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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

No. 301133

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

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.

APPELLANT'S BRIEF

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I. ASSIGNMENTS OF ERROR

A. Assignments of Error. The trial court erred in awarding judgment for the defendants.

The trial court erred in making the following Findings of Fact:

3.4 It is a common practice where crops are planted every-other year to average the two-year total in determining yield and resulting rent owed.

3.5 Defendants made all rental payments to the plaintiff under the written lease, and plaintiff accepted those payments as payment in full, except for $12,369.40, referred to hereafter in Paragraph 3.14.

3.6 The defendants had a history of paying the amounts due under the lease late, but the plaintiff accepted the payments, waiving any right to ask for late fees.

3.13 At the time of turning over the land to the replacement tenant, the defendants signed over any future interest in the buffer-strip Conservation Reserve Program ("CRP") payments, which further payments were worth roughly $21,000.00 to defendants. The signing over of such payments was to pay off Dr. Muriby any sums he

claimed were owed so that the defendants could be released as lessees.

3.14 Plaintiff, Dr. Muriby, accepted the said future interest in such CRP payments and the receipt of such payment satisfied all lease obligations of the defendants including the $12,369.40 referred to in Paragraph 2 above.

The trial court erred in ruling that there had been no breach of the lease agreements.

The trial court erred in denying the plaintiff's Motion for Reconsideration.

The trial court erred in not awarding judgment to the plaintiff for the unpaid rental payments in the amount admitted by the defendants or as established by the evidence.

The trial court erred in not awarding interest, costs, and fees to the plaintiff.

B. **Issues Pertaining Assignments of Error**. Whether the trial court erred when it allowed the tenants a setoff for future CRP payments when the tenants' own testimony showed they contracted to receive those payments in exchange for maintaining the land in the CRP program, which they would no longer do when they terminated the lease.

Whether the trial court erred in accepting the tenants' damage calculations when the tenants' own exhibits demonstrated they used the wrong figures and their own calculations showed they misapplied the terms of the lease.

Whether the trial court's findings on waiver and satisfaction are supported by substantial evidence.

Whether the trial court erred in not awarding interest and attorneys' fees as required by the lease and common law.

II. STATEMENT OF THE CASE

A. The original farm lease. This case involves a farm lease. In 1995, Dr. Muriby bought some farmland in Garfield County, Washington. (RP 30) At that time, Mike Anderson was farming the subject property. (RP 30) Dr. Muriby entered into a written lease with Mr. Anderson for five crop years. (Exhibit 18, ¶ 2) The lease was quite thorough; it was ten pages in length, single spaced. (Exhibit 18) The Lease required payment of $19,000.00 per year "cash" rent, plus 30% of gross income in excess of $60,000.00. (Exhibit 18, ¶¶ 3.1 and 3.2) If rent was not paid when due, the tenant was required to pay interest. (Exhibit 18, ¶ 4.5) The Lease also provided for an award of attorney's fees if an action was brought to enforce the lease. (Exhibit 18, ¶ 15) During this first five years, the Andersons would have crops on 2/3 of the property and

1/3 in summer fallow during any given year. (RP 30) There were no disputes during this five-year period.

B. <u>The written lease expires</u>. Mike Anderson married Caryle Anderson on April 7, 2000. (CP 28, Answer, ¶ 2) In 2001, Mr. Anderson told Dr. Muriby that they no longer wanted to pay cash rent and wanted just a percentage arrangement, but Dr. Muriby would not agree. (RP 108, 161-162) Even though Mr. Anderson had other leased and owned land to farm, he agreed to Dr. Muriby's demands and agreed to continue under the same terms and pay cash rent. (RP 148, 161-162) In 2001, the Andersons had the entire acreage in summer fallow. (RP 108-109)

In 2002, the problems began. The Andersons were late with the first cash rent payment. (RP 32) Dr. Muriby complained and the Andersons eventually paid all the cash rent. (RP 32) However, the Andersons failed to pay the full 30% due for crop income. (Exhibit 11)

The parties renegotiated their agreement in 2003. At that time, the Andersons asked to put a portion of the farm into the Conservation Reserve Program, or CRP. (RP 32) Much of the negotiation was by email, found at Exhibit 12. There were three main issues to be negotiated: the cost to put the land into the program, the future of cash rent, and the calculation of percentage rent.

First, there were costs associated with preparing the land for the CRP program. Mr. Anderson told Dr. Muriby that there were costs of about $40,000.00. (RP 35 and Exhibit 12, page 1) He further explained to Dr. Muriby that the program had a 90% cost share. That is, the government would pay 90% of the cost and the landowner would pay 10%, so Dr. Muriby had to pay about $4,000.00. *Id.* Mr. Anderson further told Dr. Muriby that the money from the government, plus Dr. Muriby's cash, was not enough to cover all the expected costs and the Andersons wanted an additional $11,200.00. *Id.* Mr. Anderson indicated, "This cost will need to come out of this years [sic] cash rent payment," acknowledging that cash rent was in fact due for 2003. (Exhibit 12, page 1, ¶ 4) As requested, Dr. Muriby agreed to forego the remaining $15,200.00 cash rent that was due in order to fund the CRP work. (RP 35, 45 and Exhibit 8 and Exhibit 12) This money was in addition to the $6,000.00 offset for fencing Dr. Muriby had agreed to pay in 2002. (Exhibit 8 and Exhibit 12, page 2) The Andersons never asked for more money for the fencing, although they had always made claims for fencing when needed in the past.

