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No. 63733-9

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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G&I IV KIRKLAND LLC,  
a Delaware limited liability company,

Respondent,

vs.

STAT MEDICAL, INC.,

Appellant.

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APPEAL FROM THE SUPERIOR COURT  
FOR KING COUNTY  
THE HONORABLE DOUGLASS A. NORTH

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REPLY BRIEF OF APPELLANT

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## I. INTRODUCTION

Summary judgment cannot be granted by looking at the facts in the light most favorable to the moving party and ignoring factual disputes on material issues. But that is exactly what G&I IV Kirkland advocates in asking this court to affirm the trial court's decision. G&I IV Kirkland concedes that the law allows oral modifications to leases. G&I IV Kirkland simply dismisses the testimony of Stat Medical's president and third party real estate broker establishing an agreement to waive Stat Medical's liability for holdover rent under the parties' lease as "self-serving," and asks the court to ignore its own correspondence confirming the parties' modification of the lease as "unauthorized."

Stat Medical paid G&I IV Kirkland \$5,751.50, and tendered into the court registry an additional \$28,000, which more than satisfied any liability for CAM charges and rent, after it timely notified G&I IV Kirkland, without objection, that it would terminate its tenancy by September 30 and vacate in mid-October. This court should reverse, vacate the judgment against Stat Medical, and remand for trial.

## II. REPLY ARGUMENT

### A. **The Trial Court Erred In Granting Summary Judgment Because There Were Genuine Issues Of Material Fact Establishing An Agreement To Allow Stat Medical To Remain On The Premises Without A Holdover Penalty.**

#### 1. **The Trial Court Erred In Holding That Any Agreement To Waive Holdover Penalties Had To Be In Writing Because A Contract Clause Prohibiting Oral Modification Is Unenforceable.**

The trial court entered summary judgment because it erroneously believed that any agreement modifying the lease “ha[s] to be indicated in writing.” (CP 452)<sup>1</sup> But, “[i]t is well settled that a contract may be modified or abrogated by the parties thereto in any manner they choose, notwithstanding provisions therein prohibiting its modification or abrogation except in a particular manner.” *Pacific Northwest Group A v. Pizza Blends, Inc.*, 90 Wn. App. 273, 278, 951 P.2d 826 (1998) (quoting *Kelly Springfield Tire Co. v. Faulkner*, 191 Wash. 549, 556, 71 P.2d 382 (1937)). Thus, a “contract clause prohibiting oral modification is essentially unenforceable because the clause itself is subject to oral modification.” *Pacific N.W. Group A*, 90 Wn. App. at 277-78.

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<sup>1</sup> G&IV I also relies on the trial court’s statement that the evidence was insufficient to support the contention that “[Stat Medical was] delayed in any fashion.” (Resp. Br. 17, citing CP 465) The trial court’s improper resolution of this factual issue is discussed below, at Reply Arg. §A.2, *infra*.

G&I IV Kirkland does not take issue with this settled principle, but concocts a fiction that Stat Medical waived this argument by failing to assert it below. (Resp. Br. 21-22) G&I IV Kirkland ignores Stat Medical's opposition to the motion for summary judgment in which it argued that Jack Rader, a managing member of G&I IV Kirkland, orally agreed to waive holdover rent under the lease as an inducement for Stat Medical to consider proposals from G&I IV Kirkland to remain as a tenant. (CP 392-93) The parties' oral modification of the lease was "called to the attention of the trial court," and is preserved for appeal. RAP 9.12 (appellate court will consider "issues called to the attention of the trial court"); ***Duncan v. Alaska USA Federal Credit Union, Inc.***, 148 Wn. App. 52, 71, ¶ 52, 199 P.3d 991 (2008) (a single sentence referring to employee disclaimer even without any analysis sufficiently preserved the issue for appeal because it was "called to the attention" of the trial court). As the trial court expressly addressed the oral modification argument (see CP 452), G&I IV Kirkland's argument is without merit.

