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DIVISION II

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STATE OF WASHINGTON
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No. 37426-9

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

C & V HOSSMAN, JR., ET AL.
Appellants,

v.

TNA FOOD SERVICE, dba JACKIE'S TERIYAKI, aka GERMAN
ORTEGA & SERGIO TOSTADO PARTNERSHIP, aka T&A FOOD
SERVICES CORPORATION,
Respondents.

APPELLANT'S OPENING BRIEF

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ORIGINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
I. ASSIGNMENTS OF ERROR	1
II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	3
III. STATEMENT OF THE CASE	5
A. The Lease.....	5
B. Mold Problem	8
C. Disputes Over Rent and CAM.....	10
1. August 21, 2006 Meeting	11
2. September 4, 2006 Meeting.....	13
3. Final Rent Payment	17
D. Eviction Proceedings	18
IV. ARGUMENT	19
A. The trial court erred when it concluded the Tenant was not obligated to begin paying rent until April 2006	21
1. The lease was valid as of December 2, 2005.....	21
2. Regardless of when the lease became valid, the Tenant agreed its obligation to pay rent would begin on March 1, 2006.....	23
3. Because the trial court erroneously concluded rent was not due until April 2006, it also erroneously found the final rent check given to the Landlord by the Tenant was for November instead of October 2006.....	27

B. The trial court erred when it found an agreement was reached at the September 4, 2006 meeting	28
C. The trial court erred when it found the Landlord had not accepted the final rent check given to it by the Tenant	30
D. Because the trial court found the Tenant was in arrears at the time the five-day notice was posted, the Landlord was entitled to a finding the Tenant was guilty of unlawful detainer	32
1. The Landlord had a good faith belief the amount listed in the five-day notice was the amount the Tenant owed	32
2. The Landlord did not waive its right to pursue an unlawful detainer action by its prior acceptance of late payments.....	36
E. The Landlord is entitled to a judgment in its favor and an award of attorney fees incurred in the proceeding below.....	38
F. Pursuant to RAP 18.1, the Landlord requests an award of its attorney fees on appeal	40
V. CONCLUSION.....	40

TABLE OF AUTHORITIES

CASES

<i>Armstrong v. Burkett</i> 104 Wash. 476, 177 P. 333 (1918)	38
<i>Artz v. O'Bannon</i> 17 Wn. App. 421, 562 P.2d 674 (1977)	22
<i>Barnett v. Buchan Baking Co.</i> 45 Wn. App. 152, 724 P.2d 1077 (1986)	22
<i>Birkeland v. Corbett</i> 51 Wn.2d 554, 320 P.2d 635 (1958)	37
<i>Bort v. Parker</i> 110 Wn. App. 561, 42 P.3d 980 (2002)	24
<i>Bowman v. Webster</i> 44 Wn.2d 667, 269 P.2d 960 (1954)	37
<i>Dice v. City of Montesano</i> 131 Wn. App. 675, 128 P.3d 1253 (2006)	24
<i>Ebling v. Gove's Cove, Inc.</i> 34 Wn. App. 495, 663 P.2d 132	25
<i>Foisy v. Wyman</i> 83 Wn.2d 22, 515 P.2d 160 (1973)	33
<i>Hanson v. Puget Sound Navigation Co.</i> 52 Wn.2d 124, 323 P.2d 655 (1958)	25
<i>Hinckley v. Casey</i> 45 Wash. 430, 88 P. 753 (1907)	38
<i>In re Marriage of Hall</i> 103 Wn.2d 236, 692 P.2d 175 (1984)	26

<i>Knight v. Am. Nat'l Bank</i> 52 Wn. App. 1, 756 P.2d 757 (1988)	23,26
<i>Mayer v. Pierce County Med. Bureau</i> 80 Wn. App. 416, 909 P.2d 1323 (1995)	24
<i>Paradise Orchards Gen. P'ship v. Fearing</i> 122 Wn. App. 507, 94 P.3d 372 (2004)	24
<i>Queen v. McClung</i> 12 Wn. App. 245, 529 P.2d 482 (1975)	39
<i>Reitz v. Knight</i> 62 Wn. App. 575, 814 P.2d 1212 (1991)	26
<i>Ridgeview Properties v. Starbuck</i> 96 Wn.2d 716, 638 P.2d 1231 (1982)	26
<i>Smith v. Shannon</i> 100 Wn.2d 26, 666 P.2d 351 (1983)	26
<i>Snuffin v. Mayo</i> 6 Wn. App. 525, 494 P.2d 497 (1972)	38
<i>Sprincin King Street Partners v. Sound Conditioning Club, Inc.</i> 84 Wn. App. 56, 925 P.2d 217 (1996)	39
<i>Staaf v. Bilder</i> 68 Wn.2d 800, 415 P.2d 650 (1996)	26
<i>Sundholm v. Patch</i> 62 Wn.2d 244, 382 P.2d 262 (1963)	38
<i>Sunnyside Valley Irrigation Dist. v. Dickie</i> 149 Wn.2d 873, 73 P.3d 369 (2003)	22
<i>Surry v. Baker</i> 132 Wash. 188, 231 P. 791 (1925)	37

<i>Trans-Canada Enters., Ltd. v. King Cy.</i> 20 Wn. App. 267, 628 P.2d 493 (1981)	26
<i>Union Local 1296, Int'l Ass'n of Firefighters v. Kennewick</i> 86 Wn.2d 156, 542 P.2d 1252 (1975)	22
<i>Woodruff v. McClellan</i> 95 Wn.2d 394, 622 P.2d 1268(1980)	22

RULES

RAP 18.1	5,40
----------------	------

STATUTES

RCW 19.36.010.....	23
RCW 59.12.030(3)	19
RCW 59.12.040.....	20
RCW 59.12.170.....	38

MISCELLANEOUS

C.J. Peck, <i>Landlord and Tenant Notices</i> 31 Wash. L. Rev. 51 (1956)	33
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I. ASSIGNMENTS OF ERROR

Appellants, Carl Hossman, Jr., Virginia Hossman, Ashley Hossman, and Josh Klakring,¹ (referred to herein as “the Landlord”) assign error to:

1. The trial court’s entry of a judgment dismissing the Landlord’s Amended Complaint and awarding the Defendant TNA Food Service (referred to herein as “the Tenant”) its attorney fees.

2. The trial court’s finding in Finding of Fact No. 3 that “there was no valid lease between the parties until late December, and thus the first free month of rent was January 2006, not December, 2005 as contemplated in the lease. Thus the first month’s rent was not due until April, 2006.”

3. The trial court’s finding in Finding of Fact No. 8 “that an agreement was made at the September 4, 2006 meeting between Mr. Klakring and Mr. Tostado that the plaintiffs would waive the August rent, and in exchange Mr. Tostado and the defendants would pay the disputed CAM charges from December, 2005 onward.”

¹ In the pleadings filed in the trial court, the Plaintiff is always referred to as “C & V Hossman, Jr., et al.” “C & V” refers to Carl and Virginia and the other Plaintiffs encompassed by “et al.” are Josh Klakring, and Ashley Hossman; these are the four individuals designated as “Landlord” in the lease between the parties. However, the Plaintiffs are not individually identified in the trial court pleadings.

