

FILED _____

AT _____ O'Clock _____ M
CLERK OF DISTRICT COURT

Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

BERNARD GURSTEIN and SHEILA)
GURSTEIN, husband and wife, and)
RUSSELL GURSTEIN,)
Plaintiffs,)
vs.)
KOOTENAI COUNTY, a political)
subdivision of the State of Idaho,)
Defendants.)
_____)

Case No. **CV 2008 7852**

**MEMORANDUM DECISION AND
ORDER ON MOTIONS FOR
SUMMARY JUDGMENT**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

Plaintiffs Bernard and Sheila Gurstein (Gursteins) operated a light industrial manufacturing business, U.S. Products, Inc., in California. In July 1988, U.S. Products, Inc., entered into a lease agreement with Kootenai County; the lease terms were favorable to U.S. Products, Inc., as part of an incentive program to bring employers to Kootenai County. Affidavit of Bernard Gurstein, p. 2, ¶ 8. In 1992, U.S. Products, Inc. transferred its interest in the lease to Bernard and Sheila Gurstein, and the County consented to this assignment. *Id.*, p. 3, ¶ 11. Gursteins thereafter sought an assignment of one-third of their lease interest to their son, Russell Gurstein. This assignment to Russell Gurstein was effected with the County's written consent via correspondence with the then Administrative Director of the Kootenai County Commissioners. *Id.*, ¶ ¶ 12-13. The Gursteins sold the U.S. Products business in 1998, but Gursteins retained ownership of the lease with the County and the building they had

constructed as an improvement on the leasehold property, subletting the property to the new U.S. Products owner. *Id.*, p. 3, ¶ 14. The Gursteins desired to sell the improvement and assign the leasehold and began that process in 2002 or 2003; however, the Gursteins only received one proposal to purchase from Blue Water Technologies, Inc. (Blue Water) in October 2006. *Id.*, p. 4, ¶ 20. Gursteins entered into a purchase and sale agreement with Blue Water in 2007. That transaction was scheduled to close on October 1, 2007, and after Blue Water granted one extension to Gursteins, it was scheduled to close on October 31, 2007. The purchase and sale agreement did not close as Blue Water withdrew due to the fact that Gursteins had failed to obtain the written consent from the County to assign the subject lease. *Id.*, pp. 4-8, ¶ ¶ 21-41.

On September 30, 2008, Gursteins filed this lawsuit for damages against the County after the closing did not occur. Gursteins alleged the County breached the lease agreement between Gursteins and the County (in part by unreasonably withholding consent to an assignment of the lease) and the County breached the implied covenant of good faith and fair dealing. Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment, p. 3.

On August 25, 2010, Gursteins filed "Plaintiffs' Motion for Partial Summary Judgment", "Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment", "Statement of Undisputed Material Facts in Support of Motion for Partial Summary Judgment", "Affidavit of John F. Magnuson Re: "Plaintiffs' Motion for Partial Summary Judgment" (with extensive exhibits) and the "Affidavit of Bernard Gurstein Re: Plaintiffs' Motion for Partial Summary Judgment" with exhibits. Also on August 25, 2010, the County filed its "Defendant's Motion for Summary Judgment", its "Memorandum in Support of Summary Judgment", and "Affidavit of Darrin L. Murphey".

On September 7, 2010, Gursteins filed their “Memorandum in Opposition to Defendant’s Motion for Summary Judgment” and the County filed its “Response to Plaintiffs’ Motion for Partial Summary Judgment”, another “Affidavit of Darrin Murphey”, and its “Concise Statement of Material Facts.” Oral arguments on the cross-motions for summary judgment were held on September 14, 2010, following which the motions were taken under advisement. This matter is currently set for a five-day court trial commencing on November 15, 2010.

II. STANDARD OF REVIEW.

In considering a motion for summary judgment, the Court is mindful that summary judgment may properly be granted only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). In determining whether any issue of material fact exists, this court must construe all facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, in the light most favorable to the non-moving party. I.R.C.P. 56(c); *Sewell v. Neilson, Monroe Inc.*, 109 Idaho 192, 194, 706 P.2d 81, 83 (Ct.App.1985). A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue for purposes of summary judgment. *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134, Idaho 84, 87, 996 P.2d 303, 306 (2002). Summary judgment must be denied if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence. *Smith v. Meridian Joint School District No. 2*, 128 Idaho 714, 718, 918 P.2d 583, 587 (1996).

