



Case No. 330371

COURT OF APPEALS, DIVISION III

STATE OF WASHINGTON

Deborah Burksfield, a single individual;

LSL Properties, LLC, a Washington limited liability company.

Appellants,

v.

Larry Sali and Gayle Sali, husband and wife;

Steven Sali and Deleta Sali, husband and wife;

and Columbia Ready-Mix, Inc.,

Respondent/Cross-Appellants.

APPELLANTS' BRIEF

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I. ASSIGNMENTS OF ERROR:

A. The trial court erred by refusing to award the plaintiff any prejudgment interest on the unpaid liquidated amount of the objectively measured cubic yards of materials (which the Defendants removed from the Plaintiff LSL's gravel mine property without paying the \$.60 per ton royalties mandated in the lease), solely because the agreed survey measurements used to determine the same arrived at a liquidated volume amount of 345,882.85 cubic yards, which (because of the defendants' spoliation and breach of contractual and fiduciary duties to maintain scale tickets for the date and weight of each load removed), then had to be converted to a weight measurement of 847.413 tons, which came to exactly \$508,448 at the agreed royalty rate of exactly \$.60/ton, which involved a small element of discretion in the tons per cubic yard conversion rate that had to be used to determine the average weight in tons for each cubic yard of material, all because the defendants didn't keep the required records.

B. The trial court also erred by awarding \$39,000 in costs under RCW 4.84.185 for suing the Defendant Sali brothers' other twin company, Columbia Asphalt and Gravel, Inc. (CAG), as a co-defendant and alter-ego of the Sali brothers and their other twin company, Columbia Ready-Mix.

Inc. company (CRM), jointly and severally, where the merits of the claim against CAG were simply never presented at trial based on the Plaintiffs' voluntary election not to pursue CAG at trial for the exact same successful recovery already fully obtained against the Sali brothers and CRM.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR:

A. Where the jury verdict at CP-2264-5 completely agreed with the Plaintiffs' objective measurement of the volume of materials taken based on surveys at DE-9 and 10 summarized at PE-16, which surveys the parties agreed in their lease agreement at DE-2.2, page 4, paragraph 3.1, would govern for any missing material and payment discrepancies, and which materials were not paid for and were still owed as summarized at PE-15 (which showed exactly 345,882.85 cubic yards of materials had been taken without paying), but a conversion formula had to be used to convert the 345,882.85 cubic yards surveyed into estimated tons because the Defendants had spoliated the actual weights and dates on 42,370 missing scale tickets for approximately 42,370 truckloads of material taken (figured at 20 tons per load), weren't the damages still sufficiently liquidated enough to require the defendants to pay pre-judgment interest on their otherwise 7 years of unjust enrichment on \$508,448 in materials taken and not paid for?

B. Did the Court properly conclude that the Plaintiffs' claims against the Defendants' other twin company, Columbia Asphalt & Gravel, Inc., (CAG), which was operated interchangeably with CRM out of the same office, with the same directors, was frivolous and advanced without any reasonable cause under the law and facts, in violation of RCW 4.84.185, just because the Plaintiff made a strategic decision at trial not to pursue the Defendants' twin company CAG, just like the Defendants elected not to pursue their counterclaims against the Plaintiffs, and the Plaintiffs also elected not to resist the Defendants' motion to dismiss the same brought just before the Plaintiff was about to non-suit the Plaintiffs' CAG claim as a matter of right, just like the Defendants did not resist the Plaintiffs' motion to dismiss the Defendants' counterclaim (**see Appendix A**), as explained by co-Plaintiff Deborah Burksfield in her sworn declaration at CP-2236-2242.

III. STATEMENT OF THE CASE

(OVERVIEW OF BACKGROUND FACTS)

Plaintiff LSL Properties LLC owns a gravel mine which it leased to defendant Columbia Ready-Mix, Inc. (CRM). DE-2.2. Plaintiff LSL, LLC is controlled by the Sali brothers who own 82% of LSL. DE-2.1. Co-Plaintiff Deborah Burksfield owns 18% of LSL. Id. The Sali brothers

also own two twin companies which they run through their same CFO Robert Jones, which both use large amounts of gravel for their respective concrete and asphalt companies, Columbia Ready-Mix, Inc. (CRM) and Columbia Asphalt & Gravel, Inc. (CAG). CP-1831, lines 7-17; RP-318, lines 13-15. Plaintiffs brought a derivative action on behalf of both LSL and Deborah Burksfield the minority shareholder against the Salis for breach of fiduciary duty and against CRM for breach of the lease, and against the Salis' other twin company CAG, all with regard to large amount of missing materials taken from LSL's gravel mine during the lease and not paid for and or underpaid. CP-1812-1829.

The lease required Defendant CRM to "keep accurate records of all material removed from the demised premises." DE-2.2, pg 6, para 8.1. Specifically, the lease also provided that "Material shall be weighed on scales on the leased property and weight tickets shall be issued for each load removed." DE-2.2, pg 4, para 3.1. Plaintiffs' expert Mr. Moorer, a 23 year veteran of the trucking industry testified that you cannot legally take any full load of materials out of the LSL property without a weight ticket or the driver will risk a big fine, and the company will have a hard time getting invoices paid from their customers without the scale tickets to back up the

record of what amount of product was delivered, how much taxes to pay the Department of Revenue, etc.. RP-239, lines 13-15; RP-265, lines 15-20; RP-273 line 14 through RP-275 line 12; RP-275 line 23 to RP-276 line 5; RP-276, lines 6-16 and lines 20-25. To be sure, the lease absolutely required CRM to "carry on any such operations in full compliance with all laws . . ." DE-2.2, page 5, paragraph 6.1.

