

No. 71318-3-I

COURT OF APPEALS DIVISION I
STATE OF WASHINGTON

MICHAEL CROSSAN and ROWENA CROSSAN, dba LAKE
WASHINGTON BOAT CENTER,

Appellant,

v.

PHILLIP D. BURGESS and LINDA L. BURGESS,

Respondents.

APPELLANT'S BRIEF

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
SEP 13 11 2:50

Ronald J. Meltzer, WSBA No. 1203
Attorneys for Appellant

SINSHEIMER & MELTZER, INC., P.S.
701 Fifth Avenue, Suite 4100
Seattle, WA 98104-7073
Telephone: 206-340-4700

 ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. ASSIGNMENTS OF ERROR.....2

III. STATEMENT OF THE CASE 5

IV. LEGAL ARGUMENT6

 A. Argument in Support of
 Assignment of Errors 1-6 6

 B. Respondents were not Entitled
 To Forfeit Rowena Crossan’s Leasehold
 Interest..... 10

 C. The Court Erred in Denying Rowena
 Crossan’s Petition for Relief from
 Forfeiture 12

V. CONCLUSION 13

TABLE OF AUTHORITIES

WASHINGTON CASES

Tungsten Products v. Kimmel
5 Wash.2d 572, 105 P.2d 822 (1954) 6, 7

McGill v. Shugarts
58 Wash.2d 203, 361 P.2d 645 (1961)..... 7

In re the Proceedings for Clallam County
for the Foreclosure of Liens for Delinquent
Real Property Taxes for Year 1991
130 Wash.2d 142, 922 P.2d 73 (1996)..... 7

City of Seattle v. McCoy
101 Wash.App. 815, 4 P.3d 159 (2003)..... 8

Hartsen Partnership,
dba Des Moines Estates MHP v. Goodwin
99 Wash.App. 227, 991 P.2d 1211 (2000) 9

Olver v. Fowler
161 Wash.2d 655, 168 P.3d 348 (2007)..... 9

Bay
Industry, Inc. v. Board of Commissioners of Jefferson County
33 Wash.App. 239, 653 P.2d 1355 (1982) 9

SECONDARY SOURCES

Restatement (Second) of Torts (1977)
Section 838..... 7, 8

STATUTES

RCW 59.12.030(5) 10
RCW 59.12.170 10, 11
RCW 59.12.190 12

I. INTRODUCTION

In February 2011 the Burgess' (Respondents in this proceeding and plaintiffs in the superior court) entered into a lease of certain commercial premises in Auburn, Washington with Michael and Rowena Crossan (CP 140). The Crossan's each signed the Lease. There was no designation in the Lease that either Crossan was acting for the marital community. During the years 2012 and 2013 Michael Crossan committed a number of acts the court found to be a nuisance, including blocking access of an adjoining tenant to his vehicles and work bay, vandalizing several display flags placed by the adjoining tenant, damaging two vehicles owned by an adjoining tenant, harassing the adjoining tenant's employees and customers and spitting in the adjoining tenant's face and lunging towards him with hands extended (CP 182-190). On none of these occasions was Rowena Crossan present nor was there any evidence she condoned or affirmed the actions of Michael Crossan. There was no evidence Rowena had any knowledge of any of the acts found by the court to constitute nuisance. Despite the total absence of any evidence Rowena Crossan knew, permitted or joined in any of the nuisance acts of Michael Crossan, the Court found she permitted the nuisance acts to occur,

terminated her tenancy, and forfeited her leasehold interest (CP189-190).

II. ASSIGNMENTS OF ERROR

1. The court erred in entering Finding of Fact 1.9:

“1.9 During 2012 and 2013, there have been numerous instances involving the Premises and the Defendants’ use of the Premises.” (CP 184)

This finding implies Rowena Crossan’s actions are part of the numerous instances involving the premises when in fact Rowena Crossan was not present nor did she participate in any of these events (CP 184).

2. The Court erred in entering Conclusion of Law 2.4:

“2.4 Defendant Michael Crossan has maintained and Defendant Rowena Crossan permitted nuisance on the Property, pursuant to RCW 59.12.030(5), and the Defendants having held over their tenancy after receiving a three-day notice, are in unlawful detainer.” (CP 187)

No Finding supports nor is there evidence that Rowena Crossan permitted a nuisance on the property or is in unlawful detainer (CP 187).

