

COURT OF APPEALS
DIVISION II

IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON
BY _____
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No. 37379-3-II

LEDAURA, LLC, a Washington limited liability company,

Plaintiff/Respondent,

vs.

RANDY GOULD and "JANE DOE" GOULD, husband and wife; BRET
DRAGER and "JANE DOE" DRAGER, husband and wife; and GREG
JOHNSON and "JANE DOE" JOHNSON, husband and wife; and
DRAGER GOULD ARCHITECTS, INC.,

Defendants/Appellants.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

BRIEF OF RESPONDENT LEDAURA LLC

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I. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Were defendants Greg Johnson and Drager Gould Architects, Inc. properly served with the notice to pay rent or vacate where defendants constituted a partnership, and where the sole shareholders, directors and officers of Drager Gould Architects, Inc. were served? Assignments of Error 1-3.

B. Is Ledaura, LLC the proper plaintiff where all interest in the property was conveyed to Ledaura, LLC with the notice and consent of defendants; where the provision in the lease relating to assignment had to do with David Smith's occupancy of the basement as opposed to mere changes in form of ownership; and where the transfer had no impact on the tenants' lease of the property? Assignments of Error 1-3.

C. Was there substantial evidence to support the trial court's determination that the lease commenced in June 2006 when the tenants took actual occupancy of the premises in January 2006, remodeled a portion of the building and began doing business there in April 2006, began demolition on the entire building in June 2006, and when the items remaining in the building at that point in time were so minor the tenants offered to remove them themselves, and could have done so easily? Assignments of Error 1-3.

D. Did the trial court properly reject the tenants' rent offset for a roof leak when substantial evidence showed the leak had been repaired, when the tenants did not complain of a leak for a substantial period of time, when the tenants were not forced to vacate the building, when their claim for breach of the warranty of habitability on that basis was dismissed, and when the lease itself provides that tenants are not allowed to setoff rent for any such conditions? Assignments of Error 1-3.

E. Did the trial court properly award Ledaura, LLC its attorney fees and costs as the prevailing party where Ledaura prevailed on all claims at trial? Assignments of Error 1-3.

F. Is Ledaura, LLC entitled to attorney fees and costs on appeal?

II. STATEMENT OF THE CASE

David Smith acquired the commercial warehouse at the corner of Sixth Avenue and St. Helens Street in Tacoma, Washington approximately thirty years ago. RP (11/19/07) 60-61. The building contains two main floors, plus an attic and a basement. RP (11/19/07) 34-35, 60-61, 63. The interior of the building (including attic and basement) is approximately 20,000 square feet in size. *Id.*; Ex. 1. The building was originally a car dealership and shop, but was more recently used for offices and as a

warehouse. RP (11/19/07) 24-25, 67. In December of 2004, while hosting Christmas banquets at his restaurant, Mr. Smith suffered a stroke. RP (11/19/07) 61. The stroke left Mr. Smith unable to speak, and impacted his ability to use his right hand and walk, but he is now generally self-sufficient. RP (11/19/07) 69. In response to the stroke, Mr. Smith's two daughters, Leah Caruthers and Laura Kuhl, sought the advice of an attorney on how to protect their father's assets and generate an income for him. RP (11/19/07) 61-62. The first step in this process was the formation of the David Smith Living Trust dated April 18, 2005. *Id.*; *See also* Ex. 6, 8 and 9. The building at 6th and St. Helens was transferred to the living trust on August 8, 2005. Ex. 3, page 15 (quitclaim deed dated August 8, 2005).

After the living trust was formed and the subject property was transferred to it, the Smith family determined they had to lease the warehouse at 6th and St. Helens in order to generate income. RP (11/19/07) 64. On October 26, 2005, Leah Caruthers listed the property for lease with Jan Williams of Cascadia Commercial Group. Ex. 2; RP (11/19/07) 65-66. A short time later, Randy Gould, Bret Drager, Greg Johnson (hereinafter the "tenants"), and their real estate agent, Aleta Benedicto met with Ms. Caruthers and expressed interest in the building.

RP (11/19/07) 23-26, 66. Ms. Caruthers made it clear to Mr. Gould, Mr. Drager, and Mr. Johnson that the building would have to be leased to them in “as is” condition since the family did not have the funds to make any improvements to the building. RP (11/19/07) 25-27, 67-68, 70. The parties entered into a lease for the property on or about December 2, 2005. Ex. 3.

At approximately the same time as the December 2, 2005, lease was executed, Greg Johnson, a real estate agent from California, began telling Ms. Caruthers that they needed to come up with a new deal. RP (11/19/07) 24, 75-80. He told Ms. Caruthers that he felt Mr. Williams and Ms. Benedicto were not adequately performing their jobs and their commissions needed to be eliminated. RP (11/19/07) 75; *See also* Ex. 9, paragraph 11 and RP (11/19/07) 83-85. He decided that this could be done by shortening up the term of the lease. RP (11/19/07) 75; *Compare* Ex. 2. He also told Ms. Caruthers that Mr. Williams was acting unethically by not presenting her with other offers on the building. RP (11/19/07) 76-77. At the urging of Mr. Johnson, Ms. Caruthers fired Mr. Williams. RP (11/19/07) 77-79; Ex. 24. Mr. Johnson also convinced Ms. Caruthers to pay the tenants’ agent, Aleta Benedicto, \$3,500 out of the \$9,000 down payment on the lease. *Id.* Mr. Johnson told Mr. Williams to “go away”

and later paid Mr. Williams \$4,860. RP (11/20/07) 8, 140; Ex. 49. Mr. Johnson told Ms. Caruthers he had paid Mr. Williams, “approximately \$5,500.” Ex. 36. From that point forward, Mr. Johnson led Ms. Caruthers to believe that he was looking out for her interests in the lease of the building. RP (11/19/07) 78.

Over the next several weeks, Mr. Johnson facilitated cancellation of the escrow for the lease and the parties had the first and last month’s rent, less a cancellation fee, sent to Ms. Caruthers. Exs. 4 and 5. Mr. Johnson then prepared a new lease, option to purchase, purchase and sale agreement, and addenda. Exs. 6-9, 45. Ms. Caruthers executed the documents on January 24, 2006, and an addendum on January 25, 2006, but she was not sure whether Mr. Gould, Mr. Drager, or Mr. Johnson signed the new lease until a fully executed copy was brought to court by the tenants on the second day of trial. *Id.*; RP (11/19/07) 80; RP (11/20/07) 63-64. Among other things, the lease provided that Mr. Smith could retain possession of the basement, “... but shall not have the right to lease, sublease or assign his right to [the] subject property.” Ex. 9, paragraph 4.

