IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

FRANK C. RODARTE and SHIRLEY D. RODARTE, husband and wife, Respondents, v. JAMES D. COOPER and DEBORAH A. COOPER, husband and wife, and their marital community, CASCADE MOBILE MIX CONCRETE LLC, d/b/a/ Cascade Mobile Mix; ERIC WRIGHT and LARISSA R. WRIGHT, husband and wife, and their marital community, CASCADE CONCRETE LLC, d/b/a Cascade Mobile Mix Concrete; Jane Does and John Does #1 - #4, Appellants.	No. 40182-7-II UNPUBLISHED OPINION

Van Deren, J. — James and Deborah Cooper and Eric and Larissa Wright[1] appeal from the trial court's conclusion that they breached their lease with Frank and Shirley Rodarte, resulting in their eviction from the premises. The Coopers and the Wrights argue that the trial court erred in finding that a lease between the parties unambiguously required the Coopers and the Wrights to pay property taxes on the leased property and in concluding that the Coopers' and the Wrights' failure to pay those taxes materially breached the lease. They further argue that the

[1] We collectively refer to James and Deborah Cooper and Eric and Larissa Wright as "the Coopers and the Wrights."

trial court abused its discretion in admitting evidence showing that the Coopers and the Wrights failed to pay the property taxes and in granting Frank and Shirley Rodarte's motion to amend their complaint to allege breach of the lease by the Coopers and the Wrights for nonpayment of the property taxes. We affirm.

FACTS

In 1986, Roger and Margaret Rodarte[2] leased property to Robert Pettit, Jr. and Lena Pettit. The lease term began on March 1, 1986, and was to terminate on February 28, 1996. The lease provided in pertinent part:

> SECTION III
> RENTAL
>
> Lessee shall pay a minimum rental of . . . $2,378.76 . . . per year during the term of this lease, payable in advance in monthly installments of . . . $198.23 . . . due on the fifth (5th) day of each month, commencing on the 5th day of March, 1986. . . .
>
> SECTION IV
> OPTION TO PURCHASE
>
> In the event Lessee has made all monthly rental payments on the premises for a period of ten (10) years, and if Lessee is not in default of any other covenant of this lease, then at the end of the initial term of this lease (10 years), Lessee shall be entitled to purchase the property for . . . $1.00 . . . . Should this option be exercised, all lease payments shall apply to the purchase of the price, to-wit: . . . $15,000 . . . including interest at . . . 10 . . . percent per annum over a ten year period. . . .
>
> SECTION V
> SUBDIVISION OF PROPERTY
>
> During the term of this lease, Lessor agrees to provide, at his own expense, a subdivision of the property . . . .
>
> SECTION VI
> RENEWAL OF LEASE
>
> Should lessor fail to complete the subdivision of the property required by this lease by the end of this lease, this lease shall renew automatically each year on the 1st day of March of each succeeding year following the end of the term of this lease. *The annual rental* for each succeeding year following the end of the term of this lease, shall be . . . $1.00 . . . payable on the 5th day of March of each

[2] For clarity, we refer to Roger and Margaret Rodarte as "the Roger Rodartes" and Frank and Shirley Rodarte as "the Rodartes." We mean no disrespect.

succeeding year.

. . . .

SECTION IX
TAXES, INSURANCE, AND PERMITS

Lessee shall pay 7.36 [percent] of all real property taxes levied on the parcel of property owned by Lessor, which includes the demised premises. . . .

Clerk's Papers (CP) at 11-13 (emphasis added) (boldface omitted).

Section XV of the lease provided that, in the event of written notice of failure to perform any lease term or condition other than rental payment, failure to cure such default within 30 days constituted breach of the lease. The remedies for breach included terminating the lease after a 30 day termination notice. Section XVII of the lease provided for an award of reasonable attorney fees to the prevailing party in an action to enforce "any condition or covenant" of the lease. CP at 15.

Between 1986 and 1996, the Pettits paid property taxes on the leased property directly to the Roger Rodartes. On February 5, 1996, the Pettits attempted to exercise the purchase option. They stated, however, that if "an outright purchase cannot be accomplished at this time, [they] desire[d] to continue with the new lease term as outlined in Section VI." CP at 572. The Roger Rodartes responded that they could not comply with the lease's subdivision requirement and requested that "[the parties] agree on Section VI 'Renewal of Lease.'" CP at 572.

