Supreme Court No. 97069-6
Court of Appeals No. 77770-0-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

BELLEVUE SQUARE, LLC, a Washington limited liability company,

Petitioner,

v.

WHOLE FOODS MARKET PACIFIC NORTHWEST, INC., a Delaware corporation; and WHOLE FOODS MARKET, INC., a Texas corporation,

Respondents.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Bellevue Square, LLC ("Bellevue Square" or "Landlord"), Plaintiff in the trial court and Respondent at the Court of Appeals, respectfully petitions this Court to accept review of the Court of Appeals' decision terminating review designated in Part II below.

II. COURT OF APPEALS DECISION FOR REVIEW

Bellevue Square seeks review of the published decision issued by Division I of the Court of Appeals dated December 17, 2018. (App. A.) Bellevue Square's timely filed motion for reconsideration was denied through an order dated March 13, 2019. (App. B.)

III. ISSUES PRESENTED FOR REVIEW

A. Whether an express operating covenant is enforceable.

B. Whether an appellate court errs when it reviews *de novo* a trial court's factual findings material to contract interpretation.

C. Whether an appellate court errs when it fails to consider extrinsic evidence that renders absurd a contract's "plain meaning."

D. Whether a Washington court can award "specific performance for the payment of money damages."

E. Whether the terms "damages" and "harms" are interchangeable under Washington law.

F. Whether a landlord's duty to mitigate its damages is inconsistent with a tenant's duty to operate.

IV. STATEMENT OF THE CASE

A. Background on the Parties.

Bellevue Square is a nationally recognized shopping center. (CP 334.) Whole Foods ("Tenant") has 474 stores in North America and the United Kingdom, 6 of which are "365 by Whole Foods." (CP 339; CP 343.) In August 2017, Amazon purchased Whole Foods in a deal valued at $13.7 billion. (CP 271.)

B. The Parties Sign a Lease with an Operating Covenant.

1. Landlord Negotiates an Operating Covenant and the Remedy of Specific Performance for Breach of It.

Originally, the space at issue was occupied by JCPenney. Landlord commenced negotiations with Whole Foods regarding the space in November 2013. (CP 8.) JCPenney did not vacate until approximately one year after Landlord began to seek a successor tenant. (CP 497.)

Whole Foods initially sought to be excused from a duty to operate. Its original Letter of Intent provided: "Whole Foods shall have the right at any time and from time to time after opening for business in the Premises to cease conducting business in the Premises." (CP 36.)

This position was categorically unacceptable to Landlord. (CP 779.) All of its leases contain an operating covenant, because leases are not merely contracts to pay rent; a tenant's *operation* is an essential component of the benefit of Landlord's bargain. *Id.*

Thirteen drafts of the operating covenant were exchanged as Bellevue Square doggedly insisted on this right. (CP 663-741.) This extrinsic evidence was not disputed by Tenant.

Tenant eventually agreed to the following in Section 7.2(b):

> Tenant covenants to conduct and carry on Tenant's business in the Demised Premises without interruption (excluding any temporary period during which Tenant is closed for rebuilding or repairs following a casualty or condemnation or by reason of any Force Majeure Events) for the first ten (10) Lease Years of the Demised Term ("**Tenant's Operating Covenant**") and, for so long as Tenant's Operating Covenant is in effect, shall keep the Demised Premises open for business at a minimum during the days and hours designated from time to time by Landlord . . .

(CP 170, underlining in original, boldface added.)

The first clause is an express operating covenant (the "Operating Covenant"). (CP 170.) Section 7.2(b) contains two distinct duties: the covenant to carry on business without interruption for ten years **and**, independently, the duty to maintain certain hours. (CP 170.)

2. Injunctive Relief Was Expressly Negotiated as a Remedy for Breach of the Operating Covenant.

The Lease entitles Bellevue Square to specific performance:

10.1 Default by Tenant.

(a) Landlord's Remedies. If (i) default shall be made . . . Landlord may treat the occurrence of any one or more of the foregoing events as breach of this Lease (an "Event of Default"), and thereupon at its option may, without any additional notice or demand of any kind to Tenant or any other person, have its rights and remedies at law or in **equity**, or as provided in Section 10.1(b) below, subject only to the limitations thereon set forth in Section 10.1(c) below. Notwithstanding anything to the contrary herein, the occurrence of any one or more of the following shall constitute an Event of Default by Tenant, which default and breach shall give rise to Landlord's remedies, pursuant to this Section 10.1:

(i) **The abandonment of the Demised Premises by Tenant.**

* * * *

(iii) **Tenant's failure to observe or perform any of the other covenants, conditions or provisions of this Lease to be observed or performed by Tenant.**

(b) Landlord's Remedies. In the event of any such default or breach by Tenant, Landlord may . . .

(i) Terminate the Lease. Terminate Tenant's right to possession of the Demised Premises by any lawful means . . .

(ii) Continue the Lease. Maintain Tenant's right to possession in which case this Lease shall continue in effect whether or not Tenant has vacated or abandoned the Demised Premises. **In such event Landlord shall be entitled to enforce all Landlord's rights and remedies under this Lease, including the right to recover the Rent, damages from Tenant's default or breach, and**

> **any other payments as they may become due hereunder, and to specifically enforce Tenant's obligations hereunder and obtain injunctive relief from further defaults and breaches**, and shall be entitled to enter the Demised Premises for the purpose of curing Tenant's failure to observe or perform any of the other covenants, conditions or provisions of this Lease to be observed or performed by Tenant, and in such case, Tenant shall pay the entire cost thereof as Additional Rent within one (1) month after receipt of an invoice therefor from landlord; or,
>
> (iii) Other Remedies. **Pursue any other remedy now or hereafter available to Landlord under the laws or judicial decisions of the State of Washington**[.]

(CP 188-89, underlining in original, boldface added.)

Thus, Section 10.1(b)(ii) specifically preserves Bellevue Square's right to specifically enforce Tenant's duty of continued operation.