Prior to signing the second lease, Mr. Gould, Mr. Drager, and Mr. Johnson obtained a key to the building from Mr. Smith and began work in

the building, which included gutting an apartment they were converting to an office. RP (11/19/07) 85-86, 137; RP (11/20/07) 96. By April 2006, Mr. Gould and Mr. Drager were doing business in the building as Drager Gould Architects, Inc. CP 164 (Finding of Fact 1.12); RP (11/19/07) 35-36, 46; RP (11/20/07) 69. Mr. Johnson eventually advertised the building as “available Spring 2007.” Ex. 18B and 18C.

Around the time the tenants obtained the key to the building they complained about a leak in the roof of the building. RP (11/19/07) 91-92, 134. Prior to entering into the lease, Ms. Caruthers paid approximately \$9,000 to repair the roof. RP (11/19/07) 92, 132; RP (11/20/07) 6. In response to the tenants’ complaint, she contacted the same roofer to take care of the problem. *Id.* 139 Mr. Gould was the contact person for the roofer. *Id.*; Ex. 15. In approximately March of 2006, the roofer, “fixed walls, gutters, and seams on top of barrel.” Ex. 15. Ms. Caruthers assumed the roof was fixed and heard nothing further from the tenants about the issue until approximately November of 2006, at which point the parties were having other disputes. RP (11/19/07) 92-93, 139; RP (11/20/07) 6-7, 45-46. Nevertheless, Ms. Caruthers asked another roofer to take care of the leak. RP (11/20/07) 6-8.

In March of 2006, the property was transferred to Ledaura, LLC as

part of the ongoing management of Mr. Smith's estate. Ex. 10; RP (11/19/07) 62. Mr. Johnson was aware of the creation of the LLC and the transfer of the property to it, but never expressed an objection to that transfer. RP (11/19/07) 62-63, 86-87; RP (11/20/07) 28-30. Both Mr. Gould and Mr. Drager testified that the transfer of the property from the trust to the LLC had no impact on them. RP (11/20/07) 66, 87.

Between March 2006 and June 2006, Ms. Caruthers, Ms. Kuhl, and their families worked to empty the building of their father's belongings. RP (11/19/07) 36-37, 89, 93-95; Ex. 17. The lease provided, in part, that the lease would commence, "... the date the building shall be free of debris and broom swept clean, approximately (60) days from the date of agreement." Ex. 9, 45. It also provided, "If Tenant occupies the Premises before the Commencement Date specified in Section 1(b), then the Commencement Date shall be the date of occupancy." Ex. 6 and 45, paragraph 3(a).

Since Ms. Caruthers lives in Texas, she hired a local person by the name of Robert Munroe to help clean out the building for her. *Id.* But on June 7, 2006, the tenants hired Mr. Munroe to demolish the interior of the building (including offices) for them. Ex. 12. As of that date, the tenants themselves believed Mr. Monroe would have all of Mr. Smith's things

removed from the building by June 8, 2006. RP (11/20/07) 82-83, 104.

By that point in time Mr. Munroe had already emptied and pressure washed one of the floors of the building (albeit without the permission of any of the parties). RP (11/19/07) 100, 128-129.

But instead of finishing the work for Ms. Caruthers, Mr. Munroe began demolishing the building for the tenants and mixed together the debris from demolition with the materials he was cleaning out for the Smith family. RP (11/19/07) 97-100, 123; RP (11/28.07) 78-83, 110-112, 117. In the course of his demolition work for the tenants, Mr. Munroe exposed asbestos in the building. *Id.* The tenants had previously obtained a bid for demolition work, including asbestos removal, but decided to hire Mr. Munroe, an unlicensed contractor, because he was cheaper. RP (11/20/07) 77-78. Because of the asbestos exposure in the building, the building was shut down by the Washington State Department of Labor and Industries, the tenants were cited, and the tenants were fined approximately \$5,000. RP (11/20/07) 79-80.

On June 13, 2006, the tenants fired Mr. Munroe, but did not ask him to leave the building. Ex. 13; RP (11/20/08) 117. Because of the location of demolition debris, and the fact it was mixed in with things the Smith family was going to remove from the building, the Smith family

was not able to remove any more debris from the building. RP (11/19/07) 112; RP (11/20/07) 57, 110-111; Ex. 37. It was not until July of 2006, that the tenants asked Ms. Caruthers to assist in the removal of Mr. Munroe from the building, at which time he left. Exs. 30, 31; RP (11/20/07) 119.

Between July 2006 and the commencement of this litigation in August 2007, the tenants complained about a few items remaining at the building, and refused to pay rent or acknowledge that the lease had commenced. Exs. 28, 29, 32-37, 39, 40, 47; RP (11/20/07) 64, 88. At this point there were a couple of desks, some paint cans, some trash, a 50 gallon drum, and an air canister remaining in the building. CP 166 (Finding of Fact 1.22); Exs. 18E-18I; RP (11/19/07) 115-118; RP (11/20/07) 16-17. In August of 2006 the tenants said they were willing to remove the few remaining items from the building themselves, but they did not do so. RP (11/20/07) 90; Ex. 34. In November of 2006 the parties met with their attorneys at the property to discuss their ongoing disputes. RP (11/20/07) 45-46. It was agreed that June or July 2006 would be the commencement date of the lease, with rent payments commencing in June of 2007. Ex 34; RP (11/19/07) 127-128. When rent payments did not commence and the tenants would not sign an agreement memorializing

their understanding, Ledaura, LLC commenced this litigation. Exs. 11, 41; CP 1-30.

III. ARGUMENT

Introduction and Standard of Review

The tenants' appeal in this case involves challenges to findings of fact and the conclusions of law drawn from those facts. The review of findings and conclusions on an appeal such as this is a two part process.

Tegman v. Accident & Medical Investigations, Inc., 107 Wn. App. 868, 30 P.3d 8 (2001). The standard of review is as follows:

We first determine whether the trial court's findings of fact were supported by substantial evidence in the record. *Landmark Development, Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999). Substantial evidence is evidence which, viewed in the light most favorable to the party prevailing below, would persuade a fair-minded, rational person of the truth of the finding. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). If the findings are adequately supported, we next decide whether those findings of fact support the trial court's conclusions of law. *Landmark Development*, 138 Wn.2d at 573, 980 P.2d 1234.

