not restrict argument or proof relating to the weight to be accorded the evidence submitted, nor does it restrict the trier of fact's authority to determine the weight of the evidence after hearing all of the

evidence and the arguments of opposing parties.”); *see also* *Washington Builders Ben. Trust*, 173 Wn. App. 34, 67, ¶ 52, 293 P.3d 1206 (“in an appeal from a bench trial, we defer to the trial court on issues regarding the weight of the evidence”), *rev. denied*, 177 Wn.2d 1018 (2013).

The trial court correctly rejected the incomplete ledger as proof of the Buckners’ delinquencies because Financial Assistance failed to support it with any credible testimony from somebody with personal knowledge of the credits and debits it purported to establish. (CP 54 (“The only testimony in support was from Jack Steiger, whose testimony was, at best, vague and without sufficient personal knowledge as to the claimed charges and method of accounting debits and credits.”)) When asked whether he “monitor[ed] the account ledger at all,” Hazel Dell’s only witness at trial, Steiger, replied “No.” (RP 16-17) Moreover, Financial Assistance failed to offer any explanation for why the ledger was missing a page. In the absence of any supporting testimony, the trial court was free to reject as “proof” of the Buckners’ arrearages the incomplete ledger offered by Financial Assistance.

D. Slack is entitled to his attorney's fees under the lease.

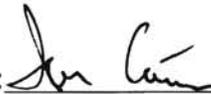
The lease specifically provided for an award of attorney's fees to a prevailing party on appeal: "[i]f either party commences action . . . in connection with this lease, the prevailing party shall be entitled to have and recover from the losing party reasonable attorney's fees . . . including cost of appeal." (Ex. 1 at 11; *see also Atlas Supply, Inc. v. Realm, Inc.*, 170 Wn. App. 234, 241, ¶ 15, 287 P.3d 606 (2012) ("A contract that provides for attorney fees at trial also supports such an award on appeal."); RAP 18.1) Slack is entitled to his attorney's fees on appeal.

V. CONCLUSION

This court should affirm the trial court in its entirety and award Slack his attorney's fees on appeal.

Dated this 14th day of March, 2014.

SMITH GOODFRIEND, P.S.

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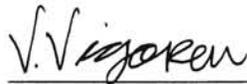
DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on March 14, 2014, I arranged for service of the foregoing Brief of Respondent, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 14th day of March, 2014.



Victoria K. Vigoren