Second, there was the issue of rent going forward. Mr. Anderson proposed that Dr. Muriby receive 85% of the CRP payments, starting October 2004 in lieu of the cash rent under the written lease. (Exhibit 12)

He further proposed that they receive the remaining 15% in order to maintain the buffer strips. *Id.* In addition to the CRP payments, Mr. Anderson suggested that Dr. Muriby receive 20% of the gross farm income. (Exhibit 12, page 1, paragraph 3) It was later agreed that Dr. Muriby would receive 25% of the gross income. (RP 120)

The parties never signed a complete amended lease. However, Mike Anderson sent Dr. Muriby a letter in 2004 that indicated a new lease was attached. (RP 54-55 and Exhibit 4. Page 1) The letter explained that the new lease changed the percentages where needed and included other minor changes. (Exhibit 4, page 1) The proposed lease documents, which included an addendum as well as the original lease, were attached to the letter. (Exhibit 4) Although counsel objected to parts of this exhibit, counsel admitted that the letter was accurate. (RP 51) The document was admitted over objection. (RP 51, 54) The Andersons never testified that the remaining portions of Exhibit 4 were inaccurate and never provided any alternative documents.

In 2004, the parties split the CRP payments as agreed. (RP 126) The Andersons paid part of the 25% of the gross they owed, but admitted that they failed to pay the full 25%. (RP 129, lines 24-25) In 2005 and 2006, the Andersons received their portion of the CRP payments (RP 132,

134, and 135), but they failed to pay any part of the agreed 25% of the gross income. (RP 136, lines 5-7)

The Andersons decided to quit the Muriby farm. (The Andersons had other leased and owned land to farm. (RP 148, lines 20-23)) At that time, Mike Anderson contracted with Mike Hastings as to the allocation of certain payments for the Muriby farm. (RP 148-149, Exhibit 15) Dr. Muriby was not a party to that agreement. *Id.* Dr. Muriby and Mr. Anderson exchanged some emails in 2006 concerning past due rent. Mike Anderson promised full payment and an accounting but did not provide either. (Exhibit 20)

C. <u>Litigation commenced</u>. On July 19, 2007, Dr. Muriby filed suit seeking the unpaid rent, interest, and attorney's fees. (CP 32-36) The Andersons answered, admitting there was a lease but denying they were in breach. (CP 28-31)

The case went to trial in April 2011. Dr. Muriby appeared *pro se*. In their trial brief, the Andersons admitted that they owed at least $12,369.40, but denied owing interest and attorney's fees. (CP 27) They made no claim in their answer or their trial brief for monies under the CRP program. (CP 21-31) It was therefore quite surprising when Ms. Anderson claimed during trial that they did not owe anything because they were entitled to an offset for the future CRP payments. (RP 136) Even

more surprising, she claimed they were entitled to payments for nine more years at $2,346.45 (RP 136) even though the program was for ten years and the Andersons had already received payment for three years: 2004 (RP 126), 2005 (RP 132), and 2006 (RP 134-135).

The Court found that there was a balance due under the lease but also held that the Court was "required by law" to offset that by amounts due under the CRP contract. (RP 180, lines 12-13) Thus, the trial court agreed with the Andersons' analysis of the contract. Therefore, even though the Andersons admitted to owing over $12,000.00 under the lease, the trial court allowed the offset and found no amounts owing[1]. (RP 180)

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[1] The Andersons made another claim for an offset based on alleged fencing costs. While examining Mr. Anderson, the Andersons' attorney stated that "Dr. Muriby testified earlier acknowledging that the costs borne by you and Carlye to put in the buffer strips was $40,000." (RP 155-156). She then asked further questions leading Mr. Anderson to state that they had unreimbursed fencing expenses of $13,800.00 for which they claimed an additional offset. RP 155-156. This offset claim was not in the pleadings and not in the trial brief. (CP 21-31) Dr. Muriby *never* testified or otherwise indicated the Andersons paid anything out-of-pocket for the buffer strips, much less that the Andersons paid $40,000.00. Moreover, Mr. Anderson's testimony was totally at odds with his own written emails explaining that the government bore 90% of the $40,000.00 cost and Dr. Muriby would bear 10%. Although mentioned in its oral ruling, (RP 181) the trial court did not make any finding allowing an offset for this additional claim. (CP 8-11)