Plaintiffs used topographical land surveys (DE-9 and 10) and forensic accounting to present their case (summarized at PE-15). Plaintiff's expert was Bruce Moorer, a forensic accounting expert, and a CPA (Certified Public Accountant) for the last 36 years, with a degree in Accounting and certified in Financial Forensics, with 23 years of that being in the trucking/hauling industry in particular, where he served as both the treasurer and chief financial officer at Haney Truckline, a local trucking firm. RP-114, line 11 to RP-115, line 4; RP-231 lines 11-20.

Under ER 703, Mr. Moorer consulted with expert surveyor Darryl Witter several times and relied in part on DE-2.9 and DE-2.10 consisting of the topographical survey measurements of the actual cubic yards removed from the gravel mining site which gave the exact net cubic yardage of the amount of material taken offsite after measuring both cuts and fills. RP-

233, line 9 to RP-235, line 16; and Witter survey summary chart at PE-16.

The parties in their lease agreement specifically agreed that surveys would control regarding any discrepancy or dispute over what was owed for the amounts of material taken from the Anderson mining site. DE-2.2, page 4, paragraph 3.1. The surveys, at DE-9 and 10, confirmed a total of exactly 345,882.85 cubic yards of material had been taken but not paid for. The lease agreement called for a royalty rate payment of \$0.60 per ton for all materials moved. DE-2.2, page 4, paragraph 3.1. However, the parties' agreement did not specify the conversion rate of tons per cubic yard that would need to be applied to convert a cubic VOLUME measurement into a WEIGHT measurement for tonnage to apply the royalty rate of \$.60/ton to.

The lack of true and actual and complete records of the exact weight and dates of all material taken was entirely caused in the first place solely by the Defendant's own breach of fiduciary duties and breach of the lease agreement requiring the Defendant to weigh and issue scale tickets with the exact tonnage for each and every load of material removed. The defendants were eventually forced to produce all the records they did have whereupon it was discovered that the amount of unpaid material even at a

full 20 tons per load¹, indicated that approximately 42,370 loads worth of scale tickets for removed material were missing and not paid for – FORTY TWO THOUSAND THREE HUNDRED AND SEVENTY, 20-TON LOADS.

This breach and spoliation of the records by the Defendants themselves (see Plaintiff's post-verdict oral arguments regarding the same at RP-49 line 19 through RP-50 line 11), is exactly what forced a fallback to the surveys used to calculate the liquidated amount of the missing cubic yards in the first place. This in turn then necessitated a conversion of the volume to a weight, which the Defendants used to avoid \$290,298.33 in interest on the unpaid \$508,448 worth of materials (345,882.85 cubic yards/847,413 tons) as calculated by Bruce Moorer from at CP-2052-2055, based on the successive surveys and explained as follows.

Based on the fact that the jury accepted the Plaintiff's claim for the 345,882.85 cubic yards/847,413 tons), Mr. Moorer then broke down the accrued interest for each stage of takings as explained herein. CP-2052-

¹ Defendants' CFO of both of the twin companies CAG and CRM, Mr. Robert Jones, testified that when the defendants charged their other customers by the truck load, they always assumed there were 20 cubic yards in an average truck load. RP-331, lines 12-17.

2056. The first survey dated April 26th, 2008 (DE-2.9) confirmed that from April 1st, 2006 the Defendants had already taken by the April 26th, 2008 date of that first survey, and without paying, exactly 179,126.12 cubic yards of material (reasonably converted to 438,859 tons) worth \$263,315.57 applying the agreed \$.60/ton royalty rate. To be clear, what the plaintiff proved was that the Defendants stole exactly 179,126 cubic yards of material between 4-1-06 and the 4-26-08 date of the first survey measurement.

However, the Plaintiff did not ask for any interest during those two plus years of interest free takings, but only for interest going forward from the survey taken at the tail end of those two years of interest free takings. Plaintiff asked for 12% per annum pre-judgment interest on that amount from the date of the tail end of the takings on the date of that survey to the date of the entry of the December 5th, 2014 judgement for those materials, which came to exactly \$208,892.22. CP-253, lines 13-23.

The second survey on September 16th, 2011 (DE-2.9) confirmed that since the April 26th, 2008 date of first survey and by the September 16, 2011 date of the second survey, the defendants had already taken without paying, another 115,837 cubic yards (reasonably converted to 283,801 more tons)

worth \$170,280.33 at the agreed \$.60/ton royalty rate. Again, Plaintiff did not ask for any interest during those three and a half years of interest free takings, but only for interest going forward from the September 16th, 2011 survey taken at the tail end of those three and a half years of interest free takings. Plaintiff only asked for 12% per annum pre-judgment from the date of that second survey to the date of the entry of the December 5th, 2014 judgement for those materials, which came to exactly \$65,779.47. CP-2054, lines 1-14.

Then finally, the last survey dated March 10, 2013 (PE-10) showed that since the date of the second survey and by the time of the last survey, the Defendants took without paying, another 50,919.6 cubic yards (reasonably converted to 124,753 more tons) worth another \$74,851.90 at the agreed \$.60/ton royalty rate. Again, Plaintiff did not ask for any interest during those one and a half years of interest free takings, but only for interest going forward from the survey taken at the tail end of those one and a half years of interest free takings. Plaintiff only asked for 12% per annum pre-judgment interest on that additional amount taken from the date of that third survey, going forward to the date of the entry of the December 5th, 2014 judgement for those materials, which came to exactly \$15,626.64.

CP-2054, lines 15-24.