4. The trial court's finding in Finding of Fact No. 9 "that it was fair that there would be a one-month forgiveness of rent in this case. In view of the mold situation and in view of the lockout situation, the Court finds that the defendants were entitled to credit of about a month no matter which way you look at the situation."

5. The trial court's findings in Finding of Fact No. 10 that of the two checks dated September 4th, "one check for \$2,139.50 was for the September rent. The August rent was forgiven." And "[o]f the two postdated checks dated September 18, one was for the October rent[.]"

6. The trial court's findings in Finding of Fact No. 11 that "on October 10, a check for the November rent was given"; "the best evidence the Court has in this case is that that check was good."; and "the November rent was tendered, but it was not apparently accepted by the plaintiffs."

7. The trial court's finding in Finding of Fact No. 12:

that on November 6th the defendants were current under the lease except for the November CAM charge of approximately \$360.00. Due to the fact that the plaintiffs had in the past repeatedly accepted late CAM charges, and in view of the minimal amount of the then due CAM charge in relation to the landlord's demand in their November 6, 2006 five day notice for \$5,845.88, the then existing deficiency was simply not enough to cause the defendants to be guilty of unlawful detainer.

8. The trial court's conclusion in Conclusion of Law No. 2 that, "The parties' lease did not commence until January 1, 2006. As a result, no rent was due under the lease until April 1, 2006."

9. The trial court's conclusion in Conclusion of Law No. 4 that, "At that meeting the parties reached an Agreement resolving their various then existing disputes. Pursuant to that Agreement, the defendants provided, and the plaintiffs accepted, four checks paying September's and October's rent and all outstanding CAM charges through October."

10. The trial court's conclusion in Conclusion of Law No. 5 that, "At the time the plaintiffs delivered the November 6, 2006 five day notice in the amount of \$5,845.88, the defendants only owed the CAM charges for the month of November of approximately \$360.00. Accordingly, the defendants were not guilty of unlawful detainer."

11. The trial court's denial of the Landlord's Motion for Reconsideration and its award of attorney fees to the Tenant in connection with that motion.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in finding the Tenant was not required to begin paying rent until April 1, 2006, when the lease was binding against the Tenant as of December 2, 2005, the lease expressly stated the Tenant was responsible for rent as of March 1, 2006, and there

is no evidence to support a finding the parties mutually agreed to change the express terms of the lease? If so, did the trial court also err in finding the Tenant was not in arrears for at least one month's rent as of November 6, 2006? (Assignments of Error 1, 2, 5 – 10)

2. Did the trial court err in finding a binding agreement was reached by the parties at their meeting on September 4, 2006, when the Tenant admitted he knew the representative of the Landlord attending that meeting had to discuss the matter with another representative of the Landlord before an agreement could be finalized? (Assignments of Error 3 and 7) If so, did the trial court also err in finding the Tenant was not in arrears for at least one month's rent as of November 6, 2006? (Assignments of Error 1, 3 – 7, 9 and 10)

3. Did the trial court err in finding that, by not cashing the final rent check received from the Tenant, the Landlord had failed to accept that check when the only finding supported by the evidence presented at trial was that the Landlord had called the bank repeatedly and was told there were insufficient funds in the bank to cover the check? If so, did the trial court further err in finding the Tenant was not in arrears for at least one month's rent as of November 6, 2006? (Assignments of Error 1, 6, 7, and 10).

4. Did the trial court err when it found the amount owed by the Tenant on November 6, 2006 was insufficient to support an unlawful detainer action when the Landlord had a good faith basis for believing the Tenant owed the amount stated in the five-day notice? (Assignments of Error 1, 7, 10 and 11).

5. In light of the responses to the preceding questions, did the trial court err in entering a judgment in favor of the Tenant and awarding the Tenant its attorney fees? If so, is the Landlord entitled to a judgment in its favor on appeal, including double damages, and an award of its attorney fees? (Assignment of Error 1 and 11)

6. Pursuant to RAP 18.1, is the Landlord entitled to an award of its attorney fees on appeal under the attorney provision in the lease?

III. STATEMENT OF THE CASE

A. The Lease

This unlawful detainer action relates to a lease between Carl & Virginia Hossman, Jr., Josh Klakring, and Ashley Hossman, designated as “Landlord” in the lease, and T&A Food Service dba Jackie’s Teriyaki, designated as “Tenant.” (Plaintiff’s Exhibit [“PE”] 1 at 1 [CP 41])²

² Trial Exhibits 1 through 36 were attached to Plaintiff’s Trial Brief. Therefore, to aid the Court in referring to the exhibits, in addition to the exhibit number, Plaintiff/Appellant will also provide the reference numbers for the Clerk’s Papers when citing to exhibits.

Before signing the lease, the Tenant gave the Landlord a check in the amount of \$2,275.00 as required under the terms of the lease. (PE 1 at 1 [CP 41]; PE 35 at 3 [CP 206]; VRP 214, li. 6 – 14) Then, on December 2, 2005, German Ortega signed the lease on the line designated for “Tenant.” (PE 1 at 16-17 [CP 56 – 57]) Mr. Ortega also signed a Guaranty of Tenant’s Lease Obligations Rider on that same date. (*Id.* at 24 [CP 64]) All four individuals listed as the Landlord signed the lease on December 23, 2005. (*Id.* at 16, 18-19 [CP 56, 58 – 59])

The lease stated it was “entered into this 2nd day of December, 2005[.]”³ (PE 1 at 1 [CP 41]) It also stated it was to “commence on December 2nd, 2005, or such earlier or later date as provided in Section 3[.]” (*Id.*) Section 3 addresses the modification of the commencement date (1) if the Landlord provides written notice to the Tenant of a different date or (2) if the Tenant occupies the premises to begin improvements before the stated commencement date. (PE 1 at 1-2 [CP 41 – 42])

The lease states the premises “consist of an agreed area of Approximately 1,250 rentable square feet[.]” (PE 1 at 1 [CP 41]) A Rent Rider sets forth the amount of the rental obligation. For “Months 1 – 3” (specifically listed as “Dec 2 – 2/28/06”), the rent is shown as “\$Base

³ Throughout this brief, whenever underscoring appears in excerpts of the lease, such underscoring was in the original document.

Rental Abatement (Pay only Triple Nets⁴)[.]” (PE 1 at 22 [CP 62]) For the remaining months of the first year, rent is listed as “\$2,291.67 (plus triple nets).” (*Id.*) The lease required the first month’s rent, which was due in March 2006, to be prepaid. (PE 1 at 1 [CP 41]) The Tenant satisfied that requirement and paid the first months’ rent when it signed the lease. (PE 35 at 4 [CP 207]; VRP 194, li. 4 – 12) With regard to the timing of subsequent rent payments, the lease stated:

Beginning on the first day of the fourth month after the lease commencement date (i.e. March 1st 2006) or upon Tenant opening for business anytime after February 1, 2006; whichever comes sooner. (The first month due will be the fifth (5th) months, due to the prepaid month paid upon execution.)”