3. Bellevue Square Agrees to "365 by Whole Foods" Concept in Reliance on a Ten Year Operating Covenant.

In June 2015, Whole Foods asked to abandon its traditional concept in favor of "365 by Whole Foods." (CP 780.) In reliance on the Operating Covenant and the credibility of Whole Foods, Landlord agreed. (CP 9; CP 780.) The Lease was executed on July 23, 2015. (CP 10.)

C. Tenant Claims "Site Challenges" and Announces Closure.

One year into operations, sales did not meet Tenant's projections. (CP 780.) Tenant asserts that it operated at a loss. (CP 775-77.) On October 12, 2017, Tenant informed its employees that it intended to close

two days later. (CP 13.) Tenant informed Landlord of the closure 15 minutes before the start of the "Store Closing" sale. (CP 13; CP 780.) Tenant had known for months — prior to its acquisition by Amazon — that it intended to close. (CP 343; CP 271.)

D. Bellevue Square Attempts to Mitigate Its Damages.

In the days immediately after Tenant's closure, Landlord learned that Tenant's premature abandonment and disparaging remarks in the press had tainted the space. (CP 773-74.) Landlord nonetheless promptly tried to mitigate its damages; a fact uncontroverted by Tenant. *Id.*

E. Bellevue Square Sues and Moves for Preliminary Injunction.

On October 24, 2017, Bellevue Square sued Tenant and promptly moved for a preliminary injunction to enforce the Operating Covenant. (CP 1-6; CP 300-33.)

On December 7, 2017, the trial court granted the preliminary injunction ("Order"). (CP 748-57.) The trial court reviewed the Lease and the voluminous extrinsic evidence of negotiations for the necessary context. It ruled on a mixed issue of law and fact that Bellevue Square was entitled to an injunction to enforce the Operating Covenant. (*See* CP 7-225; 334-48; 397-557; 663-741; 773-74; 778-83.)

Tenant successfully moved to stay enforcement pending review.

F. The Court of Appeals Reverses.

On December 17, 2018, Division One of the Court of Appeals issued an opinion (the "Opinion") reversing the trial court. (App. A.)

V. ARGUMENT

A. Standard of Review.

This Court should accept review:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or . . . (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

B. The Opinion's Holding Addresses an Issue of First Impression That Involve a Substantial Public Interest.

The holding of the Opinion addresses an issue of first impression in Washington on a vital and emerging area of law: the enforceability of operating covenants in commercial leases.

Courts in various jurisdictions have opined about whether an operating covenant can be specifically enforced. They have addressed nuanced aspects of the issue, including: the degree of harm that must be

established;[1] the extent to which judicial oversight is required;[2] and the clarity of the language necessary to establish an operating covenant.[3]

The Opinion reversed the equitable weighing of the trial court and refused to enforce the Operating Covenant on a different and fundamentally flawed ground: that Landlord has an express Operating Covenant, but its remedy of specific performance is limited to enforcing "further [monetary] defaults." (Opinion, pp. 13-14.)

Washington courts have specifically enforced landlords' non-monetary lease obligations. In *Garbrick v. Franz*, 13 Wn.2d 427, 431, 125 P.2d 295 (1942), this Court affirmed the trial court's reformation and specific performance of a defective deed to enjoin a landlord from interfering with a tenant's possession and enjoyment until the expiration of the lease term. The *Garbrick* court stated: "It is well settled in this and many other states that a sufficient part performance by a lessee of the covenants contained in a lease removes the contract from the statute of frauds and authorizes a court of equity to decree the specific performance of the agreement by the lessor." *Id.* Likewise, in *Wharf Restaurant, Inc. v.*

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[1] *Massachusetts Mut. Life Ins. Co. v. Associated Dry Goods Corp.*, 786 F. Supp. 1403 (N.D. Ind. 1992); *Dover Shopping Center, Inc. v. Cushman's Sons, Inc.*, 63 N.J. Super. 384, 164 A.2d 785 (1960) (granting a preliminary injunction to force an anchor tenant to continue to operate based on the threat to the viability of the shopping center).
[2] *Lorch, Inc. v. Bessemer Mall Shopping Center, Inc.*, 294 Ala. 17, 310 So. 2d 872 (1975) (reversing injunction, due to complexity of performance and difficulty of oversight).
[3] *Hamilton W. Dev. v. Hills Stores Co.*, 959 F. Supp. 434, 441 (N.D. Ohio 1997) (finding circumstances presented in this case would justify an order requiring specific performance if lease contained express operating covenant).

Port of Seattle, 24 Wn. App. 601, 605 P.2d 334 (1979), the Court of Appeals affirmed the trial court's order granting the former tenant a decree of specific performance requiring the landlord to renew the former tenant's lease for a five-year term and voiding the lease between the landlord and the new tenant. *See also Feigenbaum v. Brink*, 66 Wn.2d 125, 130-31, 401 P.2d 642 (1965) (holding "specific performance will lie to enforce the landlord's duty to repair"); *Hedgecock v. Mendel*, 146 Wash. 404, 414-15, 263 P. 593 (1928) (specifically enforcing a lease assignment over the landlord's objection); *Carpenter v. Folkerts*, 29 Wn. App. 73, 76, 627 P.2d 559 (1981) ("[A] lease containing a lessee's option to purchase is enforceable by specific performance.").

There is also authority awarding specific performance to a landlord. *See Crafts v. Pitts*, 161 Wn.2d 16, 25, 162 P.2d 382 (2007) (affirming order of specific performance requiring tenant to transfer a quitclaim deed into trust).

There is no question that Tenant could enjoin Bellevue Square from, for example, violating any of the restrictive covenants and "exclusives" that it negotiated. (CP 166-67.) Why should Tenant's Operating Covenant not be enforceable as well?

The Opinion's basic thesis is that "paying rent is enough" and that money damages can remedy all *harms* that a landlord may suffer if a

tenant chooses to ignore an operating covenant.[4] This policy shift would have devastating effects on commercial landlords if it were given (even implicitly) the force of law. It essentially amounts to a holding that money is an adequate remedy for any breach by a **tenant** to a lease, while landlords may be compelled to specifically perform their duties.