**2. The Existence Of The Parties' Oral Agreement To Modify The Lease And Waive Holdover Rent Is A Question Of Fact That Should Be Tried And Not Decided On Summary Judgment.**

Summary judgment cannot be granted by looking at the facts in the light most favorable to the moving party and ignoring factual disputes on material issues. See CR 56(c); *Pacific Northwest Group A.*, 90 Wn. App. at 280. All reasonable inferences from the evidence must be resolved in the non-moving party's favor. *Pacific Northwest Group A.*, 90 Wn. App. at 280. In particular, "disputes over the existence of oral agreements are not appropriately decided on summary judgment," because "as here, disputes about oral agreements depend a great deal on the credibility of the witnesses." *Crown Plaza Corp. v. Synapse Software Systems, Inc.*, 87 Wn. App. 495, 500, 962 P.2d 824 (1997).

Respondent G&I IV Kirkland ignores these settled principles here. G&I IV Kirkland asks this court to ignore all of the evidence offered by Stat Medical to support its claim that there was an oral modification of the lease, and relies exclusively on its own written documentation in arguing that the "contemporaneous writing and terms of lease" fail to show a "meeting of minds." (Resp. Br. 23). To the extent it acknowledges Stat Medical's declarations at all,

G&I IV Kirkland dismisses any evidence establishing the existence of an agreement as “self-serving.” (Resp. Br. 16, 23) But *any* declaration filed by a party in opposition to summary judgment is necessarily “self-serving.” Such objections go only to the weight of the testimony, which is not a proper consideration in deciding a motion for summary judgment. See ***Lamphiear v. Skagit Corp.***, 6 Wn. App. 350, 360, 493 P.2d 1018 (1972) (testimony by plaintiff is “necessarily self-serving”). It is only when a party’s own statement contradicts that party’s prior sworn testimony, that such “self-serving” evidence is insufficient to raise an issue of material fact and defeat summary judgment. See, e.g., ***Marshall v. AC & S Inc.***, 56 Wn. App. 181, 185, 782 P.2d 1107 (1989) (Resp. Br. 14). Here, however, Stat Medical’s sworn discovery responses were consistent with its declarations.

For instance, G&I IV Kirkland’s contention that there was “no evidence” of an agreement to waive holdover rent, (Resp. Br. 23), requires the court to ignore the sworn answers to interrogatories of Mike Conforto, president of Stat Medical. Conforto was told by one of G&I IV Kirkland’s managing members, Jack Rader, “that slowing our current process down to hear them out and consider what they

have to offer would not result in damaging us in the form of holdover rent... We again indicated that we were concerned about doing anything to slow down the process in order to be out of the space as quickly as possible. We were told that we would not be penalized if we would listen to the options they had for us.” (CP 338) This was consistent with testimony from Stat Medical’s broker, Daran Davidson, who is not a party and who has no financial interest in this action: “Mr. Rader told me that if my client, Stat Medical, would meet with him ‘your client would not be financial[ly] hurt by talking with us.’” (CP 379)

G&I IV Kirkland denies that it agreed to waive holdover rent, but “because this is a summary judgment appeal, [the court] does not weigh the parties’ credibility but resolve[s] all reasonable inferences in favor of the non-moving party. [The court] must accept [the non-moving party]’s characterization of the agreement.” *Duckworth v. Langland*, 95 Wn. App. 1, 8, 988 P.2d 967 (1998), *rev. denied*, 138 Wn.2d 1002 (1999); *Pacific Northwest Group A*, 90 Wn. App. at 280 (“on summary judgment, this court must assume that [the non-moving party]’s testimony is truthful”); *see*

also ***Crown Plaza Corp. v. Synapse Software Systems, Inc.***, 87 Wn. App. at 501.

In ***Crown Plaza Corp.***, a landlord sued its tenant for breaching its lease by abandoning the premises before the end of its term. The tenant alleged an oral agreement with the landlord to terminate the lease. The landlord denied it. This court reversed summary judgment for the landlord, holding that “disputes over the existence of oral agreements are not appropriately decided on summary judgment.” ***Crown Plaza Corp.***, 87 Wn. App. at 500. This court rejected an argument, similar to the one made here, that the tenant “presented no evidence beyond mere allegations or assertions supporting the formation of an oral contract.” ***Crown Plaza Corp.***, 87 Wn. App. at 501. This court noted that the landlord “appears to confuse the concept of making a bare assertion (e.g., ‘there was an oral contract’) with making a statement that, if believed by a factfinder, would support the legal contention... Only a factfinder can determine which of these statements is more credible, considering all the evidence.” ***Crown Plaza Corp.***, 87 Wn. App. at 501.