(PE 1 at 2 [CP 42])

At trial, conflicting testimony was introduced regarding when the Landlord gave the Tenant a key to the premises. Joshua Klakring testified he provided keys to Sergio Tostado, one of the individuals who was part of T&A Food Service, in November, 2005, before the lease was signed. (VRP 75, li. 17-25; 149, li. 15 – 150, li. 11) Mr. Tostado denied having received the keys at that time, testifying they were not given to him until January 2006. (VRP 186, li. 13 – 25; 188, li. 22-25) The trial court

⁴ Throughout the trial, the parties used the terms triple net charges and Common Area Maintenance (“CAM”) charges interchangeably to refer to the charges to the Tenant for costs to which all tenants contribute, including garbage service, taxes, and insurance. *See, e.g.*, PE 80 at 1.

specifically stated it was making no finding as to when the keys were provided to the Tenant. (CP 254)

After the lease was signed, the Tenant questioned whether the space was actually 1,250 square feet. Joshua Klakring testified at trial that he and Mr. Tostado then measured the space together and determined it was 1,167 square feet. (VRP 51, li. 1 – 8) Based upon the new measurement, the rent was adjusted to \$2,139.50 per month and the triple-net charge was reduced from \$415 to \$389. (VRP 50, li. 18 – 25)

B. Mold Problem

After the Tenant took possession of the premises, it began to perform the work required to make the space usable as a teriyaki restaurant. At some point before May 31, 2006, Mr. Tostado called Josh Klakring and told him there was mold in the building. Conflicting testimony was presented at trial regarding the timing of the initial report and extent of the mold when initially reported. Josh Klakring testified Mr. Tostado called him in April 2006 and told him there was mold on the ceiling. (VRP 54, li. 4 – 17) Mr. Klakring went to the building and observed “Green spots, black, and very tiny.” (VRP 54, li. 15) He testified that Mr. Tostado offered to spray it with bleach. (VRP 54, li. 19-20) Mr. Klakring agreed and told Mr. Tostado to let him know “immediately” if the bleach did not work. (VRP 54, li. 21-22) Mr.

Klakring testified that, on May 31, 2006, Mr. Tostado called him again and said the mold problem had gotten significantly worse. (VRP 54, li. 25 – 55, li. 4) Mr. Klakring testified his wife went to the premises to inspect the situation and took pictures of the mold. (VRP 55, li. 8 - 10) He stated that, when he saw the pictures he was shocked by the extent of the problem and upset that Mr. Tostado had not called him sooner. (VRP 155, li. 11 – 21)

In contrast, Mr. Tostado testified he reported the mold problem in February 2006. (VRP 208, li. 19 – 24) He said Mr. Klakring told him he would take care of it, but did nothing. (VRP 209, li. 1 – 2) Mr. Tostado testified he did not meet with Mr. Klakring in April regarding the mold, but the person installing the hood in the kitchen did. (VRP 209, li. 3 – 9) He agrees he reported the problem again in May. (VRP 209, li. 13 – 15) The trial court made no findings regarding when the mold was reported or the extent of the mold as initially reported. (CP 253 – 260)

Ashley Klakring ultimately retained a professional service to remediate the mold. Mr. Klakring testified it took the service six days to remediate the mold in the Tenant's space. (VRP 165, li. 13 – 16) Mr. Tostado testified that, while the service was remediating the mold in the Tenant's space and the rest of the building, they worked from the Tenant's space and the remediation took a month. (VRP 210, li. 3 – 211, li. 4) The

trial court found the mold remediation “was actually a problem of approximately twenty days’ duration.” (CP 256, li. 3 – 5)

C. Disputes Over Rent and CAM

Between April and August, the parties were involved in multiple disputes about the late payment of rent (PE 5 [CP 84], 8 [CP 89 - 90], and 12 [CP 95]), the amount that should be charged for CAM (PE 4 [CP 80 – 82]), and the Tenant’s failure to pay a contractor, which resulted in a Claim of Lien against the property (PE 10 [CP 92 – 93]). Concerned the Tenant’s actions would result in further negative consequences for the property, on July 27, 2006, the Landlord posted a notice that, due to a gross violation of the lease, the premises were being secured. (VRP 62, li. 7 – 63, li. 12; PE 13 [CP 96 – 98]) The Landlord had the locks changed (*Id.*) and also issued a notice of intent to terminate tenancy. (PE 13 at 3 [CP 98])

On August 1, 2006, attorney J. Michael Morgan sent Josh Klakring a letter detailing the Tenant’s position. (PE 14 [99 – 100]) Among the complaints in the letter, the Tenant asserted for the first time that the first month rent was due was April, not March. Mr. Morgan stated his clients wished to meet and settle the disputed issues. (*Id.*) Mr. Klakring responded on August 2, 2006, detailing the amounts the Landlord claimed the Tenant owed: (1) triple net charges for May, June, July, and August,

(2) rent for July and August and (3) late charges for June and July. (PE 15) The total owed was \$6,046.00. (*Id.*) In his response on August 4, 2006, in addition to addressing other items, Mr. Morgan claimed for the first time that the Tenant had no obligation to pay triple net charges. (PE 16 [CP 103 – 104]) Thereafter, the parties had further exchanges regarding various issues. (PE 17 [CP 105 – 108] and 18 [CP 109 – 110])

1. August 21, 2006 Meeting

On August 21, 2006, the parties had a meeting at a Keg Restaurant in Burien. (VRP 76, li. 12 – 17) Present were Mr. Klakring, Mr. Hossman, Mr. Tostado and Enrique Munoz. (VRP 76, li. 21 – 23) Mr. Klakring testified they discussed the disputed issues and the Tenant’s representatives believed they were entitled to a one month rental credit for the mold problem. (VRP 77, li. 1 – 4) Mr. Klakring said he and Mr. Hossman thought the Tenant should be entitled to only six days credit and offered that. (VRP 77, li. 4 – 8) He further testified the final offer the Landlord made before Mr. Hossman left the meeting was that the Landlord would give the Tenant “one week’s free rent as long as they paid everything else they owed.” (VRP 77, li. 10 – 12) Because the parties could not resolve their dispute, Mr. Hossman “became angry and left.” (VRP 77, li. 12 – 13) Mr. Klakring stayed and attempted to work things out. He testified he offered that, if the Tenant paid \$4,344 by the

following day, it would resolve all the disputes; if not, the Landlord would proceed with eviction proceedings. (VRP 77, li. 17 – 78, li. 19) Mr. Klakring testified that, while they were discussing things, he was writing notes on a piece of paper and left it on the table when he left. (PE 36 [CP 221]) He testified the Tenant did not accept the offer and the Landlord did not receive any money the following day. (VRP 81, li. 22 – 82, li. 7)

Mr. Tostado testified that, at the time of the August 21 meeting, the Tenant was current on rent through July. He testified the three free months of rent should not have been December 2005, and January and February 2006 because the Tenant did not receive the keys to the premises until January 2006. (VRP 214, li. 15 – 23) Rather, the free months were January, February, March 2006. (*Id.*) Therefore, when the Tenant paid what the Landlord believed to be rent for June, it was actually for July. (VRP 213, li. 9 – 15) With regard to the August rent the Landlord claimed was due, Mr. Tostado testified he believed the Tenant was entitled to a credit for the entire month of August due to the mold problem and the fact that the Landlord locked them out. (VRP 215, li. 18 – 24) He further testified that CAM charges were not owed for the months during which the rent was free. (VRP 216, li. 3 – 14) Therefore, although the Tenant had actually paid those charges for December, January, February and March, it had not been obligated to do so. (VRP 216, li. 10 – 11) As a

result, although the Landlord claimed CAM charges were owed for May, June, July, and August, the prior payments should have been considered payment for those months.

