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No. 66533-2-1

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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JIMI LOU STEAMBARGE, d/b/a ALLUSIA,

Defendant/Appellant,

v.

BELLEVUE SQUARE, LLC, a Washington limited liability company,

Plaintiff/Respondent

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APPEAL FROM THE SUPERIOR COURT  
FOR KING COUNTY

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**RESPONDENT'S BRIEF**

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TABLE OF CONTENTS

I. INTRODUCTION ..... 1

II. STATEMENT OF ISSUES ..... 2

III. STATEMENT OF FACTS ..... 3

    A. Background on Bellevue Square and Allusia ..... 3

    B. Bellevue Square and Ms. Steambarge Execute a Lease in September 2009, Which Contains an Integration Clause . 3

    C. Ms. Steambarge Defaults in the Payment of Rent, Refuses to Cure the Defaults, Submits a Letter Purporting to Terminate Her Tenancy, and Vacates the Premises on or about March 29, 2010 ..... 4

    D. Bellevue Square Sues Ms. Steambarge; She Files 14 Affirmative Defenses and a Counterclaim ..... 5

    E. Bellevue Square Re-Lets the Premises Less Than Five Months after Ms. Steambarge’s Default and Obtains Summary Judgment after Ascertaining Its Damages with Certainty ..... 6

    F. Ms. Steambarge Moves for Reconsideration and Offers Only Evidence and Arguments Available Prior to Summary Judgment; the Trial Court Denies the Motion without Inviting Bellevue Square to Respond ..... 8

    G. Ms. Steambarge Seeks and Obtains Seven Continuances and Extensions Before Placing the Instant Appeal Before this Court ..... 9

        1. First Extension ..... 9

        2. Second Extension ..... 9

3.	Third Extension .....	10
4.	Fourth Extension .....	11
5.	Fifth Extension .....	11
6.	Sixth Extension .....	11
7.	Seventh Extension .....	11
H.	Bellevue Square Garnishes One of Ms. Steambarge’s Accounts with Wells Fargo, Which Leads to the Entry of a Default Judgment, an Order Vacating the Default Judgment, and an Appeal Linked to the Instant Appeal .	12
IV.	ARGUMENT .....	12
A.	Standard of Review .....	12
1.	Order Granting Summary Judgment .....	12
2.	Order Denying Reconsideration .....	13
B.	This Court Should Affirm the Trial Court’s Grant of Summary Judgment on Bellevue Square’s Claim for Breach of Lease .....	14
C.	This Court Should Affirm the Dismissal of Ms. Steambarge’s Counterclaims .....	15
1.	Ms. Steambarge Failed to Establish a Genuine Issue of Material Fact with Respect to a Claim for Fraud .....	15
2.	Ms. Steambarge Failed to Establish a Claim for Negligent Misrepresentation .....	18

3.	Ms. Steambarge Failed to Establish a Claim for Damage to a Sign .....	20
D.	This Court Should Affirm the Trial Court’s Denial of Ms. Steambarge’s Motion for Reconsideration .....	20
1.	Ms. Steambarge’s Various Challenges to Bellevue Square’s Damages Calculations Fail as a Matter of Law .....	21
a.	Bellevue Square Adequately Mitigated Its Damages .....	21
b.	Bellevue Square Is Entitled to Collect Merchant’s Association Dues Pursuant to the Lease .....	23
c.	There Was No Agreement to Waive Charges .....	24
d.	Ms. Steambarge Failed to Adequately Challenge Any of the Remaining Categories of Damages or the Manner in Which They Were Calculated .....	24
E.	Ms. Steambarge Is Not Entitled to Reversal or Remand Because No Audio or Video Recording or Transcription Was Made of the Summary Judgment Oral Argument ..	26
F.	Steambarge Had Ample Opportunity to Conduct Discovery and Never Requested a Continuance .....	27
G.	Ms. Steambarge’s Conjecture and Argument Regarding the Identity of the Landlord Do Not Merit Reversal or Remand .....	28
H.	This Court Should Award Bellevue Square Its Reasonable Attorney Fees and Costs Incurred on Appeal .....	28

V. CONCLUSION ..... 30

## TABLE OF AUTHORITIES

### CASES

<i>Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.</i> , 170 Wn.2d 442, 243 P.3d 521 (2010) .....	18
<i>Alejandre v. Bull</i> , 159 Wn.2d 674, 153 P.3d 864 (2007) .....	17
<i>Gwinn v. Church of the Nazarene</i> , 66 Wn.2d 838, 405 P.2d 602 (1965) .....	14
<i>Hargis v. Mel-Mad Corp.</i> , 46 Wn. App. 146, 730 P.2d 76 (1986) .....	23
<i>Higgins v. Stafford</i> , 123 Wn.2d 160, 866 P.2d 31 (1994) .....	12, 13, 24
<i>Knight v. American National Bank</i> , 52 Wn. App. 1, 756 P.2d 757 (1988) .....	22
<i>Lawyers Title Ins. Corp. v. Baik</i> , 147 Wn.2d 536, 55 P.3d 619 (2002) .....	19
<i>Michigan Nat'l Bank v. Olson</i> , 44 Wn. App. 898, 723 P.2d 438 (1986) .....	19
<i>Paradise Orchards Gen. P'ship v. Fearing</i> , 122 Wn. App. 507, 94 P.3d 372 (2004), <i>review denied</i> , 153 Wn.2d 1027, 110 P.3d 755 (2005) .....	14
<i>Riley v. Andres</i> , 107 Wn. App. 391, 27 P.3d 618 (2001) .....	19
<i>Seattle-First Nat'l Bank v. Westlake Park Assocs.</i> , 42 Wn.App. 269, 711 P.2d 361 (1985) .....	14