At a time when the retail industry is in a state of significant change, it is essential to the business of a shopping center to rely on the continued operation of tenants that have agreed not just to pay money, but **to operate in a specific manner**.

The enforceability of operating covenants has massive implications beyond whether a tenant may be forced to continue to operate against its will (or to reopen, if they close in bad faith as Tenant did). Operating covenants are also vital to governing tenants who operate voluntarily. Commercial leases do not merely involve the exchange of space for the payment of rent. They address such issues as what hours a store maintains, what inventory it stocks, and the permitted use in the premises. If a clothing store at Bellevue Square started to sell sporting goods, fresh fruit, and marijuana, the Opinion's reasoning posits that a check from the tenant would be an "adequate remedy" for Landlord's harm.

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[4] "[T]he lease gives Bellevue Square a plain, complete, speedy and adequate remedy at law." (Opinion, p. 2.)

By reversing the injunction with confused and confusing reasoning, the Opinion has potentially rendered lease covenants unilateral as a matter of law. It is difficult to envision a better test case regarding enforcement of an operating covenant. This is not a tenant on the brink of insolvency; it is one of the most successful companies in the world. Nor are the equities unclear or in relative balance. The Opinion concedes that Tenant agreed to an Operating Covenant. Tenant nonetheless gave Bellevue Square 15 minutes' notice before conducting a closure sale.

If the Court does not reverse the Opinion and enforce the Operating Covenant in this case, it potentially excises such covenants from every commercial lease and invites any tenant to behave with equal bad faith. In short: if Whole Foods can do this, anyone can. The Court should address this vital issue.

C. The Opinion's Reasoning Conflicts with Precedent.

The Opinion reached an incorrect ruling and created patently incorrect law on multiple issues; including several issues where existing Washington authority reaches a contrary result.

1. The Opinion Applied the Incorrect Standard of Review.

The Opinion begins with the faulty predicate that "[t]he interpretation of a lease is a question of law that this court reviews de novo." (Opinion, p. 6.) This proposition is misleadingly incomplete.

"A lease is a contract." *City of Puyallup v. Hogan*, 168 Wn. App. 406, 430, 277 P.3d 49 (2012) (citing *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990)). "The interpretation of a contract can be a mixed question of law and fact." *Mut. of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d 411, 424 n. 9, 191 P.3d 866 (2008). "**When a court relies on inferences drawn from extrinsic evidence, interpretation of a contract is a question of fact.**" *Viking Bank v. Firgrove Commons 3, LLC*, 183 Wn. App. 706, 712, 334 P.3d 116 (2014) (emphasis added).

The trial court's interpretation of the Lease relied on hundreds of pages of extrinsic evidence. The factual findings of the trial court, which were not contradicted by Tenant, should have been afforded deference in a review for abuse of discretion. Instead, the Opinion treated the Lease's interpretation as a purely legal issue and afforded it no deference.

This Court has held that such deference is appropriate when a trial court weighs documentary evidence:

> Appellate courts give deference to trial courts on a sliding scale based on how much assessment of credibility is required; the less the outcome depends on credibility, the less deference is given to the trial court. However, substantial evidence is more appropriate, even if the credibility of witnesses is not specifically at issue in cases such as this where the trial court reviewed an enormous amount of documentary evidence, weighed that evidence, resolved inevitable evidentiary conflicts and discrepancies, and issued statutorily mandated written findings.

Dolan v. King County, 172 Wn.2d 299, 311, 258 P.3d 20 (2011).

Despite Landlord's argument for a substantial evidence standard of review, the Opinion glossed over the trial court's analysis of the factual extrinsic documentary evidence and offered its own illogical "plain meaning" analysis under the guise of *de novo* review. It then misread the contract, ignored the equities, and reached the wrong result.

If the substantial evidence standard is inapplicable to a case such as this, the Court should clarify the continuing applicability of *Dolan* and *Viking Bank*. If the cases are still good law, then the Opinion applied the incorrect standard on review.

2. Disregard of the Context Rule Is Contrary to Authority.

The trial court carefully reviewed extrinsic evidence regarding lease negotiations, including those surrounding the Operating Covenant. It correctly concluded that Landlord is entitled to specific performance. The Opinion, on the other hand, merely considered the "plain language"[5] of the Lease, not the extrinsic evidence. It thus erroneously concluded that "[t]he plain and unambiguous language of the lease does not support the trial court's conclusion." (Opinion, p. 7.) In analyzing solely the express language of the Lease, the Opinion concluded that "under the express terms of the lease, the right . . . to specific performance and injunctive

[5] (*See* Opinion, pp. 1-2, 7.)

relief does not apply beyond the circumstances specifically described in section 10.1(b)(ii)." (Opinion, p. 14.)

Washington courts uniformly apply the "context" rule to avoid such myopic interpretations. "To interpret a contract, we must determine the parties' intent, for which we apply the 'context rule'." *Fedway Marketplace W., LLC v. State*, 183 Wn. App. 860, 871, 336 P.3d 615 (2014); *see also Tanner Elec. Coop. v. Puget Sound Power & Light*, 128 Wn.2d 656, 674, 911 P.2d 1301 (1996); *Roats v. Blakely Island Maint. Comm'n, Inc.*, 169 Wn. App. 263, 274, 279 P.3d 943 (2012); *Shafer v. Bd. of Trs. of Sandy Hook Yacht Club Estates, Inc.*, 76 Wn. App. 267, 275, 883 P.2d 1387 (1994).

The context rule allows a court, when "viewing the contract as a whole, to consider extrinsic evidence, such as the circumstances leading to the execution of the contract, the subsequent conduct of the parties and the reasonableness of the parties' respective interpretations." *Fedway Marketplace W., LLC*, 183 Wn. App. at 871. This rule applies "**even when the disputed provision is unambiguous**." *Id.* (emphasis added); *see also Spectrum Glass v. PUD of Snohomish*, 129 Wn. App. 303, 311, 119 P.3d 854 (2005).