At trial, the Surveyor Darryl Witter used Defendants' survey reports at DE-9 and 10 and then Mr. Witter's own chart summarizing the same at PE 16 to show and testify how he calculated the amount of material extracted by the Defendants from the gravel mine at issue. The surveys measured the extracted materials taken during three different periods of time, starting from a baseline measurement of the pre-mining topography in 2003 to the mined topography on the Plaintiff's first commissioned survey on April 26th, 2008, then from that topography on April 26th, 2008 to the topography at the time of the second survey on September 16th, 2011, and then from September 16th, 2011 to the topography on the third and final survey on March 10th, 2013. RP-203 to RP-213.

Defendants did not dispute the survey methodology but took issue with the fact that for measuring the volume of material taken from the mining site by the time of each new survey, the preceding survey was used as the new baseline for Mr. Witter's calculation of the net amount of extracted material taken from one baseline to the next. From the baseline survey of 2003, and the surveys in between, and all the way up to the final survey on March 10th, 2013, Mr. Witter was able to measure the gross

removal of 1,040,416 cubic yards of material from the Anderson mining site by comparing the survey topographical surfaces at each point in time. RP-210 line 25 to RP-211 line 2; RP-224, line 22. Mr. Witter agreed that 33,000 cubic yards of fill material found on the final survey should be deducted from the gross volume of extracted material. RP-211 line 5 to RP-212 line 2.

Bruce Moorer testified that he was asked to calculate damages for unpaid royalties after crediting all the actual payments on materials taken from Plaintiff LSL's Anderson gravel mine. RP-231, lines 23-25. With regard to the proper conversion rate to convert the surveyed volume measurement of cubic yards into a weight measurement of tons to apply the per ton royalty rates, Mr. Moorer testified that he took the unpaid cubic yards from the surveys and converted the liquidated volume measurements into a weight measurement by using a conversion factor of 2.45 tons per cubic yard for Pacific Basalt that Mr. Moorer initially found through internet research on Google. RP-237, lines 13-21.

Of course, Mr. Moorer then confirmed the conversion rate was appropriate based on the rates he reviewed and read up on from a book of geology for mines in the Western United States. RP-238, lines 13-18.

Mr. Moorer was actually able to find this conversion factor was listed for the basalt located in this area. RP-238, lines 20-25. Furthermore, Mr. Moorer discussed the conversion factor with Mr. Witter, the surveyor hired to measure the missing volume. RP-239, line 1. Additionally, Mr. Moorer also consulted with Mr. Steven Taylor of McLucas & Associates, a geological engineering firm located in Olympia, Washington, regarding the proper conversion rate and they concurred that 2.45 tons per cubic yard was appropriate and in fact could actually be as high as 2.53 tons per cubic yard. RP-287 line 16 to RP-288 line 25.

Defendant Columbia Ready-Mix, Inc.'s own CFO and controller, Robert Jones, testified that he too was asked "to determine whether royalties have been paid in full." RP-320, lines 4-5. Mr. Jones testified that he prepared DE-2.5, and that DE-2.5 was intended to show the amount of royalties that should have been paid on an annual basis from defendant Columbia Ready-Mix, Inc. to plaintiff LSL, LLC from 2013 to 2013. RP-320, lines 18-23 and RP-321, lines 7-12. Mr. Jones testified that for the surveyed cubic yardage measurements on his DE-2.5 chart, Mr. Jones also used the same conversion factor of 2.45 tons per cubic yards as the Plaintiffs did. RP-327 line 21 to RP-328 line 9.

Mr. Jones also testified that he converted all cubic yards measured from the surveys by the factor of 2.45 to get “THE TONNAGE EQUIVALENT” with regard to the tons of direct sales between plaintiff LSL and KLB [which defendant Columbia Ready-Mix, Inc. was trying to blame KLB for taking material to justify missing weight scale tickets for all the unaccounted for missing and unpaid material removed from the Anderson mining site at issue, in order to seek a credit against the missing surveyed materials claimed by the Plaintiff]. RP-330, lines 14-20; RP-331, lines 18-19; RP-353, lines 15-23. The Anderson lease signed by the parties and admitted into evidence stated “Material SHALL BE weighed on scales on the leased property and weight tickets SHALL BE issued for each load removed.” DE-2.2, at page 4, paragraph 3.1.

Mr. Moorer pointed out that Mr. Jones’ accounting (at DE-2.5) claimed 23,030.69 tons that the defendants wanted credited for alleged direct sales of Anderson mining site materials from LSL to KLB, when the actual 13,030.69 tons listed therein had been overstated by 10,000 tons. RP-285, lines 2-16; RP-520, lines 8-25. That wasn’t the only problem with the Defendants’ accountings.

At trial, Mr. Moorer gave uncontradicted testimony that that PE-14

was Defendant lessee Columbia Ready-Mix (CRM)'s June 2007 Invoice #38 issued by CRM to KLB Construction, and presented in discovery by CRM as a true and correct accounting record of everything indicated thereon. However, at trial the Defendants had then submitted a doctored version of the same June 2007 Invoice #38 at DE-2.7 which changed the entire letterhead of the invoice from Defendant CRM letterhead into Plaintiff LSL letterhead, to make it look like LSL had sold the material to KLB directly when in fact CRM itself had taken the materials and directly sold the materials taken from Plaintiff LSL's Anderson gravel mine to third party KLB. RP-521, line 11 to RP-523, line 13. This was just one incident of fabricated evidence that Defendants Salis and CRM got caught with at trial and had absolutely no explanation for. Again, compare PE-14 to DE-2.7 (June 2007 Invoice). Also, Defendants' own records, admitted at trial, clearly showed that CAG billed CRM for materials taken from the Plaintiff LSL Anderson mine. DE-2.7 (June and July 2007 Invoices).