<i>Sligar v. Odell</i> , 156 Wn. App. 720, 233 P.3d 914 (2010) .....	13, 22
<i>Sourakli v. Kyriakos, Inc.</i> , 144 Wn. App. 501, 182 P.3d 985 (2008), <i>rev. denied</i> , 165 Wn.2d 1017 (2009) .....	20, 27
<i>Stiley v. Block</i> , 130 Wn.2d 486, 925 P.2d 194 (1996) .....	16, 17
<i>Thompson v. Everett Clinic</i> , 71 Wn. App. 548, 860 P.2d 1054 (1993) .....	13
<i>Woody v. Stapp</i> , 146 Wn. App. 16, 189 P.3d 807 (2008) .....	16, 17

#### STATUTES

RCW 2.32.180 .....	27
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#### RULES

CR 9(b) .....	15
CR 56 .....	12
CR 59(a) .....	21
LCR 59(b) .....	24
RAP 9.3 .....	27
RAP 9.6(a) .....	9
RAP 10.2(a) .....	19

RAP 18.1(a) .....	28
RAP 18.1(d) .....	29

## I. INTRODUCTION

Respondent Bellevue Square, LLC (“Bellevue Square”) owns and operates a shopping center. Appellant Jimi Lou Steambarge signed a lease (“Lease”) to operate a store doing business as Allusia in September 2009.

The store was not successful. Ms. Steambarge failed to pay rent when due, and in March 2010 notified Bellevue Square that she would be terminating the Lease more than one year before the expiration of its term.

Bellevue Square found a replacement tenant who remodeled the space and began paying rent less than six months after Steambarge’s abandonment. However, the breach caused Bellevue Square over \$50,000 in damages.

Rather than attempt to resolve the deficiency in good faith, Ms. Steambarge raised a spirited *pro se* defense. She lodged a counterclaim for misrepresentation arising from the formation of the Lease. After six months of discovery to investigate these defenses, Bellevue Square obtained summary judgment on all claims and counterclaims. Undaunted, Ms. Steambarge filed a Motion for Reconsideration, offering various new theories and documents (available at the time of her response to the summary judgment motion) to support her defenses and claims. The trial court denied the motion for reconsideration without inviting a response.

After seeking and obtaining seven extensions over the course of a year, Ms. Steambarge has finally placed this appeal properly before this Court. The trial court correctly granted summary judgment on Bellevue Square's claims and Ms. Steambarge's counterclaim. The trial court did not abuse its discretion in denying the motion for reconsideration, as Ms. Steambarge did not articulate any reason (because there was none) why the evidence proffered on reconsideration could not have been brought in response to the motion and because the evidence would not have created a genuine issue of material fact had it been brought timely. This Court should affirm the trial court in all respects and award Bellevue Square its attorney fees and costs incurred on appeal.

## **II. STATEMENT OF ISSUES**

1. Whether the trial court correctly ruled that Ms. Steambarge failed to create a genuine issue of material fact and that Bellevue Square was entitled to judgment as a matter of law on its claims and Ms. Steambarge's counterclaims.

2. Whether the trial court properly exercised its discretion in denying Ms. Steambarge's Motion for Reconsideration when she presented no new evidence that she could not have presented at the summary judgment hearing, and failed to present any evidence sufficient

to create a genuine issue of material fact.

3. Whether Bellevue Square is entitled to its attorney fees and costs incurred on appeal if the trial court is affirmed.

### **III. STATEMENT OF FACTS**

#### **A. Background on Bellevue Square and Allusia.**

Bellevue Square leases commercial space to over 200 tenants. It is generally recognized among the top 20 shopping centers out of over 53,000 centers of all types in the United States. Bellevue Square has been a premier shopping center with the same ownership at the same location for over 40 years. (CP 162-70.)

Jimi Lou Steambarge had “several years in business” as a retail proprietor leading up to her execution of the instant Lease. (CP 83.)

#### **B. Bellevue Square and Ms. Steambarge Execute a Lease in September 2009, Which Contains an Integration Clause.**

On or about September 25, 2009, Steambarge entered into a 20 month lease (“Lease”) with Bellevue Square for Space 205 in the Bellevue Square Shopping Center (“Leased Premises”). (CP 21.) The Lease expiration date was June 30, 2011. (Id.) The store’s concept, as defined by the Lease, was “the retail display and sale of high-end home accessories, decorative items, furniture, gifts, and personal accessories[.]”

The proposed deal of signing a "Confession of Judgment" is not a viable or beneficial option. It has been made clear that ALLUSIA currently has no income and no available cash. The Bellevue Square venture is the catalyst behind this situation. Furthermore, a monthly recurring loss of \$15,000 will not and cannot be sustained.

