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

NO. 337197

ALFRED W. BUCHELI

Appellant

v.

WING CENTRAL'S ROADHOUSE GRILL, INC., and WC
ROADHOUSE, LLC,

Respondents

BRIEF OF APPELLANT

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I. INTRODUCTION

Alfred Bucheli owns a butcher shop in Yakima, Washington. Mr. Bucheli sells sausage, bacon and meat at his shop. Mr. Bucheli also owns real property, and a restaurant building situated on the property, in Ellensburg, Washington. From 2002 to 2007, Mr. Bucheli operated the Matterhorn Restaurant on the property. During the time he operated the restaurant, Mr. Bucheli's butcher shop supplied the meat products that he used in the Matterhorn Restaurant.

James and Shannon Rowe are married. Shannon Rowe is the sole member of WC Roadhouse LLC and the sole shareholder of Wing Central's Roadhouse Grill, Inc. They own and operate restaurants. For purposes of this brief, Mr. Bucheli refers to the Respondents WC Roadhouse LLC, Wing Central's Roadhouse Grill, Inc., and James and Shannon Rowe collectively as "Wing Central's".

In 2007, Mr. Rowe approached Mr. Bucheli about buying the Matterhorn Restaurant. Mr. Bucheli had always refused to sell it to Mr. Rowe in the past. Mr. Bucheli made clear that he would not lease the property unless Wing Central's agreed to purchase all of its meat products from Mr. Bucheli's butcher shop. After Mr. Rowe said that he would buy meat from Mr. Bucheli as part of his lease of the Matterhorn Restaurant,

Mr. Bucheli agreed to lease the restaurant property to Wing Central's, with an option to purchase.

Under the Lease, Wing Central's agreed to purchase meat from Mr. Bucheli and to pay a 20% surcharge if it purchased available meat products elsewhere. Mr. Bucheli insisted on the meat purchase agreement because it provided him with an outlet for his butcher shop's meat products and an additional source of revenue. Mr. Rowe agreed to purchase meat products from Mr. Bucheli and told Mr. Bucheli that he would be the Roadhouse Grill's "in-house butcher".

When they entered into the lease, the parties shared the mistaken belief that there were no legal impediments to Wing Central's agreement to purchase all meat products from Mr. Bucheli. Neither party had knowledge of any laws or regulations that potentially applied to Wing Central's agreement to purchase meat from Mr. Bucheli's butcher shop. The parties believed that Mr. Bucheli's butcher shop could sell meat to Wing Central's in the same manner as he had provided meat to the Matterhorn Restaurant.

Shortly after signing the lease, Wing Central's stopped buying meat from Mr. Bucheli and refused to pay the 20% surcharge for meat products it purchased elsewhere. Wing Central's refused to buy meat from Mr. Bucheli because it claimed that Mr. Bucheli's meat was of

insufficient quality for use in Wing Central's restaurant. Long after it stopped buying meat from Mr. Bucheli due to claimed quality issues, Wing Central's suggested that the parties' could not perform their agreement without violating United States Department of Agriculture (USDA) labelling and inspection requirements. Wing Central's did not identify any specific USDA regulation that it claimed the parties' agreement implicated, and did not assert any specific violation of a regulation as a basis for refusing to buy meat from Mr. Bucheli until 2011.

The parties' mistaken belief that Mr. Bucheli could provide Wing Central's with the meat Wing Central's needed for use in Wing Central's restaurant was a basic assumption upon which the parties entered into the lease. The mistake had a material effect on the parties' agreed exchange of performances. Mr. Bucheli would not have leased the restaurant if Wing Central's would not have agreed to purchase its meat from Mr. Bucheli. Wing Central's had an option to purchase Mr. Bucheli's restaurant that it could exercise if it was not in default. Mr. Bucheli refused to sell the restaurant because he alleged that Wing Central's was in breach of the lease and option to purchase by refusing to buy meat products or pay the 20% owed for not purchasing meat from Mr. Bucheli.

Wing Central's filed a lawsuit alleging, among other things, a claim for specific performance asking that Mr. Bucheli be required to sell

the restaurant to them. Mr. Bucheli alleged mutual mistake and that the parties did not know that any regulation would prevent Mr. Bucheli from selling meat products to them. Wing's Central moved for summary judgment on its claims and on Mr. Bucheli's counterclaim of mutual mistake. The trial court granted Wing Central's summary judgment on its claim for specific performance of the lease and option to purchase and dismissed Mr. Bucheli's mutual mistake counterclaim.