The Andersons' attorney drafted Findings of Fact and Conclusions of Law and noted them for presentment. (CP 8-11) Dr. Muriby sent her a letter objecting to the terms of the proposed order and setting forth his analysis of the issues. (CP 13-18) He provided a copy of the letter to the trial court, which apparently treated the letter as a Motion for Reconsideration. The court denied the "motion" and entered judgment accordingly. (CP 6-7, 12) Dr. Muriby retained counsel and this appeal followed. (CP 4-5)

III. SUMMARY OF ARGUMENT

The trial court erred in allowing an offset for the future amounts claimed under the CRP contract. The Andersons' own testimony showed that they contracted to receive those CRP payments in exchange for work on the CRP buffer strips. Therefore, when they quit the lease, they were no longer obligated to maintain the buffer strips and they were then no longer entitled to the CRP payments. They fabricated this offset to avoid paying the amounts they admitted they had inexcusably failed to pay Dr. Muriby. The trial court's decision to allow this offset was error as a matter of law and must be reversed.

The trial court also erred in its calculation of damages. The parties agreed that Dr. Muriby was entitled to a fixed percentage of the gross proceeds, yet the Andersons' own exhibits showed the Andersons'

calculations were based on net proceeds. Moreover, the Andersons took unauthorized and unexplained deductions from the gross to further reduce the amount owed. The trial court's damage calculation must also be reversed.

The trial court should have allowed prejudgment interest on amounts claimed, based on the lease as well as common law. Finally, Dr. Muriby should have been awarded his fees incurred in this action.

IV. ARGUMENT

A. The trial court erred in holding that the defendants were entitled to an offset for future CRP payments when their own testimony established they contracted to receive such payments only in exchange for work on the CRP buffer strip and they would no longer perform that work upon termination of the lease. In their trial brief, the Andersons admitted they had failed to make all the rent payments and seemed to acquiesce to a judgment for the amount they admitted was due. (CP 27) But during trial, Ms. Anderson claimed for the first time that they should be entitled to an offset for the CRP payments they "gave up" at the termination of the lease. (RP 136) The trial court accepted this argument and thus found that the Andersons did not owe Dr. Muriby anything more. (RP 180-182) This was error because the undisputed evidence showed that the CRP payments were due only in

exchange for maintenance work and thus, as a matter of law, the Andersons terminated all claim to those payments when they terminated the lease. There was no legal or contractual right to an offset.

The first question for this Court is the appropriate standard of review. The issue is whether the Andersons were entitled to the future CRP payments under the contract. This is a matter of determining the legal effect of the parties' agreement, or a matter of contract construction. This is a legal question which should be reviewed *de novo*. "A court interprets a contract as a question of law." *Berg v. Hudesman*, 115 Wn.2d 657, 663, 801 P.2d 222 (1990). Even when the court considers extrinsic evidence, contract interpretation is a question of law when there is only one reasonable interpretation to be drawn from that evidence. *Dice v. City of Montesano,* 131 Wn. App. 675, 684, 128 P.3d 1253, *rev. denied* 158 Wn.2d 1017 (2006). Here, there is no dispute what the parties agreed; the issue is the legal effect of their agreement. The trial court incorrectly ruled the Andersons were entitled to the CRP payments even though they no longer were to perform the services promised in exchange for those payments. This was error. This court should rule as a mater of law that the Andersons were not entitled to an offset.

The facts are not in dispute. In emails written at the time of the agreement, Mr. Anderson stated at least twice that 15% of the CRP

payment was his share in order to maintain the fence. (Exhibit 12, page 1, last paragraph and page 4) Ms. Anderson testified to the same understanding when she said, "And we take the 15% to maintain because we still had to make sure weeds didn't grow on it, that it was mowed down and stayed in compliance with whatever FSA had us do." (RP 118, lines 4-8) Thus, the Andersons both unequivocally stated that the 15% CRP payment was theirs *in exchange for* work on the fence and CRP buffer area. Even after their dispute arose, Mr. Anderson expressed the same understanding of their agreement when he wrote in an email to Dr. Muriby in April 2006, "The 15% of the CRP payment was agreed upon by you for maintenance of the buffer strips, spraying of weeds/and or mowing as well as the upkeep of the fence because of the zero tolerance of livestock grazing." (Exhibit 20, page 1, paragraph 3) Later, in the same email, Mr. Anderson said, "The intent for the 15% CRP payment to us, or any one else you had leasing the land should we want to let our lease go, was a good way to maintain the CRP and fence at no out-of-pocket expense to you." *Id.* Thus, both of the Andersons unequivocally stated that they contracted to receive the CRP payments in exchange for maintaining the CRP buffer strip. Of course, when they decided to quit the farm in 2006, they were no longer obligated to maintain the buffer strips. But by the

same token, they were then no longer entitled to receive CRP payments for maintenance they would no longer perform.

