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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By: \_\_\_\_\_

No. 301133

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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III

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NUJID R. MURIBY,  
a married man dealing in his separate property,

Appellant,

v.

MIKE ANDERSON AND CARLYE ANDERSON,  
husband and wife and the marital community comprised thereof,

Respondents.

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APPELLANT'S REPLY BRIEF

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## **I. REPLY TO STATEMENT OF THE CASE**

Although Dr. Muriby takes issue with many of the factual allegations and supporting record citations in Respondents' Brief, he will respond to only those assertions needed for his argument. This is not meant as a concession on those points, as the record speaks for itself.

After the written lease expired in 2000 and the Andersons got married, the parties' relationship soured. The Andersons did not want to pay as much cash rent; Dr. Muriby wanted to maintain the return on his investment. (RP 108-109) Yet, in spite of their issues with the rent and disagreements with Dr. Muriby, the Andersons, who had other farmland in the area, chose to continue to farm the Muriby land. (RP 108, 148, 161-162) The trial court found that from September 2000 until the new agreement in 2003, "the parties followed the terms of the expired lease." (CP 10, Findings 3.7 and 3.9) As admitted by all, that lease included provisions for interest on unpaid rent and attorneys fees in suits for collection. (Exhibit 18, paragraphs 4.5 and 15)

The trial court further found that in 2003, the parties entered into a new agreement. (CP 10, Finding 3.9) According to the court's findings, the new agreement replaced the cash rent provision with payment from the the CRP, split 85% to Dr. Muriby and 15% to the Andersons. (CP 10, Finding 3.10) The Andersons' share of CRP payments was in exchange

for work on the CRP land. (RP 118 and Exhibit 12) The parties agreed to split all other farm income on a 75/25 basis. *Id.* Notably, the finding does not say the parties replaced their entire agreement; the finding refers only to the rent provisions. Moreover, although the Andersons dispute that they agreed to the remaining terms of the written farm lease, a letter from Mike Anderson to Dr. Muriby indicates that the original lease formed the foundation of their agreement. (Exhibit 4) In that letter, Mr. Anderson stated, "I feel the original lease covered the same aspects as now and propose the small changes regarding minimum payments and years land is harvested." *Id.* The letter also mentions an attached agreement.

Although Mr. Anderson denied<sup>1</sup> the draft lease provided in Exhibit 4 was the one mentioned in the letter, the Andersons failed to provide any other document as an alternative. (RP 52) Regardless, the trial court found the parties were following the expired lease, with the alteration on rent effective in 2003. The Andersons did not challenge those findings.

The parties relationship came to an end when the CRP survey showed less land in the program than originally thought, resulting in a

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<sup>1</sup> It should be noted that this denial (at pages 51 and 52) did not take place under oath (Mr. Anderson was not sworn until page 148) and is thus not actually evidence. Thus, strictly speaking, there is no evidence to dispute that Exhibit 4 was in fact the parties' agreement for 2003 foreword.

substantial drop in payments to Dr. Muriby. When they first agreed to the CRP program, it was assumed that, Dr. Muriby would receive \$19,917.98 for his share of the CRP, resulting in an increase of income from \$19,000. (Exhibit 12) With the survey, Dr. Muriby's share dropped to 85% of \$15,643, or \$13,296.55. (Exhibit 19)

At this time, the Andersons decided to quit the farm. Since the Andersons had not signed a new lease, Dr. Muriby did not and could not, force them to stay<sup>2</sup>. After efforts to get information from the Andersons failed, (Exhibit 20) Dr. Muriby sued to recover unpaid rent for the hold over years. (CP 32-36)

## **II. ARGUMENT**

### **A. The Andersons have improperly raised the issue of equitable estoppel**

The Andersons contend that equitable estoppel justifies the result in this case. Such a contention must be rejected for procedural reasons alone.