Mr. Tostado testified he and the Landlord did not reach an agreement when they met at the Keg in August 2006. (VRP 217, li. 9 -11) He said he and Josh agreed they were going to set up another meeting and Josh told him to “bring some money” so Josh could “convince” his father-in-law, Mr. Hossman. (VRP 217, li. 11-16)

2. September 4, 2006 Meeting

Mr. Tostado testified there was another meeting on September 4, 2006 and he brought four checks with him.⁵ (VRP 217, li. 17 – 18) He gave the checks to Mr. Klakring, who returned the keys to the premises to Mr. Tostado. (VRP 251, li. 14 – 15) However, Mr. Klakring testified that he had already returned the keys to the Tenant by leaving them with the neighboring tenant so the Tenant could pick them up; the Landlord notified Tenant’s attorney on August 7, 2006, that it had done this. (VRP 71, li. 22 – 72, li. 19) The trial court acknowledged the conflicting testimony, but made no finding as to when the keys were returned to the Tenant. (CP 256)

⁵ The checks are drawn on an account in the name of Airedigital, Inc., another business Mr. Tostado testified he owned. (VRP 226, li. 22 – 24)

Two of the checks Mr. Tostado gave to Mr. Klakring were for monthly rent of \$2,139.50 and two were in the amount of \$778.00, each representing CAM payments for two months. (VRP 217, li. 19 – 22). One rent check was dated September 4, 2006 (PE 19 at 1 [CP 111]) and the other was dated September 18, 2006 (PE 19 at 3 [CP 113]). Similarly, one of the CAM checks was dated September 4, 2006, (PE 19 at 2 [CP 112]) and the other was dated September 18, 2006 (PE 19 at 4 [CP 114]). Mr. Tostado testified the rent checks were for September and October (VRP 218, li. 7 – 9; 243, li. 14 – 15) and the other two checks were to cover all the outstanding CAM charges (VRP 220, li. 9 – 12). He stated he asked Mr. Klakring to cash the checks dated September 4 first and to wait to cash the two dated September 18, 2006. (VRP 243, li. 12 – 16)

Mr. Tostado testified he and Mr. Klakring agreed the Tenant would pay all outstanding CAM charges and the Landlord would give them credit for August's rent. (VRP 220, li. 18 – 21) He testified they also agreed July's rent had already been paid. (VRP 219, li. 22 – 24) In addition, Mr. Tostado provided conflicting testimony regarding the piece of paper Mr. Klakring had described as notes written at the August 21 meeting. First, he implied the piece of paper actually documented the agreement they had reached on September 4, 2006. (VRP 249, li. 15 – 13) He then testified the document did not state payment of the amount listed

(\$4,344) would bring them current through August. (VRP 251, li. 12 – 14) Rather, that was simply the agreement he and Mr. Klakring reached at the September 4 meeting and it is apparently undocumented. The exchange at trial regarding that point was as follows:

Q So you're saying this doesn't say, "Pay me \$4,344. Then that will get us current through August"?

A No. That's the agreement that him and I made when I gave him the four checks. He gave me the keys back. He was going to go back and talk to his father-in-law, and I was expecting an addendum back from him. Every month, him and I had a conversation back and forth since January, February, March, April, May, June, July.

(VRP 251, li. 12 – 19)

Mr. Klakring provided a different version of the September 4, 2006 meeting. He testified he told Mr. Tostado to bring some checks with him to the meeting or they would not even bother negotiating:

A I said, "If you want to meet with us again and negotiate with us again, you had better come to this meeting with some checks, and – because we're not – we're no longer willing to negotiate with you unless you put some money in front of us that gets you current or at least is an offer to get you close to being current. We're not going to continue to work with you if you don't give us some sort of payment."

(VRP 82, li. 20 – 83, li. 1) He testified the checks were for July and August rent and CAM for May through August. (VRP 87, li. 19 – 23) Therefore, the payments did not bring the Tenant current. (*Id.*)

After receiving the checks, the Landlord deposited them each on a different day. The rent check dated September 4 was deposited on September 5 (PE 19 at 1 [CP 111]; VRP 83, li. 23 – 84, li. 3), the CAM check dated September 4 was deposited on September 8 (PE 19 at 2 [CP 112]; VRP 85, li. 9 – 11), the rent check dated September 18 was deposited on September 18 (PE 19 at 3 [CP 113]; VRP 86, li. 1 – 7) and the CAM check dated September 18 was deposited on September 29 (PE 19 at 4 [CP 114]; VRP 86, li. 21 – 22). Mr. Klakring testified the different deposit dates were due to the fact that his wife had to wait to deposit each check until Mr. Tostado had confirmed there were funds in the account:

A . . . When Mr. Tostado gave me those checks, he basically said, “The first rent check is good. You can deposit that immediately.” He had post-dated the other checks, and he had also said that, you know, “I will let you know when these checks are good.” I was angry even at that, saying that the checks should be good for the day you post-dated it. That’s the agreement we have.

Although that was our, you know, feeling, I still called Mr. Tostado or my wife to make sure that those funds would be good before she made a trip to the bank to deposit those. . . .

(VRP 85, li. 14 – 24) Mr. Klakring testified this was Mr. Tostado’s general pattern and practice with regard to making rent payments. (VRP 86, li. 23 – 87, li. 3)

3. Final Rent Payment

On October 10, 2006, Mr. Tostado gave Mr. Klakring two more checks. By this time, the parties had measured the space again and determined that, due to some of the work the Tenant had done in the space, the square footage was reduced a few feet more. (VRP 51, li. 13 – 52, li. 2) The Landlord reduced the rent, but apparently not the CAM charge. Therefore, the rent check provided on October 10 was in the amount of \$2,117.00 and the CAM check was for \$770.00. (PE 21 [CP 117 – 119]) The CAM check was deposited on October 12. (PE 21 at 1; VRP 89, li. 15 – 17) However, the rent check was not deposited. Mr. Klakring testified that, when they did not hear from Mr. Tostado that there were funds in the bank, his wife contacted the bank and was told funds were not available to cover the check. (VRP 89, li. 21 – 23) He testified she contacted the bank a number of times and there were never sufficient funds to cover the check. (VRP 89, li. 24 -25) She finally tried to deposit the check on March 27, 2007, and it was returned marked “Account Closed.” (PE 21 at 2 [CP 118])

The rent check includes the notation “Oct Rent” in the memo line. (*Id.*) The other check includes the notation “For Sep & Oct CAM.” (PE 21 at 1 [CP 117]) Mr. Tostado testified he made the notations, but was mistaken when he put “Oct Rent” on the rent check because it was

actually for November's rent. (VRP 220, li. 21 – 221, li. 3) He testified there was money in the bank in October to cover that rent check. (VRP 222, li. 11 – 17) He provided no testimony as to whether sufficient funds were in the account in November. (*Id.*)

D. Eviction Proceedings

On November 6, 2006, the Landlord calculated the amount the Tenant was in arrears. Based upon the belief there were insufficient funds in the bank to cover what the Landlord believed to be the October rent check, as of November 6, 2006, the Landlord concluded the Tenant was in arrears for part of September's rent, all rent for October and November Rent, November CAM, and late charges. (PE 22 [CP 120 – 129]) At trial, the Landlord introduced into evidence a summary showing how it had determined the final amount owed was \$5,844.73. (PE 35 [CP 204 – 220]) Essentially, the Landlord calculated the total amount of rent from March 2006 at \$2,117 per month and CAM of \$389 per month. (PE 35 at 1 [CP 204]) From that amount, they deducted the total amount paid by the Tenant through November 6, 2007.⁶ (*Id.*) They then deducted credits for rent and CAM for 11 days during the time they had locked the Tenant out