Under the lease, Wing Central's agreed to purchase Mr. Bucheli's inventory. Wing Central's did not pay for \$2,556.56 in inventory. The lease expressly conditioned the option to purchase on Wing Central's not being in default under the lease. The trial court ruled, as a matter of law, that Wing Central's failure to pay \$2,556.56 for the inventory was not a material breach of the agreement and that, therefore, Wing Central's could exercise the option to purchase.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred when it determined, as a matter of law, that the parties did not make a mutual mistake as to whether Wing Central's could legally buy the type and quantity of meat from Mr. Bucheli that the lease required.

2. The trial court erred in dismissing Mr. Bucheli's counterclaims that the parties' mutual mistake rendered the lease voidable or subject to reformation, or that Mr. Bucheli is entitled to restitution due to the parties' mutual mistake.

3. The trial court erred in granting summary judgment on Wing Central's claim for specific performance of the option to purchase and in requiring Mr. Bucheli to sell the restaurant to Wing Central's.

4. The trial court erred in ruling, as a matter of law, that Wing Central's failure to pay Mr. Bucheli for inventory was not a material breach of the lease and that Wing Central's was not in default for failing to pay for the inventory.

5. The trial court erred in awarding Wing Central's attorney fees and costs as the prevailing party.

B. Issues Pertaining to Assignments of Error

1. Is the parties' shared belief that Wing Central's could legally purchase the type and quantity of meat products from Mr. Bucheli that the lease required a basic assumption of the lease?

2. Is whether the parties shared a mistaken belief that Mr. Bucheli's butcher shop could legally supply the type and quantity of meat products to Wing Central's that the lease required a material factual issue?

3. Does a question of fact exist as to whether the parties' mutual mistake regarding Mr. Bucheli's ability to supply Wing Central's meat materially affected their agreed upon exchange of performances?

4. Did Mr. Bucheli bear the risk of mutual mistake, as a matter of law, when the lease did not allocate the risk to him and he was unaware of any law or regulation that hindered his ability to sell meat to Wing Central's?

5. Do questions of fact exist as to whether Wing Central's failure to pay Mr. Bucheli for inventory was a material breach of the lease that precluded Wing Central's from exercising the option to purchase?

III. STATEMENT OF THE CASE

Alfred (Fred) Bucheli is 85 years old. Clerk's Papers (CP) 321. He has been a butcher and sausage maker for approximately 68 years. *Id.* Since 1966, Mr. Bucheli has operated a custom meat shop in Yakima, Washington called Matterhorn Meats. *Id.* From 2002 to 2007, Mr. Bucheli owned and operated the Matterhorn Restaurant in Ellensburg, Washington. CP 320. Mr. Bucheli supplied meat products that he prepared in his Yakima butcher shop, including bacon, sausage, steaks, and poultry, for use in the Matterhorn Restaurant. CP 321.

James Rowe approached Mr. Bucheli in 2007 about leasing Mr. Bucheli's restaurant.¹ CP 321. At that time, James and Shannon Rowe were operating a casual restaurant in Ellensburg that served the college market and sold mainly burgers and chicken wings. CP 283. Mr. Rowe had previously approached Mr. Bucheli about buying the Matterhorn Restaurant, but Mr. Bucheli refused to sell. CP 321. Mr. Rowe knew that Mr. Bucheli supplied meat for the Matterhorn Restaurant from Mr. Bucheli's butcher shop. CP 291. As part of Mr. Rowe's offer to lease the restaurant, he said that he would buy the meat for his proposed restaurant from Mr. Bucheli's butcher shop. CP 321.

Mr. Rowe's offer to buy meat for the new restaurant from Mr. Bucheli enticed Mr. Bucheli to lease to Mr. Rowe because it provided Mr. Bucheli with an outlet for his meat products. CP 321-22. Based on the amount of meat that Mr. Bucheli was supplying to the Matterhorn Restaurant, he expected that Mr. Rowe's agreement would create approximately \$2,000 per month in meat sales. CP 321-22. Mr. Bucheli and Mr. Rowe met almost every day for approximately one week about Mr. Rowe's business leasing Mr. Bucheli's restaurant. CP 321. During their negotiations, Mr. Bucheli made clear to Mr. Rowe that he would not

¹ James Rowe is the operations manager of the Roadhouse Grill. CP 311. Shannon Rowe is James Rowe's wife. She was formerly known as Shannon Leahy. CP 310.

lease the restaurant to Mr. Rowe without Mr. Rowe's promise to buy the restaurant's meat from Mr. Bucheli. CP 321. Mr. Bucheli would never have agreed to lease the restaurant without Mr. Rowe's promise to buy meat from him. CP 322.