Tegman v. Accident & Medical Investigations, Inc., 107 Wn. App. 868, 874, 30 P.3d 8, 12 (2001). In determining whether there is substantial evidence to support the findings of fact, the court does not review evidence in the record contrary to the findings. *Structurals Northwest, Ltd. v. Fifth & Park Place, Inc.*, 33 Wn. App. 710, 658 P.2d 679 (1983).

“The question is, rather, ‘whether the evidence most favorable to the prevailing party supports challenged findings.’” *Id.* at 716 (citation omitted).

Also, in reviewing a matter, the Court of Appeals generally does not address assignments of error not addressed or argued in the brief of appellant. *State v. Noah*, 103 Wn. App. 29, 9 P.3d 858 (2000); *Huebner v. Sales Promotion, Inc.*, 38 Wn. App. 66, 684 P.2d 752 (1984); *Wharf Restaurant, Inc. v. Port of Seattle*, 24 Wn. App. 601, 605 P.2d 334 (1979).

Such arguments are deemed waived. *Valley View Industrial Park v. City of Redmond*, 107 Wn.2d 621, 733 P.2d 182 (1987); *Seattle School District No. 1 of King County v. State*, 90 Wn.2d 476, 585 P.2d 71 (1978); *Rocha v. McClure Motors, Inc.*, 64 Wn.2d 942, 395 P.2d 191 (1964). In the present case the tenants assigned error to Finding of Fact 1.24, that the testimony of Randy Gould was not credible, but nowhere in their brief do they ever address the issue. This might be explained by the fact that issues of witness credibility are left to the discretion of the trial court and generally are not disturbed on appeal. *Keever v. Washington State Law Enforcement Officers' and Fire Fighters' Retirement Bd.*, 34 Wn. App. 873, 664 P.2d 125 (1983). Regardless, by not presenting any argument or citation to authority on the issue, the assignment of error to Finding of Fact

1.24 should be considered waived, and a verity on appeal.

- A. GREG JOHNSON AND DRAGER GOULD ARCHITECTS, INC. WERE PROPERLY SERVED WITH THE NOTICE TO PAY RENT OR VACATE, AND THE TRIAL COURT HAD SUBJECT MATTER JURISDICTION BECAUSE MR. JOHNSON, MR. GOULD, AND MR. DRAGER ARE BUSINESS PARTNERS; AND MR GOULD AND MR. DRAGER ARE CORPORATE OFFICERS AND AGENTS OF DRAGER GOULD ARCHITECTS, INC.

Service of the notice to pay rent or vacate on Mr. Gould and Mr.

Drager in this case was sufficient to convey jurisdiction over Mr. Johnson and Drager Gould Architects, Inc. Service of a notice to pay rent or vacate can be obtained by personally delivering it to the person entitled to notice.

RCW 59.12.040. Service on a subtenant can be obtained just like service on a regular tenant. *Id.* When the entity entitled to notice is a corporation, notice can be delivered, “to any officer, agent, or person having charge of the business of such corporation...” *Id.* Similarly, with regard to a partnership, “each partner is an agent of the partnership for the purpose of its business.” RCW 25.05.100.

The principals of Drager Gould Architects, Inc. are Mr. Gould and Mr. Drager. Ex. 20. Bret Drager is the contact person for purposes of paying property taxes. Ex. 21. Mr. Drager and Mr. Gould are the sole shareholders of Drager Gould Architects, Inc. Ex. 20; RP (11/20/07) 65-

67, 75-76. Both Mr. Gould and Mr. Drager received the notice to pay rent or vacate. CP 167, Finding of Fact 1.32; RP (11/20/07) 65-67. There should be no dispute that Mr. Gould and Mr. Drager, the sole owners of Drager Gould Architects, Inc., were, “officer[s], agent[s], or person[s] having charge of the business of such corporation.” RCW 59.12.040. Since both Mr. Gould and Mr. Drager received the notice, the trial court’s conclusion that service of the notice to pay rent or vacate was properly served on Drager Gould Architects, Inc. is supported by the record and should be affirmed.

Similarly, the court’s conclusion that Mr. Johnson was properly provided notice is supported by the record. It is true the court declined to include the word “partnership” in Finding of Fact 1.7, but such a finding was not required if there is evidence in the record to support the court’s decision. RAP 2.5(a); *LaMon v. Butler*, 112 Wn.2d 193, 200-201, 770 P.2d 1027, *cert. denied* 493 U.S. 814 (1989) (trial court can be affirmed on any basis supported by the record); *See also Ives v. Ramden*, 142 Wn. App. 369, 174 P.3d 1231 (2008) (whether a finding of fact was required is not an issue the court of appeals reviews; it is within the trial court’s discretion to determine what facts it deems important). Despite the trial court’s choice to not enter a finding, there is no dispute that Bret Drager, Randy

Gould, and Greg Johnson were partners for the purpose of leasing this building. RP (11/20/07) 65-67, 75-76. Both Mr. Gould and Mr. Drager testified that was the case. *Id.* In fact, during direct examination by his own attorney, Bret Drager testified,

Well, if I can state that in not exact numbers, currently we have a loan that allows us to draw on up to \$200,000 for Randy's and mine one half of the partnership and we have currently spent – we've drawn that down to about \$130,000. We've drawn \$130,000 on that loan. Generally I think Greg's portion, and I would have to ask him exactly, but it's somewhere in the \$80,000 range, so we spent a sizable amount doing this work.

RP (11/20/07) 157-158 (describing how much money they spent improving the building). Bret Drager had authority to act on behalf of the partnership. Ex. 13. For the tenants to argue so stridently against the existence of a partnership is curious given that the uncontroverted testimony at trial *by the tenants themselves* was that all three of them were partners for the purpose of leasing and fixing up the property. The tenants should not be allowed to have it both ways; to argue that they are partners when it suits them, but not partners when it may cause an adverse result. Under the circumstances there is substantial evidence in the record to affirm the trial court's determination that all the defendants were properly served with the notice to pay rent or vacate.

B. THE TRANSFER OF THE PROPERTY FROM THE DAVID SMITH LIVING TRUST TO LEDAURA, LLC DID NOT VIOLATE ANY LEASE PROVISION ON ASSIGNMENT OF THE LEASE BECAUSE THERE IS SUBSTANTIAL EVIDENCE THE TENANTS WERE AWARE OF AND CONSENTED TO IT, BECAUSE THE PROVISION IN THE LEASE AT ISSUE ONLY RELATED TO ASSIGNING MR. SMITH'S RIGHT TO OCCUPY THE BASEMENT DURING HIS LIFETIME, AND BECAUSE THE TRANSFER WAS MERELY A CHANGE IN FORM OF OWNERSHIP AND HAD NO IMPACT ON THE TENANTS.

