

No. 74433-0

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

FILED
May 02, 2016
Court of Appeals
Division I
State of Washington

AMARJIT SANDHU and AMERICAN PIZZA & PASTA INC,

Appellants,

v.

SEATTLE CHILDREN'S HOSPITAL,

Respondent.

APPELLANTS' OPENING BRIEF

Law Office of William P. McArdel III
1826 114th Ave NE, Suite 101
Bellevue, WA 98004
(425) 454-1828

Attorney for Appellants

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I. INTRODUCTION

Appellants AMARJIT SANDHU and AMERICAN PIZZA & PASTA INC hereby provide the Court with the following roster of parties and persons who are significant in this case.

In the left hand column is the name of the person or entity together with a thumbnail description of the person or entity, and in the right hand column is how the person or entity will be referred to in this

Brief:

American Pizza and Pasta Inc. dba A Pizza Mart (Appellant, Defendant, owner/operator of the “A Pizza Mart” business, and Co-Tenant to Seattle Children’s Hospital)	Pizza Mart
Amarjit Sandhu (Appellant, Defendant, sole officer, sole director, and co- shareholder with his spouse of Pizza Mart, and Co-Tenant with Pizza Mart, which entity operates the business known as A Pizza Mart)	Mr. Sandhu
Seattle Children’s Hospital (Respondent, Plaintiff, and Landlord to Mr. Sandhu and Pizza Mart)	Children’s
Jessica Espinosa (Property Manager of Children’s with respect to Pizza Mart)	Ms. Espinosa

Sandhu were indeed forfeiting a substantially valuable asset when the Trial Court ordered forfeiture of the Lease option.

5. The Trial Court erred in denying Pizza Mart and Mr. Sandhu's Motion for Summary Judgment Dismissal of Plaintiff's Complaint.

6. Because the Judgment entered by the Trial Court was based upon the erroneous Order Granting Partial Summary Judgment to Children's, the Trial Court erred in entering the Judgment.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Should this Court reverse the Trial Court having granted Children's Motion for Partial Summary Judgment on Lease Option to Renew? (Assignment of Error No. 1)

2. Did the Trial Court err in construing the terms of the Lease between Children's, Mr. Sandhu, and Pizza Mart, concerning whether any notice was required from Children's in order to commence the applicable cure period? (Assignment of Error No. 2)

3. Did the Trial Court fail to identify genuine issues of disputed material fact with respect to whether Children's had issued any notice complying with the terms of the Lease such that the options to extend the Lease were forfeited? (Assignment of Error No. 3)

4. Did the Trial fail to identify genuine issues of disputed material fact with respect to whether Pizza Mart and Mr. Sandhu forfeited a substantially valuable asset when the Trial Court forfeited the Lease options? (Assignment of Error No. 4)

5. Should this Court reverse the Trial Court's denial of the Motion of Pizza Mart and Mr. Sandhu for Summary Judgment Dismissal of Plaintiff's Complaint? (Assignment of Error No. 5)

6. Should this Court reverse the Trial Court's entry of Judgment based on its prior entry of the Order granting Partial Summary Judgment in favor of Children's? (Assignment of Error No. 6)

IV. STATEMENT OF THE CASE

A. Statement of Facts:

This appeal concerns a lease in which Children's is the current Landlord and Mr. Sandhu and Pizza Mart are and have at all material times been the Tenants.

On December 23, 2005, Touchstone 9th and Stewart, LLC ("Touchstone") executed a lease (the "Lease") as Landlord with Mr. Sandhu as the tenant. (CP 2) In February 2006, Touchstone and Mr. Sandhu executed a First Amendment to the Lease adding Pizza Mart as

an additional Tenant. (CP 2) On October 26, 2006, Touchstone assigned its right, title and interest in the Lease to Children's. (CP 2) The premises which are the subject of this proceeding is referred to as Retail Space #3 located in a commercial office building known as the Ninth and Stewart Life Sciences Building. (CP 2) The Complaint filed by Children's asserted that Sandhu and Pizza Mart were operating the business known as "A Pizza Mart" at the premises as a "dive bar" rather than as a pizza restaurant. (CP 2) However, the controlling language in the Lease is contained in paragraph 3.5 of the Lease, which paragraph is set forth in full as follows:

Landlord hereby consents to the sale of alcohol on the Premises by Tenant, provided that Tenant obtains and maintains during the term of the Lease and while selling such alcohol, a license from the appropriate governmental agencies, including without limitation, the Washington State Liquor Control Board and Tenant otherwise abides by the laws of the state of Washington in connection with the sale of such alcohol. Further, **Tenant shall not allow any consumption of such alcoholic beverages in or on the Premises or any other part of the Project, except in conjunction with the operation of its business as a pizza restaurant** and then only if prior to allowing such consumption on the Premises, Tenant obtains a liquor liability endorsement to the insurance Tenant is obligated to maintain under the other provisions of this Lease. (Emphasis added)
(CP 48-49)

Pizza Mart has always operated in accordance with the laws of the State of Washington in connection with the sale of alcohol, has provided the liquor liability endorsement to Children's, and has complied with applicable law in the conduct of the business. Children's has never disputed these facts.