This court also reversed a summary judgment decision in favor of the landlord, when there was a dispute as to whether there was an oral modification to the lease in ***Pacific N.W. Group A***, 90 Wn. App. at 280 (*discussed* App. Br. 16-19) G&I IV Kirkland attempts to distinguish ***Pacific N.W. Group A***, by asserting that there, “the landlord acquiesce[ed] to the tenant’s claim of modification... in sharp contrast” to the situation here, because Stat Medical did not previously claim there had been a modification of the lease. (Resp. Br. 26, 27) That is false. Stat Medical told G&I IV Kirkland’s business manager that the parties reached an agreement to modify the lease (CP 85), which its business manager had confirmed in her August 16, 2006 letter (CP 81) – an agreement now denied by G&I IV Kirkland.

Likewise, in ***Pacific N.W. Group A***, the tenant claimed that the landlord’s representative “expressly agreed” to the arrangement of no holdover rent – an agreement denied by the landlord. 90 Wn. App. at 280-81. In reversing judgment for the landlord, this court assumed the tenant’s testimony to be “truthful” on summary judgment, and held that the tenant “raises a question of fact as to

whether the parties modified the lease.” ***Pacific N.W. Group A***, 90 Wn. App. at 280-81.

G&I IV Kirkland’s argument that there was no “meeting of the minds” to support an oral modification of the lease (Resp. Br. 22), also ignores the summary judgment record. A “meeting of the minds” requires only that a party present evidence that there was an offer and an acceptance. See ***Lakeside Pump & Equipment, Inc. v. Austin Const. Co.***, 89 Wn.2d 839, 845, 576 P.2d 392 (1978) (“Offer and acceptance are the tools by which courts and contract negotiators arrive at the illusive contractual concept of a ‘meeting of the minds.’”) Here, G&I IV Kirkland offered to waive holdover penalties if Stat Medical would meet with G&I IV Kirkland and consider renewing its lease. (CP 338, 379, 389) Stat Medical accepted this offer by attending the meeting and considering its landlord’s proposal to renew its tenancy. (CP 338, 379, 389) See ***Cascade Auto Glass, Inc. v. Progressive Cas. Ins. Co.***, 135 Wn. App. 760, 769, ¶ 22, 145 P.3d 1253 (2006) (“one party offers to do a certain thing in exchange for the other’s performance, and performance by the other party constitutes acceptance”), *rev. denied*, 161 Wn.2d 1012 (2007).

Moreover, the parties' "meeting of the minds" was acknowledged in writing by G&I IV Kirkland's own business manager, Linda Kaivola, who confirmed the agreement that Stat Medical would remain on the premises beyond the expiration of its lease on July 31, 2006, and that no holdover rent would be imposed until October 1, 2006:

This letter serves as follow up to our conversation regarding Stat Medical's tenancy... [the] Lease Agreement dated September 1, 1999 for Suite 180 expired on July 31, 2006. It is our understanding that Stat Medical would like to continue leasing Suite 180 on a month-to-month Holdover basis... This letter serves as Landlord's thirty day notice effective October 1, 2006, the monthly Base Rent for Suite 180 will increase from \$11,503.00 NNN to \$23,006.00 NNN.

(CP 81)

G&I IV Kirkland dismisses this evidence by arguing that "Ms. Kaviola had no authority to modify the lease." (Resp. Br. 24-25, *citing* CP 57) But Ms. Kaviola's contractual authority is irrelevant. Stat Medical has asserted only that Ms. Kaviola's letter reflects the parties' previously negotiated agreement with its managing member, not that Ms. Kaviola herself entered into the agreement to waive holdover rent on behalf of her employer. (See CP 338-39, 341) See ***Crown Plaza, Corp.***, 87 Wn. App. at 501 n.1 (regardless

whether the operations manager had authority to bind landlord, material issue of fact whether the vice-president for the landlord, who had authority, agreed to terminate the lease as alleged by tenant).