The Confession of Judgment document is highly controversial, illegal in most states and basically would contract away my right to raise legitimate defenses, which I have against KDC.

\* \* \*

**Please accept this letter as an official 30-Day Termination Notice of ALLUSIA'S tenancy at 205 Bellevue Square; Bellevue, WA 98004, and as Notice of Cancellation of the Lease Agreement on the part of ALLUSIA.**

**March 30, 2010, will be ALLUSIA'S last day as a tenant of Bellevue Square and Kemper Development Company.**

(CP 50-51, emphasis in original.)

Ms. Steambarge vacated the Premises on or about March 29, 2010; acknowledging her abandonment of the Premises in an email to Robert Dallain. (CP 53.) However, she did not remove her store signage. Bellevue Square removed the signage and delivered it to her. (CP 17.)

**D. Bellevue Square Sues Ms. Steambarge; She Files 14 Affirmative Defenses and a Counterclaim.**

Faced with Ms. Steambarge's unambiguous repudiation of the Lease and abject refusal to accept responsibility for her financial

obligations, Bellevue Square sued Ms. Steambarge on April 5, 2010. (CP 1-3.)

On April 30, 2010, Ms. Steambarge filed a *pro se* “Answer, Affirmative Defenses and Counterclaim”. (CP 4-12.) Despite the lack of an attorney, Ms. Steambarge alleged 14 discrete affirmative defenses. (CP 6-7.) She then devoted five pages to a “Counterclaim”. (CP 7-11.) The Counterclaim did not expressly articulate any causes of action, but claimed that Bellevue Square “misled” Ms. Steambarge into signing the Lease, and “knowingly and intentionally neglected to inquire about JIMI LOU STEAMBARGE’S and/or ALLUSIA’S past and/or existing business history, sales volume, financial resources, business plan, marketing plan, and/or its financial backing.” (CP 9, emphasis in original.)

Bellevue Square conducted discovery into Ms. Steambarge’s defenses and counterclaim, including requests for production, interrogatories and a deposition of Ms. Steambarge. (CP 219-25.) When she failed to respond to the discovery requests, Bellevue Square was forced to file a motion to compel the responses. (Id.)

**E. Bellevue Square Re-Lets the Premises Less Than Five Months after Ms. Steambarge’s Default and Obtains Summary Judgment after Ascertaining Its Damages with Certainty.**

Bellevue Square promptly sought a new tenant for the Leased

Premises, and one began paying rent on August 23, 2010. (CP 17.) With Bellevue Square's damages thereby fixed, Bellevue Square moved for summary judgment on September 22, 2010. (CP 57-73.) Bellevue Square sought \$49,910.57 in principal, \$5,015.87 in prejudgment interest, and \$14,431.46 in attorney fees and costs. (CP 137.) The Lease provides for interest on past due amounts at the rate of 2% per month. (CP 32.)

Section 20.3 of the Lease contains an attorney fee clause entitling Bellevue Square to its reasonable attorney fees incurred on appeal. (CP 42.)

In addition to seeking judgment on its claims, Bellevue Square explicitly sought dismissal of Ms. Steambarge's "Counterclaim," generously construing it as potentially articulating claims for veil piercing, breach of contract, intentional misrepresentation, negligent misrepresentation, and breach of the covenant of good faith and fair dealing. (CP 64-69.)

Ms. Steambarge responded timely to the motion for summary judgment and offered two declarations in support of her Response; one from Axel Duerr and one from Ms. Steambarge. (CP 74-81; CP 82-86; CP 87-115.)

In her 42 pages of responsive documents, Ms. Steambarge did not challenge the calculation or amount of damages. (CP 74-81.) Rather, she

focused her opposition on her allegations of misrepresentation, an attempt to explain her decision to repudiate the Lease, and an extensive discussion of the facts surrounding her removed sign. (Id.)

The trial court granted Bellevue Square's Motion for Summary Judgment in its entirety. (CP 137-139.) Because Ms. Steambarge stated at oral argument that she wished to file a motion for reconsideration, but wanted extra time to file it, Bellevue Square stipulated that she could have until November 18, 2010. (CP 139.)

**F. Ms. Steambarge Moves for Reconsideration and Offers Only Evidence and Arguments Available Prior to Summary Judgment; the Trial Court Denies the Motion without Inviting Bellevue Square to Respond.**

Ms. Steambarge filed her Motion for Reconsideration on November 18, 2010, and included a 62 page declaration. (CP 140-201.) Most of the motion was a repetition of the arguments raised in her response. But for the first time, Ms. Steambarge also alleged a failure to mitigate damages and a challenge to the amount of damages claimed. (CP 140-151.) She offered no justification for the failure to provide these arguments and evidence in opposition to the motion for summary judgment. (Id.)

On December 8, 2010, the trial court denied Ms. Steambarge's Motion for Reconsideration without inviting a response. (CP 217-218.)

Thus, Bellevue Square never had the opportunity (or need) to rebut or explain the various arguments articulated for the first time in the motion.

(Id.)