During the last few years of the Lease, Children's has at various times raised objection to the nature of the business conducted as "A Pizza Mart," complaining about operational hours, off premises damage/vandalism, noise, firecrackers lit on the sidewalk on New Year's Eve, etc. Pizza Mart and Mr. Sandhu declined to change their hours which were similar to other similar business in downtown Seattle, and pointed out to Children's that the misbehavior complained about by Children's occurred off the lease premises and outside of their control, and were committed by persons who might not be customers of Pizza Mart, Pizza Mart and Mr. Sandhu nonetheless agreed to pay extra janitorial fees and take steps to help eliminate misbehavior occurring off premises. Pizza Mart and Mr. Sandhu repeatedly solicited comment, advice, or invitation on how Pizza Mart and Mr. Sandhu could resolve the objections of Children's such that Pizza Mart and Mr. Sandhu could be valued Tenants of Children's. The written communications regarding

these facts and the Tenants' various proposals to resolve the issues are numerous. (CP 333-336, 343-345, 347-349, 353-356, 455-457, 462-464, 466-467, 471, 473-475, 477, 480, 526-528, 530, and 532)

During the Great Recession, Pizza Mart, like many businesses around the world struggled with profitability and paying the bills, and did in fact fall behind on the rent paid to Children's. Pizza Mart continued to pay the rent and triple net expenses on a fairly regular basis but in the familiar situation of a tenant who has fallen behind on the rent but continues to pay, was behind on the rent for over a year. (CP 292) Children's had conversations with Mr. Sandhu and issued simple correspondence concerning the delinquent rent but never issued any formal notices claiming a default. (CP 216, 218-219)

In June 2011, Children's did issue to Pizza Mart and Mr. Sandhu a 3 Day Notice to Pay or Vacate. (CP 340-341) Pizza Mart and Mr. Sandhu paid the amount due within the allowed time, and to their credit, Children's has not disputed that Tenants timely cured that arrearage. (CP 36-37)

Ms. Espinosa, an employee of Children's and the Project Manager II, who manages the landlord-tenant relationship with Pizza Mart, acknowledged at deposition that she did not know of any late

payment of rent or other lease charges by Pizza Mart and/or Mr. Sandhu from 2012 to the date of the deposition. (CP 300) (CP 386)

On February 17, 2015, Pizza Mart and Mr. Sandhu properly delivered to Children's their notification of their intent to extend the terms of the Lease. (CP 130, 221-222) On February 24, 2015, Children's filed this lawsuit asking the Trial Court for Declaratory Judgment that the use by Pizza Mart and Mr. Sandhu of the leased premises was in violation of the terms of the Lease and asking the Trial Court for a Declaratory Judgment to such effect and to allow Children's to terminate the Lease. (CP 1-5) Pizza Mart and Mr. Sandhu denied that Pizza Mart was operating the business in violation of the terms of the Lease and counterclaimed for a Declaratory Judgment determining that Pizza Mart and Mr. Sandhu had properly exercised the Lease option. (CP 11-16)

B. Summary of Procedure Below:

Children's, together with Mr. Sandhu and Pizza Mart, both filed Summary Judgment type motions but with respect to distinctly different issues in the case. The motion of Children's was entitled "Partial Summary Judgment on Lease Option to Renew." The motion of Pizza Mart and Mr. Sandhu was entitled "Defendants'

Motion for Summary Judgment Dismissal of Plaintiff's Complaint.”
The competing Motions were definitely not two sides of the same coin.
The Trial Court was incorrect when it began the Summary Judgment hearing as follows:

The Court: So we're here on Children's
 versus Sandhu, and we've got
 cross-motions for Summary
 Judgment which are essentially
 mirror images of each other.
 (RP3)

The two Summary Judgment Motions involved the same parties, but dealt with different facts, different legal theories, different sections of the Lease to be construed, and involved a completely different legal analysis.

The Trial Court continued to be confused from the very beginning of the hearing as the Trial Court kept referring to the Children's Motion as a request to terminate the Lease early when it was actually a request for the Court to deny the right of Pizza Mart and Mr. Sandhu to exercise the option to extend the Lease another five (5) years beyond the December 31, 2015 end of the then-current term of the Lease. (RP 5) The original Complaint of Children's had been a request to terminate the Lease early. The Motion for Summary Judgment by Pizza Mart and Mr. Sandhu was to request dismissal of

Children's Complaint for Declaratory Action that asserted the Pizza Mart was really just a bar operating in violation of the terms of the Lease.

The Trial Court entered an Order granting Children's Motion for Partial Summary Judgment on Lease Option to Renew and denying the Motion of Mr. Sandhu and Pizza Mart for Summary Judgment Dismissal of Plaintiff's Complaint.

Sandhu and Pizza Mart subsequently filed a Motion for Reconsideration, which motion was denied by the Trial Court without explanation or comment. (CP 579-580)

In order to insure that there was an appealable order, Mr. Sandhu and Pizza Mart entered into a stipulation with Children's for entry of a Judgment awarding attorneys fees and costs to Respondent, the terms of which Judgment were expressly subject to the rights of appeal of Mr. Sandhu and Pizza Mart. (CP 581-583)

V. SUMMARY OF ARGUMENT

The summary of Sandhu and Pizza Mart's argument is as follows:

1. The Trial Court made a reversible error when it entered the Order granting Children's its Motion for Partial Summary

Judgment on Lease Option to Renew due to the way the Trial Court misconstrued the terms of the Lease.

2. The Trial Court made a reversible error when it failed to construe ambiguous terms in a manner most favorable to Pizza Mart and Mr. Sandhu as tenants of the Lease.

3. The Trial Court made a reversible error when it ruled that written notice complying with the terms of the Lease had been provided to trigger a forfeiture of the Lease option by Sandhu and Pizza Mart.

4. The Trial Court made a reversible error when it ruled that Pizza Mart and Mr. Sandhu would not suffer any substantial loss as a result of the judicially ordered forfeiture of the Lease options to extend the Lease.

5. The Trial Court made a reversible error when it denied the Order granting Mr. Sandhu and Pizza Mart their Motion for Summary Judgment Dismissal of Plaintiff's Complaint.

6. The Trial Court erred in its entry of the Judgment due to the Trial Court's prior errors relating to it granting Partial Summary Judgment in favor of Children's and its denial of Summary Judgment in favor of Pizza Mart and Mr. Sandhu.

VI. ARGUMENT

A. Standard on Review.

The Court of Appeals reviews an order granting summary judgment *de novo*. *City of Seattle v. Mighty Movers, Inc.* 152 Wn.2d 343, 348, 96 P.3d 979 (2004). On review of a summary judgment order the Court of Appeals “engages in the same inquiry as the Trial Court and only considered evidence and issues raised below.” *Halbert v. Forney*, 88 Wn. App. 669, 673, 945 P.2d 1137 (1997), citing *Wash. Fed’n of State Employees v. Fin. Mgmt.*, 121 Wash.2d 152, 157, 849 P.2d 1201 (1993); RAP 9.12.