Where, as here, both parties file motions for summary judgment relying on the same facts, issues and theories, the judge, as trier of fact, may resolve conflicting inferences if the record reasonably supports the inferences. *Riverside Dev. Co. v.*

Ritchie, 103 Idaho 515, 518-20, 650 P.2d 657, 661-62 (1982). Where both parties file motions for summary judgment relying on the same facts, issues and theories, the fact that both parties have filed summary judgment motions alone does not in itself establish that there is no genuine issue of material fact. *Id.*, 103 Idaho 515, 518, n. 1, 650 P.2d 657, 661, n. 1. This is so because by filing a motion for summary judgment, a party concedes that no genuine issue of material fact exists under the theory that he is advancing, but does not thereby concede that no issues remain in the event that his adversary seeks summary judgment upon different issues of theories. *Id.*

In any case which will be tried to the court, rather than to a jury, the trial judge is not constrained to draw inferences in favor of the party opposing a motion for summary judgment, but instead, can arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts. *Id.*; *J.R. Simplot Co. v. Bosen*, 144 Idaho 611, 618, 167 P.3d 748, 755 (2006).

III. ANALYSIS.

A. Breach of Contract.

Gursteins move this Court for an Order granting them partial summary judgment on the issue of whether the County breached its lease agreement with Gursteins. If partial summary judgment were granted on the breach of contract, the issue of damages would remain and would be determined at the court trial. Plaintiff's Motion for Partial Summary Judgment, p. 2. In their memorandum in support of the motion for partial summary judgment, Gursteins clarify they seek partial summary judgment on the issue of liability with regard to both their breach of contract and breach of implied covenant of good faith and fair dealing claims; "[t]he issue of damages presents a question of fact that should remain for trial." Memorandum in Support of Plaintiffs'

Motion for Partial Summary Judgment, p. 3. Gursteins argue: (1) the County breached the unambiguous terms of the lease agreement entered into by the parties by unreasonably withholding and/or denying its consent to assignment of the leasehold interest to Blue Water and (2) the County breached the implied covenant of good faith and fair dealing by unreasonably withholding and/or delaying its consent. Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment, pp. 11-18.

Gursteins set forth in their Statement of Undisputed Material Facts that written request for the County's consent to assignment of the ground lease to Blue Water was made on September 19, 2007, in anticipation of the October 31, 2007, closing date for the transaction between Gursteins and Blue Water. Statement of Undisputed Material Facts, p. 7, ¶ 23. After Gursteins failed to hear back from the County, Bernie Gurstein contacted Commissioner Todd Tondee, who allegedly advised Bernie Gurstein the County would only consent to the assignment if the lease amount were increased. *Id.*, ¶ 25. Both counsel for Gursteins and counsel for Blue Water contacted the County throughout October 2007, "imploing" the County to give its consent to the assignment. *Id.*, pp. 9-10, ¶ ¶ 31-33. On October 24, 2007, the County issued a Notice of Default of Lease Agreement, alleging Gursteins had defaulted by: (1) having assigned a one-third interest in the lease to Russell Gurstein in 1992 and (2) subleasing to Blue Water from October 2006 to October 2007 without the express written consent of the County. *Id.*, pp. 10-11, ¶ ¶ 37-38. Blue Water cancelled their transaction with Gursteins after the closing date passed and Gursteins were unable to acquire the County's consent to the lease assignment. *Id.*, p. 12, ¶ 43. Gursteins were unable to proceed with the sale as planned and thereafter agreed to lease their building and sublease the land to Blue Water; the County consented to the sublease to Blue Water, "thereby removing any

doubt as to the bonafides or acceptability of Blue Water as a substitute tenant.” *Id.*, ¶ 44.

The County filed its cross motion for summary judgment, arguing Kootenai County did not breach the lease agreement with Gursteins because the County was not agreeable to waiving all prior breaches, and the County had no duty to waive all prior breaches of the agreement, known or unknown. Memorandum in Support of Motion for Summary Judgment, p. 5. The County states:

As part and parcel of the [October 31, 2007] closing, Blue Water requires, as a mandatory condition of closing, that the County waive all prior breaches or claims of breach to the Lease, whether known or unknown.