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<sup>2</sup> At page 17, the Andersons said Dr. Muriby told them they could not get out of their tenancy, citing RP 108, 161, 162. There is absolutely nothing in those pages that support such a contention. There is no testimony the Andersons wanted out of the tenancy before 2006; however, there is plentiful testimony they wanted to pay significantly less rent. Unable to negotiate the rent they wanted, they could have left at any time after the expiration of the written lease.

First, it has not been properly raised. It was not included in the Answer. (CP 28-31) It was not mentioned in this context in the trial brief. (CP ) (The trial brief did argue equitable estoppel precluded a claim for 2003 cash rent, which is not at issue in this appeal. (Appellant's Brief, pages 20-21)) It was not mentioned in closing argument. (RP 172-178) This Court should not consider an argument raised for the first time on appeal. RAP 2.5

Second, equitable estoppel is not supported by the Findings of Fact drafted by the Andersons' own attorney. (CP 8-11) In the findings, the Andersons theory was that the CRP payments were given to pay off Dr. Muriby. (CP 11, Finding 3.13) Having failed to provide evidence of a bargain and acceptance, they now wish to switch to an estoppel theory. But the findings are silent on the necessary elements of estoppel. (CP 8-11) Nor are there any oral findings on the elements of equitable estoppel. (RP 179-183) When no finding is entered on a material issue, it is a finding against the party having the burden of proof. *Pacesetter Real Estate, Inc. v. Fasules*, 53 Wn.App. 463, 475, 767 P.2d 961 (1989). Thus, the trial court's decision cannot be affirmed on the basis of equitable estoppel because there are no findings to support it.

**B. The evidence does not support equitable estoppel.**

Even if it was properly raised, the record in this case does not justify the application of the doctrine of equitable estoppel. Equitable estoppel requires the claimant to prove, by clear and cogent evidence, (1) an admission, statement, or act inconsistent with the claim asserted afterward; (2) action by the other party in reasonable reliance on that admission, statement, or act; and (3) injury to that party when the first party is allowed to contradict or repudiate its admission, statement, or act. *McDaniels v. Carlson*, 108 Wn.2d 299, 308, 738 P.2d 254 (1987). The Andersons did not prove the existence of these elements.

The first element the Andersons needed to prove was some act or statement by Dr. Muriby which induced reliance. *Id.* Careful review of the testimony shows there was no such act or statement.

Mrs. Anderson indicated she did not talk to Dr. Muriby about this. (RP 139, lines 10-18) Thus, she could offer no testimony of action or words by Mr. Muriby. Mike Anderson said he “understood” he would not owe anything after he signed off on the CRP (RP 154, lines 24-25; 155 lines 1-3) but did not testify that he actually discussed or conveyed his subjective understanding to Dr. Muriby. In other words, neither testified they ever discussed these understandings with Dr. Muriby or that Dr. Muriby made any statement that would lead them to believe he was

forgiving the many years of past due rent. Moreover, in eight pages of emails between Dr. Muriby and Mr. Anderson from April and May of 2006, Mr. Anderson never claimed he was exonerated from the past due rent. (Exhibit 20) Thus, there is simply no evidence to establish the first element of estoppel.

The second element is an action in reliance. Both Andersons claimed they had to sign off on the CRP contract. But in fact, they did not produce any document showing they had to sign off on anything. Exhibit 19, the revised CRP contract, was to acknowledge the modifications from the GPS survey. (Exhibit 19 and RP 137-138) Their self-serving statements that they actually had to sign off on anything are hardly clear and convincing proof of an action taken in reliance.

The final element of equitable estoppel is resulting injury. *McDaniels v. Carlson*, 108 Wn.2d at 308. The Andersons proof again fails. The Andersons simply assert they were somehow entitled to be paid \$21000 on the contract in the future. Yet Ms. Andersons testimony showed she understood the CRP contract was in exchange for work. (RP 118) Mike Anderson's own emails in early 2006 show he intended to continue to maintain the buffer strips to finish out his CRP agreement for the year and then get off the contract so the new farmer could take over, indicating he knew full well he was required to perform maintenance

under the CRP split. (Exhibit 20, page 4 and top of 5) The Andersons do not explain on what possible basis they can legitimately claim a contract right to the future CRP payments if they did not farm the property and perform the agreed maintenance.