Summary judgment is only appropriate if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). The moving party has the burden to show that no genuine issue of material fact exists. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). The Court must view all of the facts in the light most favorable to the Appellant, the non-moving party below, and all inferences to be drawn from the facts must be

drawn in favor of the Appellant. *Green v. A.P.C.*, 136 Wash.2d 87, 960 P.2d 912 (1998) (and cases cited therein).

A motion [for summary judgment] should be granted only if, from all the evidence, reasonable persons could reach but one conclusion. *Clements v. Travelers Indemnity Company*. 121 Wash.2d 243, 850 P. 2d 1298 (1993).

B. The Trial Court Erred in Granting Children's Motion for Partial Summary Judgment on Lease Option to Renew.

For the reasons set out in this Brief, Pizza Mart and Mr. Sandhu assert that the entry by the Trial Court of the Order granting Summary Judgment in favor of Children's with respect to the Lease option was reversible error. As will be described below, the Trial Court misconstrued the terms of the Lease between Children's and Tenants and also disregarded genuine issues of disputed material fact.

C. The Trial Court Erred in Either Failing to Apply or in How it Applied Rules of Construction Applicable to a Lease.

The following are three (3) principles of contract construction regarding or applicable to Leases. These principles are outlined early in this Brief because they are an overlay on all of the rest of the arguments made by Pizza Mart and Mr. Sandhu and because it

seems like the Trial Court either did not apply these principles or applied them incorrectly.

1. Ambiguities in a Lease are to be construed in favor of the Lessee.

It is well established law that if a Lease is ambiguous, the Court will adopt the interpretation that is most favorable to the Lessee. *Allied Stores Corp v. North West Bank*, 2 Wash. App. 778, 469 P.2d 993(Div. 1 1970) *Carlstrom v. Hanline*, 98 Wash. App. 780, 990, P. 2d 986 (Div. 1 2000).

2. Ambiguities in a Contract must be construed against the one who drafted the Contract.

Also well established in Washington law is that if there are ambiguities in a regular contract, those ambiguities must be construed against the party who drafted that contract.

It is a longstanding principle of contract law that, absent parol evidence as to the meaning of an ambiguous term, ambiguous terms of a contract are construed against the drafter of the contract. *Seaborn Pile Driving Co., Inc. v. Glew*, 131 Wash.App 1005 (Div. 1 2006). See also *King v. Rice*, 146 Wash.App 662, 191 P.3d 946 (Div. 1 2010). If extrinsic evidence does not resolve the ambiguity, the contract will be construed against the drafter.

In this instance, Children's is the direct assignee of Touchstone which drafted the Lease, and as the direct assignee, steps into the shoes of the assignor. *Federal Financial Co. v. Gerard*, 90 Wash.App 169, 949 P.2d 412 (Div. 1 1998). *Puget Sound Nat. Bank v. State Dept. of Revenue*, 123 Wash.2d 284, 868 P.2d 127 (1994).

Similarly, ambiguities in a lease agreement must be construed against the one who prepared the lease agreement. *McGary D. Westlake Investors*, 99 Wash. 2d 280, 661 P. 2d 971 (1983). See also *Carlstrom, ibid.*

3. Loss of Lease Option to Extend Lease is a Forfeiture which is Disfavored at Law and Abhorred in Equity.

This Court has ruled in a fairly recent case that the loss of an option to extend the term of the Lease is a forfeiture. *Recreational Equipment, Inc. v. World Wrapps Northwest, Inc.*, 165 Wash. App. 553, 266 P. 3d 924 (Div. 1 2011).

Other Washington Courts have also considered the loss of a lease renewal option to be a potential forfeiture. *Heckman Motors, Inc. v. Gunn*, 73 Wash. App 84, 867 P.2d 683 (Div. 2 1994). “It is elementary law in this jurisdiction that forfeitures are not favored and never enforced in equity unless the right there to is so clear as to prevent no denial.” *Hansen*, 76 Wash. 2d 220, 455 P.2d 946 (1969), citing *Dill v. Zielke*, 26 Wash. 2d. 246, 173 P.2d 977 (1946); *Moeller v. Good Hope Farms, Inc.*, 35 Wash. 2d 777, 215 P. 2d 425 (1950); *State ex rel. Foley v. Superior Court*, 57 Wash. 2d 571, 358 P.2d 550 (1961); *Hyrkas v. Knight*, 64 Wash. 2d 733, 393 P.2d 943 (1964); *Rocha v. McClure Motors, Inc.*, 64 Wash. 2d 942, 395 P.2d 191 (1964). In the *Hansen* case, *ibid*, the Court quoted the *Dill v. Zielke* case as follows:

Recognizing the hardship that often attends a strict enforcement of a forfeiture provision, and confronted with a situation where such enforcement would do violence to the principle of substantial justice between the parties concerned, under the particular facts of the case, the Courts of this state have frequently relieved a party from default of payment on an executory contract involving real estate by extending to such person a 'period of grace' within which to make such payments.

D. The Lease Between the Parties is Not Susceptible to the Construction Placed Upon it by the Trial Court that an Applicable Cure Period Can Commence Without Written Notice to the Tenant.

The primary error by the Trial Court was its conclusion that an "applicable cure period" as provided for by the Lease terms could commence without any written notice whatsoever from Children's to Pizza Mart and Mr. Sandhu to inform them that there had been a breach and that a cure period was commencing immediately.

As will be clear from the language of the Lease, the "applicable cure period" provided for by the Lease only commences after the Landlord issues a written notice complying with the "Notices" section to the Tenant. This notion that an applicable cure period would only commence upon the written notification to the other party that a

cure period had started also is corroborated by the custom of the industry, Washington case law, as well as our basic ideas of fair play and substantial justice.