3. The court erred in entering Conclusion of Law 2.5:

“2.5 The actions by the Defendants that constitute a nuisance as outlined above are such that they impede or obstruct the Plaintiffs’ comfortable enjoyment of the Premises in that they require the Plaintiffs to repeatedly

have to deal with these actions by the Defendants and they require the Plaintiffs to repeatedly have to drive long distances from the Plaintiffs' home to the Premises to deal with the irrational and dangerous actions of Defendants. The actions by the defendants also place the Plaintiffs at risk for liability rising from Defendants increasingly irrational and dangerous behavior." (CP 187-188)

No Finding supports nor is there evidence that any action of Rowena Crossan constituted a nuisance or placed Plaintiffs at risk for liability (CP 188-189).

4. The court erred in entering Conclusion of Law 2.7:

"2.7 The actions by the Defendants that constitute a nuisance as outlined above are such that they impede or obstruct the Plaintiffs' comfortable enjoyment of the Premises in that they expose the Plaintiffs to possible personal liability for future actions by the Defendants against tenants and/or customers visiting the Premises." (CP 188)

No Finding supports nor is there evidence that any action by Rowena Crossan impeded Plaintiffs' comfortable enjoyment of the premises or exposed them to liability.

5. The court erred in entering conclusion of law 2.8:

"2.8 Plaintiffs are entitled to restitution of the above described Premises and forfeiture and termination of the Defendants' tenancy." (CP 188)

The Plaintiffs were not entitled to this relief against Rowena Crossan as she committed no acts constituting nuisance nor did she permit or affirm any acts of Michael Crossan constituting nuisance (CP 189).

6. The court erred in entering the Order Reissuing the Writ of Restitution:

“3.1 That Defendants MICHAEL CROSSAN and ROWENA CROSSAN, d/b/a LAKE WASHINGTON BOAT CENTER and all others now occupying the premises commonly known as 423 Auburn Avenue North, Auburn, WA 98002, are adjudged to be guilty or unlawful detainer of the Premises and should be evicted therefrom, as Plaintiffs are entitled to immediate possession of the Premises;

3.2 That Defendants MICHAEL CROSSAN and ROWENA CROSSAN, d/b/a LAKE WASHINGTON BOAT CENTER have forfeited the Lease Agreement dated February 28, 2011 and have forfeited the tenancy to the Premises commonly known as 423 Auburn Avenue North, Auburn, WA 98002;

3.3 That the King County Superior Court Clerk shall forthwith reissue a writ of restitution ordering the Sheriff of King County to restore the property located at 423 Auburn Avenue North, Auburn, WA 98002 to the Plaintiffs.”

Plaintiffs were not entitled to this relief against Rowena Crossan.

7. The Court erred in denying Rowena Crossan’s Motion for Reconsideration (CP 194).

8. The Court erred in denying Rowena Crossan's Petition for Relief from Forfeiture (CP 199).

III. STATEMENT OF THE CASE

This is an appeal by Rowena Crossan from a decision of the Superior Court granting relief for Plaintiffs Phillip and Linda Burgess (hereinafter "Burgess") finding her in unlawful detainer and terminating her tenancy of certain commercial premises (CP 182-190).

The Burgess' filed an unlawful detainer action against Michael Crossan and Rowena Crossan (CP 1-41) alleging various acts performed by Michael Crossan constituted a nuisance entitling the Burgess' to terminate the Lease between the parties. After a non-jury trial the Court entered Amended Findings of Fact, Conclusions of Law and Order Reissuing Writ of Restitution (CP 182-190). In essence, the Court found a number of instances where the conduct of Michael Crossan constituted a nuisance justifying the imposition of a remedy of unlawful detainer. No evidence was presented that Rowena Crossan participated in these actions, knew of these actions or ratified the behavior of Michael Crossan (CP 7-289). Rowena Crossan moved for reconsideration (CP 164-168). This motion was denied (CP 194). Rowena Crossan also petitioned for relief from forfeiture. This Petition was denied (CP 199). This appeal followed (CP 201-219).