Mr. Bucheli and Mr. Rowe ultimately negotiated a lease that granted Wing Central's² an option to purchase the restaurant, provided that Wing Central's was not in default. CP 148-67. Paragraph 5 of the lease states:

5. MEAT PRODUCTS: Tenant agrees to purchase at competitive rates all meat products from lessor (d/b/a Matterhorn Meats) so long they are available through lessor, or tenant shall pay lessor a 20% surcharge of available meat products purchased elsewhere.

CP 150. At the time they signed the lease, neither party believed there was anything that would prevent Mr. Bucheli from selling the type and quantity of meat products to Wing Central's that the lease required. CP 291, 321-22, 324. The parties believed that he could sell his meat products to Wing Central's just as he had provided meat to Matterhorn Restaurant, without inspection or labelling. *Id.*

² The lease was between Alfred Bucheli as lessor and WC Roadhouse LLC as tenant. CP 148. WC Roadhouse LLC assigned its rights under the lease to Wing Central's Roadhouse Grill. CP 311. The Rowes personally guaranteed payment and performance of the lease. CP 282, 310.

Exhibit B to the lease provided that Wing Central's would pay for inventory that Mr. Bucheli had at the restaurant when Wing Central's took possession. CP 167. Wing Central's took possession of the restaurant on May 18, 2007. CP 285. Mr. Bucheli suggested to the Rowses that they take inventory on the day the parties signed the lease, but they said they were too busy. CP 325. The parties arranged to meet the following week, but when Mr. Bucheli arrived, the Rowses refused to take inventory. *Id.* For approximately two-to-three weeks, Mr. Bucheli visited the restaurant every day in an attempt to complete the inventory, but Mr. Rowe claimed he was too busy. *Id.* Mr. Bucheli valued the inventory at \$4,083.31. CP 329. The Rowses did not pay for any of the inventory until September of 2007, when they paid \$1,526.75. CP 325. Wing Central's did not pay for the remaining \$2,556.56 in inventory. CP 328.

By September 2007, Wing Central's was not buying the meat products it promised to buy. CP 326, 396-97. Wing Central's menus show that it sold the meat products that Mr. Bucheli sold at his butcher shop. CP 327, 399-406. Mr. Bucheli's attorney sent Ms. Rowe a letter that stated, in part, "It is apparent to Mr. Bucheli you have not been purchasing the restaurant meat requirements from him." CP 396. The Rowses' attorney responded that the Rowses, were "running a different kind of restaurant than was run by [Mr. Bucheli] . . . [The Rowses] serve certain

high end products that [Mr. Bucheli] does not have or does not have at competitive prices.” CP 418. Wing Central’s did not raise any issue of USDA inspection or labelling. CP 418-19.

Mr. Bucheli sent Mr. Rowe a letter on March 10, 2008 stating that Mr. Bucheli was entitled to the 20% surcharge because Wing Central’s stopped buying meat in September 2007. CP 413. Mr. Bucheli proposed an alternative solution: to increase the rent by \$500 per month if Wing Central’s did not want to buy meat from him. *Id.* On April 23, 2008, Mr. Bucheli sent another letter to Mr. Rowe stating that he was forced to charge the 20% surcharge because the Rowses were not buying meat. CP 414. The Rowses did not claim that Mr. Bucheli was violating any USDA regulation as an excuse for refusing to buy meat from Mr. Bucheli. CP 331. On July 30, 2008, Mr. Bucheli’s former attorney sent a letter to Mr. Rowe that asked Mr. Rowe to sign a letter agreeing to increase rent by \$570 per month in exchange for eliminating paragraph 5, the meat purchase provision, from the lease. CP 331, 416. The July 30, 2008 letter noted that “[w]hen Mr. Bucheli agreed to lease the restaurant, sale of meat products was a significant and valuable motivation.” CP 416. The Rowses did not raise meat inspection or labelling as a reason for not purchasing meat products from Mr. Bucheli, and did not agree to the proposed revision to the lease. CP 331.

When the Rowes entered into the lease, they had no knowledge that USDA regulations related to the processing, purchase, sale, and delivery of meat products potentially affected their ability to purchase the type and quantity of meat from Mr. Bucheli that paragraph 5 of the lease required. CP 291. Mr. Rowe also believed that Mr. Bucheli could legally sell and deliver meat products to Wing Central's because he had previously provided meat products from his butcher shop to the Matterhorn Restaurant. CP 291. Mr. Bucheli had no knowledge of any USDA regulations that would potentially affect his ability to sell meat to Wing Central's according to the lease's terms. CP 321-23.