Additionally, Defendants also submitted a May 2004 invoice within DE-2.7, This one however, also went even further and altered the quantity of material by adding 10,000 tons (worth \$5,000 at the time) to the amount CRM claimed it had paid for. Again compare PE-5 to DE-2.7 (May 2004

Invoice). Nevertheless, Mr. Moorer's \$535,674 conclusion of the total amount owed by the defendants for unpaid and underpaid materials gave the defendants full credit for all KLB direct sales and in fact for all scale tickets the defendants produced, except for the ones that were clearly erroneous or fraudulent. RP-368, lines 18-25.

Defendants' own expert witness, was Georg Bennett, a geologist working primarily in the mining industry for the last 35 years, who actually manages a couple of silica mining quarries. RP-373, lines 18-25. Mr. Bennett testified that his job focus was to actually "keep a really tight inventory of our materials. So we keep an inventory of what is in the pit, what we crush and how much is in the stockpile. So we – we survey the stock piles every month. And we do a flyover of the pit probably every 18 months." RP-375, lines 3-8.

Mr. Bennett explained that his focus was on monitoring the quantity of material, what's been dug out of the pit, what's been stockpiled, and what gets trucked out on a daily basis. RP-375, lines 13-23. Mr. Bennett had personally visited the Anderson gravel mining pit at issue in this case. RP-

376, line 1. Mr. Bennett stated that he looked at the Anderson mining operation with an interest in the geology formations there and confirmed that the geology there was “part of the Columbia River basalt group. RP-376, lines 6-9.

Mr. Bennett stated the pit was highly variable, some less desirable areas full of clay could have a conversion factor of less than 2 tons per cubic yard, but the areas with the best material to make nice asphalt chips “could have a conversion factor as high or even higher than that 2.45. But how they all add up together . . . I just have to average it out over a long period of time and come up with an overall average. And I don’t even want to say what it is based on my – my brief visit there.” RP-387, lines 4-16.

In any event, Mr. Bennett, agreed that the survey measurements of volume are “very accurate”. RP-391, lines 4-6. However, no matter what, without the weight scale tickets and tonnage records required of the defendant Lessee CRM, conversion of the liquidated amounts of the surveyed materials taken would require a conversion which required some aspect of estimation of the reasonable amount of tons to be figured for each cubic yard of material taken.

Plaintiffs’ expert, Mr. Moorer was then able calculate exactly

\$508,448 in removed materials that had not been paid for. RP-243, lines 10-13. Mr. Moorner also found that for the materials the defendants actually did pay for from April 1st, 2006 to December 31st, 2006, the defendants underpaid each ton they paid for by ten cents which came to \$27,226.82. RP-243, lines 16-22.

Thus, Mr. Moorner testified that the total unpaid and underpaid materials came to exactly \$535,674.62. RP-244, lines 1-2. These two figures for unpaid and underpaid materials and their sum total and all the math showing all the calculations were also provided to the jury in an evidentiary exhibit admitted into evidence as PE-15. The jury returned a verdict of exactly \$535,674.62 (at CP-2264-5) exactly as calculated by Mr. Moorner, actually using the exact figures in PE-15.

Mr. Moorner then prepared two post-trial sworn declarations in support of the Plaintiff's requests for pre-judgment interest. CP-2044-2051 and a recalculation when the presentation hearing was delayed. CP-2052-6. The defendants then used their own spoliation of all the scale tickets that would have given the actual tons instead of having to convert the liquidated amount of the surveyed volume into the weight measurement in order to argue against the Plaintiff's request for pre-judgment interest.

Plaintiffs asserted the spoliation was obvious due to both the contractual scale ticket record keeping obligations and the fiduciary duties owed and the resulting fact that 42,370 loads of material left the mining site without paying and there were no scale tickets for those.

However, at the December 5th, 2014 court hearing, on Plaintiff's motion for pre-judgment interest, the Court expressed concern that the jury itself had never made a finding of spoliation. This was as if the Court thought spoliation was a cause of action that had to be pleaded as a cause of action and a verdict obtained thereon from the jury rather than a ruling the Court could make in a post-verdict motion for interest, just like motions for fees and costs, that is always handled by the Court not the jury. RP-11 line 23 to RP-13 line 15.

Next, in support of CAG's motion for \$39,000 in costs pursuant to RCW 4.84.185, the Defendants had no response to Ms. Burksfields' declaration and exhibits (CP-2236-2242) showing that CAG was jointly involved in selling materials taken from the Plaintiffs' mine and was clearly putting its name on the sales invoices as doing business side by side with the lessee Defendant CRM. Rather, Defendants just argued that it shouldn't make a difference who was actually selling the material taken

from the Plaintiffs' gravel mine. RP-44. lines 1-9. The reason it made no difference to the defendants is because the Salis and their twin companies CRM and CAG were all operating as a single operation precisely as stated in Ms. Burksfield's declaration. CP-2236-2242. Defendants then emphasized that after the Plaintiff elected not to pursue CAG at trial, the Defense orally moved to dismiss CAG, unopposed by the Plaintiffs, but before the Plaintiffs themselves ever requested a voluntary dismissal. RP-45. lines 2-4. However, this was irrelevant because the same thing could be said regarding the Defendants' own counterclaims against the Plaintiff which the Defendants likewise, silently abandoned at trial without presenting any evidence or testimony thereon and without seeking a voluntary dismissal of their own before the Plaintiff sought its own dismissal order on the counterclaims. Yet we didn't see the Plaintiff make just as baseless frivolous claim allegations against the Defendants.