IV. LEGAL ARGUMENT

A. ARGUMENT IN SUPPORT OF ASSIGNMENT OF ERRORS 1-6.

There was no evidence supporting the Court's decision to impose the remedy of unlawful detainer against Rowena Crossan.

The Court found the actions of Michael Crossan, a co-tenant on this Lease, constituted a nuisance and accordingly deprived Rowena Crossan of her leasehold interest. No Finding supports nor was there any evidence presented that Rowena Crossan was present when any of the complained of acts occurred, permitted any of these acts to occur, knew any of the acts were occurring, or later affirmed the conduct of Michael Crossan in performing these acts.

There is substantial case law to support the proposition the act of a co-tenant does not bind the remaining tenant. In *Tungsten Products v. Kimmel*, 5 Wash.2d 572, 105 P.2d 822 (1954) the court stated at p. 575:

“The finding of the trial court that appellants had agreed to the suspension of work on the property for a period of ninety days was based on the theory that Offa M. Kimmel was the agent of the other appellants. That he himself actually made such an agreement on November 30, 1938, cannot be doubted. That he had authority to speak for his associates is another matter. It is alleged in the complaint and admitted by the answer that appellants held the leases from the state as tenants in common-each owning an undivided one-fifth. The mere

fact that they were tenants in common did not in itself confer upon Offa Kimmel the powers of an agent for the others. It is well settled that one co-tenant cannot do anything with respect to the common property binding upon his co-tenants unless they may have authorized or ratified his act. No agency by implication arises out of his act merely from the relationship of co-tenancy.”

In *McGill v. Shugarts*, 58 Wash.2d 203, 361 P.2d 645 (1961)

the court stated at p. 204:

“It is true, as the appellants point out, that the Hamiltons and the Palms could convey by deed no greater interest than they owned, which was a one-quarter interest in the fee, and it is also the law that one cotenant cannot do anything with respect to the common property binding upon his cotenants unless they have authorized or ratified his act. *Tungsten Products, Inc. v. Kimmel*, 5 Wash.2d 572, 105 P.2d 822.”

In *In re the Proceedings for Clallam County for the Foreclosure of Liens for Delinquent Real Property Taxes for Year 1991*, 130 Wash.2d 142, 922 P.2d 73 (1996) the Court described the nature of the co-tenants interest as follows at p. 148:

“The essential attribute of a tenancy in common is possession; each cotenant is the holder of an undivided interest in the whole of the property, with the right to possession and enjoyment of the whole property. See *Rouse v. Glascam Builders, Inc.*, 101 Wash.2d 127, 130, 677 P.2d 125 (1984).”

This analysis is also supported by cases analyzing nuisance in a tort context. Restatement (Second) of Torts, Section 838 (1977)

entitled "Possessor Who Fails to Prevent Nuisance Caused by Activity" provides:

"A possessor of land upon which a third person carries on activity that causes a nuisance is subject to liability for the nuisance if it is otherwise actionable, and (a) the possessor knows or has reason to know that the activity is being carried on and that it is causing or will involve an unreasonable risk of causing nuisance, and (b) he consents to the activity or fails to exercise reasonable care to prevent the nuisance."

In this case the "possessor" is Ms. Crossan. There is no evidence she knew of the activities of Mike Crossan which the court found to be a nuisance nor is there any evidence in the record that she failed to exercise reasonable care to prevent the nuisance or consented to the activity. See *City of Seattle v McCoy*, 101 Wash.App. 815, 4 P.3d 159 (2003) where the Restatement section referred to above is cited with approval.

In summary, the case law supports the proposition that Rowena Crossan was not bound by any acts of Michael Crossan absent evidence of ratification or consent and was entitled as a co-tenant to full use of the property. The Court, in denying the Motion for Reconsideration, confused the ability of Michael Crossan to bind his marital community and the rights of Rowena Crossan in her individual capacity.

The Lease was not signed by Michal Crossan and his marital community; it was signed by two individuals who happened to be married. As such they had individual rights.