There is substantial evidence to support the finding of fact that Mr. Johnson knew about and consented to the transfer of the property from the David Smith Living Trust to Ledaura, LLC. As discussed above, when determining whether there is substantial evidence to support a finding, the court does not review evidence in the record contrary to the findings, rather it looks at the evidence in the light most favorable to the prevailing party to see if the findings are supported. *Structurals Northwest, Ltd. v. Fifth & Park Place, Inc.*, 33 Wn. App. 710, 658 P.2d 679 (1983).

As the trial court found, the uncontroverted evidence was that Ms. Caruthers discussed formation of the LLC, and transfer of the property to the LLC, with Greg Johnson and none of the partners objected. CP 164-165, Findings of Fact 1.14 and 1.15; RP (11/19/07) 61-63, 86-87; RP (11/20/07) 28-29. There is substantial evidence to support the finding. *Id.* The tenants' arguments about conflicting evidence supporting why the

court should have found otherwise should be disregarded under the rules stated in *Structurals Northwest*.

In any event, the assignability of the lease needs to be read in the context of the entire lease. In determining the meaning of a particular term in a contract, courts must view the “contract as a whole, the subject matter and objective of the contract ... and the reasonableness of respective interpretations advocated by the parties.” *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990) (quoting *Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250, 254, 510 P.2d 221 (1973)). In this case that means Section 27 of the lease should be read together with the addendum to the lease. Exs. 6, 9, 45. The addendum provides that Mr. Smith shall have the right to occupy the basement of the building during his life (up to 8 years), “... but shall not have the right to lease, sublease, or assign his rights to the subject property.” Exs. 9 and 45 (Addendum dated January 25, 2006, paragraph 4). The language in paragraph 27 of the lease relates to Mr. Smith’s ability to assign his right to possession of the basement, not the landlord’s ability to change its legal form. This interpretation is consistent with the intent of the parties and language of the entire lease, and is supported by substantial evidence in the record. RP (11/19/07) 27-28, 81-82; RP (11/20/07) 44.

Finally, the transfer of the property from the living trust to the LLC was not actually an assignment, rather, it was simply a change in form of ownership. Ex. 10; RP (11/19/07) 61-63; *See also* WAC 48-61A-211. Clearly the transfer of the property from the trust to the LLC had absolutely no impact on the tenants. RP (11/20/07) 66, 86-87. The tenants are simply trying to raise form over substance by arguing the LLC is not the proper party, even though there is no dispute the LLC is the owner of the property. The tenants themselves could not point to any impact the transfer had on them whatsoever, substantively or procedurally. RP (11/20/07) 66, 86-87. There was substantial evidence to support the court's findings and conclusions that the LLC was the proper party and therefore the trial court should be affirmed.

- C. THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE TRIAL COURT'S DETERMINATION THAT THE LEASE COMMENCED JUNE 2006 WHEN THE TENANTS TOOK ACTUAL POSSESSION IN JANUARY 2006, REMODELED A PORTION OF THE BUILDING AND BEGAN DOING BUSINESS THERE IN APRIL 2006, BEGAN DEMOLITION OF THE ENTIRE BUILDING IN JUNE 2006, WHEN THE ITEMS REMAINING IN THE BUILDING IN JUNE 2006 WERE SO MINOR THE TENANTS OFFERED TO REMOVE THEM AND COULD HAVE REMOVED THEM WITHIN MINUTES, AND WHEN THE TENANTS THEMSELVES SAID THE LEASE SHOULD COMMENCE IN JUNE OR JULY 2006.

There is substantial evidence in the record to support the trial

court's determination that the lease commenced at the point in time where the tenants exercised control over the entire property. Section 1(b) of the lease provides:

Lease Commencement Date. The Lease shall commence on *upon [sic] delivery of premises See Attached Addendum*, or such earlier or later date as provided in Section 3 (the "Commencement Date").

Exs. 6, 45 (italics represent handwritten terms). The Addendum referred to in paragraph 1(b) of the Lease provides:

Lease term shall be (3) years whereby lease commencement date shall be the date the building shall be free of debris and broom swept clean, approximately (60) days from date of agreement.

Exs. 9 and 45. Section 3 of the lease provides:

If Tenant occupies the Premises before the Commencement Date specified in Section 1(b), then the Commencement Date shall be the date of occupancy.... If Landlord does not deliver possession of the Premises to Tenant within 60 days (60 if not filled in) after the date specified in Section 1(b), Tenant may elect to cancel this Lease by giving written notice to Landlord within 10 days after such time period ends.

Exs. 6 and 45. The tenants were aware of this provision and did not remove it from the lease. RP (11/20/07) 148.

It is Ledaura's position that the lease commences either when the premises are broom swept clean (paragraph 2 of Lease Addendum, Exs. 9

and 45), or when the tenants occupy the premises (Section 3 of Lease, Exs. 6 and 45) whichever occurs first. The tenants argue that the addendum supersedes Section 3 of the lease. But that is not supported by the plain language of the lease. Clearly, given the language in Section 1(b) that, “The Lease shall commence on *upon* [sic] *delivery of premises See Attached Addendum*, or such earlier or later date as provided in Section 3 (the ‘Commencement Date’),” the addendum only modifies Section 1(b) of the lease, not Section 3. Any other interpretation would make the provisions in Section 3 of the lease meaningless, which is contrary to general principals of contract construction. *Mayer v. Pierce County Medical Bureau, Inc.*, 80 Wn. App. 416, 423, 909 P.2d 1323 (1995).

Further, the lease provides,

By signing this Lease, Tenant acknowledges that it has had adequate opportunity to investigate the Premises, acknowledges responsibility for making any corrections, alterations and repairs to the Premises (other than the Landlord’s Work), and acknowledges that the time needed to complete any such items *shall not delay the Commencement Date*.

Exs. 6 and 45, Section 3(b) (emphasis added). Therefore, when the tenants took possession of the premises, whether or not it was free of debris and broom swept clean, the lease commenced.