Id., p. 3, ¶ 7. The lease agreement at issue contains a non-waiver clause, which reads:

Section 9.02 – Nonwaiver: Waiver by the County of strict performance of any provision of this Lease shall not be a waiver of or prejudice the County’s right to require strict performance of the same provision or any other provision in the future.

Complaint, Exhibit A, p. 24, § 9.02. The County argues § 9.02 of the lease agreement explicitly gives the County the right to demand strict performance of all lease provisions, regardless of any prior waiver, thus, the County argues that its lack of consent to the assignment “was not the actual or proximate cause of Blue Water’s decision not to purchase the lease and improvements.” Response to Plaintiff’s Motion for Partial Summary Judgment, p. 3. Additionally, the County argues that because it was agreeable to assignment of the lease, but not to waiver of all prior known or unknown breaches, it follows that the County did not breach the implied covenant of good faith and fair dealing. Memorandum in Support of Motion for Summary Judgment, pp. 7-8.

Gursteins respond the County’s actions are “specious.” Memorandum in Opposition to Defendant’s Motion for Summary Judgment, p. 6. Gursteins argue the claimed defaults did not, in fact, amount to breaches. *Id.*, pp. 5-7. Gursteins contend

the County gave its consent to assignment of one-third of the lease to Russell Gurstein approximately fifteen years before the facts giving rise to the instant action occurred. *Id.*, p. 5. While Gursteins concede they entered into a lease agreement with Blue Water prior to seeking the approval of the County, Gursteins argue the County suffered no damage of any kind. *Id.*, p. 6. Gursteins characterize their sublease to Blue Water as merely a “technical” or “non-material” default and identify as their problem (not the County’s problem) the fact they sought consent from the County in an untimely fashion. *Id.*

Gursteins argue the County improperly delayed or denied giving its consent to the lease assignment based on alleged defaults that do not withstand scrutiny. Memorandum in Support of Plaintiffs’ Motion for Partial Summary Judgment, p. 12. Gursteins point to Exhibit 12 to the Affidavit of John Magnuson to demonstrate the County gave written consent to the transfer of a one-third lease interest to Russell Gurstein. *Id.* Gursteins claim the County’s delaying consent based on a default refuted by its own files is unreasonable. *Id.* The County responds this is a factual issue not material to the pending cross motions for summary judgment, and continues that prior to the County’s issuing its Notice of Default of Lease Agreement on October 24, 2007, Gursteins had failed to disclose the May 13, 1992, letter from the Kootenai County Commissioners Administrative Director to U.S Products (stating the named lessees would include Russell Gurstein) in discovery or otherwise. Response to Plaintiffs’ Motion for Partial Summary Judgment, p. 3, fn. 1.

Given the record before this Court, the County’s arguments with regard to the one-third transfer to Russell Gurstein issue as a basis for Gursteins’ default or breach fails. The County concedes the 1992 letter, “...indicat[es] that it is likely that Kootenai

County consented to the assignment to Russell Gurstein.” *Id.* The County also misconstrues Exhibit 17 to the Affidavit of John Magnuson, which the County argues is evidence that Gursteins were not aware of any written documents demonstrating written consent by the County to either the Russell Gurstein transfer or the 2006-2007 sublease to Blue Water. *Id.* The letter states:

Relative to the Gurstein to Blue Water Technologies transaction, I am writing to confirm that my clients are in possession of no other written documents evidencing consent of the Kootenai County Commissioners to the assignment of their leasehold interest other than those which you and I have discussed.

Affidavit of John Magnuson, Exhibit 17. Clearly, the letter is in reference only to the sublease with Blue Water and not the transfer of one-third interest to Russell Gurstein.

With respect to Gursteins’ argument that any sublease with Blue Water is at best a technical, non-material default, this Court must look to the lease agreement itself. The lease agreement at issue contains the terms and conditions pursuant to which Gursteins could assign, transfer or sublease:

Section 8.04 - Assignment, Transfer, and Sublease: The Lessee shall have the right to assign or transfer by sale or conveyance any or all of the rights, privileges, uses, interest or improvements arising under the terms of this lease, if the written approval of the County has first been obtained. Such approval shall not be unreasonably held or delayed if the transfer or assignment contemplates uses similar to those specified under Article IV [light industrial manufacturing].