An unlawful detainer action is in derogation of the common law and as such courts strictly construe them in favor of the tenant *Hartsen Partnership, dba Des Moines Estates MHP v. Goodwin*, 99 Wash.App. 227, 991 P.2d 1211 (2000).

Each spouse owns an undivided ½ interest in the community property, *Olver v. Fowler*, 161 Wash.2d 655, 168 P.3d 348 (2007) and *Bay Industry, Inc., v. Jefferson County, Board of Commissioners of Jefferson County*, 33 Wash.App. 239, 653 P.2d 1355 (1982). In the latter case the court stated at p. 241:

“RCW 36.87.020 requires a road vacation petition to be signed by 10 freeholders residing in the vicinity of the road. Appellant contends that only 5 freeholders signed the petition, because each married couple constitutes only one freeholder. We disagree. A freeholder is one who holds either legal or equitable title to real estate. *Daniels v. Fossas*, 152 Wash. 516, 278 P. 412 (1929). Each spouse owns an undivided one-half interest in the whole community real estate and the community does not own property as a separate entity. *deElche v. Jacobsen*, 95 Wash.2d 237, 622 P.2d 835 (1980). Therefore, we hold that each spouse in a marital community is a freeholder with reference to community owned real estate. The freeholder requirement of the statute was satisfied here.”

Therefore the Court's finding that the act of Michael Crossan which bound his marital community was not a sufficient basis to deprive Rowena Crossan of her ½ undivided interest in the leased property.

B. RESPONDANTS WERE NOT ENTITLED TO FORFEIT ROWENA CROSSAN'S LEASEHOLD INTEREST. ASSIGNMENT OF ERRORS 7.

Even if the court finds the remedy of unlawful detainer applied to Rowena Crossan the Court was not entitled to forfeit her leasehold interest.

Respondents' unlawful detainer action was based on a violation of RCW 59.12.030(5) which states:

“(5) When he or she commits or permits waste upon the demised premises, or when he or she sets up or carries on thereon any unlawful business, or when he or she erects, suffers, permits, or maintains on or about the premises any nuisance, and remains in possession after the service (in manner in RCW 59.12.040 provided) upon him or her of three days' notice to quit.”

RCW 59.12.170 specifically provides for "forfeiture" of the lease only in the instance of unlawful detainer based on non-payment of rent or breach of lease condition and contains no language authorizing forfeiture for nuisance or waste:

“If upon the trial the verdict of the jury or, if the case be tried without a jury, the finding of the court be in favor of the plaintiff and against the defendant, judgment shall

be entered for the restitution of the premises; and if the proceeding be for unlawful detainer after neglect or failure to perform any condition or covenant of a lease or agreement under which the property is held, or after default in the payment of rent, the judgment shall also declare the forfeiture of the lease, agreement, or tenancy. The jury, or the court, if the proceedings be tried without a jury, shall also assess the damages occasioned to the plaintiff by any forcible entry, or by any forcible or unlawful detainer, alleged in the complaint and proved on the trial, and, if the alleged unlawful detainer be after default in the payment of rent, find the amount of any rent due, and the judgment shall be rendered against the defendant guilty of the forcible entry, forcible detainer, or unlawful detainer for twice the amount of damages thus assessed and of the rent, if any, found due. When the proceeding is for an unlawful detainer after default in the payment of rent, and the lease or agreement under which the rent is payable has not by its terms expired, execution upon the judgment shall not be issued until the expiration of five days after the entry of the judgment, within which time the tenant or any subtenant, or any mortgagee of the term, or other party interested in its continuance, may pay into court for the landlord the amount of the judgment and costs, and thereupon the judgment shall be satisfied and the tenant restored to his or her estate; but if payment, as herein provided, be not made within five days the judgment may be enforced for its full amount and for the possession of the premises. In all other cases the judgment may be enforced immediately. If writ of restitution shall have been executed prior to judgment no further writ or execution for the premises shall be required.”

Given case law previously cited that unlawful detainer actions are construed in favor of the tenant, giving respondents a non-statutory remedy of forfeiture clearly exceeded the Court’s authority.