At trial, Ledaura argued two alternative theories of the case. First, it argued that the lease commenced when the tenants took occupancy of the premises in January of 2006. CP 44-47. This interpretation of the contract is supported by the record and could justify affirming the trial court decision without a detailed analysis of the trial court's findings of fact about when the property was "broom swept clean." Alternatively, Ledaura argued that if the lease had not commenced – as the tenants were arguing – then the tenants' occupancy of the premises was unlawful, and they owed rent at fair market value for the period of their occupancy. CP 47.

On appeal, the tenants argue the trial court adopted their interpretation of the lease, which was that the lease commenced when the premises were or should have been broom swept clean. Appellants' Opening Brief, pages 20-22. Ledaura disagrees with the tenants' argument on appeal for the reasons stated above, and submits that the trial court actually agreed with its interpretation of the lease, but came to a different conclusion as to when the tenants actually "occupied" the premises. But regardless of which interpretation the trial court adopted, there is substantial evidence in the record to support the findings and conclusions that the lease commenced in June of 2006.

The tenants took physical possession of the premises in January 2006, and were doing business there regularly since April 2006. RP (11/19/07) 35-36, 46, 85-86, 137; RP (11/20/07) 69, 96; CP 164. There was substantial evidence that by diverting Mr. Munroe from clean up work to demolition work, the tenants interfered with Ledaura making the property “broom swept clean.” When the tenants entered into the demolition contract with Mr. Munroe on June 7, 2006, Mr. Munroe was no more than a day away from having all of the landlord’s things out of the building. RP (11/20/07) 82-83, 104. Not only had he “broom swept” one of the floors, he had actually pressure washed it. RP (11/19/07) 100, 128-129. Despite some arguments to the contrary at trial, the tenants themselves instructed Mr. Munroe to begin demolition the next day, June 8, 2007. Ex. 12; RP (11/20/07) 70-72. When the tenants found out Mr. Munroe was doing demolition work instead of removing items from the building, they did not tell him to stop and finish cleaning out the building. RP (11/20/07) 83:4-10.

The tenants argue they “organized the Debris so it could be conveniently removed,” but the point is that their activity actually created new debris. Appellants’ Opening Brief, p. 23; RP (11/19/07) 112; RP (11/20/07) 56-57, 110-111, 152; Exs. 37, 47. On June 30, 2006, the debris

created by the tenants was still in the building and was obstructing access to the building. Ex. 47, RP (11/20/07) 152. And it was still in the building two months later hindering the landlord's access to the building. Ex. 37. The tenants' activity also resulted in the exposure of asbestos in the building and caused the building to be shut down. RP (11/19/07) 97-100, 123; RP (11/20/07) 79-80, 110-112, 117.

In addition to showing interference with Ledaura's attempts to finish emptying the building, the tenants' demolition work demonstrates that in June of 2006, the tenants were exercising dominion and control over the entire leased premises to the extent they intended under the lease.

There is no dispute that the building was in a serious state of disrepair and the tenants – two architects and a real estate agent – wanted the building so they could remodel it themselves to their own purposes and design. Ex. 9, 45; RP (11/20/07) 65-66. In fact, they spent somewhere in the neighborhood of \$200,000 doing so. RP (11/20/07) 157-158. That is a substantial amount of money to spend on a building the tenants claim they never had possession of.

The tenants try to make a mountain out of a mole hill with regard to the items remaining at the property between June 2006 and September 2007. They argue that there are differences between the terms, "free of

debris and broom swept clean,” “essentially cleared out,” “almost free,” and “somewhat clean.” Appellants’ Opening Brief, pps. 24-28. The only items in the building between June 2006 and September 2007 the tenants claim the landlord should have removed were a 55 gallon drum, some desks, an air canister, and some paint cans. CP 166, Finding of Fact 1.22. Those items are depicted in Exhibits 18E-18I. As depicted in those exhibits, it can be seen that these items take up such a small amount of floor space in a 20,000 square foot building with 12,000 square feet of leased area that the complained of items could not have had any discernable impact on the tenants’ occupancy. These items were so insignificant the tenants themselves had no problem removing them. Ex. 34; RP (11/20/07) 90-91. In August of 2006, the tenants themselves said, “we acknowledge that we have been able to make limited use of the rented areas... it is reasonable and fair to designate the commencement date as July 1, 2006.” Ex. 34. Now the tenants want the court determine that these few minor items prevented their use of the entire building, when they did not even believe that themselves.

The tenants argue the items were a major issue because they were “hazardous substances.” Appellants’ Opening Brief, p. 24. There is no evidence in the record to support such a conclusion. RP (11/19/07) 115-

118. The tenants claim they did not want to touch the “solvents” (which did not exist) and paint cans, but this alleged caution on the part of the tenants is insincere in light of their knowing exposure of asbestos inside the building. RP (11/19/07) 97-100, 123; RP (11/20/07) 77-83, 110-112, 117. Instead of showing unreasonableness on the part of Ledaura, these facts demonstrate the tenants were just using these few remaining items as an excuse for not paying rent.

The tenants also argue there was more in the building than just those few items. Appellants’ Opening Brief, pps. 26-28. They rely on Exhibits 28, 29 and 32, which are pictures from July 2006, depicting what Mr. Munroe did after he stopped working for Ledaura, and began work for the tenants. Ex. 12; RP (11/20/07) 110-113. It should also be noted that the tenants admit that they were continuing renovations in the building until sometime in August 2006. Appellants’ Opening Brief, p. 24 (“...shortly after the demolition work was completed, on August 23, 2006, the Tenants specifically proposed...”); Ex. 34. The argument that Ledaura is responsible for the mess depicted in Exhibits 28, 29, and 32 is inconsistent with the tenants’ continued demolition work, it is inconsistent with Exhibit 47, and it is inconsistent with the tenants’ own testimony that the building would be empty by June 8, 2006. RP (11/20/07) 82-83, 104.

Clearly the building was virtually free of debris and broom swept clean on June 7, 2006; the question is who was responsible for the mess created after that. *See* RP (11/20/07) 112-113. Mr. Gould testified, “The rest of the floor was completely clean, and from then on Rob [Munroe] apparently began sorting through the stuff to get to metal and so on and it got redispersed all over that floor.” RP (11/20/07) 108.

The tenants argue that it was Leah Caruthers who allowed Mr. Munroe to move the things around the building in July of 2006. RP (11/20/07) 110-113; Appellants’ Opening Brief, pps. 29-31. The trial court disagreed, finding it was the tenants who allowed Mr. Munroe to return to the building. CP 166, Finding of Fact 1.27. This finding of fact is supported by substantial evidence.