In *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 694-97, 974 P.2d 836 (1999), this Court was asked whether courts should apply the "context

rule" in analyzing restrictive covenants. The Court resolved the split between the divisions and answered in the affirmative. *Id.*

The Opinion is in derogation of the context rule. It does not even acknowledge the extrinsic evidence in its Lease analysis. It thus produced the kind of staggeringly incorrect interpretation that the context rule was designed to avoid: that Landlord has an absolute right to an operating covenant, but absolutely no remedy to enforce it. This Court should reaffirm that courts are bound to do more than look for "plain meaning."

3. Construing Specific Performance to Apply Merely to "Further Defaults" in Payment Is Erroneous.

To reverse the trial court and thwart Bellevue Square's right to injunctive relief, the Opinion had to explain away the obvious right to specific performance enumerated in Section 10(b)(ii), which allows Landlord to "specifically enforce Tenant's obligations hereunder and obtain injunctive relief from further defaults and breaches." (CP 189.)

The Opinion posits that when "continuing the Lease" (which one would naturally associate with the continuance of all of Tenant's duties under the Lease; to wit, the Operating Covenant), all Landlord can do is specifically enforce Tenant's duty to "make requisite payments as they come due." (Opinion, p. 14.) The Opinion concludes that Landlord's only

right of specific performance is to "seek specific performance of **these continuing [monetary] obligations**." *Id.* (emphasis added).

It would be absurd to seek specific performance to secure money damages. If Landlord merely sought damages, it would have terminated the Lease and secured a worth at the time of award for 19 years' worth of payments in a lump sum (less what Tenant could prove could be reasonably avoided). It elected to "continue the lease" to compel Tenant's continued operation **because that is what it bargained for**.

No case holds that specific performance is a remedy to compel payment (which is the very definition of money damages). Many cases hold the opposite. "When a court's legal powers cannot adequately compensate a party's loss with money damages, then a court may use its broad equitable powers to compel a party to specifically perform its promise." *Crafts*, 161 Wn.2d at 24 (citing Restatement (Second) of Contracts Section 360 (1981)); *see also Eugster v. City of Spokane*, 118 Wn. App. 383, 416 P.3d 741 (2003) (citing *Steward v. Bounds*, 167 Wash. 554, 565, 9 P.2d 1112 (1932)) ("[S]pecific performance ordinarily cannot lie to compel a promise to loan money.").

The Opinion's view of specific performance is antithetical to the very purpose of the remedy. This Court has decreed that it "recognized

specific performance is a suitable remedy to enforce a lease provision." *Crafts*, 161 Wn.2d at 24. The Operating Covenant is such a provision.

4. *Damages* and *Harms* Are Different Concepts.

The Opinion rules that Bellevue Square's waiver of incidental and consequential damages precludes consideration of harms experienced by Landlord for the purposes of awarding injunctive relief.[6] (Opinion, p. 14.)

The Opinion conflicts with precedent. Courts have previously held that specific performance is not contingent on the availability of contract damages. The Court of Appeals in *Cornish Coll. of the Arts v. 1000 Va. Ltd. P'ship*, 158 Wn. App. 203, 229, 242 P.3d 1 (2010), affirmed the trial court's ability to award consequential damages in addition to specific performance; not as a damages award for breach of a contract, but as an equitable award to make the non-breaching party whole. *See also Rekhi v. Olason*, 28 Wn. App. 751, 757, 626 P.2d 513 (1981).

The concept of "harms" is broader than "damages." Bouvier Law Dictionary, 2012 ed. Courts have often distinguished between them. *See, e.g., Cogan v. Kidder, Matthews & Segner*, 97 Wn.2d 658, 666, 648 P.2d 875 (1982) (emphasis added) ("Not only does **harm** not define the scope of fiduciary duty, it also is not determinative of **damages**."); *Reebok Int'l,*

[6] The trial court concluded that *many*, not *all*, of the harms experienced by Bellevue Square could be characterized as consequential or indirect damages. (CP 751-52.)

Ltd. v. J. Baker, Inc., 32 F.3d 1552, 1558 (Fed. Cir. 1994) (emphasis added) ("**Harm** to reputation resulting from confusion between an inferior accused product and a patentee's superior product is a type of **harm** that is often not fully compensable by money because the **damages** caused are speculative and difficult to measure."). The Opinion ignores this distinction. Worse, it explicitly conflates the distinct concepts by finding that waiver of consequential damages precludes specific performance.

Waiver of indirect and consequential damages should not negate the right to specific performance. Landlord does not seek *payment* for such harms, but they should still be considered when balancing equities for the purposes of injunctive relief. Bargaining away consequential damages is not inconsistent with specific performance; it is equally consistent with reliance on specific performance as a remedy available for such breach. The waiver of consequential damages renders the refusal to grant specific performance even more harmful. Citing that waiver as a basis to deny specific performance is thus ironic as well as inequitable.

The legal concept of "damages" is not synonymous with "harms." Waiver of damages should never preclude specific performance. The Opinion erred when it reversed the trial court on this point.

5. A Landlord's Duty to Mitigate Is Consistent with a Tenant's Duty to Operate.

The Opinion holds that "[t]he duty to mitigate damages is inconsistent with the trial court's conclusion that Bellevue Square is entitled to compel Whole Foods to continue operating." (Opinion, p. 13.)

This is a logical absurdity contradicted by authority and the trial court record. In *Crown Plaza v. Synapse Software*, 87 Wn. App. 495, 499, 962 P.2d 824 (1997), a commercial tenant with one year left discussed a termination agreement with its landlord. While the parties contested whether a termination agreement was reached, there was no dispute that landlord began "showing [the tenant]'s space to potential tenants" while the tenant occupied the premises. *Id.* Thus, the landlord actively mitigated its damages while the tenant operated.

Indeed, the record in this case includes the example of Bellevue Square actively looking for new tenants to occupy the JCPenney space **a full year** before JCPenney ceased operating. (CP 497.)

The Opinion's pronouncement that a landlord's duty to mitigate is inconsistent with a tenant's duty to operate is factually, practically, and legally unsound. It must not stand in a published opinion.