In order to eliminate any concern that the language is being taken out of context, the following are the applicable paragraphs which control this part of the Appeal, with the critical language in bold.

The following is from Article 51, OPTIONS TO EXTEND LEASE:

51.1 Extension Option. Tenant shall have the option to extend this Lease (the “Extension Option”) for two additional terms of five (5) years each (the “Extension Period”), upon the terms and conditions hereinafter set forth.

51.2 **Tenant may not exercise its Extension Option if at the time of exercise it is then in default beyond any applicable cure period or if it has ever been in default beyond any applicable cure period more than two (2) times in any twelve (12) month period.** The exercise by Tenant of each Extension Option is subject to Landlord’s review of Tenant’s then-current financial reports and Landlord’s determination, in its discretion, that Tenant meets Landlord’s then-existing standards for creditworthiness. Tenant may exercise its Extension Option by delivering written notice thereof to Landlord not later than six (6) months prior to the expiration of the initial term or the expiration of previous Extension Period, whichever is applicable. In the Extension Period, all terms and conditions of this Lease shall apply except (i) there shall be no additional renewal terms other than the second Extension Option provided by this Section at the end of the first Extension Period, and (ii) the Base Monthly Rent for each Extension Period shall be the then prevailing Fair Market Rent, provided that in no event shall the Base Monthly Rent for any Extension Period be less than the Base Monthly Rent for the last month of the initial term.

(Emphasis added)

The following is from Article 22, DEFAULT BY TENANT:

22.1 The term “Event of Default” refers to the occurrence of any one (1) or more of the following:

(a) **Failure of Tenant to pay when due any sum required to be paid hereunder, provided that Landlord shall not take action based on such default unless such failure is not cured within three (3) days after written notice thereof (the “Monetary Default”);**

(b) Failure of Tenant, after fifteen (15) days written notice thereof, to perform any of Tenant’s obligations, covenants, or agreements except a Monetary Default, provided that if the cure of any such failure is not reasonably susceptible of performance within such fifteen (15) day period, then an Event of Default of Tenant shall not be deemed to have occurred so long as Tenant has promptly commenced and thereafter diligently prosecutes such cure to completion and completes that cure within thirty (30) days;

(c) Tenant, or any guarantor of Tenant’s obligations under this Lease (the “Guarantor”), admits in writing that it cannot meet its obligation as they become due; or is declared insolvent according to any law; or assignment of Tenant’s or Guarantor’s property is made for the benefit of creditors; or a receiver or trustee is appointed for Tenant or Guarantor or its property; or the interest of Tenant or Guarantor under this Lease is levied on under execution or other legal process; or any petition is filed by or against Tenant or Guarantor to declare Tenant bankrupt or to delay, reduce, or modify Tenant’s debts or obligations; or any petition filed or other action taken to reorganize or modify Tenant’s or Guarantor’s capital structure if Tenant is a corporation or other entity. Any such levy, execution, legal process, or petition filed against Tenant and Guarantor shall not constitute a breach of this Lease provided Tenant or Guarantor shall vigorously contest the same by appropriate proceedings and shall remove

or vacate the same within ninety (90) days from the date of its creation, service, or filing;

(d) The abandonment of the Premises by Tenant, which shall mean that Tenant has vacated the Premises for ten (10) consecutive days, whether or not Tenant is in Monetary Default and such abandonment has impaired Landlord's insurance coverage for the Premises or the Building;

(e) The discovery by Landlord that any financial statement given by Tenant or any of its assignees, subtenants, successors-in-interest, or Guarantor was materially false; or

(f) If Tenant or any Guarantor shall die, cease to exist as a corporation or partnership, or be otherwise dissolved or liquidated or become insolvent, or shall make a transfer in fraud of creditors.
(Emphasis added)

The following is from Article 36, NOTICES:

36.1 Whenever in this Lease it shall be required or permitted that notice or demand be given or served by either party to this Lease to or on the other, such notice or demand shall be given or served in writing and delivered personally, or forwarded by certified or registered mail, postage prepaid, or recognized overnight courier, addressed as follows:

If to Landlord:

c/o The Prudential Insurance Company of America
Prudential Real Estate Investors
8 Campus Drive, 4th Floor
Parsippany, New Jersey 07054
Attention: PRISA II Portfolio

With a copy by the same method to:

c/o The Prudential Insurance Company of America
Prudential Real Estate Investors
8 Campus Drive, 4th Floor

Parsippany, New Jersey 07054
Attention: Gregory Shanklin, Assistant General Counsel

With a copy by the same method to:

Touchstone Corporation
2025 First Avenue
Seattle, WA 98121
Attention: James O' Hanlon

With a copy by the same method to:

Buck & Gordon LLP
2025 First Avenue
Seattle, WA 98121
Attention: Joel Gordon

If to Tenant:

(If prior to Commencement Date)

5026 University Way NE
Seattle, WA 98105
Attention: Amarjit Sandhu

(If on or after the Commencement Date)

To the above address

36.2 Notice hereunder shall become effective upon (a) delivery in case of personal delivery and (b) receipt or refusal in case of certified or registered mail or delivery by overnight by overnight courier.

36.3 The notice addresses for each party may be changed from time to time by either party serving notice as provided above.

(Emphasis added and italics indicate handwritten on original)

The Court's attention is first directed to Article 51, paragraph 51.2, to the following specific sentence:

Tenant may not exercise its Extension Option if at the time of exercise it is then in default beyond any applicable cure period or if it has ever been in default beyond any applicable cure period more than two (2) times in any twelve (12) month period.

The Trial Court did not find that Mr. Sandhu and/or Pizza Mart was in default at the time the option was exercised. Rather, the Trial Court ruled that there had been at least two defaults within a 12 month period on payment of the rent back in 2009/2010.