On August 18, 1998, the Pettits assigned their lease to James and Deborah Cooper. The assignment provided that the Coopers "assume[ ] all rights and duties required of [the Pettits] under the lease[], including all payments required thereby, and shall comply with all terms and conditions of the lease." CP at 573 (second alteration in original) (internal quotation marks omitted).

On December 23, 1999, the Roger Rodartes sold the leased property to the Rodartes. The Rodartes did not demand that the Coopers pay the property taxes according to the lease, and the Coopers made no payments for property taxes. On June 1, 2005, the Coopers assigned the lease to Eric and Larissa Wright. The Coopers used a form agreement that contained language stating that the Coopers sold the property, not just assigned lease rights, to the Wrights.[3]

Even though the Rodartes had never demanded tax payments from the Coopers or the Wrights, on May 22, 2007, the Rodartes notified the Coopers and the Wrights that they were in default of the lease because they had not paid the property taxes as required under section IX of the lease and that they had 33 days to cure the default. Neither the Coopers nor the Wrights responded to the Rodartes' notice nor did they pay the taxes. On August 28, 2007, the Rodartes gave the Coopers and the Wrights written notice of their intent to terminate the lease.

On August 29, 2007, the Rodartes sued the Coopers and the Wrights, alleging that they had breached the lease. The complaint did not specifically allege that the Coopers and the Wrights had breached the lease by failing to pay the property taxes specified in the lease and in their notice of default. Instead, it stated:

> 4.14 By certified letter mailed May 22, 2007 [the] Rodarte[s] notified [the] Cooper[s] . . . that they were in default of the lease and of [the] Rodarte[s'] intention to evict [them] (terminate the lease) unless default was . . . cured within 33 days. More than 33 days have elapsed and the default has not been cured.

CP at 6. In their answer and counterclaim to the Rodartes' suit, the Coopers and the Wrights

[3] The purported sale apparently led to the Rodartes' discovery of the nonpayment of property taxes because the Coopers and Wrights recorded deeds against the leased property and the Wrights began paying taxes directly to Pierce County on a different parcel owned by the Rodartes. According to one of the Rodartes' employees, the taxes due on the leased parcel were minimal, with a "low estimate" totaling $1,118.89 for all the unpaid years' taxes. CP at 143.

alleged that "[d]uring all times relevant to this cause of action, the Lessee Pettit or his successors paid the full amount of taxes due." CP at 336. But this answer was based on the Coopers' and the Wrights' position that no taxes were ever due from them under the lease. They did not deny that they had not paid the property taxes on this parcel of property. The Rodartes denied the Coopers' and the Wrights' assertion that the required taxes on the leased parcel had been paid.

Before trial, the Coopers and the Wrights asked the trial court to exclude any testimony or evidence related to their failure to pay property taxes, arguing that such evidence was irrelevant to any elements of the Rodartes' pleaded causes of action. But the Coopers and the Wrights admitted that the Rodartes' notice of default and their notice to the Coopers and the Wrights that their failure to pay the accrued property taxes would result in default of the lease were part of an earlier summary judgment motion in the case, decided in the Rodartes' favor.[4] In response to the motion to exclude evidence showing the failure to pay the property taxes, the Rodartes argued that (1) the default notice they sent to the Coopers and the Wrights stated that the lease's termination was based on the Coopers' and the Wrights' failure to pay the property taxes; (2) both James and Deborah Cooper's depositions addressed the failure to pay the property taxes; (3) the earlier summary judgment motion "was replete with discussion and argument regarding taxes"; (4) the Coopers and the Wrights knew the case involved tax issues; (5) the Rodartes were entitled to argue failure to pay property taxes as a breach theory; and (6) the pleadings could be amended to conform to the evidence produced at trial. Report of Proceedings (RP) at 19. The trial court reserved its ruling to gain "more of a context of what the case is about." RP at 19.

[4] A different trial judge granted summary judgment to the Rodartes, requiring the Coopers and the Wrights to remove the deeds that they had wrongfully recorded against the property owned by the Rodartes and only leased to the Coopers and the Wrights.