There is substantial evidence the tenants permitted Mr. Munroe access to the property after June 2006. The tenants, “...were kind of waiting to see what would happen between the beginning, well, when this happened and the end of June. We didn't want to completely alienate him [Mr. Munroe] because of his ability to damage us with regard to L&I.” RP (11/20/07) 110. To avoid problems with L&I, the tenants led Mr. Munroe on, implying they might hire him to finish the work once everything quieted down. RP (11/20/07) 114. The tenants did not remove Mr.

Munroe from the building for fear of what he would tell L&I if they did so.

At no point in time was Mr. Munroe told by the landlord that he could stay in the building or sleep in the building. RP (11/19/07) 95. After the tenants were cited for exposing and removing asbestos by L&I, no one on behalf of Ledaura ever asked Mr. Munroe to resume work at the property. RP (11/19/07) 98-99. It is undisputed that Ms. Caruthers was thousands of miles away in Texas during June and July 2006, when Mr. Munroe was redistributing things throughout the building. RP (11/19/07) 87-89; Ex. 17. It was only by way of the tenants notifying Ms. Caruthers that Mr. Munroe was still at the building doing work, that Ms. Caruthers became aware of that fact. Ex. 30. She immediately, at the request of the tenants, asked Mr. Munroe to leave the premises, which he did. Ex. 31. RP (11/19/07) 95-99. There is no evidence in the record that Ledaura had Mr. Munroe working for it after June of 2006. RP (11/19/07) 97. But, as discussed above, there is substantial evidence in the record to show that the tenants permitted Mr. Munroe to remain at the property and the reasons why they did so.

Next, the tenants argue there is not substantial evidence to support Finding of Fact 1.28, which states the tenants took over the middle and upper floors and began demolition work. Appellants' Opening Brief, pps.

31-33. This assignment of error and argument is odd since the tenants themselves admit they hired Mr. Munroe on June 7, 2006, to do exactly that. Ex. 12; RP (11/20/07) 77-80. It was exactly this type of argument the court relied upon in finding that Mr. Gould's testimony was not credible. CP 166, Finding of Fact 1.24. Also, the tenants expended approximately \$200,000 in connection with renovation of the building. RP (11/20/07) 157-158.

The tenants want to have it both ways: they argue that their obligation to pay rent was never triggered because the lease never commenced, but at the same time they claim the landlord's obligations under the lease were triggered. Either the lease commenced or it did not commence. If it commenced, then the tenants' obligation to pay rent began 11 months later. Ex. 45. There is substantial evidence in the record to support the trial court's determination that by taking possession of the property, demolishing the interior of the building, exposing asbestos in the building, operating their business there, and spending \$200,000 to improve the building, that the lease commenced in June of 2006. But if the lease did not commence, because it was not "free of debris and broom swept clean" within 60 days, then the tenants' remedy was to notify the landlord of their intention to terminate the lease. Exs. 6 and 45, Section 3(a).

Nowhere does the lease say the tenants' remedy in that situation is to take possession and claim an abatement of rent. In fact, such a remedy is specifically prohibited by the lease. Exs. 6 and 45, Section 3(a) and Section 4.

The tenants also make an argument about what constitutes "Landlord's Work" on page 38, footnote 8 of their brief and argue that language delays the commencement date. That argument conflicts with the testimony and other evidence submitted at trial. Lease Exhibit A was the legal description of the property. Ex. 6. Exhibits 6 and 45, page 13, paragraph 32 refer to an addendum dated January 24, 2006. That addendum was revoked and replaced with a different addendum. Ex. 9. In the meantime, Exhibit B to the lease became the Commercial & Investment Real Estate Purchase & Sale Agreement. Ex. 6. All of Lease Exhibit A is missing from Trial Exhibit 45, and the coversheet for Lease Exhibit B is also missing from Trial Exhibit 45. *Compare* Ex 6 and Ex. 45. There never was a description of "Landlord's Work" (a defined term in the lease, Ex. 6, Section 3) attached to the lease, because there was no "Landlord's Work." RP (11/19/07) 102; RP (11/20/07) 40-41, 59. On its face, the lease addendum dated January 25, 2006, is not an itemization of "Landlord's Work," and it never was intended to be since the property was

leased "as is." RP (11/19/07) 26, 67-68, 102; RP (11/20/07) 40-42, 59.

For all of the reasons discussed above, there is substantial evidence in the record, when viewed in the light most favorable to Ledaura, that the lease commenced in June of 2006. Therefore, the trial court's findings and conclusions on this issue should be affirmed.

D. THE TENANTS WERE NOT EXCUSED FROM PAYING RENT DUE TO A ROOF LEAK WHERE THE LEAK APPEARED TO HAVE BEEN FIXED, WHERE TENANTS DID NOT COMPLAIN OF THE LEAK FOR SEVERAL MONTHS, WHERE THE LEAK DID NOT CAUSE THEM TO VACATE THE BUILDING, WHERE IT WAS ISOLATED TO ONE AREA OF THE BUILDING, WHERE THEIR CLAIM FOR BREACH OF THE WARRANTY OF HABITABILITY WAS DISMISSED AND HAS NOT BEEN APPEALED, AND WHERE THE LEASE DOES NOT ALLOW THE TENANTS A SETOFF OF RENT FOR SUCH CONDITIONS.

As with the issue of the lease commencement date, the tenants want to have it both ways: they claim the lease had not yet commenced, but at the same time they claim the landlord breached the lease by not fixing a roof leak. If the trial court is reversed on the issue of the lease commencement date, then the claim regarding the roof leak is not yet ripe for review because no lease had commenced obligating the landlord to make repairs.

If the lease had commenced, the condition of the roof did not justify the tenants' failure to pay rent. The lease provides,

Tenants shall pay Landlord *without demand, deduction or offset*, in lawful money of the United States, the monthly rental stated in Section 1(d) in advance on or before the first day of each month during the Lease Term...

Exs. 6 and 45, Section 4. Section 3(b) of the lease provides, "...Landlord makes no representations or warranties to Tenant regarding the Premises."

Exs. 6 and 45, Section 3(b). The lease further provides:

30. QUIET ENJOYMENT. So long as Tenant pays the Rent and performs all of its obligations in this Lease, Tenant's possession of the Premises will not be disturbed by Landlord or anyone claiming by, through or under Landlord, or by the holders of any Landlord's Mortgage or any successor thereto.

Exs. 6 and 45, Section 30.