⁶ The Landlord did not include in the total amount received the rent check dated October 12, 2006, that had not been deposited by the Landlord. (PE 35)

of the space and for six days for the mold remediation. To that amount, they added \$278.38 for late charges. The total due was \$5,844.73.⁷ (*Id.*)

On November 6, 2006, the Landlord posted a five-day pay rent or vacate notice and mailed a copy of it to TNA Food Service, Sergio Tostado, Air Motion (Attn: Sergio Tostado) and Jackie's Teriyaki. (PE 22 [CP120-29]) A Complaint for Unlawful Detainer was then filed. On December 20, 2006, the court issued a Writ of Restitution. (PE 29 [CP 155 – 157]) The Landlord executed on the Writ of Restitution on January 5, 2007, and regained possession of the premises. (PE 30 [CP 158 – 160]) On March 16, 2007, upon motion by the Tenant, the court vacated the Writ based upon its conclusion the Tenant had not been properly served with the complaint. (PE 31 [CP 161-62]) However, the court specifically declined to restore possession of the premises to the Tenant. (PE 31 at 1 [CP 162]) The Landlord subsequently obtained a second Writ of Restitution on May 9, 2007. (PE 33 [CP 174 – 89]) The Landlord has been in possession of the premises since it executed on the first Writ of Restitution on January 5, 2007.

IV. ARGUMENT

Pursuant to RCW 59.12.030(3), a tenant is guilty of unlawful detainer:

⁷ Due to a typographical error, the Notice showed the total amount owed as \$5,845.88). (VRP 115, li. 8 – 16)

(3) When he or she continues in possession in person or by subtenant after a default in the payment of rent, and after notice in writing requiring in the alternative the payment of the rent or the surrender of the detained premises, served (in manner in RCW 59.12.040 provided) in behalf of the person entitled to the rent upon the person owing it, has remained uncomplied with for the period of three days after service thereof. The notice may be served at any time after the rent becomes due;

Although the statute includes only a three-day notice requirement, the lease in this matter included a five-day notice provision. (PE 1 at 9 [CP 49]) The trial court found the Landlord properly served the required five-day notice to pay rent or vacate premises on November 6, 2006. (CP 258) In addition, the Tenant did not make any payments to the Landlord following the notice. Therefore, the only issue at trial was whether the Tenant was in default in the payment of rent when the notice was served. Before serving the five-day notice, the Landlord had determined the Tenant owed rent for two full months and one partial month. In contrast, the trial court concluded the Tenant owed only the November CAM charges and was, therefore, not guilty of unlawful detainer. This conclusion, however, was based upon erroneous findings of fact and conclusions of law.

The trial court erroneously concluded the Tenant was not required to begin paying rent until April 2006, as opposed to March, 2005. When that finding is set aside, the result is that the final rent check given to the

Landlord by the Tenant was for October rent, not November. Therefore, the Tenant owed rent for the full month of November at the time the five-day notice was served.

The trial court erroneously found the Landlord had failed to accept the final rent check because it did not attempt to deposit it in the bank. When that finding is set aside, the result is that the Tenant owed rent for the month of October at the time the five-day notice was served.

The trial court erroneously concluded the parties agreed in their September 4, 2006, meeting that the Landlord would waive rent for the full month of August. When that finding is set aside, the result is that the Tenant was obligated to pay partial rent in August. Therefore, when the five-day notice was served, the Tenant owed rent for two full months and one partial month, just as the Landlord had calculated.

A. **The trial court erred when it concluded the Tenant was not obligated to begin paying rent until April 2006.**

1. **The lease was valid as of December 2, 2005.**

In Finding of Fact No. 3, the trial court found “there was no valid lease between the parties until late December, and thus the first free month of rent was January, 2006, not December, 2005 as contemplated in the lease.” Although stated as a finding of fact, a finding regarding the

validity of the lease is actually a conclusion of law.⁸ It is, therefore, reviewable as such by this Court⁹ and is subject to a *de novo* standard.¹⁰

The trial court erroneously concluded the lease was not valid until late December. The Tenant signed the lease on December 2, 2005 and the lease stated it was to commence on that date. (PE 1 at 1 [CP 41]) In addition, as of December 2, the Tenant had already paid a security deposit and the first month's rent as required by the lease. The Tenant's actions were, therefore, consistent with an understanding that the lease was immediately valid.

Although the Tenant claimed it was not given keys until January 2006, the trial court expressly declined to make a finding as to when the keys to the premises were given to the Tenant. (CP 254, li. 23 – 24) Rather, the trial court based its conclusion regarding the validity of the lease entirely upon the fact that the lease was not signed by the Landlord until December 23, 2005. (CP 255, Finding of Fact No. 3) The court's reasoning is not supported by the law.

⁸ *Barnett v. Buchan Baking Co.*, 45 Wn. App. 152, 156, 724 P.2d 1077 (1986) (conclusions regarding the legal effect of actions taken by the parties are questions of law properly reviewable by the Court of Appeals).

⁹ *Woodruff v. McClellan*, 95 Wn.2d 394, 396-97, 622 P.2d 1268 (1980) (citing *Union Local 1296, Int'l Ass'n of Firefighters v. Kennewick*, 86 Wn.2d 156, 542 P.2d 1252 (1975)); *Artz v. O'Bannon*, 17 Wn. App. 421, 562 P.2d 674 (1977) (trial court's conclusion that defendants properly rescinded an earnest money agreement was a conclusion of law improperly designated as a finding of fact and was subject to review as a conclusion of law).

¹⁰ *E.g., Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

Because the lease was for a period of more than one year, it was required to be in writing under the statute of frauds as codified in RCW 19.36.010, which provides:

In the following cases, specified in this section, any agreement, contract and promise shall be void, unless such agreement, contract or promise, or some note or memorandum thereof, be in writing, and *signed by the party to be charged therewith*, or by some person thereunto by him lawfully authorized, that is to say: (1) Every agreement that by its terms is not to be performed in one year from the making thereof; . . .¹¹

There is no requirement in the statute that a contract be signed by both parties for it to be binding against one party who has signed it. As a result, when the Tenant signed the lease on December 2, 2005, the Tenant was bound by its terms. Therefore, the trial court's conclusion that, "there was no valid lease between the parties until late December, and thus the first free month of rent was January, 2006" is in error and should be vacated.

2. Regardless of when the lease became valid, the Tenant agreed its obligation to pay rent would begin on March 1, 2006.

Even if the lease were not considered valid until signed by the Landlord, the law does not prohibit parties to a lease from expressly agreeing when rent will be due, regardless of when they sign the lease.

¹¹ RCW 19.36.010 (emphasis added). See *Knight v. Am. Nat'l Bank*, 52 Wn. App. 1, 756 P.2d 757 (1988) applying RCW 19.36.010 to commercial lease.

Here, the parties expressly agreed the lease began in December, but the Tenant would be entitled to free rent for the first three months. In addition, the lease expressly designated the fourth month of the lease term as March 2006. (PE 1 at 1 [CP 41]) Therefore, even if the lease was not valid until December 23, 2005, when the Landlord signed it, the terms of the lease were clear and should be enforced as written.