IV. ARGUMENT

A. THE STANDARD OF REVIEW:

1. A trial Court's decision on whether or not to grant pre-judgment interest based on whether the amount owed was sufficiently liquidated or not is

reviewed for an abuse of discretion. Humphrey Industries v. Clay Street Associates, 176 Wn.2d 662, 672, 295 P.3d 231 (2013) (citing to Scoccolo Constr., Inc. v. City of Renton, 158 Wn.2d 506, 519, 145 P.3d 371 (2006)). “Under this standard, we reverse a trial court’s decision only if it ‘is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons. Untenable reasons include errors of law’.” Humphrey, supra, at 672 (citing to Noble v. Safe Harbor Family Pres. Trust, 167 Wn.2d 11, 17, 216 P.3d 1007 (2009)).

2. A trial Court’s award of attorney’s fees or costs pursuant to RCW 4.84.185 for defending against allegedly frivolous litigation is reviewed for an abuse of discretion. Alexander v. Sanford, 181 Wash. App. 135, 183-184, (2014)(citing to Rhinehart v. Seattle times, Inc., 59 Wash. App. 332, 339-340, 798 P.2d 1155 (1990)). A trial court abuses its discretion if its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. Salas v. Hi-Tech Erectors, 168 Wn.2d 664, 668-69, 230 P.3d 583 (2010). “A discretionary decision ‘is based on untenable grounds’ or made ‘for untenable reasons’ if it rests on facts unsupported in the record or was reached by applying the wrong legal

standard." State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008) (emphasis omitted) (internal quotation marks omitted) (quoting State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

B. The Analytical Framework (Argument and Authority):

1. PRE-JUDGMENT INTEREST:

In this case, the parties expressly agreed in their lease (DE-2.2, page 4, para 3.1) that the survey measurements would govern on any dispute or discrepancy regarding materials taken and not paid for. Those survey measurements accurately and objectively confirmed the exact, liquidated amount of the cubic yardage of the volume of material which taken and not paid for.

The surveys were entirely necessitated solely because the defendants SPOLIATED all the actual scale ticket tonnage records for of 345,882.85 cubic yards taken which would have listed the tons without the need for any tons per cubic yard conversion factor. The 2.45 tons per cubic yard figure was conservatively and unanimously used to the benefit of the Defendant by all the experts and was sole conversion factor used by all the parties at the trial, such that the jury itself didn't exercise any of their own

opinion or discretion.

The use of the conversion factor was not only accepted by and actually used by every expert and witness in the case and in the parties' competing calculations presented to the jury on the amounts owed or not owed, it was solely and entirely necessitated by the Defendants' own spoliation of the scale ticket records which would have provided the actual tonnage weights as the Plaintiff was promised and supposed to be entitled to, per the lease agreement and the benefit of the bargain thereof.

To remedy spoliation of evidence by a party, which had knowledge and notice that the evidence was relevant to the case and to the claims of one or even both parties, and being specifically requested by the other party for the opportunity for examination and evaluation of the same, the Court should presume that the spoliated evidence would have been adverse to the party responsible for the spoliation AND the Court may also shift the burden of proof regarding the spoliated evidence to the party responsible for the spoliation. Marshall v. Bally's Pacwest, Inc., 94 Wash. App. 372, 972 P.2d 475 (1999). See again Plaintiff's brief to the trial Court at CP-2228.

Accordingly, this Court should reject any quibbling from the

Defendants over the use of the conversion factor necessitated by the Defendants' own spoliation of the scale weight ticket records which necessitated the surveys of missing cubic yardages in the first place, never mind the fact that the defendants have already been given every possible undeserved indulgence and benefit of the doubt in the start dates and measurements already.

The Court will keep in mind that Prejudgment interest is favored in the law because it promotes justice and is designed to compensate the Plaintiff for the lost usage of the money that should have been paid by the Defendants. Seattle-First National Bank v. Washington Ins. Guarantee Association, 94 Wash. App. 744, 759-760, 972 P.2d 1282 (1999).

The defendants' brief offered the following quote: "Certainly, a defendant should not, however, be required to pay prejudgment interest in cases where he is unable to ascertain the amount he owes to the plaintiff." Hansen v. Rothaus, 107 Wn.2d 468, 473, 730 P.2d 662 (1986)(further citations omitted). However, that cite left off a key part of the rest of the actual quote which originally came from Prier v. Refrigeration Engineering Company, 74 Wn.2d 25, 34 (1968) was:

. . . he who retains money which he ought to pay to another should be charged interest upon it. The difficulty is that **it cannot well be said one ought to pay money, unless he can ascertain how much he ought to pay with REASONABLE EXACTNESS. MERE DIFFERENCE OF OPINION as to amount is, however, no more a reason to excuse him from interest than difference of opinion whether he legally ought to pay at all.** which has never been held an excuse.

Id., at 34 (citing to Laycock v. Parker, 103 Wis. 161, 79 N.W. 327 (1899), quoted extensively in 5 A. Corbin, Contracts § 1046 n.69 (1964)). In this case, the need to convert the 345,882.85 cubic yards taken into tons by the use of a conversion factor from yards to tons is **STILL “REASONABLY” EXACT ENOUGH** to still be considered liquidated under all the circumstances of our case at bar. This case had reasonable exactness regardless of any alleged difference of opinion on the conversion factor, even though both sides of the case used the same 2.45 tons per cubic yard conversion factor.

The weigh and pay requirement of the lease required that a scale ticket be issued for every load measuring every ton precisely so the Defendants would be able to ascertain the amount owed to the Plaintiffs. DE-2.2, page 4, paragraph 3.1. The parties also agreed that surveyed

measurements would also prevail for the ascertainment of the amount owed. Id. So the Defendants actually stipulated to the use of a conversion factor. The conversion factor simply gave an average tons per cubic yard. 2.45 was the factor actually used by all the experts, even though Plaintiff's expert Moorer and Defendant's expert Bennett, both stated it could easily be higher (more tonnage per cubic yard).