In an undated letter purporting to respond to a March 17, 2008 letter from Mr. Bucheli, Mr. Rowe stated that Wing Central's refused to buy meat from Mr. Bucheli because the Roadhouse Grill was a different type of restaurant than the Matterhorn Restaurant, they had certain meat products that Mr. Bucheli did not provide, and that Wing Central's had quality problems with Mr. Bucheli's meats in the past. CP 205. Although he did not allege it as a basis for refusing to buy meat from Mr. Bucheli, Mr. Rowe's letter states:

Our lawyer says for liability purposes, we must use only products that are USDA approved or are legally exempt from USDA inspection. We also must follow all Health Department and food handling guidelines as well and we're unsure if those or the USDA standards could be

met with Matterhorn Meats selling to a restaurant as opposed to a[n] over the counter customer.

CP 205. Wing Central's continued to refuse to buy meat from Mr. Bucheli, but never claimed that USDA inspection or labeling requirements was a reason until early 2011. CP 326.

Wing Central's discovery responses imply that the Rowes did not raise the issue of illegality until well after they stopped buying meat from Mr. Bucheli. CP 381-83. In response to Mr. Bucheli's interrogatory requesting the reasons that Wing Central's did not purchase meat from Mr. Bucheli, Wing Central's answered: "[Wing Central's] was not aware that [Mr. Bucheli] was a custom butcher, exempt from USDA inspections. They had no reason to believe that he could not deliver all meat needed that was competitive priced and available in the quantities and qualities needed." CP 381. Wing Central's further answered: "As [Wing Central's] became more knowledgeable in their understanding of the kind of meat shop Mr. Bucheli was operating and its limitations, they learned from [USDA Food Safety Inspection Service] inspectors that there was not a single product delivered by Mr. Bucheli that was legal."³ CP 381.

³ Mr. Bucheli disagrees with Wing Central's claim that he could not legally sell any meat to Wing Central's. Wing Central's motion for summary judgment contradicts its claim that he could not legally sell any product to Wing Central's. CP 121. As an exempt custom butcher, Mr. Bucheli could sell up to 25% of his total sales of meat products, in terms

The only documents that Wing Central's produced in discovery to show the claimed illegality were emails between Wing Central's attorney, the Rowes, and Wing Central's expert, former USDA Food Safety Inspection Service (FSIS) inspector Robert Liefert. CP 259, 388-94. The first email is dated February 15, 2011. CP 388. Until then, Wing Central's had not identified any specific alleged illegality in any of Mr. Bucheli's processes as a justification for refusing to buy Mr. Bucheli's meat products. CP 326. Instead, Wing Central's insisted it was not buying meat from him because of claimed deficiencies in the quality of the meat. CP 326, 382.

Wing Central's sued Mr. Bucheli seeking, among other things, a declaratory judgment that paragraph 5 of the lease was unenforceable and that Wing Central's had not violated paragraph 5. CP 86-87. Wing Central's also sought specific performance of the lease's option to purchase, which the Rowes attempted to exercise after filing their original complaint in this lawsuit. CP 89-90, 92. Mr. Bucheli refused to sell due to Wing Central's defaults under the lease. *See* CP 101.

of dollar value, to restaurants and maintain his exemption. *See* 9 CFR §303.1(d)(iii)(b). Wing Central's expert witness, a former USDA FSIS inspector, also agrees that Mr. Bucheli could sell up to 25% of his total meat product sales to restaurants and maintain his exemption. CP 389, 391.

Mr. Bucheli filed counterclaims against Wing Central's for ejectment, declaratory judgment as to whether Wing Central's breached the lease and as to whether federal or state law prevented him from selling meat to Wing Central's, breach of lease, and mutual mistake. CP 101-02. On his mutual mistake counterclaim, Mr. Bucheli sought an order declaring that the lease is voidable and canceled by Mr. Bucheli on the basis of mutual mistake as to his ability to sell meat to Wing Central's under paragraph 5 of the lease. CP 102. Alternatively, Mr. Bucheli requested reformation and restitution. CP 102.

The trial court granted Wing Central's summary judgment on its specific performance claim and ruled that Wing Central's was not obligated to purchase meat from Mr. Bucheli under paragraph 5 of the lease. CP 504. The trial court dismissed Mr. Bucheli's counterclaims. CP 505. In dismissing Mr. Bucheli's counterclaim for breach of the lease related to Wing Central's failure to pay for inventory, the court ruled that Mr. Bucheli's claim that Wing Central's "failed to pay for inventory in the maximum amount of \$2,556.56 is not material [] since the Plaintiffs have offered to pay and tendered that amount to avoid further proceeding plus interest at 12%." CP 505. The court required Mr. Bucheli to sell the restaurant to Wing Central's and pay reasonable attorney's fees and costs. CP 505-06.