In construing a written contract, the intent of the parties controls.¹²

Although the court may consider extrinsic evidence in determining the parties' intent:

Admissible extrinsic evidence does not include (1) evidence of a party's unilateral or subjective intent as to the meaning of a contract word or term, (2) evidence that would show an intention independent of the contract, or (3) evidence that varies, contradicts or modifies the written language of the contract.¹³

In the present matter, the parties' intent is clearly expressed in the lease – March 2006 was to be considered the fourth month of the lease term and the month when the obligation to pay rent was to begin. Specifically, the lease states, “Upon execution of this Lease, Tenant shall deliver to Landlord the sum of \$2,291.670 [sic] as prepaid rent, to be applied to the Rent due for the Fourth (4th, i.e. March 2006) month(s) of

¹² *Dice v. City of Montesano*, 131 Wn. App. 675, 683-84, 128 P.3d 1253 (2006) (citing *Mayer v. Pierce County Med. Bureau*, 80 Wn. App. 416, 420, 909 P.2d 1323 (1995)).

¹³ *Paradise Orchards Gen. P'ship v. Fearing*, 122 Wn. App. 507, 94 P.3d 372 (2004) (citing *Bort v. Parker*, 110 Wn. App. 561, 574, 42 P.3d 980 (2002)).

the Lease.” (PE at 1) Similarly, the Rent Rider expressly designates “Months 1 – 3” as “Dec 2 – 2/28/06.” It appears that, in reaching its conclusion the lease did not mean what it expressly stated, the trial court relied on extrinsic evidence to determine the parties’ intent with regard to the commencement date. However, any such evidence related only to the unilateral or subjective intent of the Tenant. (VRP 214, li. 12 – 215, li. 2; PE 14 [CP 99 – 100]) In addition, any evidence regarding the Tenant’s intent specifically contradicts the written language of the lease. Therefore, the trial court improperly relied on extrinsic evidence to modify the plainly stated intent of the parties, as it appeared in their written contract.¹⁴

Because the lease unambiguously shows the parties intended the first month of the lease to be December 2005, the only way January 2006 could be considered the first month is if the parties modified the terms of the lease by mutual agreement. However, there is no evidence in the record to support a finding the parties agreed to anything other than the express terms of the written lease.

“Mutual modification of a contract by subsequent agreement arises out of the intentions of the parties and requires a meeting of the minds.”¹⁵ Here, there is no evidence of a mutual intent to modify the lease to make

¹⁴ *Id.*

¹⁵ *Ebling v. Gove’s Cove, Inc.*, 34 Wn. App. 495, 499, 663 P.2d 132 (citing *Wagner v. Wagner*, 95 Wn.2d 94, 103, 621 P.2d 1279 (1980); *Hanson v. Puget Sound Navigation Co.*, 52 Wn.2d 124, 127, 323 P.2d 655 (1958)).

April 2006 the fourth month of the lease term. The only evidence presented regarding that issue shows it was unilaterally raised by the Tenant in a letter from its attorney to the Landlord on August 1, 2006, over seven months after the Tenant had signed the lease. (PE 14 [CP 99 – 100]) The mere fact that the tenant wanted the lease to be modified cannot make it so.

A finding of fact can only be upheld if there is substantial evidence to support it.¹⁶ “Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the declared premise.”¹⁷ Here, there is *no evidence* to support Finding of Fact No. 3, that “the first free month of rent was January, 2006, not December, 2005 as contemplated in the lease.” Similarly, there is no evidence to support the trial court’s conclusion, in Finding of Fact No. 3, that “the first months’ rent was not due until April, 2006.” Therefore, those portions of Finding of Fact No. 3 should be set aside. (CP 255) Similarly, Conclusion of Law No. 2 – “The parties’ lease did not commence until January 1, 2006. As a result, no rent

¹⁶ *E.g., In re Marriage of Hall*, 103 Wn.2d 236, 246, 692 P.2d 175 (1984) (citing *Trans-Canada Enters., Ltd. v. King Cy.*, 20 Wn. App. 267, 271, 628 P.2d 493 (1981); *Reitz v. Knight*, 62 Wn. App. 575, 582, 814 P.2d 1212 (1991) (citing *Staaf v. Bilder*, 68 Wn.2d 800, 803, 415 P.2d 650 (1966)).

¹⁷ *In re Marriage of Hall*, 103 Wn.2d at 246 (citing *Smith v. Shannon*, 100 Wn.2d 26, 666 P.2d 351 (1983); *Ridgeview Properties v. Starbuck*, 96 Wn.2d 716, 638 P.2d 1231 (1982)).

was due under the lease until April 1, 2006.” – must be vacated because it is premised upon the erroneous findings in Finding of Fact No. 3.

3. Because the trial court erroneously concluded rent was not due until April 2006, it also erroneously found the final rent check given to the Landlord by the Tenant was for November instead of October 2006.

When the court’s erroneous findings and conclusions regarding the commencement date of the lease are set aside, the result is that, as of November 6, 2007, the Tenant owed at least one month’s rent. Due to the erroneous findings and conclusions, the trial court treated each payment made by the Tenant as being for one month later than it actually was. Therefore, the court erred in Finding of Fact No. 10 when it found the two rent checks given to the Landlord at the September 4, 2006 meeting were for September and October. Similarly, the trial court erred in Finding of Fact No. 11 when it found “on October 10, a check for the November rent was given, but it was not cashed by the plaintiffs.”

When March 2006 is properly designated as the first month rent was due, the result is that the rent checks provided at the September 4 meeting were for July and September (the parties were still disputing what should happen with August rent). It follows the final check the Tenant gave to the Landlord was actually for October rent. Mr. Tostado even wrote that on the check itself. (PE 35 at 17 [CP 220]) Therefore, even if

the final check is treated as an actual payment (an issue discussed in section C, below), as of November 6, 2006, the Tenant still owed the Landlord rent for November.

Because the Tenant owed at least a full month's rent as of November 6, 2006, the trial court erred in Finding of Fact No. 12, when it found "that on November 6th the defendants were current under the lease except for the November CAM charge of approximately \$360.00." Similarly, the court erred in Conclusion of Law No. 5 when it held, "At the time the plaintiffs delivered the November 6, 2006 five day notice in the amount of \$5,845.88, the defendants only owed the CAM charges for the month of November of approximately \$360.00. Accordingly, the defendants were not guilty of unlawful detainer." In addition to November CAM, the Tenant owed rent for the entire month of November and, was therefore, in default under the lease.

B. The trial court erred when it found an agreement was reached at the September 4, 2006 meeting.

The third sentence of Finding of Fact No. 8 states, "The Court finds that an agreement was made at the September 4, 2006 meeting between Mr. Klakring and Mr. Tostado that the plaintiffs would waive the August rent, and in exchange Mr. Tostado and the defendants would pay

the disputed CAM charges from December, 2005 onward.” However, the evidence in the record does not support this finding.