The provisions of the lease cited above are consistent with Washington law on the subject of quiet enjoyment and the warranty of habitability. There generally is no warranty of habitability under a commercial lease. 57 Am.Jur. Proof of Facts 3d 127 § 7. Washington has followed this rule. *Olson v. Scholes*, 17 Wn. App. 383, 563 P.2d 1275 (1977); 17 Wash. Prac., Real Estate § 6.28. Further, even if the court did imply a warranty of habitability under the facts of this particular case, the complained-of condition must result in a constructive eviction (i.e. the tenants actually move out) before the tenants can be excused from the payment of rent. *Foisy v. Wyman*, 83 Wn.2d 22, 515 P.2d 160 (1973).

In the present case the tenants' claims for breach of the warranties of quiet enjoyment and the warranty of habitability were dismissed at a motion *in limine*. CP 62-63; CP 164, Finding of Fact 1.9. The tenants have not appealed the order dismissing those claims. CP 62-63, 176-192. On that basis alone the trial court should be affirmed.

In any event, the allegations about the leaking roof do not justify withholding rent. The tenants' argument that the roof was never fixed is misleading. Appellants' Opening Brief, p. 34. The citation to the record for that proposition refers to a line of questioning about whether the landlord fixed the roof in January of 2006. RP (11/19/07) 139-141. The landlord did. Ex. 15. In the testimony at issue, it is true that the landlord did not contest that the roof may have been leaking at the time of trial and that if the landlord had the money by way of the tenants paying rent, it would repair the roof again. *Id.* But for the reasons explained below, there is no evidence in the record to support the argument that (1) the landlord did not fix the roof, or (2) the landlord had knowledge of a roof leak after November 2006.

Just prior to entering into the lease, Ms. Caruthers had Bosnick Roofing repair the roof for approximately \$9,000. RP (11/19/07) 86. The first complaint about a roof leak occurred about the time the lease was

signed, but before the lease commenced. Exhibit 23; RP (11/19/07) 91-93, 132-134; CP 167, Finding of Fact 1.29; CP 169, Conclusion of Law 2.4. There were two leaks located in an office area (which was demolished by the tenants in June of 2006), under which two buckets had been placed. RP (11/19/07) 134; Ex. 23. If the lease had not commenced at this point in time, Ledaura had no obligation under the lease to repair it. Exs. 6 and 45. Nevertheless, Bosnick Roofing was contacted and performed "leak repair" consisting of, "fixed walls, gutters and seams on top of barrel," in approximately March of 2006. Ex. 15. Bosnick Roofing's contact person at the property was one of the tenants, Randy Gould. Ex. 15; RP (11/19/07) 92.

The trial court found and concluded that the lease between the parties did not commence until June 2006. CP 167, Finding of Fact 1.29; CP 169, Conclusion of Law 2.4. Ms. Caruthers did not receive any other complaints about roof leaks until approximately November of 2006. RP (11/19/07) 143; RP (11/20/07) 5-7, 37-38; Ex. 34. The leak was in a slightly different place, but still near the windows where the offices had been located. RP (11/19/07) 92-93; RP (11/20/07) 37-38. Ms. Caruthers called another roofer, T.A. Manning to go out and take care of the problem. RP (11/19/07) 92-93, 143. When Ms. Caruthers heard nothing

more about the leak from Mr. Manning or the tenants, she assumed it had been fixed. RP (11/19/07) 92-93; RP (11/20/07) 6-7; Ex. 41.

The area affected by the leak was very minor in relation to the entire building and leased premises. Ex. 23. Clearly the leak did not “constructively evict” the tenants. They did not move out of the building in response to the leak. CP 3 (paragraph VII, which the tenants admitted at CP 32); 164, Finding of Fact 1.13. Instead, they spent \$200,000 gutting the building. RP (11/20/07) 157-158.

E. LEDAURA, LLC WAS THE PREVAILING PARTY AT TRIAL BECAUSE IT WAS GRANTED THE RELIEF IT REQUESTED; THE TENANTS WERE NOT GRANTED ANY OF THE RELIEF THEY REQUESTED; AND THE SUPPOSED DIFFERENCES IN AMOUNTS REQUESTED AND AWARDED TO LEDAURA ARE NOT RELEVANT TO WHETHER A PARTY PREVAILED, AND IN THIS CASE ARE SOLELY ATTRIBUTABLE TO THE FACT LEDAURA ARGUED ALTERNATE LEGAL THEORIES AT TRIAL.

Ledaura prevailed on all the claims at trial, including the claim brought by the tenants. The prevailing party is the party who obtains an affirmative judgment, or against whom no affirmative judgment is entered.

Eagle Point Condominium Owner’s Assoc. v. Coy, 102 Wn. App. 697, 706-707, 9 P.3d 898 (2000); *Wood v. Lowe*, 102 Wn. App. 872, 877, 10 P.3d 494 (2000). To be considered the prevailing party, one need not prevail on the entire claim. *Benchmark Land Co. v. City of Battleground*,

94 Wn. App. 537, 972 P.2d 944 (1999). But if neither party wholly prevails, the prevailing party is the party who substantially prevails. *Id.*; *Kyle v. Williams*, 139 Wn. App. 348, 161 P.3d 1036 (2007). Ledaura wholly prevailed on both claims and is therefore the prevailing party.

The tenants cite *Marassi v. Lau*, 71 Wn. App. 912, 859 P.2d 605 (1993) for the proposition that the net affirmative judgment rule should not always be applied where there are multiple claims. There were only two claims in the underlying litigation: (1) Ledaura's claim based upon unlawful detainer, and (2) the tenants claim for breach of the warranty of habitability. CP 1-27, 31-35. Ledaura prevailed on both of those claims and is therefore the prevailing party. CP 62-63, 162-175.

With regard to the tenants' argument about the amount of money in dispute, it has been observed,

while the amount in dispute does not create an absolute limit on fees, that figure's relationship to the fees requested or awarded is a vital consideration when assessing their reasonableness.

Scott Fetzer Company v. Weeks, 122 Wn.2d 141, 149-150, 859 P.2d 1210 (1993). It should first be noted that this rule applies with regard to the reasonableness of fees under the Lodestar method, not whether or not a party is a prevailing party. *Id.* Further, in discussing this factor the court

is talking about the *amount in dispute*, not the amount actually awarded.

Id. Applying these rules it is clear Ledaura was the prevailing party because Ledaura was awarded over \$57,000 in rent, late fees, interest, and double rent. CP 173-175.