Thus, the Andersons were not entitled to receive an offset for the future CRP payments after they quit their lease. At trial, they claimed they were entitled to the CRP payments, but their own testimony about the lease terms shows they had no legal claims to the CRP after they terminated the lease. It is the court's job to determine the legal effect of the parties' agreement as a matter of law. *Berg v. Hudesman, supra.* In this case, there is but one possible construction. The Andersons were entitled by contract to CRP payments if they maintained the CRP buffer area. However, if they quit the lease (as they were entitled to do) and quit maintaining the buffer area, they had no legal or contractual claim to those future payments. As a matter of law, they had no legal right to an offset. The trial court erred in holding they were. Thus, this court should reverse the decision of the trial court and remand with instructions to enter a judgment for Dr. Muriby.

B. <u>The trial court's finding that Dr. Muriby accepted the CRP payments in satisfaction of all lease obligations is not supported by the evidence</u>. In its oral ruling, the trial court found that the Andersons should be given an offset or credit as a matter of equity, but also said quite clearly that there was no meeting of the minds that by signing off on the

CRP payments that Dr. Muriby would agree that it was all over. (RP 181-182) In contrast to the oral ruling, Findings of Fact 3.13 and 3.14 says that the signing over of such payments was to pay Dr. Muriby for amounts he claimed and that he accepted those payments in satisfaction of such claims. (CP 11, ¶¶ 3.13 and 3.14) These findings are clearly not supported by the terms of the lease nor the evidence.

First, as discussed above, the Andersons were not entitled to the CRP payments once they left the property. They had no legal claim to the CRP payments. They gave nothing and Dr. Muriby received nothing in this so called exchange. In other words, there was a complete failure of consideration for the alleged satisfaction. *Cf. Rosellin v. Banchero*, 83 Wn.2d 268, 273, 517 P.2d 955 (1974) (modification or subsequent agreement is not supported by consideration if one party is to perform some additional obligation while the other party is simply to perform that which he promised in the original contract). The Findings of Fact fail as a matter of law.

Second, even if this could be characterized as a factual issue, the findings are not supported by substantial evidence. Substantial evidence is sufficient evidence to persuade a fair minded person of the truth of the matter. *Wenatchee Sportsmen Ass'n. v. Chelan Cnty.*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). In this case, the findings are to the effect that Dr.

Muriby agreed to, or contracted to, accept the future CRP payments in exchange for the past due rent. Washington follows the objective manifestation theory of contract. *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d. 262 (2005). In this case, Mike Anderson only testified that his own *subjective* understanding was that they were absolved of responsibility. (RP 154) However, subjective beliefs of one side are generally irrelevant to contract interpretation. *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d at 504. There is no evidence that the Andersons ever expressed this belief objectively to Dr. Muriby or that Dr. Muriby ever agreed that the "return" of the CRP payments was made in satisfaction of the rent due. As the trial court said in its oral ruling, there was no meeting of the minds. (RP 181-182) In summary, the record is totally devoid of any evidence the parties entered into such an agreement at the termination of the lease.

It is also notable that the Andersons never suggested they had given up the CRP payments in exchange for a release until the day of trial. For example, the Andersons did not even mention this understanding in the emails they sent to Dr. Muriby in April of 2006 when he was seeking past due payments. (Exhibit 20) In that exhibit, Mr. Anderson never expresses the belief that there had been an agreement to release rent claims in exchange for the CRP payments. The Andersons never made such a

claim in their pleadings. It is not in the Answer of the trial brief. (CP 21-31) In other words, not only is there no evidence the Andersons and Dr. Muriby made such an agreement at the time the Andersons quit the lease, the Andersons never even claimed such an agreement existed until the day of trial.

In summary, there is simply no evidence that Dr. Muriby ever agreed that the Andersons gave him the CRP payments in exchange for a release. As the trial court stated in its oral ruling, "there was never any meeting of the minds" on this issue. (RP 181) This court should therefore reverse and remand with instructions to enter a judgment for Dr. Muriby.

C. <u>The trial court's damage calculation is not supported by the evidence and must be reversed</u>. In their trial brief, the Andersons admitted that they had failed to pay $12,369.40. Ms. Anderson went through the calculations for these sums in her testimony. (RP 109-136) The trial court found that "Defendants made all payments to the plaintiff under the written lease, and plaintiff accepted those payments as payments in full, except for the $12,369.40 referred to hereafter in Paragraph 3.14." (CP 10, Finding of Fact 3.5) Thus, the court found the total damages suffered by Dr. Muriby were $12,369.40. As will be shown, this finding is not supported by substantial evidence and should be reversed and the case remanded for entry of judgment in the proper amount.