**G. Ms. Steambarge Seeks and Obtains Seven Continuances and Extensions Before Placing the Instant Appeal Before this Court.**

**1. First Extension.**

Ms. Steambarge first filed her Notice of Appeal on January 7, 2011. Her Designation of Clerk's Papers and Statement of Arrangements was due on February 7, 2011. RAP 9.6(a). She did not file her Designation of Clerk's Papers or Statement of Arrangements by that deadline. Instead, on February 9, 2011, Ms. Steambarge filed a Motion for Extension of Time asking for an additional 45 days, or until April 5, 2011, to file her Designation of Clerk's Papers and Statement of Arrangements, which motion was granted. (App. 1.) She filed her Designation of Clerk's Papers on April 4, 2011, but not her Statement of Arrangements.

**2. Second Extension.**

Ms. Steambarge's brief was due on May 19, 2011. RAP 10.2(a). She did not file a brief and still had not filed a Statement of Arrangements by that date. Instead, on May 20, 2011, she filed another Motion for Extension of Time to file her Statement of Arrangements, making no

mention of her brief. She asked for an additional three months to file her Statement of Arrangements, or until July 28, 2011. The Court of Appeals granted the motion, but set a deadline for filing a Statement of Arrangements, or to advise the Court that she intends to proceed without a report of proceedings, of July 20, 2011. The Court advised that “Appellant should not expect any additional extensions.” (App. 2.)

Ms. Steambarge filed a Statement of Arrangements on July 19, 2011. On September 16, 2011, the transcription service Steambarge used informed the Court that there was no recording of the summary judgment proceeding. (App. 3.)

### **3. Third Extension.**

On November 15, 2011, the Court set a hearing on a Motion to Dismiss for failure to file a brief. The Court said it would strike the hearing if Ms. Steambarge filed a brief by November 28, 2011. Instead, on November 27, 2011, she filed a Motion for Extension of Time to file her Brief, asking for an extension to January 31, 2012. The Court granted her extension, but only until January 3, 2012. The Court noted:

Perfection of this appeal has been significantly delayed. Extension of time to file the brief of appellant granted to January 3, 2012. This represents a 60 day extension. If the brief is not filed by January 3, 2012, the case will be dismissed without further notice.

(App. 4.)

**4. Fourth Extension.**

Ms. Steambarge did not file her brief by January 3, 2012. Instead, she filed another Motion for Extension of Time, requesting an extension until January 31, 2012. The Court not only granted this extension, but gave Steambarge until February 10, 2012 to file her Brief. (App. 5.)

**5. Fifth Extension.**

Bellevue Square finally received Ms. Steambarge's Brief on February 13, 2012, but it did not comply with the Rules of Appellate Procedure. As such, the Court of Appeals rejected the Brief, but gave her until February 27, 2012 to file a corrected brief. (App. 6.)

**6. Sixth Extension.**

Ms. Steambarge did not file her corrected brief by February 27, 2012. On March 13, 2012, the Court noted a hearing on a motion to dismiss and/or impose sanctions, set for April 6, 2012. The Court agreed to strike the hearing if Ms. Steambarge filed her brief on or before March 23, 2012. (App. 7.)

**7. Seventh Extension.**

Steambarge still did not file her brief by March 23, 2012. Instead, she appeared at the hearing on the Court's Motion to Dismiss. It was there that the most recent extension of time was granted to Steambarge, when the Court agreed to accept Ms. Steambarge's late-filed brief. The Court

also declined to impose any sanctions on Ms. Steambarge, though Bellevue Square, who also attended the hearing, requested them. (App. 8.)

**H. Bellevue Square Garnishes One of Ms. Steambarge’s Accounts with Wells Fargo, Which Leads to the Entry of a Default Judgment, an Order Vacating the Default Judgment, and an Appeal Linked to the Instant Appeal**

Following the entry of judgment, Bellevue Square garnished Ms. Steambarge’s accounts at Wells Fargo Bank, N.A. and JP Morgan Chase. Wells Fargo refused to answer the garnishment and a default judgment was entered against it. The trial court granted Wells Fargo’s motion to vacate the default judgment. Bellevue Square has appealed the order vacating the judgment. This Court, *sua sponte*, has “linked” the two matters on appeal. Thus, oral argument on the Wells Fargo appeal will not be heard until this appeal is resolved. (App. 9.)

**IV. ARGUMENT**

**A. Standard of Review.**

**1. Order Granting Summary Judgment.**

An appellate court engages in the same inquiry as the trial court when it reviews the trial court’s order of summary judgment. *Higgins v. Stafford*, 123 Wn.2d 160, 168, 866 P.2d 31 (1994). A party seeking to recover upon a claim may move with supporting affidavits for a summary judgment in his favor upon all or any part thereof. CR 56. The judgment

**B. This Court Should Affirm the Trial Court’s Grant of Summary Judgment on Bellevue Square’s Claim for Breach of Lease.**

Leases are contracts as well as conveyances, and the rules of construction that apply to contracts also apply to them. *Seattle-First Nat’l Bank v. Westlake Park Assocs.*, 42 Wn.App. 269, 272, 711 P.2d 361 (1985). Unambiguous contracts are interpreted as a question of law. *Paradise Orchards Gen. P’ship v. Fearing*, 122 Wn. App. 507, 517, 94 P.3d 372 (2004), *review denied*, 153 Wn.2d 1027, 110 P.3d 755 (2005).