The Coopers and the Wrights presented evidence that Robert Pettit, Jr. and the Coopers' own understanding of the lease was that it did not require them to pay the property taxes after the initial 10 year lease period because the Roger Rodartes had failed to subdivide the property. Over the Coopers' and the Wrights' continuing objections, the trial court allowed other testimony and evidence about their failure to pay the property taxes. The trial court denied the Coopers' and the Wrights' motion to exclude such evidence during one of their objections, stating, "I'm not going to exclude the evidence on property taxes." RP at 63.

After the Rodartes rested their case, they moved to amend the pleadings under CR 15(b) to include a cause of action for breach based specifically on the Coopers' and the Wrights' failure to pay the property taxes. The trial court granted the motion to amend the complaint, stating,

> [T]he initial Complaint does refer to the Notice of Default. One of the grounds for the Notice of Default was the failure to pay taxes. So I think the defendants were sufficiently put on notice that taxes were going to be one of the issues. The precise nature of issues often change[s] from the time a Complaint is filed as a result of discovery. So I don't think there was unfair surprise or an interference with the ability of the defendants to prepare for trial.

RP at 193.

The trial court concluded that the Coopers and the Wrights had breached the lease by failing to pay property taxes and entered an order terminating the lease, evicting the Coopers and the Wrights, and awarding the Rodartes their attorney fees. The Coopers and the Wrights appeal.

ANALYSIS

I. Property Tax Payments and Material Breach

We observe that the parties make many arguments regarding the lease, but this case turns primarily on whether the lease unambiguously required the Coopers and the Wrights to pay

property taxes to the Rodartes.[5] The Coopers and the Wrights, relying on extrinsic evidence, such as Robert Pettit, Jr.'s understanding of the lease, contend that section VI was ambiguous about whether the lease required them to pay property taxes. The Rodartes respond that the lease, when read as a whole, unambiguously required property tax payments from the Coopers and the Wrights. We agree with the Rodartes.

The Coopers and the Wrights assign error to the trial court's finding of fact 2.20 that stated, "[The Coopers and the Wrights] presented evidence and argument that Section VI concerning the 'Renewal of Lease' was ambiguous. The Court finds that Section VI was not ambiguous." CP at 578. The Coopers and the Wrights also assign error to the trial court's conclusions of law 3.1 and 3.8 that their failure to pay property tax constituted a material breach of the lease and that the Rodartes were the prevailing party and entitled to attorney fees.

A. Standard of Review

On appeal from a bench trial, we review conclusions of law de novo. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). We review findings of fact to determine whether they are supported by substantial evidence and, if so, whether the findings support the conclusions of law. *Hegwine v. Longview Fibre Co.*, 132 Wn. App. 546, 555, 132 P.3d 789 (2006), *aff'd*, 162 Wn.2d 340, 172 P.3d 688 (2007). "Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise."

[5] For example, the Coopers and the Wrights assign error to finding of fact 2.2, "James D. and Deborah A. Cooper were responsible for paying to the Pettits the property taxes described in Section IX of the March 1, 1986 Lease of Premises (Exhibit 1)." CP at 572 (boldface omitted). But this finding is irrelevant to the central issue in this case, i.e., whether the Coopers and the Wrights breached the lease by failing to pay property taxes to the Rodartes. Further, the Coopers and the Wrights provide no argument supporting their assignment of error to this finding. We do not review assignments of error unsupported by argument. RAP 10.3(a)(6).

Holland v. Boeing Co., 90 Wn.2d 384, 390-91, 583 P.2d 621 (1978). "Unchallenged findings [of fact] are verities on appeal." *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002).

B. Lease Interpretation

When interpreting a contract, we seek to determine and to effectuate the parties' mutual intent. *Berg v. Hudesman*, 115 Wn.2d 657, 663, 801 P.2d 222 (1990). Interpretation of a contract provision is usually a question of fact. *Martinez v. Kitsap Pub. Servs., Inc.*, 94 Wn. App. 935, 943, 974 P.2d 1261 (1999). Contract interpretation involves "'a question of law only when (1) the interpretation does not depend on the use of extrinsic evidence, or (2) only one reasonable inference can be drawn from the extrinsic evidence.'" *Martinez*, 94 Wn. App. at 943 (quoting *Tanner Elec. Coop. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 674, 911 P.2d 1301 (1996)). "When analyzing the parties' intent, a court must examine not only the four corners of any writing the parties may have signed, but also the circumstances leading up to and surrounding the writing," for which extrinsic evidence is admissible. *Hall v. Custom Craft Fixtures*, *Inc.*, 87 Wn. App. 1, 8, 937 P.2d 1143 (1997).