Findings of Fact are normally reviewed for substantial evidence. *Soltero v. Wimer*, 159 Wn.2d 428, 433, 150 P.3d 552 (2007). Substantial evidence means sufficient evidence to persuade a rational, fair-minded person that the premise is true. *Wenatchee Sportsmen Ass'n. v. Chelan Cnty.*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). However, in this case, most of the damage evidence is found in documents, including numerous documents submitted by the Andersons. Our Supreme Court has recently explained that, "Appellate courts gives deference to the trial courts on a sliding scale based on how much assessment of credibility is required; the less the outcome depends on credibility, the less deference is given to the trial court." *Dolan v. King Cnty.* No 82842-3 Slip Opinion, page 12 (August 18, 2011). The Court explained that it will apply a de novo standard with a purely written record. *Id.* Under the reasoning of *Dolan*, this case calls for a less deferential standard of review. The damage calculations did not turn on witness credibility but on the documents and. thus, this court need not defer to the trial court's factual determination of damages. Moreover, as to at least two matters, the calculations are questions of law to be reviewed *de novo*.

The trial court accepted the defendants' damage calculation without detailed explanation. (RP 180, lines 10-12) No doubt this was a difficult case to follow which was exacerbated by a *pro se* litigant, but that

does not mean the trial court should not engage in its own rigorous analysis of the evidence. As will be shown, the Andersons' damage calculations are simply not supported by their own documentary evidence and the finding based on those calculations must be reversed. This requires a rather lengthy and perhaps tedious review of the record.

The first year for which there is a dispute is 2002. For this year, the parties had agreed to operate under the terms of the written lease. (CP 10, Finding of Fact 3.8) There was no claim for cash rent, just a dispute over the 30% of the gross. The Andersons admitted they still owed at least $1,829.53. (Exhibit 11 and RP 113) Dr. Muriby claimed they owed $17,788.22. (Exhibit 8) The difference was based on two factors. The first was a disagreement as to the gross production figures. Second, the Andersons deducted $120,000.00 from the gross before calculating the percentage owed, rather than $60,000.00 allowed by the lease. The Andersons' calculations are not supported by the evidence nor the terms of the lease and must be rejected. Dr. Muriby provided records from Pomeroy Grain Growers (PGG) that showed gross production of $146,714.22 and a document provided by the Andersons had the same figures. (RP 58 and Exhibits 5 and 6) The Andersons had introduced some of the same records, but incorrectly based their calculations on the net amount paid of $134,908.47, rather than the gross amount of

$146,714.22. The Andersons' own document, Exhibit 10, page 1, is a report from PGG. It shows payment to the Andersons of $134,908.47; but it also shows deductions from the gross receipts of $11,805.64 for freight, a commission, and testing. Under the terms of the lease, these deductions must be added back to reflect the gross amount received by the Andersons. When added back, the amount is the same as that claimed by Dr. Muriby, or $146,714.22. The Andersons also received $7,870.00 from USDA Farm Service Agency ("FSA")[2]. (Exhibit 11) Thus, the documentary evidence from both the Andersons and Dr. Muriby showed gross production and FSA of $154,584.22, rather than $142,778.42 as claimed by the Andersons.

In addition to misstating the gross production figures, the Andersons deducted $120,000.00 from the gross before calculating the percentage rent. (RP 124, Exhibit 11) Under the lease, the Andersons were only entitled to deduct $60,000.00, as set forth in Paragraph 3.2. (Exhibit 18) Ms. Anderson's justification for her calculation was difficult to follow. She said that, if they only deducted $60,000.00, Dr. Muriby would become 45% owner of the cash. (RP 124) This does not really

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[2] At trial, Dr. Muriby claimed the FSA payments were $9,078.00. This figure was based on a document Dr. Muriby believes was provided by the Andersons, Exhibit 5. However, for purposes of appeal, he will accept the documented amount of $7,870.00.

make any sense and is certainly not a reason to ignore the terms of the lease. She also claimed they had to take a two-year average, but of what was not stated. (RP 124 -125) Reviewing her testimony, it is clear that Ms. Anderson was simply re-writing the terms of the lease to allow a double deduction. However, the lease is clear; Dr. Muriby was entitled to 30% of the gross over $60,000.00 and the Andersons were not entitled to double deductions simply because they decided not to grow crops in 2001. As to this portion of the calculations, the trial court was faced with an issue of law: did the lease allow the Andersons a second deduction? It did not allow a second deduction and thus, as to this matter, the trial court erred and must be reversed.

Using the correct gross figures and the correct deduction, Dr. Muriby was entitled to $28,375.26 for 2002 crops. [($154,584.22 gross production - 60,000) x .30 = 28,375.26)] He was paid $5,004.00 and agreed to a further reduction of $6,000.00 for fencing expenses, leaving a balance due for 2002 of $17,371.26, not the $1,829.53 admitted by the Andersons.

For 2003, Dr. Muriby was still entitled to cash rent, but agreed to waive at least $15,200.00 of it toward the cost of additional fencing materials to enter the CRP program. (Exhibit 8) There was a dispute about the remaining $3,800.00 of the cash rent. Dr. Muriby denied he had

received it and the Andersons did not produce any record of having paid it, in spite of the fact they produced numerous checks showing payment of cash rent. (See Exhibit 1, pages 3-10) It is reasonable to assume the Andersons neglected to make that payment, but this is a matter of credibility and thus Dr. Muriby must concede this portion of his rent claims.