IV. ARGUMENT

A. Standard of Review

Appellate courts review summary judgment orders de novo, considering the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). Mr. Bucheli, the non-movant, is entitled to every favorable inference from the facts in the affidavits. *Meadows v. Brant's Auto Brokers*, 71 Wn.2d 874, 881, 431 P.2d 216 (1967). Courts should grant summary judgment only if reasonable people could reach but one conclusion from the evidence. *Morris v. McNicol*, 82 Wn.2d 491, 494, 519 P.2d 7 (1974).

Summary judgment is inappropriate “if the record shows any reasonable hypothesis which entitles the non-moving party to relief.” *Mostrom v. Pettibon*, 25 Wn. App. 158, 162, 607 P.2d 864 (1980). Wing Central’s bears the burden of proving, by uncontroverted facts, that no genuine issue of material fact exists. *Olympic Fish Products, Inc. v. Lloyd*, 93 Wn.2d 596, 602, 611 P.2d 737 (1980).

Wing Central’s cannot meet its burden to show that no genuine issues of material fact exist. Material questions of fact exist regarding whether the parties made a mutual mistake as to Wing Central’s ability to

purchase meat from Mr. Bucheli and whether Wing Central's failure to pay for the inventory was a material breach of the lease.

B. Genuine issues of material fact exist regarding the parties' mutual mistake as to Wing Central's ability to buy the amount and type of meat from Mr. Bucheli that the lease required.

Material factual issues exist regarding whether the parties entered into the lease with the mistaken belief as to Wing Central's ability to buy meat products from Mr. Bucheli to sell in Wing Central's restaurant. A party seeking to rescind or reform an agreement on the basis of mutual mistake must show by clear, cogent, and convincing evidence that the parties were independently mistaken. *Denaxas v. Sandstone Court of Bellevue, LLC*, 148 Wn.2d 658, 669, 63 P.3d 125 (2003); *Simmonson v. Fendell*, 101 Wn.2d 88, 91, 675 P.2d 1218 (1984). A mistake is a "belief not in accord with the facts." *Chemical Bank v. Wash. Pub. Power Supply Sys.*, 102 Wn.2d 874, 898, 691 P.2d 524 (1984) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 151 (1981)).

A mutual mistake of law has the same effect as a mutual mistake of fact. Washington courts recognize that the Restatement (Second) of Contracts does not distinguish between mistakes of fact and mistakes of law. *Scott v. Petett*, 63 Wn. App. 50, 58, 816 P.2d 1229, 1235

(1991)(citing RESTATEMENT (SECOND) OF CONTRACTS § 151, cmt. b (1981)). Restatement § 151 “treat[s] the law in existence at the time of the making of the contract as part of the total state of facts at that time.” RESTATEMENT (SECOND) OF CONTRACTS § 151, cmt. b.

Questions of fact exist regarding Mr. Bucheli’s mutual mistake claim. Whether a mutual mistake exists is a question of fact. *See e.g., Matter of Estates of Wahl*, 99 Wn.2d 828, 831, 664 P.2d 1250 (1983). (“There is a question of fact as to whether the Wahls were mistaken as to the effect of the language of the community property agreement”); *Foye v. Shore*, 31 Wash. 686-687, 71 P. 1134 (1903); *Obendorf v. F.D.I.C.*, 67 F. Supp. 2d 1223, 1230 (D. Idaho 2009). The critical time for determining whether a mutual mistake exists is when the contract is made. *See Denaxas*, 148 Wn.2d at 668.

In *Chemical Bank*, the court held that certain participants in agreements for the construction of nuclear power plants were excused from performance under the contracts because all parties to the contracts were mistaken as to the authority of the municipalities and public utility districts (PUDs) to enter into the contracts. 102 Wn.2d at 898-99. All parties to the contracts presumed that the municipalities and PUDs were statutorily authorized to enter into the contracts, though they were not. *Id.* The court held that “the assumption that the municipalities and PUDs had

statutory authority was a mistaken assumption material to the contract.”

Id. Because the court also determined that the participants seeking to avoid performance did not bear the risk of the mutual mistake, the court held that the participants were released from their contractual obligations under the mutual mistake doctrine. *Id.* at 899.