Disputed issues of fact need not prevent the entry of summary judgment where all of the alleged issues of material fact would not change the legal significance of the language used in a contract. *Gwinn v. Church of the Nazarene*, 66 Wn.2d 838, 846, 405 P.2d 602 (1965).

Here, the Lease provides that in the event of a default, Bellevue Square has the right to terminate the Lease and recover “all past due Minimum Rent, Percentage Rent, additional rent and Other Charges; [and] the expenses of reletting the Leased Premises, including attorneys’ fees[.]” (CP 42.)

Ms. Steambarge does not dispute either her monetary default or sending the letter that unambiguously repudiated the Lease. (CP 50-51.) In opposition to the Motion for Summary Judgment, Ms. Steambarge did not challenge any category of Bellevue Square’s damages or their amount. The

trial court did not commit error in granting the Motion for Summary Judgment, and this Court should affirm.

**C. This Court Should Affirm the Dismissal of Ms. Steambarge's Counterclaims.**

Ms. Steambarge's appeal rests primarily on the theory that she was damaged because Bellevue Square "lured" her into its shopping center and convinced her to make a bad business decision. (CP 4-5.) "Luring" a tenant into a shopping center is, of course, not itself a cognizable cause of action. However, even granting both her counterclaim and her evidence in opposition to summary judgment every reasonable inference, Ms. Steambarge failed to demonstrate a genuine issue of fact as to any counterclaim. This Court should affirm the trial court's dismissal of all of Ms. Steambarge's counterclaims.

**1. Ms. Steambarge Failed to Establish a Genuine Issue of Material Fact with Respect to a Claim for Fraud.**

Fraud has nine elements and must be pled with particularity. CR 9(b). "Each element of fraud must be established by clear, cogent and convincing evidence. The nine elements of fraud are: (1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance on the truth of the representation; (8) plaintiff's right to rely upon it; and (9)

damages suffered by the plaintiff.” *Stiley v. Block*, 130 Wn.2d 486, 505, 925 P.2d 194 (1996).

When reviewing a civil case [on summary judgment] in which the standard of proof is clear, cogent, and convincing evidence, this court must view the evidence presented through the prism of the substantive evidentiary burden. Thus, we must determine whether, viewing the evidence in the light most favorable to the nonmoving party, a rational trier of fact could find that the nonmoving party supported his or her claim with clear, cogent, and convincing evidence. To overcome a presumption on summary judgment, the challenging party must offer evidence establishing a prima facie case supporting the claim or defense.

*Woody v. Stapp*, 146 Wn. App. 16, 22-23, 189 P.3d 807 (2008) (internal quotation marks and citations omitted).

Here, Ms. Steambarge has not even pled the nine elements of fraud, much less pled them with particularity or offered evidence establishing a prima facie case of fraud. The misrepresentations alleged appear to be as to: (1) expected sales volume and overall sales volume; (2) customer traffic numbers, patterns, demographics, and/or expectations; and (3) the alleged concealment of true patronage and sales numbers by timing Steambarge’s solicitation to coincide with the holiday shopping season. (CP 8, 88.)

First, there is no evidence that any information supplied as to sales volume, traffic numbers, patterns, demographics, or “expectations,” was false, much less evidence a jury could find to be clear, cogent and convincing. *See Woody*, 146 Wn. App. at 22-23. In fact, in opposing

summary judgment, Steambarge failed to present any evidence whatsoever supporting these claims. (CP 74-115.) It was only on reconsideration that Steambarge began presenting some of Bellevue Square's sales material, but she never presented any evidence to show that any of the statements therein were false or even misleading. (CP 157-171.)

A claim for fraudulent (or negligent) misrepresentation must concern an "existing" fact. *See Stiley*, 130 Wn.2d at 505. "Expected sales volume" is a prediction of a future event, not an existing fact. *See id.* at 505-06 (promise of future performance not representation as to existing fact). As to the alleged concealment by timing Ms. Steambarge's solicitation with the holiday shopping season as a basis for fraud, she must be ignorant of the falsity, reasonably rely on, and have a right to rely on the misrepresentation.

The "right to rely" element imposes on Ms. Steambarge a duty to conduct a reasonable investigation into the truth of representations. *See Alejandre v. Bull*, 159 Wn.2d 674, 690, 153 P.3d 864 (2007).

Ms. Steambarge is an experienced retailer, having previously operated two retail locations for a number of years. (CP 83.) Any member of the general public, and especially an experienced retailer, knows that holiday shopping traffic in malls is substantially higher than during other times of year. On this ground, her claim must fail as a matter of law

because no reasonable juror could sustain a claim of fraud on the basis that she was ignorant of the fact that malls are substantially busier during the holidays than other times of year or that she reasonably relied or had a right to rely on any representation to the contrary.

**2. Ms. Steambarge Failed to Establish a Claim for Negligent Misrepresentation.**

To the extent Ms. Steambarge alleges negligent misrepresentation or negligence, she is barred by the independent duty rule, as Bellevue Square and Ms. Steambarge are parties to a contract that governs the transactions at issue, and she points to no injury resulting from the breach of a duty arising independent of the parties' contract. *See Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.*, 170 Wn.2d 442, 449, 243 P.3d 521 (2010).