There was also a dispute about the production rent owed. Although Dr. Muriby disputes there was an agreement to calculate this portion of the rent based on production for two years, he will do so since mathematically it does not make a difference and it simplifies comparison on appeal. For 2003 and subsequent years, the Andersons had agreed to pay 25% of the gross, without a deduction for costs. (RP 129)

For 2003 and 2004, the Andersons admitted they still owed Dr. Muriby $4,693.09. Here again, the Andersons have based their calculation on the net receipts from PGG, not the gross as required by their agreement. Ms. Anderson testified to production using the net receipts, or $45,860.02 and $30,570.30, as set forth in Exhibit 10 at pages 10 and 11. (RP 125) She failed to include $6,460.40 and $4,306.97 that PGG had deducted from their gross receipts. *Id.* These figures are further borne out by Exhibit 6, which shows a gross total of $52,320.42 and a net receipt of $45,860.02 on the first page and a gross of $34,880.27 and a net of

$30,573.30 on the third page. Since the lease agreement called for 25% of the gross, Ms. Anderson simply used the wrong figures. The actual gross was $87,200.69 from PGG, plus $22,437.35 from FSA, or $109,638.04. Dr. Muriby's 25% share is $27,409.51. He was paid $20,024.58, so he is still owed $7,384.91 for 2003/2004.

For 2005 and 2006, the Andersons admit owing at least $5,846.78, but this calculation is again not supported by the documentary evidence. Moreover, the Andersons once again took an unwarranted deduction from the amount owed.

Turning first to the evidence of the receipts from PGG, Ms. Anderson testified they received $14,665.13 in 2005, omitting $3,060.99 from the total. (RP 131, Exhibit 10, page 27) Moreover, she testified they received $13,749.48 in 2006 (RP 131, Exhibit 1, pages 28-29), for a total of $28,414.61 in 2005/2006 combined. (Exhibit 11) Dr. Muriby produced two documents which were full settlement details from PGG for 2006 showing gross receipts of $19,301.56 and $28,952.32. (RP 66, 68 and Exhibit 7) Thus, the PGG documents show gross production for these two years was $65,980.00, not $28,414.61. (This sum is also much more consistent with production from the past years.) Adding the actual PGG receipts to the Andersons' FSA amount of $13,662.00 (Exhibit 11) equals $79,642.00. Dr. Muriby was entitled to 25% of that, or $19,910.50.

The Andersons' calculation for 2005/2006 also contains an unwarranted deduction of $4,672.37 that was not explained by the Andersons. (Exhibit 11) Ms. Anderson was asked if Dr. Muriby received any other payments for this period and she said no. (RP 136, lines 8-9) It appears that this is actually an amount the Andersons claimed was owed by Mr. Hastings, who took over the farm after they quit. (RP 151-152) Hastings disputed the debt, but it was evidenced by an agreement. (RP 27, Exhibit 15) Regardless, Mr. Anderson could not explain why Dr. Muriby was responsible for payment of this amount. (RP 153-154) Thus, there is no factual or legal justification for deducting it. Using the correct numbers and without the deduction, the Andersons owed Dr. Muriby $19,910.50 for the 2005/2006 crop years. The defendants admitted they did not pay anything for these years. (RP 136, Exhibit 11)

In summary, the documentary evidence submitted by the Andersons and Dr. Muriby proves the Andersons owe much more than they admitted. This is not a question of credibility but a question of reading business statements. Dr. Muriby made this abundantly clear to the trial court in his letter to Ms. Burns dated June 19, 2011, which was copied to the Court. (CP 13-18) The Andersons' own evidence demonstrates they owe significantly more than admitted. The Andersons also violated the lease by taking additional deductions against the gross.

Thus, the trial court's damage finding is not supported by the evidence and is incorrect as a matter of law. The decision must be reversed and the case remanded for a proper calculation of damages.

D. <u>The trial court erred in failing to award pre-judgment interest and attorney's fees</u>. The trial court found there was unpaid rent, but offset this amount by the CRP payments. Thus, the trial court did not award interest on amounts past due. As demonstrated above, the offset or credit was improper. Thus, the trial court should be required to award judgment to Dr. Muriby. Moreover, the trial court should be directed to award interest under the lease[3] as well as attorney's fees. As will be shown, the parties agreed to abide by the terms of the written lease after it expired, and, thus, the terms of that lease must be enforced.

The Andersons were obligated to pay interest on past due amounts under the original written lease. Paragraph 4.5 provided that interest at the rate of 15% would be due on any payments more than 30 days past due. (Exhibit 18) Generally speaking, payment for crops was due December 1. (Exhibit 18, Paragraph 4.) Paragraph 15 of the lease provided for an award of costs and attorney's fees to the prevailing party in any action to enforce the lease. *Id.*

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[3] Dr. Muriby also requests prejudgment interest based on common law. This will be addressed more fully below.