But in considering the agreement's surrounding circumstances, we examine the parties' objective manifestations of intent, not "their 'unilateral or subjective purposes and intentions about the meaning of what is written.'" *Hall*, 87 Wn. App. at 9 (quoting *Lynott v. Nat'l Union Fire Ins. Co.*, 123 Wn.2d 678, 684, 871 P.2d 146 (1994)). In other words, we "strive[] to ascertain the meaning of what is written in the contract, and not what the parties intended to be written" but did not commit to writing. *Bort v. Parker*, 110 Wn. App. 561, 574, 42 P.3d 980 (2002). Thus, if the contract's language is clear and unambiguous, then we must enforce the contract as written. *Allstate Ins. Co. v. Peasley*, 131 Wn.2d 420, 424, 932 P.2d 1244 (1997).

Extrinsic evidence offered to contradict the terms of an unambiguous contract is inadmissible. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695, 974 P.2d 836 (1999).

Here, lease sections III, VI, and IX respectively governed the Coopers' and the Wrights' rental and property tax payment obligations. Section VI modified "annual rental" payments following the lease's original 10 year term. The language in section VI of the lease did not modify or supersede other obligations or payment provisions of the lease, such as section IX's property tax payment requirements. Section IX unambiguously required payment of the proportionate amount of property taxes charged to the Rodartes, "Lessee shall pay 7.36 [percent] of all real property taxes levied on the parcel of property owned by Lessor, which includes the demised premises." CP at 13. The Coopers and the Wrights remained lessees and the Rodartes were the lessors.

Although the Coopers and the Wrights offered testimony and evidence of their own contrary, subjective interpretation, we must enforce the lease's unambiguous language as written. Read as a whole, the lease required them to continue to pay property taxes to the Rodartes after the expiration of the original 10 year term. Substantial evidence supports finding of fact 2.20 and conclusion of law 3.1.

Accordingly, section XV also provided that failure to cure a failure to perform any lease term or condition, other than rental payments, within 30 days of written notice would constitute breach of the lease. The Rodartes' remedies included terminating the lease after a 30 day termination notice. The Coopers and the Wrights failed to pay property taxes to the Rodartes, the Rodartes gave all required written notices of default and termination, and the Coopers and the Wrights failed to cure their default. And the lease's section XVII provided for an award of

reasonable attorney fees to the prevailing party in an action to enforce "any condition or covenant" of the lease. Thus, the trial court's findings support conclusions of law 3.1 and 3.8.

II. CR 15(b) Amendment and ER 401

The Coopers and the Wrights argue that the trial court abused its discretion by admitting testimony and evidence about their failure to make the property tax payments because testimony and "evidence presented to prove a legal theory that was not explicitly plead is not admissible under ER 401 until and unless the [trial c]ourt first grants a motion to amend." Br. of Appellant at 35. The Coopers and the Wrights also argue that the trial court abused its discretion by granting the motion to amend because they were unable to raise affirmative defenses as required by CR 12(b). The Rodartes did not respond to these arguments.

A. Standard of Review

We review the interpretation of court rules, a matter of law, de novo. *Burt v. Dep't of Corr.*, 168 Wn.2d 828, 832, 231 P.3d 191 (2010). We apply the same principles when interpreting court rules that we apply when we interpret statutes. *State v. Carson*, 128 Wn.2d 805, 812, 912 P.2d 1016 (1996). When words in a court rule are plain and unambiguous, further statutory construction is not necessary and we apply the court rule as written. *State v. Robinson*, 153 Wn.2d 689, 693, 107 P.3d 90 (2005).

We review a trial court's CR 15 ruling for manifest abuse of discretion. *Herron v. Tribune Publ'g Co., Inc.*, 108 Wn.2d 162, 165, 736 P.2d 249 (1987). A trial court abuses its discretion if its decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668-69, 230 P.3d 583 (2010).