C. THE COURT ERRED IN DENYING ROWENA COWAN'S PETITION FOR RELIEF FROM FORFEITURE. ASSIGNMENT OF ERRORS 8.

Though Appellant contends the trial court had no authority to forfeit the lease given the courts ruling, Appellant was entitled to the protections afforded in RCW 59.12.190 which reads as follows:

“The court may relieve a tenant against a forfeiture of a lease and restore him or her to his or her former estate, as in other cases provided by law, where application for such relief is made within thirty days after the forfeiture is declared by the judgment of the court, as provided in this chapter. The application may be made by a tenant or subtenant, or a mortgagee of the term, or any person interested in the continuance of the term. It must be made upon petition, setting forth the facts upon which the relief is sought, and be verified by the applicant. Notice of the application, with a copy of the petition, must be served on the plaintiff in the judgment, who may appear and contest the application. In no case shall the application be granted except on condition that full payment of rent due, or full performance of conditions of covenants stipulated, so far as the same is practicable, be first made.”

Rowena Crossan timely filed her Petition for Relief from Forfeiture (CP 169-171). The Court denied the motion without comment (CP 199). While the granting of the motion is discretionary the court offered no reason why the Petition should not be granted. The Petition provided Michael Crossan would not be on the premises, that rent had been paid, and that Rowena Crossan would post a bond

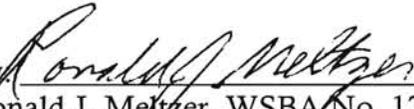
insuring her performance. On its face the Petition met all concerns of Respondents regarding the conduct of Michael Crossan.

V. CONCLUSION

The Trial Court's order finding Rowena Crossan in unlawful detainer, terminating her tenancy and forfeiting her leasehold interest should be reversed with direction to the Superior Court to restore her right of possession consistent with the terms of the lease.

RESPECTFULLY submitted this ___ day of May, 2014.

SINSHEIMER & MELTZER, INC., P.S.

By 

Ronald J. Meltzer, WSBA No. 1203
Attorneys for Appellant

No. 71318-3-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MICHAEL CROSSAN and ROWENA CROSSAN, dba LAKE
WASHINGTON BOAT CENTER

Appellant,

and

PHILLIP D. BURGESS and LINDA L. BURGESS,

Respondents.

PROOF OF SERVICE

Ronald J. Meltzer, WSBA No. 1203
Attorney for Appellant

SINSHEIMER & MELTZER, INC. P.S.
701 Fifth Avenue, Suite 4100
Seattle, WA 98104-7073

Telephone: 206-340-4700

FILED
COURT OF APPEALS
STATE OF WASHINGTON
JAN 19 PM 2:50

 ORIGINAL

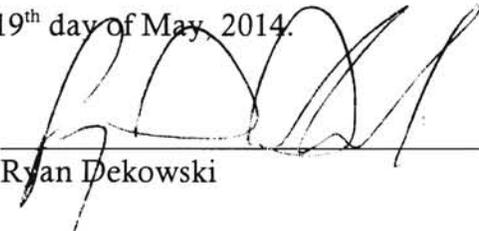
I, Ryan Dekowski, certify that all at times mentioned herein I was and now am a citizen of the U.S. and a resident of the State of Washington, over the age of 18 years, not a party to this proceeding or interested therein, and competent to be a witness therein.

On May 19, 2014 I caused a copy of Appellant's Brief to be served on the attorneys for Respondents at the address below:

Kenyon E. Luce
Christi C. Goeller
Luce Kenney & Associates
4505 Pacific Highway East, Suite A
Tacoma, WA 98424-2638

-] By causing a full, true and correct copy thereof to be MAILED in a sealed, postage-paid envelope, addressed as shown above, which is the last known address for Mr. Grundstein, and deposited with the U.S. Postal Service on the date set forth below;
-] By causing a true and correct copy thereof to be DELIVERED VIA ABC LEGAL MESSENGER to the Respondent's attorneys at the address listed above, on the date set forth below;
-] By causing a full, true and correct copy thereof to be FAXED to the party at the facsimile number shown above, which is the last known facsimile number for the party, on the date set forth below.

DATED this 19th day of May, 2014.



Ryan Dekowski