The Lessee shall have the right to sublease all or any part of the buildings and/or premises to other parties provided that the uses contemplated under the sublease are compatible with or identical to those specified under Article IV and that the County’s written approval has first been obtained.

Failure to obtain prior written approval from the County will constitute default.

Complaint, Exhibit A, p. 23, § 8.04. Neither party argues that any portion of the lease agreement at issue is ambiguous, thus this Court must give Section 8.04 its plain,

ordinary meaning. *C. & G, Inc. v. Rule*, 135 Idaho 763, 765, 25 P.3d 76, 78 (2001) (“ In the absence of ambiguity, the document must be construed in its plain, ordinary and proper sense, according to the meaning derived from the plain wording of the instrument.”) Whether a contract is ambiguous is a question of law; interpreting a term deemed ambiguous is an issue of fact. *Bakker v. Thunder Spring-Wareham, LLC*, 141 Idaho 185, 190, 108 P.3d. 332, 337 (2005).

It is without question that the lease agreement contemplates an assignment, sublease or transfer, made without the prior written approval of the County, amounts to a default. It is also undisputed that Gursteins sublet the property to Blue Water for approximately one year (from October 2006 to October 2007) without the County’s written approval. The question, then, for this Court is whether the County acted reasonably in issuing Gursteins the October 24, 2007, Notice of Default of Lease Agreement and thereby not giving its written approval of the sought assignment. Section 8.01B of the lease agreement provides that where the lessee fails to comply with any term or condition or fails to fulfill any obligation in the lease, within 30 days of written notice by the County specifying the nature of the default with reasonable particularity, the lessee is in default. Complaint, Exhibit A, pp. 18-19, ¶ 8.01B. Here, the County had not provided written approval of Gursteins’ sublease to Blue Water, and the County’s approval had not even been requested until approximately eleven months after the Gursteins’ sublet to Blue Water had begun. Having failed to obtain the County’s prior written approval, Gursteins were in default thirty days after receiving written notice from the County stating the nature of the claimed default with reasonable particularity. While the alleged improper transfer of one-third of the leasehold to Russell Gurstein was actually pursuant to the County’s written approval, the sublet to Blue

Water was not. As such, Gursteins were in default of the lease agreement if the sublease to Blue Water continued thirty days following the County's notice of default to Gursteins.

The question for this Court now is whether the default based on the sublease to Blue Water results in the County having acted appropriately and reasonably in withholding consent to the assignment sought on September 19, 2007. Part of this Court's analysis must include consideration of the reasonableness of the County's withholding its consent in light of Blue Water's request that the County waive any and all prior known and unknown breaches. The County states Blue Water required an estoppel preventing the County from claiming any breach of the lease between Gursteins and the County as part of the assignment sought. Memorandum in Support of Motion for Summary Judgment, p. 3, citing Affidavit of Darrin Murphey, Exhibit A, pp. 7-8. In his deposition, Tom Daugherty (Daugherty), President of Blue Water, testified Blue Water sought a representation by Gursteins that there were no material breaches in the lease agreement between Gursteins and the County as part of the closing requirements for the agreement between Blue Water and Gursteins. *Id.*, p. 7, LI. 3-5. Daugherty testified:

As I understand the lease when it started with the Gursteins that there was a five-year...every five years there was a bump [lease amount increase], and I don't think that had been effectuated by the County. I also think there was some controversy over whether or not the son of the Gursteins was part and parcel to the lease. As I recall, seemed like there was some document or allegation that he was part of the lease and another one that he wasn't part of the lease, and if that caused any breach of the lease, we wanted that to be behind us. We didn't want any trouble with the increases that weren't effectuated or any breach of the lease to carry forward to a new situation.

Id., pp. 7-8, LI. 18-25, LI. 1-5. The County argues it was not agreeable to, and had no obligation to, waive all prior breaches pursuant to Section 9.02 of the lease agreement.