VI. CONCLUSION

The landlord-tenant relationship is fundamental to American life. It governs many residential relationships and most retail and commercial ones. A landlord's duties are indisputably legion. They are established by statute, common law, and leases strictly construed against landlords in many contexts. The consequences for failure to abide by the letter of these obligations can be catastrophic.

The Opinion would reduce that fundamental association, at its essence, to a one-way relationship. Such a system would be unjust as to all the tenants it would benefit. When the tenant is Whole Foods, owned by Amazon, the injustice is billions of times worse.

This Court should accept review. It should then reverse the Court of Appeals and reinstate the trial court's injunction.

RESPECTFULLY SUBMITTED this 10th day of April, 2019.

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APPENDIX TO PETITION FOR REVIEW

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

BELLEVUE SQUARE, LLC, a Washington limited liability company, Respondent, v. WHOLE FOODS MARKET PACIFIC NORTHWEST, INC., a Delaware corporation; WHOLE FOODS MARKET, INC., a Texas corporation; Appellants	)	No. 77770-0-I PUBLISHED OPINION FILED: December 17, 2018

2018 DEC 17 AM 8:27

SCHINDLER, J. — On July 23, 2015, Bellevue Square LLC executed a 20-year lease with Whole Foods Market Inc. to operate a "365 by Whole Foods" store. Whole Foods closed the store and vacated the premises on October 14, 2017. Bellevue Square filed a lawsuit against Whole Foods Based on a lease provision containing an "operating covenant," Bellevue Square sought a mandatory preliminary injunction requiring Whole Foods to reopen and continue operating the store. The trial court granted the motion for a preliminary injunction and ordered Whole Foods to reopen the store within 14 days. We granted discretionary review and stayed the preliminary injunction. Because Bellevue Square has only a limited legal right to specific performance under the terms of the lease that is unrelated to the operating covenant

and the lease gives Bellevue Square a plain, complete, speedy, and adequate remedy at law, we reverse and remand.

FACTS

Bellevue Square LLC is a shopping mall developed and managed by Kemper Development Company with 1.3 million square feet of retail space. In 2013, there were three anchor tenants: Nordstrom occupied 266,708 square feet, Macy's occupied 218,371 square feet, and JCPenney occupied three floors or approximately 200,000 square feet.

In late 2013, JCPenney notified Bellevue Square it planned to vacate the following year. A vice president of leasing contacted Whole Foods Market Inc. about leasing a portion of the space. Whole Foods expressed interest in leasing the ground floor space, approximately 34,000 square feet. Whole Foods decided to open a "365" concept store at the mall. The 365 concept offers lower-price Whole Foods products and operates with fewer employees. The Whole Foods 365 store at Bellevue Square would be the only 365 store located in a mall.

Bellevue Square and Whole Foods[1] executed a lease on July 23, 2015. The lease term is 20 years with four 5-year optional extensions. The lease provides for annual base rent with regular increases according to a set schedule and if gross sales exceed a set amount, the lease requires Whole Foods to pay percentage rent at a rate of two percent of gross sales during each calendar year. The lease contains an "operating covenant" that requires Whole Foods "to conduct and carry on" its business "without interruption" for the first 10 years of the lease and sets minimum business

[1] Whole Foods Market Pacific Northwest Inc executed the lease as the tenant Whole Foods Market Inc guaranteed the obligations of the tenant

hours. The lease defines a default and the remedies available to the tenant and the landlord in case of breach.

Whole Foods opened its 365 store in the Bellevue Square space on September 14, 2016. On October 14, 2017, Whole Foods closed the 365 store, sold its inventory, and offered the 56 employees jobs at other stores.

On October 24, Bellevue Square filed a lawsuit against Whole Foods alleging breach of the lease and the guarantee for the lease obligations. Bellevue Square alleged Whole Foods breached the operating covenant of the lease and sought injunctive relief and damages.

On November 15, 2017, Bellevue Square filed a motion for a preliminary injunction to compel Whole Foods to "promptly reopen" at Bellevue Square. Bellevue Square argued it had a clear legal and equitable right under the operating covenant of the lease, section 7.2(b), to require Whole Foods to continue operations and the store closure violated the terms of the lease, resulting in actual and substantial injury. Retail shopping center expert John Talbott and finance economics expert Jarrad Harford submitted declarations in support of the injunction.

Talbott stated that by vacating the premises, Whole Foods disrupted the stability of the shopping center, affected negotiations with potential and current tenants, reduced customer traffic, prevented Bellevue Square from recovering percentage rent, and impacted Bellevue Square's reputation. Harford cites the harms Talbott described and concludes on a more probable than not basis that few of the harms could be quantified with any degree of certainty.

Whole Foods conceded it vacated the premises but asserted that under the terms of the lease, the available remedy for the breach was damages. Whole Foods argued the lease did not give Bellevue Square the clear legal right to specific performance of the operating covenant in section 7 2(b). Whole Foods pointed to section 10.1(a) of the lease that allows Bellevue Square to pursue the remedies available under the lease if Whole Foods vacates the premises, section 10.1(c)(i) that imposes a duty to mitigate damages and requires Bellevue Square to attempt to find another tenant in the event of a default, and section 10.1(c)(iv) that precludes Bellevue Square from recovering consequential damages resulting from Whole Foods' default. Whole Foods argued that interpreting the lease to permit Bellevue Square to compel it to continue operating the store as a remedy for a breach is inconsistent with those provisions of the lease.

The court granted Bellevue Square's motion for a preliminary injunction and ordered Whole Foods to reopen for business at Bellevue Square effective 14 days from the date of the order. The findings state the lease contains an "express 'Operating Covenant' " and "imposes a duty on Whole Foods to be open and operational for at least the first 10 years of the 20-year Lease term." The court rejected the argument that the duty of Bellevue Square to mitigate damages and the inability to recover consequential damages were inconsistent with the relief sought. The court concluded that "Bellevue Square is entitled to specific performance of the Lease."

Whole Foods filed a notice for discretionary review. We granted discretionary review and stayed the preliminary injunction.