Even if the negligent misrepresentation claim was not barred by the independent duty rule, Steambarge failed to produce any evidence satisfying the elements of such a claim. The elements of a claim of negligent misrepresentation are:

- (1) That the defendant supplied information for the guidance of others in their business transactions that was false; and
- (2) That the defendant knew or should have known that the information was supplied to guide the plaintiff in business transactions; and
- (3) That the defendant was negligent in obtaining or

communicating false information;

(4) That the plaintiff relied on the false information supplied by the defendant; and

(5) That the plaintiff's reliance on the false information supplied by the defendant was *justified* (that is, that *reliance was reasonable under the surrounding circumstances*); and

(6) That the false information was the proximate cause of damages to the plaintiff.

*Lawyers Title Ins. Corp. v. Baik*, 147 Wn.2d 536, 545, 55 P.3d 619 (2002)

(internal quotation marks omitted; emphasis in original).

Again, there was no evidence presented by Steambarge that any representations made by Bellevue Square were false. This alone defeats any claim of negligent misrepresentation. As for the allegation concerning solicitation during the holiday shopping season, the claim fails the “justifiable reliance” test for the same reason that it failed the “reasonable reliance” test above. As an experienced retailer, Steambarge knew that shopping centers are busier during the holidays.

Ms. Steambarge's citation to *Riley v. Andres*, 107 Wn. App. 391, 27 P.3d 618 (2001) and *Michigan Nat'l Bank v. Olson*, 44 Wn. App. 898, 723 P.2d 438 (1986) for the proposition that courts should be hesitant to grant summary judgment when the material facts are only within the knowledge of the moving party are inapposite. The material facts here (most basically, her failure to pay rent and early termination of the Lease) are undisputed.

Even any alleged “misrepresentations,” if they occurred, would be within the knowledge of both parties.

**3. Ms. Steambarge Failed to Establish a Claim for Damage to a Sign.**

On appeal, Ms. Steambarge baldly alleges for the first time that there was \$2,800 in damage to her store sign. Once again, however, there is no testimony or other evidence in the record to support the \$2,800 figure. Moreover, arguments not raised in the trial court may not be considered for the first time on appeal. *Sourakli v. Kyriakos, Inc.*, 144 Wn. App. 501, 509, 182 P.3d 985 (2008), *rev. denied*, 165 Wn.2d 1017 (2009).

**D. This Court Should Affirm the Trial Court’s Denial of Ms. Steambarge’s Motion for Reconsideration.**

Superior Court Civil Rule 59 specifies the following grounds for reconsideration of a trial court’s decision:

- (1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial;
- (2) Misconduct of prevailing party . . . . ;
- (3) Accident or surprise which ordinary prudence could not have guarded against;
- (4) Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered or produced at the trial;
- (5) Damages so excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion

or prejudice;

- (6) Error in the assessment of the amount of recovery whether too large or too small, when the action is upon a contract, or for the injury or detention of property;
- (7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law;
- (8) Error in law occurring at the trial and objected to at the time by the party making the application; or
- (9) That substantial justice has not been done.

CR 59(a).

Ms. Steambarge raised several arguments for the first time in her Motion for Reconsideration. The trial court did not abuse its discretion in denying that motion. In addition to utterly failing to meet the requisite standard for establishing an adequate basis for the consideration of new evidence for the first time, none of Ms. Steambarge's new evidence establishes a genuine issue of material fact even if it had been timely before the trial court in opposition to summary judgment.

**1. Ms. Steambarge's Various Challenges to Bellevue Square's Damages Calculations Fail as a Matter of Law.**

For the first time on reconsideration, Ms. Steambarge lodged various arguments and challenges to Bellevue Square's damage calculations. The trial court did not abuse its discretion in declining to grant reconsideration based on these arguments, as there was no excuse

articulated for the delay in bringing this evidence before the trial court. *Sligar*, 156 Wn. App. at 733-34. However, even if the evidence had been brought timely, it would not have created a genuine issue of material fact.

**a. Bellevue Square Adequately Mitigated Its Damages.**

In her Motion for Reconsideration, Ms. Steambarge asked for the first time: “did the Plaintiff fully and adequately mitigate?” (CP 148.) She first complained that Bellevue Square granted the replacement tenant Papyrus too many concessions by allowing it to conduct its build-out without paying rent. (Id.) As was argued below, this is a common and commercially reasonable practice in retail leasing. Indeed, a similar concession was offered to Ms. Steambarge herself at the commencement of her tenancy. (CP 84; 126.) Bellevue Square is entitled to recover rent from Steambarge for this period because it is entitled to its expectation damages. *Knight v. American National Bank*, 52 Wn. App. 1, 9-10, 756 P.2d 757 (1988).

“Damages for breach of a lease should, as a general rule, reflect a compensation reasonably determined to place the lessor in the financial position he would have occupied had the breach not occurred.” *Id.* Had Ms. Steambarge not breached the Lease, Bellevue Square would have received rent during these months.