The bottom line is there was no agreement that the Defendant could take **exactly 345,882.85 cubic yards of material** for nearly 7 years without paying anything or any interest thereon just because they spoliated weight tickets and the taking dates thereon, and get it all interest free as a reward for stealing and trying to cover it up by getting rid of what must have been tens of thousands of scale tickets for 847,413 tons (over 42,370 loads at a generous mere 20 tons per load – that is at least 42,370 missing conveniently missing scale tickets for each unpaid load of the materials that definitely left the Anderson mine.).

Spoliating around 42,370 scale tickets wasn't the only method the Defendants used to try to cover up the takings. Defendants also got caught during trial trying to fabricate and alter the evidence by changing the

letterhead on at least one invoice to make it look like a direct sale by LSL to a third party, and on top of that altered the tonnage on an invoice by 10,000 tons. See again DE-7 (Invoice and Credit Memo May 2004) and PE-5. See also DE-7, invoice #38, and compare to PE-14.

Aside from all the spoliation and some outright fraud trying to cover up the taking without paying and or the intentional underpayment over a steady course of nearly 7 years, dripping wet, Defendants claim that their Geologist expert George Bennett had once mentioned that the lowest possible conversion rate was possibly as low 2.00 before conceding that figure was inappropriate and that 2.45 was more than reasonable (as conservatively accepted and unanimously used by Moorer, Witter, Rothenbueller, and Bennett) because it could have been even higher.

Any modest difference in the interest calculations from using the 2.45 conversion factor deemed to be reasonably acceptable by all the experts instead of the lowest possible one that even Bennett admitted that he felt was not appropriate, is more than made up for by the fact that Plaintiff could have but did not ask for any interest for the two years the defendants were stealing material from 4-1-06 to the date of the first survey, or the next

three and a half years of interest free takings to the second survey, or the next one and half years of interest free takings to the third survey, or the eight months of interest free intentional underpayments. That is more than a wash in the Defendants' favor.

The bottom line is that based on Defendants' own intentional takings without paying and spoliation and their attempt to literally cover it all up, is that their own actions have forced the use of a conversion factor in the first place. As such, they are **EQUITABLY ESTOPPED** from complaining and the court should presume based on the Defendants' spoliation, the scale tickets would have actually shown more than the 847,413 tons that the Plaintiff showed, or the Defendants would have gladly shown the tickets to establish otherwise.

Like the Doctrine of Spoliation, the doctrine of Equitable Estoppel is grounded in the principle "that a party should be held to a representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon [or who is forced to rely]." Wilson v. Westinghouse Elec. Corp., 85 Wn.2d 78, 81, 530 P.2d 298 (1975). A party seeking the protection of the doctrine

must establish three elements: "(1) an admission, statement, or act inconsistent with the claim afterwards asserted; (2) action by the other party on the faith of such admission, statement or act; (3) injury to such other party resulting from permitting the first party to contradict or repudiate such admission, statement, or act." *Id.* See again Plaintiff's arguments thereon to the trial court at CP-2232-3.

Since the Defendant blocked the Plaintiff from showing the actual tons by conveniently getting rid of over 42,370 weight scale tickets, and forced the surveys to measure volume instead, which confirmed 345,882.85 liquidated cubic taken and not paid for, the Defendants should be equitably estopped from claiming the weights were not proven with "exactness" sufficient for application of prejudgment interest for the payment owed and withheld thereon all these years.

A defendant "who retains money which he ought to pay to another should be charged interest upon it." The fact of the matter is that the Defendants have unjustly enriched themselves by wrongful actions to the detriment of the Plaintiffs. That is the bottom line and additionally, Defendants should never be rewarded and unjustly enriched by evading

nearly \$300,000 in interest by simply spoliating the evidence of what is owed in order to evade the interest owed. Any complaint with crocodile tears about having themselves forced the use of a conversion factor is the defendants own making for their illicit taking without weighing and paying in direct breach of the lease that was designed to avoid this controversy.

In any event, the Defendants have absolutely nothing to quibble about regarding the \$290,298.33 in interest on the unpaid \$508,448 worth of materials (345,882.85 cubic yards/847,413 tons/42,370 truckloads over 7 years) in interest they owe for the materials they've took and didn't bothered to pay anything for since April 1st, 2006 through the date of presentation on December 5th, 2014. The figure would be even much higher if it was calculated from the dates the material was actually taken based on scale tickets rather than merely the after the fact surveys years later, which already gave the Defendants years and years of extra interest free takings.

The jury award for the taken and unpaid material at issue was not a subjective pain and suffering award or a subjective appraisal opinion valuation like for a painting or piece of art. This was an objectively

surveyed materials taken and not paid for case which involved highly accurate and actually surveyed liquidated cubic yardage measurements agreed upon in advance by the parties. Those surveys did not involve any reliance on opinion or discretion whatsoever, and instead solely involved the use of completely objective precision measuring instruments and mathematical calculations at multiple levels in spite of all the spoliation and missing dates.

This is key **because “[i]t is the character of the original claim, rather than the court's ultimate method for awarding damages, that determines whether prejudgment interest is allowable.** Prier v. Refrigeration Engineering Co., 74 Wn.2d 25, 33, 442 P.2d 621 (1968). Here, the clearly liquidated character of the original claim (the liquidated volume of the objectively measured unpaid materials taken = exactly 345,882.85 cubic yards determined by survey precisely as called for in the lease), rather than the ultimate method for awarding the damages thereon by converting the same into tons, is what should govern the issue of whether to award prejudgment interest for 7 years of non-payment for materials taken. The only thing that involved a small degree of estimation out of

necessity was the fact that the Defendants forced a tiny bit of opinion and discretion into one small aspect of the conversion process of the underlying liquidated volume taken, by spoliating the critical contractually mandated weight and date scale ticket evidence needed to maintain the exactness of the surveyed amounts taken.