In fact, contrary to Ms. Andersons' testimony that they owned the contract regardless of their continued operation, (RP 136, lines 17-19), the Andersons could not legally accept payment after they left the farm. The CRP contract states that it is an agreement between the CCC and "the undersigned owners, operators, or tenants." Once the Andersons quit the farm, they no longer qualified under the terms of the contract. According to 7 CFR § 1410.5 (a), only owners, tenants, and operators are eligible for payments under the CRP program. Both factually and legally, the Andersons had no legitimate claim to the CRP payments. Thus, they cannot show they suffered any detriment because they gave up nothing.

The Andersons try to claim they were damaged because the future CRP payments were meant to reimburse them for the initial work on the CRP fencing. (Respondents' Brief, page 10) As demonstrated in footnote 1 of the Appellant's Brief, this argument totally lacks merit. (Appellant's Brief, page 8, footnote 1) The record shows that these costs were paid in full by the government cost share program and by Dr. Muriby forgiving much of the cash rent for 2003. (Exhibit 12) There was no claim for

these expenses until the day of trial or no documentary support for the expenses claimed<sup>3</sup>. There is thus not substantial evidence of any harm to the Andersons.

In summary, even if the Court wishes to consider the belatedly raised issue of collateral estoppel, the Andersons failed to provide evidence, much less clear cogent and convincing evidence to establish the necessary elements. This argument must be rejected.

**C. The trial court did not find “that equitable considerations estopped appellant from seeking further obligations under the expired lease and that there was no breach of the expired lease.”**

The Andersons assert that the trial court “found that equitable consideration estopped the appellant from seeking further obligations under the expired lease.” (Respondents’ Brief, page 13) This is false. The Findings of Fact and Conclusions of Law, drafted by the Andersons’ attorney, do not even contain the words “equity”, “equitable” or

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<sup>3</sup> Moreover the court found that there would be no cash rent in 2003 because of the Andersons needed to work to repair the fencing. (CP 10, paragraph 3.11) There are no findings to suggest the Andersons had any expenses that were not otherwise reimbursed. (CP 8-11) When no finding is entered on a material issue, it is a finding against the party having the burden of proof. *Pacesetter Real Estate, Inc. v. Fasules*, 53 Wn.App. 463, 475, 767 P.2d 961 (1989).

“estoppel.” (CP 8-11) It appears that, once Dr. Muriby demonstrated that Findings of Fact 3.13 and 3.14 (that there was agreement as to the disposition of the CRP payments) were totally contrary to the judge’s oral ruling that there was no meeting of the minds (RP 181-182), the Andersons try to salvage their case on a new theory. But as demonstrated above, equitable estoppel was not properly raised, is not in the trial court’s written ruling, and certainly not proved by clear cogent and convincing evidence. This argument must be rejected.

Nor is this case just about credibility. It is about the legal effect of the parties’ agreement and it is about the total absence of testimony to support contentions.

First, it is about the legal effect of the parties’ agreement. Were the Andersons entitled to an offset for future CRP payments when they both said they were to get the payments in exchange for work on the CRP land? The trial court erred as a matter of law when he failed to analyze the legal effect of the undisputed agreement properly.

And it is about the total absence of testimony to support assertions. The heart of the Andersons claim for an offset is that they gave up their right to CRP payments based on some agreement or in reliance on something Dr. Muriby did. But there is nothing to support this. At page 15 of the Response, the Andersons say that they testified “that Appellant

agreed to let them out of the business relationship in exchange for the CRP contract and them finding him a new tenant” citing to 136-138, 153-154 and 163-164. Careful review of the cited pages reveals the testimony was consistently about what the Andersons thought and understood at the termination of the lease but never about what Dr. Muriby said or did. There is simply no testimony that Dr. Muriby ever agreed that he should give up past due rent in exchange for the CRP payments. And why would he? As has been demonstrated, the Andersons were not contractually entitled to the money if they did not do the maintenance work.