The problem with the Trial Court's ruling was that the Trial Court construed Section 22.1 (a) to read that the applicable cure period of three (3) days could start without written notice to the Tenant. However, Section 22.1 (a) describes exactly the opposite, which is that notice is required before that three (3) day cure window commences. According to Section 22.1 (a), the failure ripens into a default only after three days have passed since the written notice was delivered or served to the Tenants.

The key phrase which the Trial Court seemed to miss is the phrase "after written notice thereof" which appears toward the end of Section 22.1 (a). The Trial Court did not dispute that the three (3) days referenced in 22.1 (a) was the "applicable cure period" referenced in section 51.2 but the Trial Court somehow read the three (3) day time

period to commence immediately upon the rent not being paid when due rather than after written notice had been issued to the Tenant by the Landlord. This conclusion is absolutely clear from the colloquy between the Court and the undersigned appearing on RP 28 which is as follows:

Mr. McArdel: Is it implicit in the Court's ruling that a notice complying with Article 36 is not required to create a default?

The Court: To create a default as is necessary to prevent the tenant from being able to, as a matter of right, exercise its extension option, yes. That is a default sufficient to do that.

Mr. McArdel: So how is the Court defining or I guess quantifying the applicable cure period that's in Article 51? Because it sounds like that –

The Court: Yeah, the applicable cure period is the three-day, so that, for instance, had he only been late one or two days on paying the rent, that wouldn't constitute a default for purposes of 51, but being more than three days late on paying the rent he's then beyond the applicable cure period.

And so then – and throughout all of late 2009 and 2010 he was more than three days beyond the applicable cure period. He was more than three days' late on paying the rent, so he's late beyond the applicable cure period. That's just the way I – reading the language of the contract as written here.

So I don't know if there's anything else we need to cover at this point, I think that's really the main issue here, but...

The Trial Court's interpretation that the three day period would start to run from the due date without written notice is contrary to the express language of the Lease, as well as to existing Washington case law, the customs of the industry, and normal ideas of fairness.

The applicable three day cure period established in 22.1 (a) does not commence upon the due date, nor does it commence upon the next calendar day or business day following the due date of rent. By the express terms of Section 22.1 (a), the three day period starts to run only "after written notice thereof," and that requirement is absolutely unequivocal and unambiguous.

The Trial Court seemed to take comfort and to derive support for its conclusion from the language of Section 22.1 (b), concerning what would be known in the industry as non monetary default, because of how that particular paragraph was structured. In Section 22.1 (b) the language puts the applicable cure period definition of fifteen (15) days early in the paragraph rather than later in the paragraph. The undersigned still believes its answer given at oral argument at the Motion was correct and that such wording in the Lease

had only to do with the nature of the cure to be effected and the complication that a non-monetary default might take more than the allowed fifteen (15) day cure period to resolve.

Regardless of how Section 22.1 (a) and (b) are drafted and detailed, the common and central theme of both paragraphs is that there needs to be written notice issued by Children's to the Tenants reasonably informing the Tenants of such failure to pay or their obligation to cure that breach.

For whatever reason, the Trial Court seemed to get lost in the weeds when reading 22.1 (a) and (b) by concerning itself with what the Trial Court considered to be the definition of a "default." The Trial Court certainly discussed the applicable cure period but inexplicably ignored the phrase "after written notice thereof" concerning the three day cure period in 22.1 (a). There is no question that the word "after" connects the concepts of the due date for the rent, the applicable cure period of three days, and written notice of the breach from Landlord to the Tenant as the trigger for the commencement of that three day cure period. The Trial Court's error on this is absolutely clear.

Even so, at the very least, the Trial Court should have construed this clause to be ambiguous, and therefore construed it in favor of Pizza

Mart and Mr. Sandhu. Obviously the Trial Court did not construe this section in favor of Pizza Mart and Mr. Sandhu, and this too was reversible error.

E. The Trial Court's Interpretation of 22.1 (a) is Untenable.

The Trial Court's interpretation of 22.1 (a) does not make any sense in terms of how that paragraph would actually be applied in the real world. First, there would be a shock to landlords and tenants in the state of Washington if the express language of a lease requiring a three day written notice after a failure of the tenant to pay the rent would commence without any written notice from the landlord to the tenant. This Court can take on judicial notice that it is the custom of the industry as well as the reasonable expectation of both businesses and individuals with commercial or residential leases that if there is a failure to pay the rent when due that there would be a written notification of some kind required from the landlord to the tenant to put them on notice of the monetary delinquency and the need to cure it within a set period of time, before the lease is lost.

In this case, the Trial Court concluded that the three day cure period somehow commenced on or after the due date without written notice. Such conclusion is extremely problematic. If the three

day cure period runs from the due date without any written notice, what then is the purpose of the written notice? If the “applicable cure period” has snuck by without any written notice and without any curative action taken by the tenant, is the notice then just to inform the tenant that they have just lost their lease? Section 22.1 (a) does not suggest that there are two three day cure periods, only one, which commences “after written notice thereof” as discussed above.

In legal theory, if the “applicable cure period” has passed, the Landlord is under no obligation to accept a cure from the tenant. If that was the case, regardless of how the tenant begged, pleaded, and petitioned the landlord for mercy or grace, if the “applicable cure period” has come and gone, the landlord could stand on its rights to terminate the lease and to cause the tenant to be evicted with the assistance of the sheriff if necessary.

The undersigned submits to this Court that well established Washington principles of law require that the laws and contracts are to be interpreted consistent with their terms and in a manner to promote stability and predictability in accordance with the rule of law. The Trial Court’s ruling that an applicable cure period could, despite the express language of the Lease, commence from the

due date without written notice to the Tenant is an extremely destabilizing type of ruling and against the rule of law.

F. The Written “Notices” Issued by Children’s were Substantively Defective as a Matter of Law to Constitute a Notice to Cure a Monetary Default.