Defendants accomplished this by eliminating the taking dates and actual weights on about 42,370 scale tickets that would have had the start dates and actual weights for interest owed. This reduced the Plaintiff to the tail end three survey dates and three cubic yardage volume measurements that would have to be forced into a conversion estimation rate because it is simply impossible measure each of the 345,882.85 cubic yards at issue because the defendants took and sold the material but got rid of the scale tickets. Even if the Plaintiff had took and weight a cubic yard of material from dozens, or hundreds, or even thousands of locations at the mining site, the Defendant would still make the exact same arguments in an effort to evade paying the interest that should be paid.

It is nothing but the Defendants' own blatant spoliation of records on tons and dates taken in direct violation of the lease and of their fiduciary

duties owed which appears to involve over 42,370 missing scale ticket records over nearly 7 years which forced the survey in the first place and thus required the conversion of the 345,882.85 cubic yards measured into the tons owed for royalties.

The defendants are requesting to be granted a free pass from interest as a reward for what amounts to their 7 years long 345,882.85 cubic yard taking without paying, and the attempt to cover it all up with spoliation and self-induced quibbling designed to cheat the plaintiffs even further. This was despite the Defendants Sali brothers' ongoing fiduciary duties to the contrary. In any event, our State Supreme recently confirmed in a 9-0, unanimous decision quoting from our United States Supreme Court, the highest law of the land, as follows:

‘THE MOST ELEMENTARY CONCEPTION OF JUSTICE AND PUBLIC POLICY REQUIRE THAT THE WRONGDOER SHALL BEAR THE RISK OF UNCERTAINTY WHICH HIS OWN WRONG HAS CREATED.’

Moore v. Health Care Authority, 181 Wn.2d 299 (Aug. 2014)(Emphasis added)(citing to Wenzler & Wad Plumbing & Heating Co. v. Sellen, 53 Wn.2d 96, 99, 330 P.2d 1068 (1958)(quoting Bigelow v. RKO Radio

Pictures, Inc., 327 U.S. 251, 265, 66 S.Ct. 574, 90 L.Ed 652 (1946)); See also Jacqueline's Wash., Inc. v. Mercantile Stores Co., 80 Wn.2d 784, 790, 498 P.2d 870 (1972)(quoting Wenzler, supra. at 99).

2. RCW 4.84.185:

Likewise, the standard for applying RCW 4.84.185 was not what was presented at trial, because the Plaintiffs simply elected not to pursue the claims against CAG. The sole issue for the alleged application of RCW 4.84.185, is whether there was a legitimate argument for filing the claim. The fact that a claim might or might not have been dismissed on summary judgment is not dispositive. **“A FRIVOLOUS ACTION IS ONE THAT CANNOT BE SUPPORTED BY ANY RATIONAL ARGUMENT ON THE LAW OR FACTS.”** Alexander v. Sandord, 181 Wash. App. 135, 184 (2014)(citing to Rhinehart v. Seattle Times, Inc., 59 Wash. App. 332, 340, 798 P.2d 1155 (1990))(emphasis added).

“In order for the court to award attorney fees [and or costs] under RCW 4.84.185, the lawsuit must be frivolous in its ENTIRETY and ‘advanced without reasonable cause.’” Alexander, supra. at 184 (citing to N. Coast Elec. Co. v. Selig, 136 Wash. App. 636, 650, 151 P.2d 211 (2007)).

Therefore, the issue is whether the Plaintiffs made any rational arguments on the law or the facts or whether the claims asserted against CAG were frivolous in their entirety.

When the Defendant filed the motion seeking RCW 4.84.185 reliefs after claims of both parties were dismissed as abandoned at trial, the Plaintiff Deborah Burksfield filed her declaration in response at CP-2236-2242, which Plaintiffs reiterated in oral arguments in opposition to Defendant CAG's motion at RP-52 line 4 through RP-54, line 12. The moving party defendants had no declaration to support their motion at all, but just made conclusory arguments alleging frivolity.

However, the Court ignored the sole uncontested declaration before him of Plaintiff Burksfield. Instead, the Court just took the mere fact that just like the Defendants elected not to pursue any of their counterclaims at trial either, the Plaintiff had likewise simply elected not to present the case at trial "there was no testimony. . . no argument to the jury" as wholly sufficient evidence of frivolity. RP-58 line 22 through 59, line 7. Those were the sole findings of fact regarding frivolity, but literally no discussion whatsoever regarding any findings on reasonableness when RCW 4.84.185

required written findings of fact, not just a legal conclusion.

Assuming the Court's oral comments were the written findings of fact, the Plaintiffs' respectable decision not to pursue the claim does not create frivolity by mere implication. If that was all that was required to establish frivolity, it would be a dangerous slippery slope indeed which could apply almost regularly in most cases. That is clearly not the correct legal standard.

In Plaintiff Burksfield's post-trial declaration and exhibits at CP-2236-2242, Plaintiff Deborah Burksfield, explained how the Plaintiffs made the tactical decision not to waste time pursuing CAG at trial, because full relief could be obtained by simply focusing mainly on CAG's twin company, the actual lessee Columbia Ready-Mix also operated interchangeably by the same Sali brothers already, and still got the same full reliefs without any further bother.