ANALYSIS

We review a trial court's decision to grant a preliminary injunction and the terms of the injunction for an abuse of discretion. Resident Action Council v. Seattle Hous. Auth., 177 Wn.2d 417, 428, 327 P.3d 600 (2013); Rabon v. City of Seattle, 135 Wn 2d 278, 284, 957 P.2d 621 (1998). "A trial court necessarily abuses its discretion if the decision is based upon untenable grounds, or the decision is manifestly unreasonable or arbitrary." Kucera v. Dep't of Transp., 140 Wn.2d 200, 209, 995 P.2d 63 (2000).

A party seeking a preliminary injunction must show " '(1) that he has a clear legal or equitable right, (2) that he has a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of are either resulting in or will result in actual and substantial injury to him.' " Tyler Pipe Indus., Inc. v. Dep't of Revenue, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982) (quoting Port of Seattle v. Int'l Longshoremen's & Warehousemen's Union, 52 Wn 2d 317, 319, 324 P.2d 1099 (1958)). If the party fails to show any one of these elements, the court must deny the injunction. Kucera, 140 Wn.2d at 209-10.

In determining whether the party has a clear legal and equitable right, the court examines the likelihood the party will prevail on the merits. Kucera, 140 Wn.2d at 216. "A doubtful case will not warrant an injunction." Huff v. Wyman, 184 Wn.2d 643, 652, 361 P.3d 727 (2015). In deciding whether to grant a preliminary injunction, the court "must reach the merits of purely legal issues." Rabon, 135 Wn.2d at 286. The appellate court on review "must similarly evaluate purely legal issues in assessing the propriety of a decision to grant or deny a preliminary injunction." Rabon, 135 Wn.2d at 286.

"An injunction is distinctly an equitable remedy and is 'frequently termed the strong arm of equity, or a transcendent or extraordinary remedy, and is a remedy which should not be lightly indulged in, but should be used sparingly and only in a clear and plain case.' " Kucera, 140 Wn 2d at 209[2] (quoting 42 AM. JUR. 2d Injunctions § 2, at 728 (1969)). "An injunction is an extraordinary equitable remedy designed to prevent serious harm. Its purpose is not to protect a plaintiff from mere inconveniences or speculative and insubstantial injury." Tyler Pipe, 96 Wn.2d at 796.

Injunctive relief is not warranted "where there is a plain, complete, speedy and adequate remedy at law." Tyler Pipe, 96 Wn.2d at 791. Courts have found remedies to be inadequate where "(1) the injury complained of by its nature cannot be compensated by money damages, (2) the damages cannot be ascertained with any degree of certainty, and (3) the remedy at law would not be efficient because the injury is of a continuing nature." Kucera, 140 Wn.2d at 210.

Whether Bellevue Square has a clear legal and equitable right to specific performance is governed by the language of the lease. The interpretation of a lease is a question of law that this court reviews de novo. 4105 1st Ave S Invs., LLC v. Green Depot WA Pac Coast, LLC, 179 Wn. App. 777, 784, 321 P.3d 254 (2014). The primary goal is to ascertain the parties' intent. Berg v. Hudesman, 115 Wn.2d 657, 663, 801 P 2d 222 (1990). The court determines intent by focusing on the objective manifestation of the parties in the written contract. Hearst Commc'ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 503, 115 P.3d 262 (2005). "Accordingly, a court considers only what the parties wrote, giving words in a contract their ordinary, usual, and popular

[2] Internal quotation marks omitted

meaning unless the agreement as a whole clearly demonstrates a contrary intent." Green Depot, 179 Wn. App. at 784; Hearst, 154 Wn.2d at 503-04.

A contract "should be construed as a whole and, if reasonably possible, in a way that effectuates all of its provisions " Colo. Structures, Inc. v. Ins. Co. of the W., 161 Wn.2d 577, 588, 167 P.3d 1125 (2007).[3] "Interpretations giving lawful effect to all the provisions in a contract are favored over those that render some of the language meaningless or ineffective." Grey v. Leach, 158 Wn App. 837, 850, 244 P.3d 970 (2010). We will not disregard the language the parties chose to use. Snohomish County Pub. Transp. Benefit Area Corp. v. FirstGroup Am., Inc., 173 Wn.2d 829, 840, 271 P.3d 850 (2012).

The plain and unambiguous language of the lease does not support the trial court's interpretation.

Section 7.2(b) of the lease requires Whole Foods to conduct its business "without interruption":

> (b) Operating Covenant. Tenant covenants to conduct and carry on Tenant's business in the Demised Premises without interruption (excluding any temporary period during which Tenant is closed for rebuilding or repairs following a casualty or condemnation or by reason of any Force Majeure Events) for the first ten (10) Lease Years of the Demised Term ("Tenant's Operating Covenant") and, for so long as Tenant's Operating Covenant is in effect, shall keep the Demised Premises open for business at a minimum during the days and hours designated from time to time by Landlord, which at the time of the execution of this Lease Landlord designates to be as follows:
>
> | | |
> |---|---|
> | Monday through Saturday | 8:00 a.m. to 9:30 p.m. |
> | Sunday | 9:00 a m. to 7:00 p.m. |
>
> The hours designed by Landlord are minimum hours. Tenant may remain open for additional hours in its sole discretion. In no event shall Tenant be

[3] Footnote omitted

> required to be open for business between the hours of 11:00 p.m. and 7:00 a.m. This provision shall not apply if the Demised Premises are closed and the business of Tenant is temporarily discontinued therein on account of strikes, lockouts, casualty or similar causes beyond the reasonable control of Tenant. Tenant shall not be required to be open on Easter, Thanksgiving Day or Christmas Day. Tenant shall keep in stock on the Demised Premises a full and ample line of merchandise for the purpose of operating its business and shall maintain an adequate sales force.