G&I IV Kirkland elsewhere concedes that Kaviola had authority to speak for the landlord to confirm its agreements by citing Kaviola's subsequent letter disavowing her earlier letters and claiming that the landlord did not agree to waive holdover rent. (Resp. Br. 25)<sup>2</sup> The trier of fact should determine the weight to be given to this subsequent Kaviola letter in light of her previous letter confirming the parties' agreement. ***Smith v. Acme Paving Co.***, 16 Wn. App. 389, 393, 558 P.2d 811 (1976) ("it is not the function of the trial court to weigh the evidence thus to be considered and so construed" in ruling on summary judgment). This is especially true because it is unclear when this letter was actually sent by Kaviola, as it was dated August 16, 2006 even though clearly written after that date as it was responding to Stat Medical's August 28, 2006 letter. (CP 85, 88, 341)

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<sup>2</sup> Contrary to G&I IV Kirkland's claim, Stat Medical did not "completely ignore" this letter in its Opening Brief. (Resp. Br. 25) In fact, Stat Medical described this letter in detail in its brief at pages 10-11.

Not only does the record refute G&I IV Kirkland's argument that there was no "meeting of the minds," it also refutes its contention that the agreement to waive holdover penalties could not be enforced for lack of consideration. (Resp. Br. 28-29) G&I IV Kirkland claims that Stat Medical's agreement to consider proposals from G&I IV Kirkland was an "illusory promise" because its performance was "entirely within the discretion, pleasure, and control of Stat Medical." (Resp. Br. 29) But it is undisputed that Stat Medical in fact did perform. It met with G&I IV Kirkland to discuss their proposals and considered its written proposal. (CP 389) Stat Medical's meeting with G&I IV Kirkland and its consideration of the proposal was the consideration for the agreement to modify the lease. See ***Cascade Auto Glass, Inc. v. Progressive Cas. Ins. Co.***, 135 Wn. App. at 769, ¶ 21.

Respondent's argument is premised on the misconception that the agreement to waive holdover rent required Stat Medical to *accept* G&I IV Kirkland's proposal for a new lease. But the parties' agreement to waive holdover rent only required that Stat Medical *consider* the proposal. Rader testified that he pushed for a meeting even after being told that Stat Medical "was too far along in its

negotiations with a new landlord at a different location to seriously consider renewing,” because he was “not happy” that G&I IV Kirkland was going to lose Stat Medical’s business. (CP 372) Thus, the fact that Stat Medical subsequently agreed to consider any proposal to remain on the premises less than two months before the lease expired was adequate consideration for the waiver of holdover rent.

Moreover, it was undisputed that G&I IV Kirkland had no potential tenants to fill the space if Stat Medical timely vacated. Rader testified that because G&I IV Kirkland’s purchase of the property did not close until the end of May – only two months before Stat Medical’s lease expired – it did not have an opportunity to contact any tenants earlier than June. (See CP 372) The agreement, therefore, provided a “win/win” situation for both parties because it allowed the landlord to continue collecting the monthly base rent of \$11,503, which it could not do if Stat Medical moved out, and saved Stat Medical the double holdover rent of \$23,006. (CP 339)

A mutual benefit to the parties as a result of the oral agreement is adequate consideration. Any “benefit to the promisor

or a detriment to the promisee, or mutual benefits or mutual detriments constitute sufficient consideration for a contract.” ***Granston v. Callahan***, 52 Wn. App. 288, 296, 759 P.2d 462 (1988). Here, the oral agreement to modify the lease provided mutual benefits to both parties by allowing G&I IV Kirkland to continue collecting rent on a space that would otherwise be vacant and allowing Stat Medical to stay on the premises without paying holdover rent.

Without this agreement, Stat Medical would not have held over on the premises. G&I IV Kirkland’s argument that it would have been “impossible” for Stat Medical to timely vacate (Resp. Br. 27) ignores Mike Conforto’s testimony that Stat Medical not only slowed down its negotiations with its new landlord, but after considering, and deciding against, G&I IV Kirkland’s offers, it committed itself to a property that would not be available immediately over other properties, which were available for quicker occupancy:

Based on our meeting with the new owner we believed we were being given additional time to move out of the space... Our current office in the Highlands was our first choice, but we knew we could not move into that space as quickly as other options available. We had other opportunities where very little work needed to be done to the space in order for us to move. Being told we would have additional time was

important because it allowed us to take advantage of our first choice which we expected to be able to move in to by September...Had we understood that we would be charged as of the end of our lease, we would have changed projects to one of the other options available that did not require any significant leasehold improvements to be operational for us.