In light of the parties’ intent, as expressed in paragraph 5 of the lease, the parties’ mutual mistake as to Mr. Bucheli’s ability to sell the amount and type of meat to Wing Central’s that the lease requires renders the lease voidable or, at a minimum, subject to reformation. The Restatement (Second) of Contracts § 152 states that a contract is voidable for mutual mistake when:

(1) Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of mistake under the rule stated in § 154.

(2) In determining whether a mistake has a material effect on the agreed exchange of the performances, account is taken of any relief by way reformation, restitution, or otherwise.

The parties’ belief that Wing Central’s could legally purchase its meat from Mr. Bucheli, in same the manner in which he had supplied Matterhorn Restaurant with meat, is a basic assumption of the lease. *See*

RESTATEMENT (SECOND) OF CONTRACTS § 152(1). To the extent that USDA regulations prevented Wing Central's from buying the amount and type of meat products from Mr. Bucheli that the lease requires, the parties' belief that Mr. Bucheli could supply the necessary quantity and type of meat to Wing Central's was not in accord with a basic assumption on which the parties contracted. *See* RESTATEMENT (SECOND) OF CONTRACTS § 152(1); CP 291, 321-23, 326-27.

The evidence, viewed in the light most favorable to Mr. Bucheli, shows the parties intended that Wing Central's would buy from Mr. Bucheli the meat products that he sold and that, if Wing Central's bought meat products that Mr. Bucheli sold from another source, Wing Central's would pay him a 20% surcharge as a penalty for not doing business with Mr. Bucheli. "[E]xtrinsic evidence is admissible as to the entire circumstances under which the contract was made, as an aid in ascertaining the parties' intent." *Berg v. Hudesman*, 115 Wn. 2d 657, 667, 801 P.2d 222 (1990) (Adopting RESTATEMENT (SECOND) OF CONTRACTS §§ 212, 214(c) (1981)).

Mr. Rowe approached Mr. Bucheli about purchasing the Matterhorn Restaurant on multiple occasions, but Mr. Bucheli refused to sell. CP 321. Mr. Rowe later offered to lease from Mr. Bucheli and buy meat for the restaurant from Mr. Bucheli. CP 321. Mr. Bucheli agreed to

lease the restaurant on the condition that Wing Central's bought its meat from him. CP 321-23. During their negotiations, Mr. Rowe told Mr. Bucheli that he would "be like an in-house butcher." CP 321. Mr. Rowe assured Mr. Bucheli that Mr. Rowe could improve restaurant sales by featuring Mr. Bucheli's meat products. CP 324.

It is undisputed that when the parties entered into the lease, they believed that nothing prevented Wing Central's from buying the amount and type of meat required in the lease from Mr. Bucheli. CP 291, 321-23, 326-27. The parties were unaware of any USDA regulations that impacted the parties' agreement for Mr. Bucheli to supply meat products to Wing Central's when they signed the lease.⁴ *Id.* Mr. Bucheli's former attorney's statement, contained in a letter he wrote well after the lease was executed, that changing the restaurant's name "could cause a USDA inspection problem" is irrelevant because the letter is not evidence of Mr. Bucheli's belief at the time he entered into the lease. *See Denaxas*, 148 Wn.2d at 668 ("The [mistaken] belief must be held at the time the contract is made.").

⁴ The parties' lack of knowledge is reasonable in light of the complexity of the federal statutes and USDA regulations that potentially apply to Mr. Bucheli's butcher shop and Wing Central's agreement to buy meat from Mr. Bucheli. *See* 9 CFR §302.1; 9 CFR §302.3; 9 CFR §303.1; *see also* 21 U.S.C. §623.

The parties' mistaken belief materially affected the parties' agreed exchange of performances because Mr. Bucheli would never have leased the restaurant to Wing Central's without Wing Central's promise to buy his meat or pay a surcharge. *See* RESTATEMENT (SECOND) OF CONTRACTS § 152(1); CP 150, 321-23. Mr. Bucheli made it clear to Mr. Rowe that the only way he would lease the restaurant to Wing Central's was if Wing Central's would use meat from Mr. Bucheli's butcher shop. CP 321-23. Mr. Bucheli insisted on paragraph 5 of the lease because it provided him with a guaranteed source of revenue in addition to the rent. CP 150, 322-23. The parties' mistake had a material effect on the agreed exchange of performances because allowing Wing Central's to avoid purchasing meat from Mr. Bucheli or paying him 20% of the cost of meat Wing Central's purchased elsewhere deprived Mr. Bucheli of all of the benefit that the parties afforded to him by agreeing to paragraph 5 in the lease. *See* RESTATEMENT (SECOND) OF CONTRACTS § 152 cmt. c.