The Tenant’s claim that CAM charges were not owed during the three free months is not consistent with the contract or the evidence. The Rent Rider expressly states that for the first three months the rent is “\$Base Rental Abatement (Pay only Triple Nets)[.]” (PE 1 at 22 [CP 62]) Even if Mr. Klakring and Mr. Tostado discussed a possible August rent credit, in return for the payment of the CAM charges owed under the express terms of the lease, there was never a meeting of the minds to modify the lease. Although Mr. Tostado stated that he and Mr. Klakring reached an agreement at the September 4, 2006 meeting, his own testimony reveals he understood there could not actually be an agreement until Mr. Hossman consented. Regarding the August 21 meeting at the Keg, Mr. Tostado testified:

Q Okay. Did you reach any final agreement at the August meeting?

A With his father-in-law, no. But we had agreed, Josh and I, *that he was going to talk to his father-in-law and that we were going to set up another meeting later.* And that’s when he said, “You should bring some money in just so I can convince my father-in-law.” His father-in-law wasn’t willing to give nothing, an inch.

(VRP 217, li. 9 – 16) Similarly, when asked whether the parties had reached an agreement at the September meeting, Mr. Tostado specifically

testified that, “He [Josh] was going to go back and talk to his father-in-law[.]” (VRP 251, li. 16) On this record, the trial court could not reasonably conclude that there was an agreement to modify the lease.

Because the trial court erred when it concluded the parties reached an agreement at the September 4, 2006, meeting, it also erred in the third and fourth sentences of Finding of Fact No. 10 when it stated, “The one check [dated September 4, 2006] for \$1,139.50 was for the September rent. The August rent was forgiven.” Conclusion of Law No. 4 is based upon the faulty findings in Finding of Fact No. 10. Therefore, the second and third sentence of that conclusion should be vacated.

When the erroneous findings regarding the September 4, 2006, meeting are set aside, the result is that, as of November 6, 2006, the Tenant owed at least partial rent for August.

C. **The trial court erred when it found the Landlord had not accepted the final rent check given to it by the Tenant.**

The trial court concluded that, because the Landlord had not attempted to deposit the final check given to it by the Tenant, it had not accepted that rent payment. (CP 258, li. 4 – 5) However, the evidence established that Mr. Tostado had a history of asking the Landlord not to deposit rent checks until Mr. Tostado advised there were sufficient funds in the account to cover the check. Mr. Klakring testified to that fact.

(VRP 86, li. 23 – 87, li. 3) In addition, the checks Mr. Tostado gave the Landlord at the September 4, 2006, meeting corroborate that testimony. The two checks dated September 4 were deposited on two different dates. (PE 19 at 1 – 2 [CP 111 – 112]) Similarly, the two checks dated September 18 were deposited on two different dates. (PE 19 at 3 – 4 [CP 113 – 114]) Most importantly, Mr. Tostado presented no evidence to refute that was his standard practice. Therefore, when the Landlord was in possession of the final rent check, as it had historically done, it waited for Mr. Tostado to call Mr. Klakring and tell him there were sufficient funds in the account to cover the check. Not receiving such a call from Mr. Tostado, the Landlord called the bank multiple times and was told each time there were insufficient funds to cover the check. (VRP 89, li. 21 – 25)

Despite this evidence, the trial court found in the third and fourth sentences of Finding of Fact No. 11 that “the best evidence the Court has in this case is that that check was good. At least it has not been proven to the Court that the check was not good.” (CP 257, li. 23 – 258, li. 2) The court apparently based its finding entirely on the following testimony from Mr. Tostado:

THE COURT: Well, just a moment. Was there money in the bank to pay the October check?

THE WITNESS: There should have been, yes.

Q (By Mr. Johns) Was it yes, there was money in the bank at that time?

A Yes, in October there was.

(VRP 222, li. 11 – 17) At best, this establishes only that the check might have been good in October. However, the five-day notice was not posted and served until November 6. There is no evidence in the record to show the account had sufficient funds in it to cover the rent check during the first five days of November. Thus, the trial court’s findings in the third and fourth sentences of Finding of Fact No. 11 are not supported by substantial evidence and should be set aside. Similarly, the court’s finding in the final sentence of Finding of Fact No. 11 that the final rent check “was tendered, but it was not apparently accepted by the plaintiffs” should be set aside.

When the erroneous findings are set aside, the result is that, as of November 6, 2006, the Tenant owed rent for October.

D. Because the trial court found the Tenant was in arrears at the time the five-day notice was posted, the Landlord was entitled to a finding the Tenant was guilty of unlawful detainer.

1. The Landlord had a good faith belief the amount listed in the five-day notice was the amount the Tenant owed.

Even if the trial court’s findings and conclusions regarding the amount owed by the Tenant are affirmed, the Landlord is still entitled to

reversal on appeal because it had a good faith belief the Tenant owed the amount listed on the five-day notice.

Our Supreme Court has held that a discrepancy between the amount stated in a notice to pay rent or vacate and the amount of rent actually found to be due during an unlawful detainer proceeding will not invalidate the proceeding.¹⁸ In *Foisy v. Wyman*, the tenant argued the entry of an unlawful detainer judgment against him was invalid for several reasons, including the fact that the amount demanded in the notice to pay rent or vacate was more than the trial court found was actually due and owing. The Supreme Court rejected that contention. The court concluded:

It appears that the plaintiff's demand for rental in the notice was in conformity with his good faith determination as to the amount of rental due, and that the defendant was not prejudiced as he could have tendered to the plaintiff the amount of rental due according to his understanding of the agreement. See C.J. Peck, *Landlord and Tenant Notices*, 31 Wash. L. Rev. 51, 61 (1956). In tendering the amount due to the plaintiff, of course, he would deduct that amount due which he believed he was relieved from paying due to the landlord's breach of his implied warranty of habitability.

We believe that under the above facts, the plaintiff's demand for rental was in substantial compliance with the statute and the fact that there was a dispute as to the amount of rent due, which was later determined contrary to the

¹⁸ *Foisy v. Wyman*, 83 Wn.2d 22, 515 P.2d 160 (1973).

plaintiff, should not invalidate the unlawful detainer proceeding.¹⁹

Similarly, in the present matter, the only conclusion supported by the evidence presented at trial is that the Landlord made a good faith determination that, as of November 6, 2006, the Tenant owed the Landlord a total of \$5,845.88. (PE 22 [CP 120 – 129]; PE 35 at 1) This amount represented full rent for October and November and partial rent for September.

The lease stated it was to commence on December 2, 2005. Therefore, the Landlord had a good faith belief it actually commenced on that date. In addition, the lease stated the first month for which rent was due was March 2006. As a result, the Landlord concluded in good faith that the first month's rent was for March 2006 and the final rent check given to it by the Tenant was for October rent, not November. Indeed, the Tenant had stated on the face of the check it was for October rent. Therefore, the Landlord had a good faith belief the Tenant had not paid rent for November.

When the Landlord called the bank on multiple occasions and was repeatedly told there were insufficient funds in the account to cover the October rent check, it concluded in good faith the Tenant had failed to pay rent for October. Moreover, the evidence shows that, when Josh Klakring

¹⁹ 83 Wn.2d at 33.

left the September 4, 2006, meeting he had not waived the August rent. At most, Mr. Klakring was going to discuss the issue with Mr. Hossman. The Landlord, therefore, had a good faith belief that, as of November 6, 2006, in addition to rent for two full months, the Tenant owed rent for another partial month.

The five-day notice also included a late charge of \$278.38. The lease includes the following provision:

If any sums payable by Tenant to Landlord under this Lease are not received by the fifth (5th) day of each month, Tenant shall pay Landlord in addition to the amount due, for the cost of collecting and handling such late payment, an amount equal to the greater of \$100 or five percent (5%) of the delinquent amount. . . .