**D. The documents do not lie; the trial court incorrectly relied on the Andersons’ damage calculation, ignoring the documents from Pomeroy Grain Growers and the contract language.**

In his opening brief, Dr. Muriby provided detailed analysis of the damage calculations for each year and will refrain from repeating those here. However, three points need to be addressed. First, the Andersons cannot honestly claim their calculations are based on Dr. Muriby’s numbers. Second, they make no effort to demonstrate that they did not in fact use the net production figures rather than the gross production figures. Finally, they fail to explain why the court should ignore the unambiguous lease in making its calculations.

The Andersons provided extensive documentation for their damage calculation in Exhibit 10 in the form of reports from Pomeroy Grain Growers (PGG), cancelled checks, and reports from Garfield County FSA Offices. (Exhibit 10) Ms. Anderson testified at length as to how she took the figures from Exhibit 10 to calculate the damages shown in her Exhibit 11. (RP 110-136) The Andersons now outrageously claim that the figures were “based on information given to them by Appellant.” (Respondents Brief, p 16) How can this possibly be true? The documents from PGG were faxed to the 509 area code in the 843 exchange, which matches the area code and exchange of the Andersons, not Dr. Muriby. (see checks in Exhibit 10) The checks are from the Andersons’ own accounts. The documents from the Garfield County FSA are all addressed to one of the Andersons, not Dr. Muriby. (Exhibit 10) How can the Andersons possibly claim their figures came from Dr. Muriby?

Second, the Andersons make no effort to dispute the fact they used the net figures from the PGG documents and ignored the gross figures. This is not a matter of witness credibility – it is a matter of looking at the documents and selecting the correct figure. Those documents, provided by the Andersons, show a consistent under-reporting of farm income.

This was further shown by the Affidavit of Robert Cox from Pomeroy Grain Growers, submitted with the letter the court treated as a

Motion for Reconsideration. (CP 16-18) That Affidavit showed the true gross figures, which were consistent with Dr. Muriby's figures found in Exhibit 8 and demonstrated the Andersons' figures on Exhibit 11 were low. *Id.* The past due rent calculations submitted by the Andersons were unequivocally wrong because they were based on net not gross. The trial court erred when it relied on Ms. Anderson's calculations.

Finally, there is the issue of the proper calculation of rent for 2002. The trial court found, and the Andersons did not dispute, that from September 2000 until the new agreement in July 2003, the parties followed the terms of the expired lease. (CP 10, Paragraphs 3.8 and 3.9) The expired lease provides for cash rent of \$19,000, which was paid, and 30% of the gross, less \$60,000, which is disputed. The Andersons insist they have a right to deduct \$120,000 from the gross production; Dr. Muriby points out that the lease allows only \$60,000. The Andersons and the trial court apparently rely on "common practice" to permit the double deduction. (CP 10, paragraph 3.4) But "common practice" cannot alter the clear and unambiguous terms of the written agreement.

Common practice is similar to course of dealing or trade usage. It is well settled under the context rule that course of dealing or trade usage may be considered when interpreting a contract. *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990). But it is equally settled that the context

rule may not be used to vary the unambiguous terms of a written contract. *Marriage of Schweitzer*, 132 Wn.2d 318, 327, 937 P.2d 1062 (1997). Here, those unambiguous terms do not permit the Andersons to take a double deduction before calculating the rent. The trial court erred as a matter of law and its damage calculation for 2002 must be reversed.