Even applying the reasoning of the tenants, Ledaura is still the prevailing party. The tenants seem to mis-perceive Ledaura's position at trial. Ledaura presented two alternate theories on the issue of rent owing: (1) that the lease commenced in February of 2006, with rent commencing February 2007, or (2) if the lease had not commenced, which was the tenants' position, then the tenants unlawfully possessed the premises and owed fair market rent from February 2006. Ex. 22; CP 45-47.

Contrary to the tenants' argument, at no point in time did Ledaura ask for more than \$218,962.70 in damages (representing rent, late fees, interest, and double damages if the lease had not commenced and the tenants were unlawfully possessing the property). *Id.* Assuming the trial court found (as it did) that the lease had commenced, Ledaura was asking for no more than \$99,088 inclusive of late fees, interest and double damages. *Id.* This was based upon a lease commencement date of February 2006. *Id.* The tenants argued for a lease commencement date of September 2007. RP (11/20/07) 64-65. Ledaura argued for a lease

commencement date of February 2006. Ex. 22; CP 45-47. The court picked a lease commencement date of June 2006, which was four months away from what Ledaura requested, but 15 months away from what the tenants requested.

Contrary to the tenants' argument, Ledaura never said the tenants were not entitled to 11 months of free rent *once the lease commenced*. Ex. 22; CP 45-47. Again, Ledaura's position was the tenants could not have it both ways; if the tenants wanted to both occupy the premises and argue that the lease had not commenced, then they needed to pay rent for the period of time they were occupying the building without a lease. CP 47. Once the lease commenced, there was absolutely no dispute that the tenants were entitled to 11 months rent free. Ex. 22; CP 45-47. Even using the tenants' math, Ledaura prevailed on about 60% of it's claim. Therefore, Ledaura was the substantially prevailing party.

F. LEDAURA, LLC SHOULD BE AWARDED IT'S FEES AND COSTS ON APPEAL.

Ledaura respectfully requests an award of fees and costs on appeal. RAP 18.1 provides for an award of costs and fees on appeal if otherwise permitted by applicable law. RAP 18.1(a). In the present case attorney fees and court costs are to be awarded the prevailing party on appeal

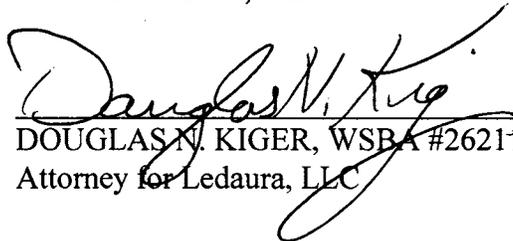
pursuant to Section 25 of the lease. Exs. 6 and 45. Ledaura requests permission to file an affidavit of fees and costs pursuant to RAP 18.1(d) following the decision on this appeal.

IV. CONCLUSION

For the reasons set forth above, Ledaura, LLC respectfully requests the trial court decision be affirmed, and that Ledaura, LLC be awarded fees and costs on appeal against Appellants.

RESPECTFULLY SUBMITTED this 18th day of September, 2008.

BLADO KIGER, P.S.


DOUGLAS N. KIGER, WSBA #26211
Attorney for Ledaura, LLC

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the 18th day of September, 2008, she placed with ABC Legal Messengers, Inc. an original Brief of Respondent Ledaura, LLC and Certificate of Service for filing with the Court of Appeals, Division II, and true and correct copies of the same for delivery to each of the following parties and their counsel of record:

Attorneys for Appellants, Randy Gould, Bret Drager, Greg Johnson, and Drager Gould Architects, Inc.:

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7525 Pioneer Way, Suite 202
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DATED this 18th day of September, 2008, at Tacoma, Washington.

BLADO KIGER, P.S.



Heather Medina

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Appendix "A"

§ 7. Limited recognition of implied warranty of fitness or suitability in commercial leases—Courts rejecting implied warranty (majority view)

On the other hand, *many courts have offered persuasive arguments against extending the implied warranty of habitability in residential leases to create an equivalent warranty in commercial leases. The majority view is that there is no implied warranty of fitness or suitability in leases of real property for commercial purposes.* Those courts rejecting an implied warranty of suitability for commercial purposes maintain that many of the factors justifying the implication of a warranty of habitability in residential leases do not exist, or do not apply with equal force, in the commercial lease context. Specifically, the argument asserts that commercial tenants typically do not hold weak bargaining positions relative to their landlords, and that the "higher standards of personal facilities vital to public health and welfare required for residential property are not generally required for business or commercial property." [FN3]

A California court offered the following reasons for not extending the implied warranty of habitability to nonresidential premises:

This warranty resulted from the necessity of protecting the health and safety of residential tenants who need adequate housing in a marketplace where satisfactory housing is difficult to locate and the tenant is unable to protect himself because of his lack of knowledge, ability and bargaining position. These factors are not present in the leasing of nonresidential premises where the tenant is more sophisticated, his bargaining position is more equal to that of the landlord and, in the usual case, the contents of the lease, including the obligation of maintenance, are negotiated between the parties. [FN4]

The court further explained that unlike the commercial-industrial rental market, housing has unique policy implications. "Although public policy embodied in the widespread enactment of comprehensive housing codes compels landlords to bear primary responsibility for maintaining safe, clean and habitable housing, we know of no equivalent policy with respect to commercial buildings. Furthermore, ... while residential tenants additionally need protection because of the legislatively recognized severe housing shortage in the state, there is no scarcity of commercial property. Also, unlike residential tenants, but like landlords, commercial tenants can absorb the costs as a business expense." [FN5]

Along these same lines, one commentator presented the following arguments against adoption of an implied warranty of suitability for commercial purposes: (1) commercial tenants are usually in a better position to inspect the premises or to hire knowledgeable

persons to do so than residential tenants; (2) commercial tenants have greater bargaining power with their landlords than residential tenants because commercial tenants have greater economic resources and commercial space is more readily available; (3) commercial landlords have a greater economic incentive to attract and retain successful commercial tenants to produce steady rental income; and (4) commercial tenants can pass along the cost of inspection or remedying defects to their customers.[FN6] Further, imposing a warranty of fitness or suitability for use in all commercial leases might be counterproductive; landlords may pass along the increased costs of such warranties in the form of higher rents, which would inordinately burden the small business lessee most in need of warranty protection, and to the extent such added expenses could not be passed along, landlord profit margins would be reduced, causing the withdrawal or abandonment of marginal business properties to the detriment of local economic health.[FN7] **57**
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