Directly contradicting her “failure to mitigate” argument, Ms.

Steambarge next complains that Bellevue Square was able to lease the space to the replacement tenant for too much money. (CP 148.) Because Bellevue Square was able to re-let the Allusia space for more than the rent she was paying, Ms. Steambarge is not being held liable for any amounts after the replacement tenant began paying rent. It is a matter of Washington law, however, that she is not entitled to a credit for the excess rent received by Bellevue Square from the replacement tenant. “A defaulting tenant is not entitled to a credit for the excess rent the landlord receives from a subsequent tenant toward the unpaid rent owed by the original tenant for the period of time the property was vacant.” *Hargis v. Mel-Mad Corp.*, 46 Wn. App. 146, 153-54, 730 P.2d 76 (1986).

**b. Bellevue Square Is Entitled to Collect Merchant’s Association Dues Pursuant to the Lease.**

Ms. Steambarge also argued on reconsideration that Bellevue Square cannot collect charges owing to the Merchants’ Association. Contrary to her argument, Bellevue Square is expressly authorized to collect Merchant’s Association dues under the terms of the Lease. Specifically, section 12.2(b) provides that “Landlord shall have the right to specifically enforce against Tenant, as a third party beneficiary, Tenant’s compliance with the provisions, terms and conditions of the Merchants’ Association’s Articles, Bylaws and Regulations.” (CP 38.)

The trial court properly awarded these damages to Bellevue Square.

**c. There Was No Agreement to Waive Charges.**

Ms. Steambarge also argued in her Motion for Reconsideration, and on appeal, that she reached an oral agreement with Bellevue Square that if she made certain unspecified installment payments, Bellevue Square would agree to waive certain late charges. (CP 149.) But she has submitted no evidence whatsoever of such an agreement to waive late charges. Once again, there is only argument in the Motion for Reconsideration to support this assertion. Argumentative assertions are not sufficient to defeat a motion for summary judgment. *Higgins*, 123 Wn.2d at 169.

**d. Ms. Steambarge Failed to Adequately Challenge Any of the Remaining Categories of Damages or the Manner in Which They Were Calculated.**

Ms. Steambarge did not contest any of Bellevue Square's damages calculations in her opposition to Bellevue Square's Motion for Summary Judgment. It was only in her Motion for Reconsideration that she first complained about Bellevue Square's damage calculations. The trial court correctly denied the Motion for Reconsideration without requesting a response: "No response to a motion for reconsideration shall be filed unless requested by the court." King County LCR 59(b).

In any case, however, Ms. Steambarge failed in her Motion for Reconsideration, as she fails on appeal, to point to any evidence in the

record showing that the calculations are incorrect. Nevertheless, these claims of “calculation errors” are addressed in turn.

Ms. Steambarge claims that Bellevue Square failed to credit \$3,000 in payments she made in March, 2011. This is simply not true. She did not pay rent in February 2011. Steambarge’s total February rent was \$3,137.58. (CP 21.) The delinquencies report shows a balance of \$137.58 due for February rent, after crediting to February rent the \$3,000 she paid in March. (CP 55.)

Ms. Steambarge also complained of a double-billed legal fee charge for the first time in her Motion for Reconsideration. This claim could have been raised in response to Bellevue Square’s Motion for Summary Judgment, as the billing summaries and fee declaration were submitted with Bellevue Square’s initial motion. (CP 55-56; 254-61.) In any case, however, Ms. Steambarge has once again failed to cite any evidence, much less sufficient evidence to create a genuine issue of material fact, of double-billing. Ms. Steambarge broadly cites only to her own Motion for Reconsideration to support her claim of double billing, but she makes no effort to show the Court any evidence of why or how it is a double-billing. (Appellant’s Brief, p. 17.)

The same is true when it comes to the security deposit, which, for the first time in her motion for reconsideration, she argued was not properly

applied. Again, Ms. Steambarge never provided any sort of accounting to rebut Bellevue Square's calculations, or even to give Bellevue Square an opportunity to correct any alleged miscalculations and Bellevue Square was never given an opportunity to respond to this claim as the Motion was properly denied without a request for response. Ms. Steambarge's late allegation was not a proper basis for reconsideration, as the claim could have been made in response to the motion for summary judgment.

In any case, however, the Lease gives Bellevue Square the option to either apply or retain the security deposit to cover "any amount which Landlord may spend or become obligated to spend by reason of Tenant's breach or default, or to compensate Landlord for any other loss or damage which Landlord may suffer by reason of Tenant's breach or default." (CP 32.) Here, there was no dispute that Ms. Steambarge was in breach and default of the Lease. There was therefore no requirement for Bellevue Square to immediately apply the security deposit to the past due back rent and charges, especially in light of the continuing litigation.

**E. Ms. Steambarge Is Not Entitled to Reversal or Remand Because No Audio or Video Recording or Transcription Was Made of the Summary Judgment Oral Argument.**

Ms. Steambarge argues that this Court should grant her relief because the trial court did not record or transcribe the summary judgment oral argument. She is incorrect. There is no requirement in Washington

law or the court's rules that the oral arguments on motions for summary judgment be recorded or transcribed. RCW 2.32.180 does not stand for any such proposition; it merely specifies that every superior court judge appoint a stenographer, not that every summary judgment oral argument be stenographically recorded. Even if a transcript of the oral argument was available, it would not make a difference to the appeal because no additional evidence was presented or testimony taken at the oral argument. Moreover, Steambarge could have prepared a narrative report of the proceedings, but she did not avail herself of the opportunity. RAP 9.3.