(CP 339) This court cannot ignore this testimony on summary judgment. *Pacific N.W. Group A*, 90 Wn. App. at 280.

Other evidence supports Conforto's testimony that Stat Medical "slowed down" its process in securing other space and delayed its vacation of the premises. For example, on May 23, 2006, Stat Medical made a request to its prospective landlord that it be allowed in the new space by July 1, 2006 (its lease with G&I IV Kirkland expired on July 31, 2006). (CP 275) On May 24, 2006, the prospective landlord told Stat Medical that the space would not be available until September, and only if Stat Medical signed a lease by June 1, 2006. (CP 275) Stat Medical did not sign the lease until June 19, 2006 – after it met with G&I IV Kirkland on June 6, 2006, and after it received its proposal on June 16, 2006, which expired on its own terms on June 20, 2006. (CP 103, 107, 131-32) As a result, the start date for Stat Medical's tenant improvements in the new premises was pushed back. (CP 85)

Had Stat Medical signed a new lease on June 1, Stat Medical would have been able to vacate the premises by August 31 – a holdover of only one month. (CP 275, 339) Because Stat Medical paid \$5,751.50 for holdover rent on August 28, 2006 (CP 85), and had a security deposit of \$5,750 (CP 93), which could have been applied towards the holdover charge, Stat Medical would have had no liability for holdover rent. Instead, G&I IV Kirkland sued Stat Medical for rent of \$40,260.50.<sup>3</sup> Thus, Stat Medical was in fact financially harmed by considering G&I IV Kirkland's proposals and delaying its execution of a new lease by two and one-half weeks.

Finally, in denying the existence of an agreement, G&I IV Kirkland relies on an offer of settlement to establish liability in violation of ER 408. After Kaivola asserted that holdover penalties would commence on September 1 and not October 1 as her August 16 letter stated, Stat Medical offered an additional \$5,751.50 to G&I IV Kirkland – one-half of the base rent – which was “certainly within the parameters of an appropriate holdover charge.” (CP 85) G&I IV Kirkland relies on this offer as evidence that Stat Medical

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<sup>3</sup> Holdover rent for August (only \$5,751.50, due to receipt of \$5,751.50 on August 28), September, October, and November.

conceded liability for holdover rent. (Resp. Br. 23) Such an offer of settlement is “not admissible to prove liability,” ER 408, because, as here, Stat Medical made the offer, not to admit liability, but as a sign of good faith. **Weyerhaeuser Co. v. Commercial Union Ins. Co.**, 142 Wn.2d 654, 675, 15 P.3d 115 (2000) (offers of compromise are irrelevant “because an offer to settle may be motivated solely by a desire to buy peace”) (citing 5A Karl B. Tegland, *Washington Practice: Evidence Law and Practice* § 408.1, at 48 (4th ed.1999)).

Respondent’s arguments go to the weight of the evidence establishing an agreement to waive holdover penalties. The trial court erred in weighing the evidence in granting summary judgment.

**B. The Trial Court Erred In Granting Summary Judgment Because There Were Genuine Issues Of Material Fact Whether G&I IV Kirkland Is Estopped From Collecting Holdover Rent.**

“To prevail on an equitable estoppel theory, [Stat Medical] must show that it reasonably relied on an admission, statement, or act of [G&I IV Kirkland] that is inconsistent with the claim that holdover rent is now due.” **Pacific Northwest Group A**, 90 Wn. App. at 281. Contrary to G&I IV Kirkland’s claim, Stat Medical

“called to the attention of the trial court,” its argument that G&I IV Kirkland should be estopped from collecting holdover rent. (CP 12, 395, 452-54, 463-66); RAP 9.12.