Ms. Burksfield further explained her personal knowledge as the former CFO of both Columbia Ready-Mix and Columbia Asphalt & Gravel, that both companies were always operated as one single company, and at all relevant times to the lawsuit had the exact same set of directors for each

company (the Sali brothers), with each company and directors operating out of the exact same office and location, sharing a single accounts receivable person preparing all invoices either company but with both companies' letterheads placed on all invoices given out to all the customers for either of them, sharing a single accounts payable person paying the debts of either one of them, and the fact that the CRM and CAG used a single dispatcher together for both companies to schedule the removal of the materials at issue taken from the LSL gravel mine at issue.

Defendant's motion simply asserted the fact that the Plaintiff did not put on its case, rather than actually proof that the claim was improperly asserted without ever having any basis at all. Rather, the order dismissing CAG simply noted that Plaintiff elected not to pursue the claims and otherwise stipulated to the dismissal. CP-2243-2244. Plaintiffs' original complaint asserted that CAG was wholly owned by the Sali brothers, personally, who were the identical shareholders, officers and directors of both CAG and CRM. CP-4, lines 7-22; See also Amended complaint repeating the same allegations again at CP-1813, lines 7-22, and this time around further explaining the link of CAG to the dispute and the case at CP-

1814 lines 7 to CP-1815 line 20 and asserting the alter-ego theory of corporate disregard.

While the defendants denied the allegations, the sole challenge proffered by CAG to liability was to merely argue that the claim for damages against CAG was could not reach further back than three years from the date of the amended complaint based on a statute of limitation argument and an argument against relation back under CR 15. CP-1845, lines 17-21, CP-1847, lines 7-22, and CP-1851-1851.

However, beyond merely trying to limit the REACH of the claim against CAG, at no time, before, during or after trial did the Defendants ever provide the court with any allegation or even any factual or legal basis for establishing there was any lack of a genuine material fact or any CR 11 insufficient basis to support a good faith, non-frivolous filing of the claims against CAG beyond the defendants' mere say-so.

Yet, after the Plaintiff exercised the discretion as the better part of valor to let CAG walk at trial, Defendants' Motion and memorandum for fees and costs against the Plaintiff was solely based on the fact they were voluntarily dismissed after the Plaintiff simply chose not to pursue CAG at

trial, getting the full amount requested in PE-15 from the other defendants instead and getting paid in full thereon. In that regard, Defendant CAG merely argued that the claim that was pleaded against CAG in the amended complaint was "frivolous". CP-2064, lines 28-30.

Defendant CAG submitted bare argument that under RCW 4.85.185, the Plaintiff's claims against CAG were not "supported by any rational argument based in fact or law . . . [simply because] Plaintiffs never provided evidence or testimony [at trial] establishing that CAG breach any fiduciary duty to Plaintiffs." CP-2065, lines 5-26. Unfortunately, that was not even the claim against CAG. See again, Plaintiff's amended complaint at CP-1813, lines 7-22 and CP-1814 line 7 to CP-1815 line 20, which the Defendants' motion for fees and costs and arguments never addressed at all.

V. ATTORNEY FEES AND COSTS:

Plaintiff is specifically requesting fees incurred for pre-judgement interest portion of this appeal pursuant to RCW 4.84.330 and the fee shifting provisions of paragraph 3.2 of the LSL, LLC agreement at DE-2.1, and the Plaintiff will comply with RAP 18.1 and 14.4 as needed.

VI. CONCLUSION

For the reasons set forth above, this Court should reverse the trial court's ruling and find the Appellants were entitled to recover prejudgment interest as requested. This Court should also reverse the trial court's award of RCW 4.84.185 frivolous action costs that was imposed against the Plaintiffs. Respectfully submitted this 22nd day of June, 2015.



DAVID B. TRUJILLO, WSBA #23580,
Attorney for Appellants Burksfield and LSL.

Appendix A

filed
12-5-14

Docket
#364

HONORABLE MICHAEL G. MCCARTHY

2 pages

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IN THE SUPERIOR COURT OF WASHINGTON
FOR YAKIMA COUNTY

DEBORAH BURKSFIELD, a single individual; LSL PROPERTIES, LLC, a Washington limited liability company,

Plaintiff,

v.

LARRY SALI and GAYLE SALI, husband and wife; STEVEN SALI and DELETA SALI, husband and wife; COLUMBIA READY-MIX, INC., a Washington corporation; COLUMBIA ASPHALT & GRAVEL, INC., a Washington corporation; JOHN ROTHENBUELLER, an individual; ALEGRIA & COMPANY, P.S., a Washington professional service corporation,

Defendants.

Case No.: 11-2-01268-8

ORDER DISMISSING ALL THE COUNTERCLAIMS OF THE DEFENDANTS WITH PREJUDICE

THIS MATTER came before the Court on November 16th, 2014, following the resting of the Defendants on the Defendants' case in chief. The Court, upon stipulation of the parties, and being otherwise fully advised, NOW THEREFORE:

1 IT IS HEREBY ORDERED THAT: The Defendants' Counterclaims against
2 Plaintiff Deborah Burksfield, which the Defendants pleaded but presented no evidence at
3 trial, and otherwise stipulated to the dismissal of said claims, are hereby dismissed with
4 prejudice as a matter of law.

5
6 DONE IN OPEN COURT this 5th day of December, 2014.

7
8
9 /s/ Michael McCarthy
10 JUDGE/COURT COMMISSIONER

11
12 PRESENTED BY:

13 Attorney for Plaintiffs:

14
15 BY: David Trujillo
16 DAVID B. TRUJILLO, WSBA# 25580

17 APPROVED AS TO FORM AND CONTENT
18 AND NOTICE OF PRESENTATION WAIVED:

19
20 BY: _____
21 SEAN A. RUSSELL, WSBA # _____

22
23 AND BY: _____
24 JOHN A. MAXWELL, JR., WSBA # _____