We also review a trial court's evidentiary rulings for abuse of discretion. *Salas*, 168

Wn.2d at 668. ER 402 provides that "[e]vidence which is not relevant is not admissible." ER 401 defines "'[r]elevant evidence'" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

B. Amendment to Conform to the Evidence

CR 15(b) provides:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. *If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.*

(Emphasis added.)

"CR 15(b) is designed to avoid the tyranny of formalism that was a prominent characteristic of former practice and to avoid the necessity of a new trial which often follows a deviation from the pleadings." *Harding v. Will*, 81 Wn.2d 132, 136, 500 P.2d 91 (1972). CR 15(b) permits amendment of the pleadings at any time, including at the trial's conclusion or at entry of judgment. *Harding*, 81 Wn.2d at 136. But amendment under CR 15(b) is improper "if actual notice of the unpleaded issue is not given, if there is no adequate opportunity to cure surprise that might result from the change in the pleadings, or if the issues have not in fact been litigated with the consent of the parties." *Harding*, 81 Wn.2d at 137. "Absent a showing of

surprise or prejudice, it is not error for a trial court upon perceiving both the issues and parties before it to be other than as pleaded, to realign parties and redefine issues" under CR 15(b). *Harding*, 81 Wn.2d at 137-138.

CR 15(b)'s plain language contemplates what occurred here; the Coopers and the Wrights objected to the admission of evidence they claimed was "not within the issues made by the pleadings." The Coopers and the Wrights provide no authority that a trial court may not reserve ruling on such objections until later in the trial. *See* RAP 10.3(a)(6).

Here, the trial court reserved its ruling on the Coopers' and the Wrights' pretrial relevancy objections because—as the Rodartes observed—their notice of default and termination notified the Coopers and the Wrights that the Rodartes were terminating the lease, in relevant part, because the Coopers and the Wrights failed to pay the property taxes or cure their nonpayment after notice of the default. They also pointed out that the pleadings could later be amended to conform to evidence of nonpayment of the property taxes, which they intended to argue. When it became apparent that evidence of nonpayment of the taxes was relevant to the Rodartes' breach theory, the trial court properly denied the Coopers' and the Wrights' motion to exclude the evidence. The trial court did not abuse its discretion in denying the motion.

After the Rodartes rested their case, the trial court granted their motion to amend the pleadings based on this properly admitted evidence of nonpayment of property taxes by the Coopers and the Wrights. The Coopers' and the Wrights' only claim of prejudice is that they were prevented from raising affirmative defenses of estoppel and waiver in their answer as required by CR 12(b). But the Coopers and the Wrights could have moved under CR 15(b) to amend their answer to include the affirmative defenses required by CR 12(b). *Rainier Nat'l Bank*

v. Lewis, 30 Wn. App. 419, 422-23, 635 P.2d 153 (1981). The Coopers and the Wrights did not move to amend their answer at any time.

Further, the Coopers' and the Wrights' motion to exclude the evidence of nonpayment of taxes and the Rodartes' responsive arguments indicated that the parties knew that the Coopers' and the Wrights' failure to pay property taxes was at issue, both parties presented testimony and evidence relating to this issue, including the fact that the Rodartes had not demanded payment of the property taxes until the notice of default, and the Coopers and the Wrights did not request a continuance so they could have more time to respond to the nonpayment issue. CR 15(b). The record shows no prejudice to the Coopers and the Wrights. *See Harding*, 81 Wn.2d at 137. Thus, the trial court did not abuse its discretion in granting the motion to amend.

III. Attorney Fees

The Rodartes request attorney fees under RAP 18.1. RAP 18.1 allows attorney fees on appeal if applicable law authorizes them. Here, the lease's section XVII provided for an award of reasonable attorney fees to the prevailing party in an action to enforce "any condition or covenant" of the lease. CP at 15. We award the Rodartes' attorney fees on appeal to be

determined upon compliance with RAP 18.1. We also affirm the trial court's award of the Rodartes' attorney fees based on section XVII's language.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, J.

We concur:

Quinn-Brintnall, J.

Worswick, A.C.J.