While Stat Medical’s counsel did not use the term “equitable estoppel,” it nevertheless presented this theory to the trial court by arguing that (1) G&I IV Kirkland represented that it would not impose holdover rent if Stat Medical considered its proposals (CP 395, 449); (2) Stat Medical relied on this statement by slowing down its negotiations with other property owners (CP 395, 463-65); and (3) Stat Medical would be injured if G&I IV Kirkland were now allowed to repudiate its earlier statement that it would not charge holdover rent because by slowing down its negotiations, Stat Medical was forced to hold over on the premises and would now be liable for holdover rent. (See CP 463-64)

The trial court considered and rejected the estoppel argument, by improperly weighing the evidence on summary judgment and finding that Stat Medical was not delayed by G&I IV Kirkland in obtaining new space. (CP 465: “It appears that they proceeded on a straight track to lease the property and there is no indication that they were delayed in any fashion.”) Therefore, even

if Stat Medical did not argue “equitable estoppel” by name, it was a theory argued and considered by the trial court and should be considered on appeal. See ***Lunsford v. Saberhagen Holdings, Inc.***, 139 Wn. App. 334, 338, 160 P.3d 1089 (2007) (“if an issue raised for the first time on appeal is ‘arguably related’ to issues raised in the trial court, a court may exercise its discretion to consider newly-articulated theories for the first time on appeal”), *aff’d* 166 Wn.2d 264, 208 P.3d 1092 (2009).

**C. Stat Medical Provided Timely Notice Of Its Termination Of Its Tenancy And Paid All Rent Due The Landlord.**

The trial court erred when it summarily determined that the tenancy ended on November 30, 2006 and concluded that Stat Medical owed rent, holdover rent, and estimated CAM charges through November. (CP 439) G&I IV Kirkland concedes that Stat Medical provided written notice on August 28, 2006 that it intended to terminate its tenancy by September 30, 2006. (CP 85) G&I IV Kirkland also concedes that when it appeared that Stat Medical’s move, pursuant to its August 28 termination notice would be delayed, Stat Medical paid October rent in full (CP 377), provided verbal notice by Monday, October 2, 2006 (29 days before the end of the month) and written notice on October 3, 2006 (28 days

before the end of the month) that it would “start moving out Friday the 13<sup>th</sup> and throughout the weekend.” (CP 328) G&I IV Kirkland’s agent confirmed this notice by email, thanking Stat Medical for the “update,” asking only for confirmation of its forwarding address, and wishing it “a successful move and continued success!” (CP 328) G&I IV Kirkland then accepted the vacated premises without complaint.

G&I IV Kirkland complains that the August 28 notice was not “proper” because it was sent by email, rather than certified or registered mail as required by the lease. (Resp. Br. 31) As there is no dispute that G&I IV Kirkland received the notice and understood that Stat Medical was terminating its tenancy effective September 30, Stat Medical substantially complied with the notice requirement to terminate its tenancy. See e.g. *Foisy v. Wyman*, 83 Wn.2d 22, 32, 515 P.2d 160 (1973) (“As to the form and contents of the notice or demand, a substantial compliance with the statute is sufficient.”).

G&I IV Kirkland also complains that October 2 and October 3 notices were not “timely” to terminate the lease by October 31 because it was not “thirty days or more” notice as required under RCW 59.04.020. (Resp. Br. 32) But Stat Medical already

terminated its lease as of September 30, 2006 pursuant to its August 28 notice. ***Worthington v. Moreland Motor Truck Co.***, 140 Wash. 528, 250 Pac. 30 (1926) (Resp. Br. 32) does not support G&I IV Kirkland's argument that Stat Medical was required to provide a second statutory notice of termination when Stat Medical held over into October. In ***Worthington***, the tenant held over when the parties could not reach an agreement on a new lease. Unlike Stat Medical, the tenant gave its first and only notice that it was vacating the premises on November 3 *after* it had already vacated the premises on November 1 and returned the keys to the landlord without payment of November rent. The landlord rejected the tenant's surrender of the premises and demanded rent until the premises were leased to another tenant. The Court held that the tenant was liable for rent through December as its termination notice was "given more than thirty days prior to the thirty-first day of December." ***Worthington***, 140 Wash. at 532.

Here, however, Stat Medical terminated its lease as of September 30. When its exit was delayed, Stat Medical paid for the full month of October, and immediately notified the landlord that it would exit the premises the weekend of October 13. In stark

contrast to **Worthington**, G&I IV Kirkland acceded to Stat Medical's move out date, accepted the final rent payment for October, accepted the premises, and wished its tenant well. G&I IV Kirkland did not seek payment from Stat Medical for any charges for November 2006 in any of its billing statements until December 2007 (CP 90), over one year after Stat Medical vacated the premises, and just before it commenced its lawsuit. (See CP 377)