Memorandum in Support of Motion for Summary Judgment, p. 5. In response, Gursteins

argue the one-third assignment to Russell Gurstein was never a breach because of the County's written consent (with which this Court agrees), and that the sublet to Blue Water for twelve months prior to seeking consent of the County was only a "technical" default because the County suffered no damages. Memorandum in Opposition to Defendant's Motion for Summary Judgment, p. 6. The latter is discussed below.

In a case of first impression, the Idaho Court of Appeals examined express lease provisions prohibiting the unreasonable withholding of consent to an assignment or sublease in *Fahrenwald v. LaBonte*, 103 Idaho 751, 653 P.2d 806 (Ct.App. 1982). The Court wrote:

Traditionally, the starting point for analyzing this type of case has been to determine whether the express prohibition against unreasonable withholding of consent should be viewed narrowly as a mere qualification of a covenant by the *tenant* not to assign or to sublet without consent, or more broadly as a covenant by the *lessor* to exercise his power of consent reasonably. (citations omitted).

103 Idaho 751, 754, 653 P.2d 806, 809. (italics in original). The Court adopted the broader view, holding that the prohibition against unreasonable withholding of consent represents a covenant by the lessor enforceable in damages. *Id.* The analytic framework set forth by the Court of Appeals was two-fold: (1) the Court reviewed the lower court's findings to determine whether they were supported by the record; and (2) the Court weighed the sufficiency of these findings against the legal standard for determining the reasonableness of a lessor's declining to consent to an assignment or sublease. 103 Idaho 751, 755, 653 P.2d 806, 810. The Idaho Supreme Court has identified the standard for reviewing a lessor's refusal to consent to a proposed sublease as "one of a reasonable person in the position of a landlord owning and leasing commercial property." *Funk v. Funk*, 102 Idaho 521, 524-25, 633 P.2d 586, 589-90 (1981).

The Court would have difficulty reviewing the reasonableness of the County's

refusal to consent to the sublease at this juncture. Questions of material fact do remain surrounding conversations Bernie Gurstein stated he had with Commissioner Tondee. The record before the Court is unclear in this regard. At his deposition, Commissioner Tondee was asked, "...and correct me if I am wrong—that one of the reasons consent wasn't given was not an effort to raise the rent". Affidavit of Darrin Murphey, Exhibit A, p. 17, LI. 19-21. Tondee replied, "Correct." *Id.*, L. 22. This testimony conflicts with the Affidavit of Bernard Gurstein, in which Gurstein states Tondee responded to a question asking how Gursteins and Blue Water could secure the sought assignment with: "We [the County] just need more money." Affidavit of Bernard Gurstein, p. 6, ¶ ¶ 30-32. At this juncture, although the Court is permitted to resolve conflicting inferences if the record reasonably supports the inferences, see *Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 518-20, 650 P.2d 657, 661-62, there simply is not only one inference reasonably supported by the record.

However, the Court need not reach the question of the reasonableness of the County's refusal to consent to the assignment, because there had already been a *default* pursuant to the plain language of the lease agreement. There remain no material questions of fact surrounding the sublease from Gursteins to Blue Water; the County's consent to the sublease had not been provided in writing prior to the sublease beginning in October 2006. This default resulted in the County's providing the Gursteins with a Notice of Default, triggering Gursteins' 30-day time period to cure the default. [The transfer to Russell Gurstein, also listed in the County's Notice to Gursteins and discussed *supra*, was consented to in writing and did not amount to a default.] See Complaint, Exhibit A, pp. 18-19, ¶ 8.01B. The County's notice to Gursteins was dated October 24, 2007, giving Gursteins until approximately November 24, 2007, to cure the default. During this period, it cannot be said the County did not act as "a reasonable person in the position of a landlord

owning and leasing commercial property” in withholding its consent to an assignment or sublease. This is true regardless of the October 31, 2007, closing date scheduled by the Gursteins and Blue Water.

As to Gursteins’ breach of contract claim against the County, Gursteins are not entitled to summary judgment. The County had an obligation, pursuant to the lease agreement, not to unreasonably withhold consent to an assignment or sublease. But because of Gursteins’ undisputed sublease to Blue Water (for approximately one year before even seeking the County’s written consent, much less receiving written consent from the County), the County did not act unreasonably in not consenting to the assignment to Blue Water in the 30-day time period following their providing Gursteins with notice of the claimed defaults. As there was no breach of the lease by the County, the County is entitled to summary judgment on this issue.