Children’s did assert in its Motion, by attachments, Exhibits F and G to the Declaration of Jessica Espinosa provided with the Motion of Children’s, to try and convince the Trial Court that Children’s had indeed issued written notices to put Pizza Mart and Mr. Sandhu on legal notice of their obligation to cure the rent delinquency. However, perhaps because the Trial Court recognized the absolute deficiency of these “notices,” which are really just simple correspondence from Children’s to the Tenants, the Trial Court did not appear to give them much if any weight because the Trial Court ruled that no written notice was required to start the three day cure period.

Even a cursory review of Exhibits F and G show that neither document makes any demand for an amount of money that is claimed to be past due, for any amount being claimed by the Landlord to be immediately due and payable, or any cure period of any duration. (CP 216, 218-219, respectively) The Trial Court does not appear to have concerned itself with the contents of Exhibits F and G,

respectively, based upon its conclusion that the three day applicable cure period started without any written notice, a conclusion which the undersigned believes is categorically incorrect.

All of the attorneys and Judges in this case have seen three day notices to pay or vacate by the dozens if not hundreds of times. We all know that such written notices express in the clearest and typically a most succinct manner that there has been a failure by the tenant to pay the rent when it came due and that a specific amount needed to be paid within a very definite time or the tenant would have to vacate the premises. Often such notices are expressly titled “Three Day Notice to Pay or Vacate.” Such standard notices either implicitly or explicitly state that the tenant’s lease rights are completely in jeopardy and that almost immediate action is required in order to save the lease from forfeiture.

In the instant case, it is clear that Exhibits F and G are completely devoid of any demand for payment of a specific amount claimed to be past due and owing and completely devoid of any stated cure period. As such, they are absolutely defective as a matter of law to constitute notices of the commencement of an applicable cure period.

G. The “Notices” Identified as Exhibits F and G to the Espinosa Declaration are also Procedurally Defective as a Matter of Law.

In its Motion for Partial Summary Judgment, Children’s cited page 30 of the deposition transcript of Jessica Espinosa as “proof” that the letters identified herein as Exhibits F and G were served, mailed, or overnighted in accordance with the requirements of the “Notices” section of the Lease. (CP 216 and 218-219, respectively)

In truth, Mrs. Espinosa acknowledged at the deposition that she did not know for a fact whether Exhibits F and G had been sent out in the manner required by the “Notices” section of the Lease. The following is an excerpt from the deposition transcript appearing at CP 392 – 393:

Q: Is there any information available as to how Exhibit F was conveyed to Pizza Mart, meaning by mail, registered mail, FedEx, courier, or some other means?

A: It does not. I do know how I’ve sent it and how Richard sent it in the past.

Q: Which was?

A: Typically was we send an e-mail copy then we always send a FedEx copy directly to the—

Q: When you send that type of thing, would you normally have a notation across the top of the letter to

indicate transmitted via e-mail and Fed Ex or overnight service?

A: Sometimes. We're not attorneys, so you know, we probably weren't that precise.

Q: Do you have any record to indicate that this letter was in fact sent out by an overnight courier such as FedEx?

A: I do not have any record of that.

Q: And no independent knowledge?

A: No.

Q: And I take it your answer would be the same as far as having – as whether or not this was personally delivered to Mr. Sandhu or sent by registered or certified mail?

A: I don't know.

Q: I'd like to turn your attention to the next exhibit in your declaration which is Exhibit G. Do you have any information as to how Exhibit G was transmitted to Pizza Mart?

Mr. Caplow: Objection. Foundation.

The Witness: No.

By Mr. McArdel:

Q: So you don't know whether or not it was sent by courier, certified, registered mail or hand delivered or just popped in the mail?

A: I don't know.

Clearly, Ms. Espinosa did not testify that Exhibits F and G were served, mailed out by certified mail, or overnighted to Pizza Mart and/or Mr. Sandhu in the manner required by the Lease, which had a very specific format required for notices spelled out in Article 36. Therefore, there was no evidence before the Trial Court on which to base a conclusion that the correspondence identified as Exhibits F and G were served or otherwise delivered in the manner required for a Notice under the Lease.

H. Pizza Mart and Mr. Sandhu did not Default upon the Terms of the Lease.

Article 22 of the Lease defines what would constitute a default under the Lease. The Lease uses terms “failure” and “default” with distinctly different meanings and purposes in the critical Section 22.1 (a) which is reproduced again here for ease of reference:

(a) Failure of Tenant to pay when due any sum required to be paid hereunder, provided that Landlord shall not take action based on such default unless such failure is not cured within three (3) days after written notice thereof (the “Monetary Default”)

The Trial Court actually misread and misquoted the above language of the Lease during the hearing in a clearly erroneous manner, making a critical error on the very point on which the Trial Court eventually

decided the entire Motion. (RP 11) At that time very early in the hearing, the Trial Court stated as follows:

Now, it goes on to say: Provided the landlord shall not take action upon such default unless such default (*sic*) is not cured within three days after written notice thereof, which is a monetary default.
(Emphasis added)

The Trial Court misread Section 22.1(a) and substituted the word “default” for the word “failure”, which completely changes the meaning of that sentence in the Lease and also makes that sentence to be internally inconsistent with the rest of that sentence in Section 22.1(a). The undersigned believes this mis-reading and mis-quoting by the Trial Court to have been a root cause of the Trial Court’s reversible error in this proceeding.

The Trial Court later ruled that a default occurred simply upon the Tenant’s failure to pay the sum when it came “due” and when the Tenants did not pay the rent within three (3) days thereafter, but without any written notice from Children’s to Pizza Mart or Mr. Sandhu. (RP 12, 13, 28)

However, the language of 22.1 (a) does not support that conclusion. The Court’s attention is directed to the second appearance of the word “failure” in 22.1 (a). If the Trial Court’s conclusion was

correct, the drafter of this document would not have used the word “failure” at that place in the sentence because such word only introduces ambiguity if what the drafter really meant was “default” (just like the Trial Court misread this Section). The real question is whether the simple failure of the Tenant to pay, without more action by someone, was a “default” or was merely a “failure” which can ripen into default if certain things happen later. The undersigned suggests that the use of the word “failure” is indicative of the contractual intent that the simple nonpayment of the rent when due would not constitute the “default” in and of itself but only a “failure”.