To the extent any holdover rent was due for October, the penalty was already paid because Stat Medical tendered \$5,751.50 in August and \$5,750 was available from its security deposit. (CP 85, 93) The trial court erred when it summarily determined that the tenancy ended on November 30, 2006 and concluded that Stat Medical owed rent, holdover rent, and estimated CAM charges through November 2006. (CP 439)

**D. Because Summary Judgment Was Inappropriate On The Issue Of Holdover Rent, The Attorney Fee Award Must Be Vacated To Abide The Outcome Of Trial.**

This court should reject G&I IV Kirkland's claim that it is entitled to *all* of its attorney fees below and on appeal even if this court reverses summary judgment on the issue of holdover rent because Stat Medical has not challenged its liability for CAM

charges. Respondent ignores the fact that Stat Medical deposited more than double the amount that could be owed on the CAM charges into the court registry one week after G&I IV Kirkland's filed its present action. (CP 1-3, 14, 377, 390) The trial court assessed \$11,531.52 for unpaid CAM charges, while Stat Medical deposited \$28,000 into the court registry. (CP 1-3, 14, 377, 390, 428) This amount plus the \$5,751.50 accepted by G&I IV Kirkland in late August, and Stat Medical's security deposit of \$5,750 (see CP 93) was more than enough to compensate the landlord for one additional month's rent and the CAM charges. Had G&I IV Kirkland accepted Stat Medical's offer to pay the CAM charges from the funds in the court registry, the litigation would not have been necessary, and no attorney fees would have been incurred.

G&I IV Kirkland's parallel argument for attorney fees on appeal even if the summary judgment order is reversed is particularly without merit. Stat Medical did not appeal the order granting summary judgment on the CAM charges. The trial court's order already compensates G&I IV Kirkland for any fees it incurred pursuing those CAM charges. (CP 442, 444) G&I IV Kirkland is not entitled to attorney fees on appeal related to an issue that is not

challenged on appeal. Accordingly, if Stat Medical prevails in its appeal, G&I IV Kirkland is not entitled to any attorney fees.

If this court holds that summary judgment was inappropriate on the issue of holdover rent, the trial court's attorney fee award must be vacated to abide the outcome of trial. ***Associated Petroleum Products, Inc. v. Northwest Cascade, Inc.***, 149 Wn. App. 429, 438, ¶ 18, 203 P.3d 1077, *rev. denied*, 166 Wn.2d 1034 (2009). Thus, if Stat Medical prevails in enforcing the parties' oral agreement modifying the lease, it should be awarded all its attorney fees in this action, which will more than offset any award to G&I IV Kirkland. See ***Transpac Development, Inc. v. Oh***, 132 Wn. App. 212, 219-20, ¶ 21, 130 P.3d 892 (2006). The trial court should also be directed to consider any award of reasonable attorney fees in light of Stat Medical's tender of \$28,000 into the court registry one month after the action was filed and before any significant litigation was commenced.

### III. CONCLUSION

The trial court erred in holding that the lease could not be orally modified to allow the waiver of holdover penalties. The trial court ignored not only the tenant's sworn testimony, but also the

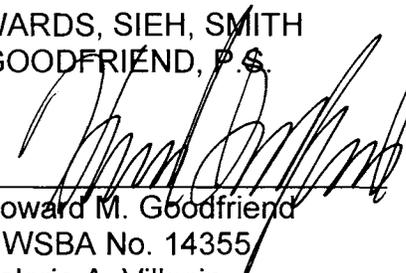
landlord's own correspondence establishing an oral agreement allowing Stat Medical to remain on the premises for a short period after the lease expired without being subjected to a holdover penalty. This court should reverse, vacate the judgment against Stat Medical, and remand for trial.

Dated this 3<sup>rd</sup> day of March, 2010.

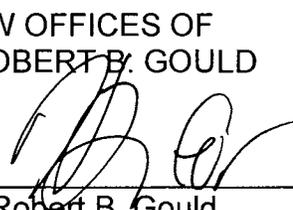
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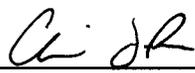
### DECLARATION OF SERVICE

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

That on March 3, 2010, I arranged for service of the foregoing Reply Brief of Appellant, to the court and to the parties to this action as follows:

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**DATED** at Seattle, Washington this 3rd day of March, 2010.

  
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Carrie O'Brien