Dr. Muriby asked for interest on amounts past due as a contract right. When interest is sought based on contract, the court does not have authority to disallow it on equitable grounds. *Farm Credit Bank of Spokane v. Tucker*, 62 Wn. App. 196, 813 P.2d 619 *rev. denied* 118 Wn.2d 1001 (1991). Here, the lease clearly provided for interest and Dr. Muriby is entitled to enforce its provisions.

The lease also provided for attorney's fees to the prevailing party in an action to enforce the lease. (Exhibit 18, Paragraph 15) When a contract provides for an award of fees, its terms are mandatory, not discretionary. *Id.* Here, if Dr. Muriby is awarded judgment under the lease, he is also entitled to an award of reasonable costs and fees.

Admittedly, these provisions were contained in the written lease which expired in 2000. However, those provisions continued after the year 2000. This requires analysis of two separate time periods: the years before 2003 and the years after.

For the years before 2003, the analysis is simple. The trial court found that, from September 2000 until they entered a new agreement, "the parties followed the terms of the expired lease." (CP 10, Finding of Fact 3.8) The new agreement commenced in 2003. (CP 10, Finding of Fact 3.9) Thus, the trial court ruled that the terms of the expired agreement applied to the years before 2003. The expired lease provided for interest

payments on amounts past due as well as attorney's fees. Thus, as to the sums due for the year 2002, the Andersons must be required to pay interest. They should also be required to pay at least a portion of the fees incurred collecting that obligation.

The Andersons denied that the written lease applied to the second period. (CP 30, ¶ 13) The record shows that the parties had agreed to be bound by the general terms of the written lease for this time period. During the 2003 negotiations, Mr. Anderson sent Dr. Muriby a letter about the new agreement, in which he stated he was attaching a new lease agreement as well as the original lease. (RP 33 and Exhibit 4) The letter stated that the original lease covered the same aspects as now and he proposed "the small changes" regarding minimum payments. (Exhibit 4, page 1) The addendum clearly indicated an intent to be bound by the interest and fee provisions. (Exhibit 4, pages 2 paragraph 4.5 and page 5, paragraph 15) Mr. Anderson's attorney denied that Mr. Anderson had drafted the addendum included in Exhibit 4, but admitted he wrote the letter. (RP 51, lines 12-18) In that letter, Mr. Anderson agreed that there were only "small changes" to the parties' agreement. Thus, the record shows a clear intent to be bound by the terms of the written lease, except as modified. As such, Dr. Muriby should be awarded interest for amounts

due after 2003 as well as costs and fees incurred in collecting those sums under the terms of the parties' agreement.

In the alternative, Dr. Muriby should be awarded prejudgment interest based on equitable principals. Prejudgment interest is favored under Washington law. *Prier v.* Refrigeration *Eng'g Co.,* 74, Wn.2d 25, 34, 442 P.2d 621 (1968). In Washington, the courts may award pre-judgment interest on liquidated claims or, if not liquidated, for an amount due upon a specific contract for the payment of money and the amount due is determinable by computation with reference to a fixed standard contained in the contract, without reliance on opinion or discretion. *Id. at* 32. In this case, the Andersons admitted they failed to make the full payments and offered no excuse. Those sums are liquidated or may be easily calculated without reliance on opinion. Thus, even if there is some question about the contractual interest provisions applying after 2003, the trial court should still be instructed to make an award of pre-judgment interest based on common law and the admitted intransigence of the Andersons.

E. <u>There is no evidence to support the trial court's finding that Dr. Muriby waived his claim to interest or late fees</u>. During the trial, the Andersons were trying to show Dr. Muriby somehow waived his claim to late fees. In its oral ruling, the trial court did not address this

issue. (RP 179-183) Nevertheless, the Andersons' attorney added a finding:

> 3.7 The defendants had a history of paying the amounts due under the lease late, but the plaintiff accepted the payments, waiving any right to ask for late fees.

As will be shown, Mr. Anderson's own emails are directly contrary to this finding. Moreover, the evidence does not support the finding and it must be reversed.

Waiver is the intentional and voluntary relinquishment of a known right. *Bowman v. Webster*, 44 Wn.2d 667, 669, 269 P.2d 960 (1954). The party who is said to have waived the right must have actual knowledge of the right. *Id.* Waiver may be express or implied. *Id.* However, waiver by conduct requires unequivocal acts of conduct evidencing an intent to waive. *Birkeland v. Corbett*, 51 W.2d 554, 565, 320 P.2d 635 (1958). In this case, there is simply no evidence that Dr. Muriby did or said anything to support a finding of waiver.