**E. Dr. Muriby was entitled to interest and fees under the contract and on equitable principles.**

The Andersons rely on the fact the written lease expired. But, as discussed above, the trial court specifically found that after the lease expired, the parties continued to follow the terms of the expired lease. (CP 10, paragraph 3.8) This finding is consistent with Washington law that the terms of a fixed lease apply to the terms of a holdover tenancy. *Marsh-McLennan Bldg. Inc. v Clapp*, 96 WnApp. 636, 644, 980 P.2d 311, 316 (1999). Thus, the court not only found the parties were following the written contract, the law requires those terms to apply to a holdover tenancy. The fact the original term expired does not prevent application of all the contractual terms to the holdover period. That lease included a provision for interest and a provision for fees should suit be required to enforce the terms. Assuming this Court finds Dr. Muriby is entitled to past due rent then Dr. Muriby is entitled to interest and fees under the terms of that lease.

Alternatively, Dr. Muriby is entitled to interest because the claims are liquidated. The Andersons argue that the claim is not liquidated because the claim is based on a lease that was either expired or modified. (Respondents' Brief, page 19) But that is not the issue. Damages are liquidated when they can be calculated without reference to opinion or discretion. *Prier v. Refrigeration, Eng'g. Co.*, 74 Wn.2d 25, 32, 442 P.2d 621 (1968) Here, in 2002, the parties were operating under the original lease. That lease contained a formula by which to calculate rent. For years after 2003, the parties agreed that rent was based on 25% of the gross farm income. The trial court made a finding to the same effect. (CP 10, paragraph 3.10) The rent calculation was thus based on numbers which could be obtained without relying on opinion or discretion. This means the rent was a liquidated claim and Dr. Muriby is entitled to pre-judgment interest on the past due rent.

**F. There is no evidence Dr. Muriby waived his right to full damages or fees.**

The trial court signed the Andersons' proposed findings that included a finding that Dr. Muriby had a history of accepting late payments, thereby waiving the right to ask for fees. (CP 10, paragraph 3.6.) Dr. Muriby demonstrated that this finding was not supported by the

oral ruling of the trial judge (RP 179-183) nor the evidence. The Andersons have not pointed to any evidence to the contrary.

In fact, the record shows that because the Andersons failed to provide accurate records, Dr. Muriby could not figure out what was owed and what was late. (Exhibit 20) Waiver must be based on Dr. Muriby's words or conduct. To constitute implied waiver, there must exist unequivocal acts or conduct evidencing an intent to waive; waiver will not be inferred from doubtful or ambiguous factors. *Cent. Wash. Bank v. Mendelson-Zeller, Inc.*, 113 Wn.2d 346, 354, 779 P.2d 697 (1989). Moreover, waiver is the relinquishment of a known right. Dr. Muriby was unable to determine the amount of the late payment because the Andersons did not provide the accounting. The Andersons point to no words or conduct by Dr. Muriby indicating he was even aware of how much remained unpaid and thus was aware such sums were incurring interest. It seems that the Andersons seek to impose waiver when their own conduct made it impossible for Dr. Muriby to determine how much he was owed.

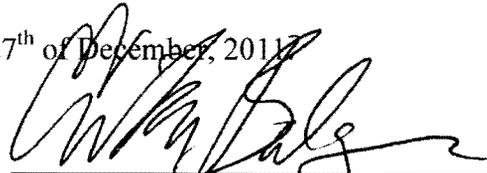
In summary, there was no evidence Dr. Muriby ever waived his claim to interest on amounts past due. It would also be extremely unfair to allow the Andersons to claim waiver when they were the ones with the

information needed to properly calculate the amounts due. The finding of waiver must be reversed.

### **III. CONCLUSION**

In conclusion, Dr. Muriby asks that this court reverse the trial court with instructions to enter judgment in his favor in the amount established by his exhibits, plus interest and fees. The trial court erred as a matter of law in awarding the offset for the CRP payments. Without the offset, he was entitled to past due rent and the other remedies provided in the written lease. He also requests he be awarded his fees on appeal under the terms of the contract.

Respectfully submitted this 27<sup>th</sup> of December, 2011



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