**F. Steambarge Had Ample Opportunity to Conduct Discovery and Never Requested a Continuance.**

For the first time on appeal, Steambarge claims she was given inadequate time to conduct discovery. This is not a basis for either reversal or remand.

“An argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal.” *Sourakli v. Kyriakos, Inc.*, 144 Wn. App. 501, 509, 182 P.3d 985 (2008), *rev. denied*, 165 Wn.2d 1017 (2009). Steambarge never requested additional time to conduct discovery and she had ample time to do so in any case. The case was commenced on April 5, 2010. (CP 1.) The Motion for Summary Judgment was not heard until October 29, 2010, more than six months later. (CP 137-39.) Bellevue

Square had time to depose Ms. Steambarge, propound interrogatories and requests for production, and file a motion to compel. (CP 219-25.)

**G. Ms. Steambarge's Conjecture and Argument Regarding the Identity of the Landlord Do Not Merit Reversal or Remand.**

Ms. Steambarge repeatedly questions whether Bellevue Square, LLC is the proper Plaintiff. Bellevue Square, LLC is the landlord and signatory on the Lease and as such is the proper Plaintiff. (CP 20; 43.) Kemper Development Company is the manager of Bellevue Square, LLC. (CP 43.) Steambarge's construction of the Lease's insurance clause is erroneous as a matter of law. The sentence she quotes as support for her proposition is: "Landlord, Kemper Development Company and any other parties in interest designated by Landlord, shall be named as an additional insured." The sentence plainly states that the tenant must name two identified parties, the Landlord (Bellevue Square, LLC) and Kemper Development Company, as well as any other parties Bellevue Square may designate, as additional insureds on the tenant's general liability policy. The sentence does not make Kemper Development Company the Landlord or divest Bellevue Square, LLC of its rights under the Lease.

**H. This Court Should Award Bellevue Square Its Reasonable Attorney Fees and Costs Incurred on Appeal.**

Bellevue Square is entitled to its reasonably incurred attorney fees and costs on appeal pursuant to Section 20.3 of the Lease. RAP 18.1(a).

Should the Court of Appeals affirm the trial court, Bellevue Square will submit an affidavit of fees and expenses pursuant to RAP 18.1(d).

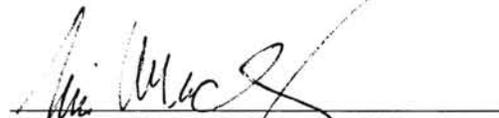
## V. CONCLUSION

Bellevue Square entered into a lease with an experienced retail whose concept failed. Ms. Steambarge does not dispute her failure to pay rent. Instead of accepting responsibility for her business failure, Ms. Steambarge launched a vigorous, if baseless, *pro se* defense blaming Bellevue Square for the store's failure.

Her allegations of misrepresentation and related theories are totally unsupported and fail as a matter of law. The trial court correctly granted summary judgment on Bellevue Square's claim and correctly dismissed her counterclaim as a matter of law. Denying her Motion for Reconsideration was not an abuse of discretion. This Court should affirm the trial court in all respects and award Bellevue Square its reasonable attorney fees and costs as provided by the Lease.

Respectfully submitted this 27<sup>th</sup> day of April, 2012.

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FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON

2012 APR 30 PM 2: 30

No.66533-2-I

COURT OF APPEALS DIVISION I  
OF THE STATE OF WASHINGTON

BELLEVUE SQUARE, LLC,

Appellant/Plaintiff,

v.

WELLS FARGO BANK, NA,

Garnishee Defendant/Respondent.

NO. 66355-2-I

DECLARATION OF SERVICE  
OF RESPONDENT'S BRIEF

I, Jodi Graham, declare as follows:

1. I am not a party to the above-captioned action and am over the age of 18.

2. I am competent to testify to the matters herein and do so based upon my personal knowledge.

3. I cause the following documents to be served on April 27, 2012 in the manner indicated below:

1. Respondent's Brief; and
2. Declaration of Service.

4. The above documents were served on the following:

Court of Appeals  
600 University Street  
One Union Square  
Seattle, WA 98101   **Via US First Class Mail**

Heidi Anderson  
Lane Powell PC  
1420 Fifth Avenue, Ste. 4100  
Seattle, WA 98101 **Via US First Class Mail**

Jimi Lou Steambarge  
921 SW 152<sup>nd</sup> Street  
Burien, WA 98166 **US First Class Mail**

I declare under the penalty of perjury under the laws of the State  
of Washington that the foregoing is true and correct.

Signed at Bellevue, Washington this 27th day of April, 2012.

A handwritten signature in black ink, appearing to read "Jodi Graham", written over a horizontal line.

Jodi Graham

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Bellevue, Washington, 98004  
Telephone: (425) 289-5555  
Facsimile: (425) 289-6666