The Court appreciates Gursteins’ arguments that: there was no damage to the County resulting from the Blue Water assignment; that the Blue Water assignment resulted in a technical but not a material default; and that there is virtually no way for Gurstein’s to ever cure that default created by the Blue Water assignment. While the Court is troubled by this outcome, the Blue Water assignment by Gursteins *created* the breach, *created* the default. That one fact, Gursteins’ breach, changes the inquiry from whether the County reasonably withheld consent to the assignment (if it were timely, which it was not), to whether the County must waive that breach. The Court has been cited to no case law and nothing in the lease agreement that would make an exception for only “material” defaults, or only defaults causing damage to the non-defaulting party, or for incurable defaults. The bottom line is Gursteins breached the lease, the County refuses to waive that breach, and there is no legal authority that requires the County to waive that breach or any breach.

B. Breach of the Implied Covenant of Good Faith and Fair Dealing.

Gursteins argue the County's actions which give rise to its claim for breach of contract also support its claim that the County breached the implied covenant. Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment, pp. 15-17. Gursteins ask the Court to find as a matter of law that the County breached the implied covenant of good faith and fair dealing by failing to cooperate with the Gursteins and depriving the Gursteins thereby of the full benefit of performance of the lease agreement. *Id.*, p. 17. The County responds all contracts with government bodies are to receive liberal construction resolving all ambiguities, presumptions, and implications in favor of the government. Response to Plaintiffs' Motion for Partial Summary Judgment, p. 4, *citing* 17A AM.JUR.2D *Contracts* § 397 (2008). And, to the extent the implied covenant is applicable, the County argues it acted in good faith at all times as evidenced by its efforts to locate documentation regarding the one-third transfer to Russell Gurstein and its providing the Gursteins with thirty days to cure their default, which Gursteins did not cure until after the closing date of October 31, 2007, had passed. *Id.*, p. 5

Gursteins note the covenant of good faith and fair dealing is implied in every Idaho contract. Memorandum in Support of Motion for Partial Summary Judgment, p. 15, *citing Taylor v. Browning*, 129 Idaho 483, 927 P.2d 873 (1996). However, in Idaho, the implied covenant of good faith and fair dealing does not override the express terms of a contract. *Bushi v. Sage Health Care, PLLC*, 146 Idaho 764, 768, 203 P.3d 694, 698 (2009). The express terms of the lease agreement have been discussed by the Court *supra*; and in light of the Gursteins' default for entering into a sublease for one year prior to seeking the County's approval, it cannot be said the County failed to act in good faith by issuing a

notice of default. Such a notice is contemplated within the lease itself and provides Gursteins with thirty days to cure, which the County notes the Gursteins failed to do by the closing date deadline. The Court may arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts in this case. *J.R. Simplot Co. v. Bosen*, 144 Idaho 611, 618, 167 P.3d 748, 755 (2006). It is uncontroverted that Gursteins were in default; therefore, the most probable inference to be drawn from the County's issuing a notice of default is that the County was not violating the implied covenant of good faith and fair dealing. There has simply been no evidence set forth by Gursteins that their request for an assignment, initially made September 19, 2007, (which gave rise to the County learning of Gursteins' default for an improper sublease) was made such that the County had any obligation, set forth in the lease or otherwise, to provide its consent by October 31, 2007, or risk being in violation of the lease provision prohibiting the County from unreasonably withholding consent.

IV. CONCLUSION AND ORDER.

For the reasons stated above, this Court must deny the motion for partial summary judgment brought by Gursteins and grant the motion for summary judgment brought by the County.

IT IS HEREBY ORDERED Gursteins' Motion for Partial Summary Judgment is DENIED.

IT IS FURTHER ORDERED the County's Motion for Summary Judgment is GRANTED. Counsel for the County shall prepare a judgment consistent with this Memorandum Decision and Order.

IT IS FURTHER ORDERED the Court trial scheduled for November 15, 2010, is VACATED.

Entered this 13th day of October, 2010.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of October, 2010, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer
John F. Magnuson

Fax #
667-0500

| **Lawyer**
Darrin L. Murphey

Fax #
446-1621

Jeanne Clausen, Deputy Clerk