Additionally, whether the lease was enforceable if USDA regulations rendered full performance of paragraph 5 illegal presents a question of fact that precludes summary judgment. "When part of an agreement is illegal and thus unenforceable, but part is legal and enforceable, a court may enforce the legal part "only where the unenforceable portion is not an 'essential part' of the consideration given

to support the contract.” *Nolte v. City of Olympia*, 96 Wn. App. 944, 958, 982 P.2d 659 (1999). “Whether the unenforceable portion is ‘an essential part of the consideration given’ depends on whether the parties would have formed the agreement without it.” *Id.* Mr. Bucheli would not have formed the agreement without Wing Central’s promise to buy meat from him or pay him 20% of the meat he purchased elsewhere. CP 321-23.

Mr. Bucheli did not bear the risk of the parties’ mutual mistake as to Wing Central’s ability to purchase its meat from Mr. Bucheli. Section 154 of the Restatement states:

A party bears the risk of mistake when:

- (a) the risk is allocated to him by the agreement of the parties, or
- (b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or
- (c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.

RESTATEMENT (SECOND) OF CONTRACTS § 154.

In *Car Wash Enterprises, Inc. v. Kampanos*, 74 Wn. App. 537, 547, 874 P.2d 868 (1994), the court held that the seller of a car wash who was a sophisticated businessman and who had reason to believe that prior owners operated a service station on the property did not bear the risk of the parties’ mistaken belief that the property’s soil was not contaminated. At the time of the negotiations, the seller knew that a previous owner sold

halide lights from the property and testified that he believed the building on the property looked like a service station. *Id.* at 539. The seller never inquired about previous uses because it “never occurred” to him. *Id.* Additionally, the seller, who owned numerous car washes, had not yet begun the practice of testing the soil at potential car wash sites for contaminants. *Id.* In holding that the seller did not bear the risk of mistake under Restatement (Second) of Contracts § 154(b), the court determined that despite his knowledge of the property’s historic uses and his business sophistication, he did not have limited knowledge of facts relating to the soil contamination and did not know of the contamination until after he sold the property. *Car Wash*, 74 Wn. App. at 547.

Mr. Bucheli did not bear the risk of mistake under Restatement (Second) of Contracts § 154(a) because the lease does not allocate to Mr. Bucheli the risk of a mistaken belief as to Wing Central’s ability to buy meat from Mr. Bucheli. *See* CP 150. Nothing in the record supports a conclusion that Mr. Bucheli bore the risk of mistake under Restatement (Second) of Contracts § 154(b) because there is no evidence that Mr. Bucheli was aware of his potential inability to sell the necessary amount and type of meat to Wing Central’s. At the time the parties entered into the lease, Mr. Bucheli was unaware of any law or regulation that prevented him from selling meat to Wing Central’s in conformance with the parties’

lease. CP 150, 321-23. He had operated his butcher shop since 1966 without receiving a warning or citation for violating any regulation or law related to his butcher shop. CP 321.

From 2002 to 2007, Mr. Bucheli provided meat from his butcher shop to his restaurant. CP 321. During that time, Mr. Bucheli never received any citation or notice from the USDA that he was violating any labeling or meat inspection laws, or that he had to label his meat or have it inspected. CP 321-22. Like the seller in *Car Wash*, 74 Wn. App. at 547, Mr. Bucheli had no knowledge that Wing Central's agreement to buy its meat from him was potentially illegal or improper and did not know of any potential illegality until long after the parties signed the lease. CP 323.

Questions of fact exist regarding whether, at the time they entered into the lease, the parties held mistaken beliefs as to Wing Central's ability to buy its meat from Mr. Bucheli. Whether Wing Central's promise to buy its meat from Mr. Bucheli or pay a 20% surcharge for buying meat elsewhere was a basic assumption of the lease is also a question of fact. Likewise, factual questions regarding whether the parties' mistake materially affected the parties' agreed exchange of performances precludes summary judgment. Nothing in the record suggests that Mr.

Bucheli bore the risk of the parties' mutual mistake, but whether he bore the risk of the parties mutual mistake is, at a minimum, a question of fact.

Moreover, questions of fact exist as to whether the parties' mutual mistake rendered the lease voidable or subject to reformation to effectuate the parties' intent that Wing Central's either buy its meat from Mr. Bucheli or pay him a 20% surcharge. *See* RESTATEMENT (SECOND) OF CONTRACTS § 152(1) (a contract is voidable for mutual mistake); *Denaxas*, 148 Wn.2d at 669 ("Reformation is an equitable remedy employed to bring a writing that is materially at variance with the parties' agreement into conformity with that agreement."). A party may seek reformation of a contract on the basis of mutual mistake. *Denaxas*, 148 Wn.2d at 669.