Furthermore, this position is even strengthened by the fact that the entirety of 22.1 (a) is prefaced in its very first word by “Failure.” Logically and grammatically, the drafter’s second use of the word “failure” relates to and modifies the first use of the word “Failure” in 22.1 (a). Again, logically and grammatically, the default does not occur until there is both the failure of the Tenant to pay and the failure of the Tenant to cure the Lease monetary delinquency, after a three (3) day cure period which commences only after written notice is issued by the Landlord to the Tenants.

By way of illustration, the way the Trial Court interpreted Section 22.1 (a) would require that the language of Section 22.1(a) be completely rearranged and re-written to read as follows:

Failure of Tenant to pay when due or within three (3) days thereafter (the “Monetary Default”) provided that Landlord shall not take action based on such default until such three days have expired.

Obviously, to be consistent with the Trial Court’s ruling, this whole issue of a three (3) day cure period commencing on delivery or service of written notice would have to be taken out of 22.1 (a) because it does not fit within the Trial Court’s definition of a “default.”

Also significant on this issue is the drafter’s placement of the parenthetical (“the ‘Monetary Default.’”) As attorneys, we are all trained to be careful in the defining of specific terms in written documents, including the placement of the defined term either at the beginning or at the end of the language which defines the term. In this instance, the placement of the parenthetical defining the term “Monetary Default” is compelling because it appears at the very end of 22.1 (a), which we all are trained to understand means that all of the foregoing language of Section 22.1(a) was intended as one coherent and cohesive concept which would, in its entirety, constitute a Monetary Default under the Lease. To remove anything within 22.1

(a), such as the three day written notice requirement, would be to gut the intent of the drafter and the literal language of the contract, which is exactly what the Trial Court did here.

The interpretation of 22.1 (a) urged by Pizza Mart and Mr. Sandhu is also consistent with our general experience and expectations concerning leases and contracts in general. It is not the normal expectation that if there is a failure to perform, that the lease or contract immediately goes into a “default” mode or status. It is our experience and expectation as attorneys and individuals that there would be some next step, normally sending written notice of the breach, in order for this breach to ripen into a full fledged default which triggers its own set of dire consequences.

If a “default” had not technically occurred, then by definition there could not have been two defaults which occurred within a twelve (12) month period such that Pizza Mart and Mr. Sandhu would lose their options under the Lease. Therefore, under this analysis as well, the Trial Court’s ruling should be reversed in its entirety.

I. There was a Substantial Forfeiture by Pizza Mart and Mr. Sandhu as a Direct Result of the Trial Court's Ruling.

The most direct result of the Trial Court's ruling was to deny Pizza Mart and Mr. Sandhu the benefit of the two (2) five year options on the Lease, the first of which was to take effect January 1, 2016. As a result of the Trial Court's determination that Pizza Mart and Mr. Sandhu could not exercise the first five(5) year option to extend the Lease (and by extension the second five (5) year option was voided as well) Pizza Mart and Mr. Sandhu suffered great loss.

The nature of the forfeiture loss suffered by Pizza Mart and Mr. Sandhu included but was not limited to the following:

Loss of a business which Mr. Sandhu estimated to be valued at \$1,000,000.00; (CP 338)

Loss of substantial portion of the income of Mr. Sandhu; (CP 338)

Loss of the value of leasehold improvements made at commencement of the Lease in the amount of \$190,000.00, with the expectation that the use of such improvements would be available for the entire 20 year term of the Lease, including options; (CP 330)

Loss of the value of additional leasehold improvements made in 2009 in the amount of \$65,000.00, with the expectation that the use of such improvements would be available for

the remainder of the 20 year term of the Lease, including options; and (CP 331)

Loss of \$65,000.00 paid in November 2014 in unbilled parking fees accrued over the course of over seven (7) years (!) which Children's had never billed and which Pizza Mart and Mr. Sandhu would have reduced dramatically had they known the monthly per space fee that Children's would charge Pizza Mart and Mr. Sandhu. Such parking fees were paid under protest to eliminate any possible monetary objections by Children's to the exercise of the option to extend the Lease. (CP 337-338, 351)

In order to convince itself that a forfeiture had not occurred in this proceeding, the Trial Court engaged in sheer speculation when it suggested that the capital investment in leasehold improvements that had been made by Pizza Mart and Mr. Sandhu at the commencement of the Lease had somehow been written off by the date the initial ten year lease term had expired on December 31, 2015. The Trial Court had no evidence before it concerning the depreciation and/or amortization schedules of Pizza Mart and Mr. Sandhu. Therefore the Trial should not have engaged in such speculation in order to justify a forfeiture of substantial assets and contractual rights.

From simply a contractual expectation standpoint the Lease in question here had not just a single initial ten year term but also

two five year option terms. Therefore, the reasonable expectation of Tenants in that context are that the initial leasehold improvements, plus all of the improvements that come at considerable cost during the life of the business, would continue to provide a return on investment to the Tenants over the initial and option terms of the Lease.

Also, in order to conclude that there had not been any substantial forfeiture, the Trial Court had to disregard the circumstances of the payment of Sixty-five Thousand Dollars (\$65,000.00) for accumulated but unbilled parking fees which were paid just days prior to Pizza Mart and Mr. Sandhu providing written notice to Children's of their exercise of the option to extend the Lease term an additional five years. (CP 477-278) The Trial Court was informed by the Declaration of Mr. Sandhu that he paid that amount of Sixty-five Thousand Dollars in reliance upon the expectation that by so doing, he would remove any claimed basis that Children's might assert for the Lease being in default so that he and Pizza Mart would be eligible to exercise the option pursuant to the express terms of Article 51 of the Lease. (CP 337-338) Pizza Mart and Mr. Sandhu had the opportunity to not pay the Sixty-five Thousand Dollars in parking fees and to simply walk away from the premises at the end of the Lease.