Section 7.2 contains two specific remedies for breach. First, Bellevue Square may recover liquidated damages if Whole Foods "fail[s] to be open to the public on a fully-operational basis during the hours required under this Lease":

> (c) Liquidated Damages for Unauthorized Closure. If, after Tenant has initially opened for business at the Demised Premises, Tenant should fail to be open to the public on a fully-operational basis during the hours required under this Lease, and such failure continues for a period in excess of five (5) days after Landlord has notified Tenant in writing of such failure, Tenant shall pay to Landlord, for each hour or portion thereof that Tenant fails to open, One Hundred Dollars ($100.00), within one (1) month of Landlord's written request therefor; but in no event shall the charge described in this Section 7.2(c) exceed Five Thousand and no/100 Dollars ($5,000.00) in any twelve (12) month period during the Demised Term. As long as Tenant opens the Demised Premises for business within one (1) hour of the opening time otherwise required, Landlord agrees to waive two (2) charges described in this Section 7.2(c) during any twelve (12) month period during the Demised Term.

Second, at any time after the Tenant's Operating Covenant "has expired," Bellevue Square has the right to terminate the lease if Whole Foods "discontinues operation of its business" in the premises for six consecutive months:

> (d) Landlord Recapture Right. Notwithstanding the foregoing, if at any time after Tenant's Operating Covenant has expired, Tenant discontinues operation of its business in the Demised Premises for a period of six (6) consecutive months (excluding any temporary period during which Tenant is closed for rehabilitation, modernization or improvement of the Demised Premises, for rebuilding or repairs following a casualty or condemnation or by reason of any Force Majeure Events), Landlord thereafter shall have the right, at its sole option, to terminate this Lease upon advance written notice to Tenant ("Landlord's Termination

> Notice") given at any time prior to the date Tenant either (A) notifies Landlord in writing that it covenants to re-commence operation of its business in the Demised Premises within two (2) months, or (B) notifies Landlord in writing that it has entered into a binding lease assignment or sublease with an assignee or subtenant in accordance with this Lease who has covenanted to open for business in the Demised Premises within two (2) months. This Lease shall terminate one (1) month after Landlord gives Tenant Landlord's Termination Notice.

Neither remedy applies here. The liquidated damages provision of section 7.2(c) expressly applies to only an "Unauthorized Closure" of the business "during the hours required under this Lease." It permits Bellevue Square to sanction Whole Foods for the failure to open to the public during the hours provided in section 7.2(b). It does not apply in the event that Whole Foods vacates or abandons the property.

Section 7.2(c) further provides:

> Notwithstanding anything herein to the contrary, Tenant's late opening or early closure shall not constitute a default under this Lease unless (i) Landlord provides written notice to Tenant of Tenant's late opening or early closure; and (ii) Tenant thereafter opens late or closes early three (3) times in a twelve (12) month period.

By its express terms, the conduct addressed in section 7.2(c) constitutes a lease default in only very limited circumstances. The tenant must open late or close early, the landlord must give the tenant written notice of this, and the tenant must thereafter open late or close early three times in a 12-month period. It is undisputed these events did not occur. Therefore, section 7.2 does not provide a basis for seeking a default remedy against Whole Foods.

The right to recapture provision in section 7.2(d) expressly applies only "after Tenant's Operating Covenant has expired." The Tenant's Operating Covenant is in effect for the first 10 years of the lease agreement. Whole Foods vacated the premises

and stopped operating its business after only 1 year, so the right of recapture set out in section 7.2(d) does not apply.

Article 10, "Default and Remedies," governs the landlord's remedies in the event of default by the tenant. Article 10.1(a)(i) specifically identifies "abandonment of the Demised Premises by Tenant." Whole Foods admits default of the lease because it vacated the premises.

Section 10.1(a) states that if Whole Foods defaults in paying rent or performing any of the other agreements in the lease and fails to cure the default, Bellevue Square may treat the default as a breach and pursue its remedies under the lease. The lease states Bellevue Square's remedies are "subject only to the limitations thereon set forth in Section 10.1(c) below." Section 10.1(a) names three specific events that constitute default and breach by Whole Foods:

> (i) The abandonment of the Demised Premises by Tenant.
>
> (ii) The failure of Tenant to perform any covenant to pay money as and when due.
>
> (iii) Tenant's failure to observe or perform any of the other covenants, conditions or provisions of this Lease to be observed or performed by Tenant.

Upon tenant default, section 10.1(b) allows Bellevue Square to either terminate the lease under section 10.1(b)(i) or continue the lease under section 10.1(b)(ii). If Bellevue Square terminates the lease, Whole Foods must "immediately surrender possession" of the premises and pay all past due rent; the "expenses of reletting" the property, including repairs; and "reasonable" attorney fees.

At oral argument, Bellevue Square stated it was proceeding under section 10.1(b)(ii). Under section 10.1(b)(ii), "Continue the Lease," Bellevue Square may:

> Maintain Tenant's right to possession, in which case this Lease shall continue in effect whether or not Tenant has vacated or abandoned the Demised Premises. In such event Landlord shall be entitled to enforce all Landlord's rights and remedies under this Lease, including the right to recover the Rent, damages from Tenant's default or breach, and any other payments as they may become due hereunder, and to specifically enforce Tenant's obligations hereunder and obtain injunctive relief from further defaults and breaches, and shall be entitled to enter the Demised Premises for the purpose of curing Tenant's failure to observe or perform any of the other covenants, conditions or provisions of this Lease to be observed or performed by Tenant, and in such case, Tenant shall pay the entire cost thereof as Additional Rent within one (1) month after receipt of an invoice therefor from Landlord.[4]

Under this provision, Bellevue Square can continue the lease and collect rent, damages, and any other applicable payments, "whether or not Tenant has vacated or abandoned" the premises. But section 10.1(c) limits Bellevue Square's remedies as follows:

> (c) Limitations on Landlord's Remedies. Anything in Sections 10.1(a) and 10 1(b) above to the contrary notwithstanding, Landlord's exercise of its rights and remedies at law or in equity upon the occurrence of an Event of Default shall be subject to the following limitations:
>
> (i) Duty to Mitigate. Landlord shall exercise commercially reasonable efforts to mitigate its damages resulting from Tenant's default; provided, however, so long as Landlord has exercised commercially reasonable efforts to mitigate its damages, Landlord shall not be liable to Tenant for, nor shall Tenant's liability to Landlord be diminished by, Landlord's inability to relet the Demised Premises.
>
> (ii) Redecorating Costs. Tenant shall have no liability to Landlord for any costs or expenses incurred by Landlord in connection with redecorating or remodeling the Demised Premises in connection with a reletting thereof.