(PE at 3 [CP 43]) The Landlord had determined the Tenant owed \$5,567.650. Based upon the late charge provision in the lease, the Landlord had a good faith belief it was entitled to a late charge of 5% of that amount or \$278.38.

Because the Landlord had made a good faith determination regarding the amount owed by the Tenant, the fact that the trial court concluded the Tenant owed only November CAM charges does not invalidate the Tenant's status as one who is guilty of unlawful detainer. Under the terms of the lease, CAM charges constitute rent. (PE 1 at 2 [CP 42]) Therefore, as of November 6, 2006, the Tenant was in default in the

payment of rent and failed to pay after receiving notice from the Landlord and the Landlord was entitled to a judgment in its favor.

2. The Landlord did not waive its right to pursue an unlawful detainer action by its prior acceptance of late payments.

The trial court's finding in Finding of Fact No. 12 that the Tenant was not guilty of unlawful detainer when it owed only November CAM charges was based, in part, on the fact that the Landlord had previously accepted late payments from the Tenant. (CP 258) However, the lease included the following non-waiver provision:

24. NON-WAIVER. Landlord's waiver of any breach of any term contained in this Lease shall not be deemed to be a waiver of the same term for subsequent acts of Tenant. The acceptance by Landlord of Rent or other amounts due by Tenant hereunder shall not be deemed to be a waiver of any breach by Tenant preceding such acceptance.

(PE 1 at 11 [CP 51] [emphasis in original]) When this provision is considered in light of the parties' actual dealings, the result is that there could be no finding that the Landlord's prior acts constituted a waiver of its right to insist on timely payments under the lease.

A 'waiver' is the intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right. The person against whom a waiver is claimed must have intended to relinquish the right, advantage, or benefit, and his actions must be

inconsistent with any other intention than to waive them.²⁰

In addition, when there is no evidence the parties expressly agreed to a waiver, there must be “unequivocal acts or conduct . . . evincing an intent to waive.”²¹ Here, no evidence was presented at trial showing unequivocal acts or conduct by the Landlord that it intended to waive its right to insist on timely payment under the lease. While it is true the Tenant had routinely made late payments, the Landlord did not ignore those acts. Rather, it had previously posted notices and wrote letters informing the Tenant it must cure its breaches of the lease. (PE 5 [CP 84], 8 [CP 89 - 90], and 12 [CP 95]) In addition, as previously discussed, the Tenant was aware Mr. Hossman was not inclined to ignore its prior delinquent behavior. These facts, coupled with the express non-waiver provision in the lease, establish that the Landlord did not waive its right to insist on timely payment of the CAM charges. Therefore, the trial court erred when it concluded the Landlord’s prior acceptance of late payments precluded the Tenant from being in default when it had failed to pay the November CAM charges in a timely manner.

²⁰ *Birkeland v. Corbett*, 51 Wn.2d 554, 565, 320 P.2d 635 (1958) (citing *Bowman v. Webster*, 44 Wn.2d 667, 269 P.2d 960 (1954)).

²¹ *Id.* (citing *Surry v. Baker*, 132 Wash. 188, 231 P. 791 (1925)).

E. The Landlord is entitled to a judgment in its favor and an award of attorney fees incurred in the proceeding below.

“In an unlawful detainer action, the court may do only two things, either dismiss the action or grant judgment for the plaintiff[.]”²² When the trial court’s erroneous findings and conclusions are set aside, the only conclusion supported by the evidence is that the court should have granted judgment for the Landlord. The Tenant was in default when the five-day notice to vacate or pay rent was served and the it did not cure that default. Therefore, the Tenant was guilty of unlawful detainer.

Pursuant to RCW 59.12.170, the court “shall assess the damages occasioned to the plaintiff by . . . unlawful detainer” and “find the amount of any rent due[.]” The statute then requires that “judgment shall be rendered against the defendant guilty of the . . . unlawful detainer for twice the amount of damages thus assessed and of the rent, if any, found due.” This has been the language of the unlawful detainer statute for at least 100 years.²³ The Supreme Court has concluded the provision leaves no room for discretion and that a doubling of an award entered in favor of the Landlord is mandatory.²⁴

²² *Snuffin v. Mayo*, 6 Wn. App. 525, 528, 494 P.2d 497 (1972) (citing *Sundholm v. Patch*, 62 Wn.2d 244, 382 P.2d 262 (1963)).

²³ See *Hinckley v. Casey*, 45 Wash. 430, 430-31, 88 P. 753 (1907).

²⁴ *Armstrong v. Burkett*, 104 Wash. 476, 479 – 80, 177 P. 333 (1918) (and cases cited therein).

In *Queen v. McClung*, the court held the provision “clearly requires the doubling of all unpaid rent, whether it accrues before or during the period the tenant is found to be in unlawful detainer.”²⁵ The amount that should be doubled here includes the amount due at the time five-day notice was posted (\$5,844.73), plus rent for the month of December when the Tenant was still in possession of the premises (\$2,117.00).

In addition, the Landlord is entitled to an award of its attorney fees incurred in the proceedings below. The lease includes the following provision:

27. COSTS AND ATTORNEYS’ FEES. If Tenant or Landlord engage the services of an attorney to collect monies due or to bring any action for any relief against the other, declaratory or otherwise, arising out of this Lease, including any suit by Landlord for the recovery of Rent or other payments, or possession of the Premises, the losing party shall pay the prevailing party a reasonable sum for attorneys’ fees in such suit, in mediation or arbitration, at trial, on appeal and in any bankruptcy proceeding.

(PE 1 at 11-12 [CP 52-53]) If this Court reverses the trial court’s decision, the Landlord will be the prevailing party and is, therefore, entitled under this section to an award of attorney fees incurred in the proceedings below.

²⁵ *Queen v. McClung*, 12 Wn. App. 245, 248, 529 P.2d 482 (1975). *But, see, Sprincin King Street Partners v. Sound Conditioning Club, Inc.*, 84 Wn. App. 56, 925 P.2d 217 (1996).

F. Pursuant to RAP 18.1, the Landlord requests an award of its attorney fees on appeal.

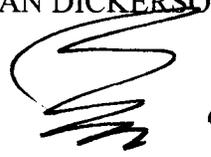
The attorney fee provision in the lease specifically states it shall apply on appeal. Therefore, if this Court reverses the trial court decision, the Landlord will be the prevailing party on appeal and will be entitled to an award of its attorney fees. Pursuant to RAP 18.1, the Landlord hereby requests an award of its fees under the terms of the attorney provision in the lease.

V. CONCLUSION

For the reasons set forth herein, the decision of the trial court should be REVERSED and judgment should be entered in the Landlord's favor, finding that the Tenant was guilty of unlawful detainer as of November 6, 2006.

Respectfully submitted this 14th day of July, 2008.

WILSON SMITH COCHRAN DICKERSON

By  

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DECLARATION OF SERVICE

The undersigned certifies that under penalty of perjury under the laws of the State of Washington that on the below date I caused the attached document to be served and filed as follows:

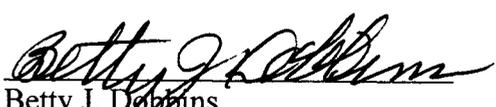
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Betty J. Dobbins