Instead, the decision was made to pay the Sixty-five Thousand Dollars and to exercise the option to extend the Lease. Obviously, with the Trial Court ruling being what it was, that Sixty-five Thousand Dollars was effectively forfeited and that Sixty-five Thousand sum was effectively paid over to Children's for nothing. (CP 337-338)

Because there was in actuality a very substantial forfeiture of money and/or value by Pizza Mart and Mr. Sandhu as a result of the Trial Court's ruling, the Trial Court should have approached such a ruling with the required "abhorrence." Instead, the Trial Court ignored the forfeiture of substantial value, ordered the forfeiture of the lease options, and left Pizza Mart and Mr. Sandhu to pick up the broken pieces of their business. The undersigned submits that this too was reversible error on the part of the Trial Court and grounds for reversal of the Trial Court's ruling.

J. The Trial Court Erred in Failing to Grant the Motion of Pizza Mart and Mr. Sandhu for Summary Judgment Dismissal of Children's Complaint.

The Trial Court erred on the Motion of Pizza Mart and Mr. Sandhu for Summary Judgment dismissal of the Complaint of Children's because there were no disputed issues of material fact and

Pizza Mart and Mr. Sandhu were entitled to Summary Judgment as a matter of Law.

As cited previously in this Brief, the Lease authorized Pizza Mart and Mr. Sandhu to operate a pizza restaurant and to sell alcohol. There were no limitations upon the ability of the Tenants to sell alcohol other than it being required that the alcohol be consumed “in conjunction with the operation of its business as a pizza restaurant (CP 48). Children’s cannot dispute that Pizza Mart is in fact a pizza restaurant, being labeled “A Pizza Mart,” selling pizza and related foods during all of its hours of operation and deriving more than 67% of its total sales from the sale of food and non-alcoholic drinks rather than the sale of alcohol at 33% of total sales. (CP 330)

Children’s based its assertion that Pizza Mart and Mr. Sandhu were simply operating a “dive bar” primarily upon reports of misbehavior or misconduct by persons who may or may not have even been customers of Pizza Mart, as well as isolated events of Pizza Mart to build business. Such irrelevant facts and/or mere anecdotal information does not constitute any level of proof that Pizza Mart and Mr. Sandhu were operating in violation of the terms of their Lease.

Whether persons who may or may not have been customers of Pizza Mart misbehaved in some way is not a factor referred to anywhere in the Lease as a component of how the Tenants were allowed to use the premises under the Lease. Furthermore, it is important to note that none of this alleged misbehavior (again, unknown as to whether conducted by Pizza Mart customers or not) occurred on the actual premises of Pizza Mart and Mr. Sandhu. According to the express terms of the Lease, Pizza Mart and Mr. Sandhu were only responsible for enforcing “appropriate behavior by its customers” in the premises (and in outside seating areas of which there were none). (CP 197)

If the Trial Court, or this Court for that matter, wanted to reduce this question to a numbers issue, the most obvious metric is the total amount of sales received from the sale of food and non-alcoholic drinks versus total amount of sales received from for the sale of alcohol. That metric, provided to the Trial Court, is that more than 67% of the total sales were from the sale of food and non-alcoholic drinks and less than 33% were from the sale of alcohol. When the sale of food and non-alcoholic drinks generates sales that are twice the sales derived from alcohol, the Trial Court, as a matter of law, should have ruled that

Pizza Mart and Mr. Sandhu were in fact operating a pizza restaurant that permissibly sold alcohol and that the terms of the Lease concerning the use of the premises was not being violated.

Because the Trial Court denied the Motion for Summary Judgment Dismissal of Plaintiff's Complaint, the Trial Court erred, its ruling should be reversed and this Court should grant Summary Judgment Dismissal of the Complaint of Children's.

K. Pizza Mart and Mr. Sandhu are Entitled to Attorney's Fees on Appeal.

This Court may award attorney's fees on appeal if permitted by "applicable law". RAP 18.1 (a) In this case, there is a prevailing party attorney's fees clause in the Lease. Therefore, if Pizza Mart and Mr. Sandhu are the prevailing parties in this appeal, this Court should award Pizza Mart and Mr. Sandhu their reasonable attorney's fees on this appeal, and those fees are hereby requested.

VII. CONCLUSION

Pizza Mart and Mr. Sandhu request that the Court reverse the Trial Court's Order granting Partial Summary Judgment in favor of Children's, reverse the Trial Court's Order denying Summary Judgment in favor of Sandhu and Pizza Mart, vacate the Judgment entered in favor of Children's against Mr. Sandhu and Pizza Mart,

award the attorney's fees of Pizza Mart and Mr. Sandhu, and remand the case for further proceedings consistent with this Court's Order.

DATED this 2nd day of May, 2016.

Law Office of William P. McArdel III

By: /s/ William P. McArdel III
William P. McArdel III, WSBA #13583
Attorney for Appellants
1826 114th Ave NE, Suite 101
Bellevue, WA 98004
Telephone: (425) 454-1828
Facsimile: (425) 454-2645
bill.wpmlaw@comcast.net

DECLARATION OF SERVICE

I declare that on this 2nd day of May, 2016, I caused to be served the foregoing document on counsel for Respondents, at the following address:

APPELLANTS OPENING BRIEF

Attorneys for Respondents

Steven P. Caplow, WSBA No. 19843	()	U.S. Mail
DAVIS WRIGHT TREMAINE LLP	()	Hand Delivery
1201 Third Avenue, Suite 2200	(X)	E-Mail
Seattle, WA 98101-3045	()	Facsimile
Ph: 206-662-3150	()	Federal Express
FAX: 206-757-7700		
<u>stevenaplow@dwt.com</u>		

/s/ William P. McArdel III
William P. McArdel III

Dated: May 2, 2016.
Place: Bellevue, Washington