[4] Emphasis added

> (iii) Percentage Rent Tenant shall have no liability to Landlord for any Percentage Rent that would have accrued subsequent to the later to occur of (A) the last day that Tenant's Operating Covenant is in effect, and (B) the date that Tenant ceases operating its business at the Demised Premises.
>
> (iv) No Consequential Damages. Except with respect to the specific circumstances described in Section 3.4 above, in no event shall Tenant be liable to Landlord for any indirect or consequential damages including but not limited to, lost rent, revenue, or other payments from other tenants, loss in value of the Development, and/or lost profits.

The trial court concluded these limitations did not prevent ordering Whole Foods to reopen within 14 days. The court concluded the duty to mitigate applies only if Bellevue Square terminates the lease rather than continue it. The court also noted the duty to mitigate is imposed by law regardless of whether it is included in the lease. As to the prohibition against consequential damages, the court found many of the harms asserted as a result of Whole Foods' default were "consequential and indirect damages under law, for which, pursuant to the Lease, Bellevue Square has waived the right to compensation." However, the court determined it could consider these harms for purposes of granting injunctive relief.

The court's interpretation of the limitations on Bellevue Square's remedies is inconsistent with the plain language of the lease. Section 10.1(c) states the limitations apply to the "Landlord's exercise of its rights and remedies at law or in equity upon the occurrence of an Event of Default." The limitations of section 10.1(c) apply whether Bellevue Square terminates or continues the lease. Further, contrary to the assertion by Bellevue Square at oral argument, section 10.1(c) is not limited to an anticipatory breach of the contract.

Regardless of whether Bellevue Square decided upon Whole Foods vacating the premises to either terminate or continue the lease, under the terms of the lease, Bellevue Square has the duty to mitigate damages The lease expressly requires Bellevue Square to attempt to "relet" the premises. The duty to mitigate damages is inconsistent with the trial court's conclusion that Bellevue Square is entitled to compel Whole Foods to continue operating. For Bellevue Square to be able to lease the premises to another tenant, Whole Foods must be permitted to cease operating on the premises.

Nonetheless, Bellevue Square argues section 10.1(b)(ii) of the lease expressly makes specific performance an available remedy for Whole Foods' breach of the Tenant's Operating Covenant in section 7.2(b). We reject this argument. As previously noted, the Tenant's Operating Covenant has very specific and limited remedy provisions.

When Whole Foods vacated the premises, Bellevue Square elected under section 10.1(b)(ii) to continue the lease, entitling it to "recover the Rent, damages from Tenant's default or breach, and any other payments as they may become due hereunder." This default remedy option contemplates an ongoing obligation on the part of the defaulting tenant to continue making the required payments to the landlord as those payments become due. To protect the landlord from "further defaults" by the defaulting tenant, section 10.1(b)(ii) allows Bellevue Square to "specifically enforce Tenant's obligations hereunder and obtain injunctive relief from further defaults and breaches "[5]

[5] Emphasis added.

In other words, once there has been a tenant default entitling Bellevue Square to invoke the remedies provided under section 10.1 and Bellevue Square has elected to invoke its option to treat the lease as continuing, there is a continuing obligation on the part of the tenant to make requisite payments as they become due. Bellevue Square has the right under section 10.1(b)(ii) to seek specific performance of these continuing obligations in the event of further default by the tenant. But under the express terms of the lease, the right of Bellevue Square to specific performance and injunctive relief does not apply beyond the circumstances specifically described in section 10.1(b)(ii)

Because Bellevue Square is not entitled to specific performance of all of the terms of the lease, the court erred in concluding Bellevue Square established a clear legal right to a preliminary injunction and specific performance. The trial court found the indirect harms experienced by Bellevue Square are "difficult to quantify with reasonable certainty" and granted injunctive relief because "[n]o adequate remedy at law exists to compensate Bellevue Square." The language of the lease does not support the court's conclusion. Under section 10.1(c)(iv) of the lease, Bellevue Square explicitly waives its right to recover "any indirect or consequential damages" such as "loss in value of the Development, and/or lost profits."

Subject to the limitations stated in section 10.1(c), the lease gives Bellevue Square an adequate, complete, and speedy remedy for the harm caused by Whole Foods vacating the premises and it may continue the lease and continue to recover rent, damages, and other payments from Whole Foods. If Whole Foods defaults on the continuing payment obligations, Bellevue Square is entitled to seek specific

performance and injunctive relief based on these further defaults as authorized by section 10.1(c).

We conclude the court abused its discretion by entering a preliminary injunction ordering Whole Foods to reopen and continue operating. We reverse and remand.

WE CONCUR:

FILED
3/13/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

BELLEVUE SQUARE, LLC, a Washington limited liability company, Respondent, v. WHOLE FOODS MARKET PACIFIC NORTHWEST, INC., a Delaware corporation; WHOLE FOODS MARKET, INC., a Texas corporation; Appellants.	)	No. 77770-0-I ORDER DENYING MOTION FOR RECONSIDERATION

Respondent Bellevue Square LLC filed a motion for reconsideration of the opinion filed on December 17, 2018. Appellants Whole Foods Market Pacific Northwest Inc. and Whole Foods Market Inc. (collectively, Whole Foods) filed an answer to the motion. A panel of the court has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that respondent's motion for reconsideration is denied.

For the Court:

Judge

NOLD MUCHINSKY PLLC

April 12, 2019 - 2:49 PM

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DECLARATION OF SERVICE

On said day below, I served a true and correct copy of this Petition for Review to the following parties:

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

Dated this 12th day of April, 2019 at Bellevue, Washington.

/s/ Natalie Quarnstrom

Natalie Quarnstrom

NOLD MUCHINSKY PLLC

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