In his Complaint, Dr. Muriby stated that the Andersons had failed to make the record accounting, thereby indicating he could not determine the exact rent owed. (CP 33, ¶¶5 and 6) Thus, it is clear Dr. Muriby was not aware of the extent of his claims because the Andersons failed to give him the accounting. Since waiver requires actual knowledge of the rights waived, the Andersons failed in their proof for this reason alone.

The Andersons also tried to suggest that Dr. Muriby was lax in his collection efforts but these claims were refuted by the documents. Mr. Anderson testified that Dr. Muriby never made a claim for past due amounts before commencing suit. (RP 155) This testimony was totally contradicted by Mr. Anderson's own emails from early 2006 which showed there was a continuing dispute as to amounts owed for past years. (Exhibit 20) The first page of the Exhibit is an email dated April 19, 2006,[4] in which Mr. Anderson is obviously responding to Dr. Muriby about various rent disputes. (Exhibit 20, page 1) It recognizes a continuing disagreement about rent as far back as 2003. Mr. Anderson also acknowledged that Dr. Muriby had called and emailed about back rent for 2005. The second page of the exhibit contains an email dated May 1, 2006, and states he is "getting the things together you requested." (Exhibit 20, page 2) In other portions of the Exhibit, Mr. Anderson agrees to send a report for 2005 and admits to problems in the past. Thus, it is difficult to understand how Mr. Anderson could testify there was no dispute prior to the filing of the lawsuit.

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[4] Note that Mr. Anderson entered into his agreement with Mr. Hastings on April 4, 2006, so these emails are clearly after Mr. Anderson has decided to quit the lease. (Exhibit 15)

Moreover, the failure to make a demand is not enough to establish waiver. Waiver requires some evidence of statements or conduct by the person who is said to have waived rights. In this case, there is simply no testimony that Dr. Muriby said anything to the Andersons nor did any act which would unequivocally convey waiver. The Andersons' only evidence is their subjective belief. This is inadequate to establish waiver and therefore this finding must be reversed.

F. <u>The trial court erred in denying the motion for reconsideration</u>. After he received the proposed Findings of Fact and Conclusions of Law, Dr. Muriby sent a letter to Ms. Burns outlining his issues with her proposals and explaining why he could not sign the proposed Findings. (CP 13-15) He sent a copy of this letter to the Court. In the letter, he quoted portions of Civil Rule 59 regarding motions for new trial but he did not formally note up a motion. The judge nevertheless treated it as a Motion for Reconsideration and denied any relief. (CP 12)

In his letter, Dr. Muriby pointed out the various issues with the trial court's ruling, including the errors in calculation of damages and the fact the Andersons were entitled to the CRP payments only in exchange for work on the CRP buffer strips. The court would not revise its ruling.

Motions for Reconsideration are within the discretion of the trial court and may be reversed upon showing of manifest abuse of discretion.

Wagner Dev., Inc. v Fidelity Bond & Deposit Co. of Maryland, 95 Wn. App. 896, 906, 977 P.2d 639 *rev. denied* 139 Wn.2d 1005 (1999). Where the trial court's orders are in error, abuse has been shown. As this brief has demonstrated, the trial court erred in allowing the setoff and erred in its calculation of damages. Thus, the trial court erred when it denied the Motion for Reconsideration and must be reversed.

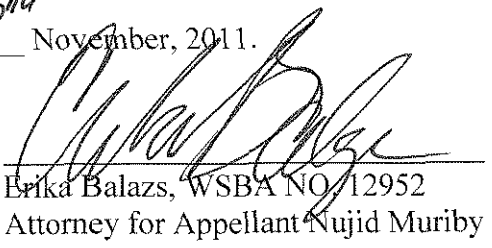
G. <u>The court of appeals should award fees on appeal</u>. Dr. Muriby seeks fees on appeal based on the contract and RAP 18.1. As demonstrated above, the contract contains a fees provision. Dr. Muriby is entitled to recover his costs and fees on appeal.

V. <u>CONCLUSION</u>

The decision of the trial court must be reversed. First, the trial court erred as a matter of law when it allowed a setoff for future CRP payments because the Andersons' own testimony showed they had no contractual right to future payments once they quit the lease. The trial court's damage calculations were incorrect as shown by the Andersons' own documentary evidence. Dr. Muriby is entitled to a judgment for unpaid rent, as well as prejudgment interest and costs and fees incurred in

bringing this action. Dr. Muriby respectfully requests that the trial court be reversed and this matter remanded for entry of an appropriate judgment in his favor.

Respectfully submitted this 2nd November, 2011.



Erika Balazs, WSBA NO. 12952
Attorney for Appellant Nujid Muriby

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of November, 2011, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to all counsel of record as follows:

Ms. Brooke J. Burns	☒	U.S. Mail
Law Office of Thomas Ledgerwood	☐	Hand Delivered
922 6th Street	☐	Overnight Mail
Clarkston, WA 99403-2079	☐	Telecopy (FAX)
	☐	Via email

ERIKA BALAZS