Also, to the extent that the doctrine of mutual mistake applies, a factual question exists as to whether Mr. Bucheli is entitled to restitution as a result of Wing Central's failure to purchase meat from him or to pay him the 20% surcharge for meat products that Wing Central's purchased from other sources. "A person who receives a benefit by reason of an infringement of another person's interest, or of loss suffered by the other, owes restitution to him in the manner and amount necessary to prevent unjust enrichment." *Chem. Bank*, 102 Wn.2d at 910 (citing RESTATEMENT (SECOND) OF RESTITUTION § 1 (Tent. Draft No. 1 1983)). "Restitution will be granted in a variety of circumstances, including those involving

contractual relief for mutual mistake or commercial frustration.” *Chem. Bank* 102 Wn.2d at 904 (citing RESTATEMENT (SECOND) OF CONTRACTS § 272). The amount of restitution is also a question of fact.

Because numerous factual issues remain, summary judgment was improper and this court should remand this case for trial.⁵

C. Whether Wing Central’s failure to pay for inventory was a material breach of the lease that precluded Wing Central’s from exercising the option to purchase is a genuine issue of material fact.

Mr. Bucheli refused to sell the property to Wing Central’s because he claimed Wing Central’s was in breach of the lease. Wing Central’s option to purchase was expressly conditioned on Wing Central’s not being in default under the lease. CP 159. Exhibit B to the lease states: “Inventory that tenant accepts as useful inventory including soft drinks, alcohol products, saleable items, frozen meat products, unopened supplies, shall be inventoried at cost and paid at the time of possession.” CP 167.

Wing Central’s took possession on May 18, 2007 but did not pay for any of the inventory until September of 2007, when it paid only \$1,526.75 of the \$4,083.31 worth of inventory. CP 325, 328. The trial

⁵ The court should also reverse the award of attorney fees and costs, since the trial court awarded fees and costs because it ruled Wing Central’s was the prevailing party. CP 506.

court ruled that Wing Central's failure to pay \$2,556.56 in inventory was immaterial and that Wing Central's failure to pay did not prevent Wing Central's from exercising the option to purchase. CP 505.

“The materiality of a breach, and thereby the issue of substantial performance, is a question of fact.” *DC Farms, LLC v. Conagra Foods Lamb Weston, Inc.*, 179 Wn. App. 205, 221, 317 P.3d 543 (2014); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 241 (1981) (factors in determining whether breach is material include extent to which injured party will be deprived of expected benefit, extent to which injured party can be adequately compensated for portion of benefit for which he is deprived, and extent to which breaching party comports with standards of good faith and fair dealing). Whether Wing Central's failure to pay for inventory that it kept and used is a material breach that rendered Wing Central's in default and prevented Wing Central's from exercising the option to purchase is a question of fact that the trial court could not determine as a matter of law.

V. CONCLUSION

Mr. Bucheli respectfully requests that the Court of Appeals reverse the superior's order granting summary judgment on the issue of specific performance and dismissing Mr. Bucheli's counterclaims and remands this

matter for trial. Questions of fact exist on Mr. Bucheli's mutual mistake counterclaim and on Wing Central's claim for specific performance. Furthermore, whether Wing Central's failure to pay Mr. Bucheli for inventory constitutes a material breach of the lease is a fact question for the jury.

Respectfully submitted this 8th day of January, 2016.

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TYLER M. HINCKLEY, WSBA No. 37143



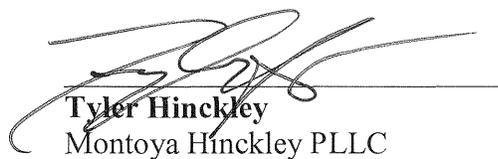
KEVAN T. MONTOYA, WSBA No. 19212

CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury under the laws of the state of Washington that on the date stated below I served a copy of this document in the manner indicated:

Richard T. Cole P.O. Box 638 Ellensburg, WA 98926	<input checked="" type="checkbox"/> First Class U.S. Mail <input type="checkbox"/> Email <input type="checkbox"/> Hand Delivery <input type="checkbox"/> FedEx Next Day
Doug Dunham Crane Dunham PLLC 2121 Fifth Ave. Seattle, WA 98121-2510	<input checked="" type="checkbox"/> First Class U.S. Mail <input type="checkbox"/> Email <input type="checkbox"/> Hand Delivery <input type="checkbox"/> FedEx Next Day

DATED at Yakima, Washington, this 8th day of January, 2016.


Tyler Hinckley
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