

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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No. 38109-5

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

JAMES STEWART

Appellant

vs.

TACOMA RESCUE MISSION, d/b/a
JEFFERSON SQUARE APARTMENTS

Respondent

REPLY BRIEF OF APPELLANT

NORTHWEST JUSTICE PROJECT

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I. Introduction.

In its Brief, TRM contends that by characterizing tenant conduct as a “nuisance,” landlords receiving federal subsidies under the Section 8 Moderate Rehabilitation Program (“Section 8 MRP”) can evade applicable federal law notice requirements and the state law obligation to comply with the lease. TRM is mistaken because such federal law notice requirements apply to any eviction from such properties. TRM also incorrectly claims that conduct of a residential tenant that can be remedied as an ordinary lease violation can amount to nuisance, and that alleged nuisance conduct need not occur on or about the premises. TRM erroneously claims that tenant conduct that is not drug or gang-related, did not involve a physical assault or a threat with a deadly weapon, and did not lead to an arrest can amount to nuisance. TRM is mistaken in its contention that landlords need not provide at least one notice with opportunity to cure. TRM’s acceptance of rent with knowledge of cause for forfeiture constitutes waiver as a matter of law.

II. TRM’s Request to Strike the Introduction and Other Portions of Appellant’s Brief Is Frivolous, Unsupported by Legal Authority and Must Be Denied.

TRM contends that the Introduction in Stewart’s Brief of Appellant is not authorized by the Rules of Appellate Procedure, violates the format requirements of RAP 10.3, and should be stricken because it

contains no citation to the record or to legal authority. (BR 1, 4-5)

These are frivolous contentions because RAP 10.3(a)(3) explicitly authorizes a concise introduction without the need for citations:

The brief of appellant or petitioner should contain under appropriate headings . . . A concise introduction. This section is optional. *The introduction need not contain citations to the record or authority.* (Emphasis added.)

RAP 10.3(a)(3).

TRM also contends that “even exhibits that were admitted into evidence must not be considered if the testimony explaining how the exhibits related to this case have not been placed into the appellate record or are included in the findings.” (BR 4) TRM cites no authority in support of this argument. A contention not supported by argument or citation of authority will not be considered on appeal. *In re Marriage of Wallace*, 111 Wn.App. 697, 45 P.3d 1131 (2002); RAP 10.3(a)(6).

TRM’s contention is also contrary to the plain language of the RAP. Under RAP 9.1(a) the record on review may consist of a report of proceedings, clerks papers and exhibits. Each party is “encouraged to designate only clerk’s papers and exhibits needed to review the issues presented to the appellate court.” RAP 9.6(a).

Appellant’s attorney elected not to provide a complete verbatim report of proceedings as it appeared unnecessary to decide the legal issues

presented on appeal. The only verbatim report included in the record is from February 8, 2008 when the court orally announced its decision. It was included with the clerks papers and admitted exhibits designated by Appellant. Under RAP 9.6(a) any party may supplement the initial designation of clerks papers and exhibits, and under RAP 9.2(c) any party may designate additional verbatim reports of proceedings and request that the party seeking review pay for them. Because TRM failed to do either, it cannot now contend that a verbatim report of testimony is necessary to contradict an admitted exhibit, or to place that exhibit in context.

TRM's request that portions of Stewart's Brief of Appellant be stricken should therefore be denied.

III. TRM's Contention That It is Not Required to Provide Tenants With Termination Notices that Comply With Federal Regulations and With the Lease is Meritless and Contrary to Applicable Law.

TRM contends that by the simple expedient of characterizing tenant behavior as a "nuisance" and issuing an unlawful detainer notice using that word, federally-subsidized landlords in Washington can lawfully avoid complying with federal law termination notice requirements, and also avoid complying with the state law requirement to abide by lease terms governing termination notices. (BR 5-10) This contention is without merit.

TRM claims that “in the case at hand the only requirement is to give a notice pursuant to state law.” (BR 10) TRM asserts that 24 C.F.R. § 882.511 “does not require a federal notice where there is a violation of state or local law.” (BR 10) TRM argues that the legal authority cited in the Brief of Appellant stating the well-established rule of law that termination notices in various types of federally-subsidized housing must comply with both federal and state law “flies in the face of the exact language found in 24 C.F.R. § 882.511.” (BR 9) As authority for this argument, TRM cites 24 C.F.R. § 882.511(c):

Grounds for termination of or refusal to renew the lease.
The Owner must not terminate or refuse to renew the lease except upon the following grounds: (1) Serious or repeated violation of the terms and conditions of the lease. (2) Violation of applicable Federal, State or local law. (3) Other good cause.

(BR 6-10); 24 C.F.R. § 882.511(c); *See also*, parallel provision in ¶ 9(a) of the lease. (Ex. 6)

Contrary to TRM's assertion, even though a violation of applicable state or local law may provide substantive *grounds* for lease termination under this section, there is no “exact language” stating, or even implying, that the procedural *notice* requirements set forth in following subsection, 24 C.F.R. § 882.511(d), and incorporated into ¶ 9(f) of the lease, do not apply when such a violation of state or local law is alleged. 24 C.F.R. §

882.511(c) prohibits landlords from terminating or failing to renew a tenancy except for adequate grounds, usually called “good cause.”¹ 24 C.F.R. § 882.511(c) is wholly silent on termination notice or other procedural requirements.

Contrary to the canons of statutory and regulatory construction, TRM’s argument would delete subsection (d) from 24 C.F.R. § 882.511. Under the canons of statutory construction, statutes must be read as a whole, interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous. *Lakemont Ridge Homeowners Ass'n v. Lakemont Ridge Ltd. Partnership*, 156 Wn.2d 696, 131 P.3d 905 (2006). The rules of statutory construction apply equally to agency regulations as well as to statutes. *Tesoro Refining and Marketing Co. v. Dept. of Revenue*, 164 Wn.2d 310, 190 P.3d 28 (2008). Statutory construction is a question of law reviewed de novo under the error of law standard. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 4 P.3d 123 (2000). It is a fundamental rule of construction that a statute should not be interpreted so as to render one part inoperative. *Colautti v. Franklin*, 439 U.S. 379, 392, 99 S.Ct. 675, 58 L.Ed.2d 596

¹ Similar tenant protections providing that federally-subsidized landlords cannot terminate or fail to renew a tenancy and subsidy without good cause are provided in all, or nearly all, federally-subsidized housing programs. *See e.g.*, 24 C.F.R. § 966.4(l)(2); 24

(1979). Just as they may not add words or clauses to an unambiguous statute, courts may not delete language from an unambiguous statute. *State v. J.P.*, 149 Wn.2d 444, 69 P.3d 318 (2003).

In arguing that subsection (c), which sets limits on the *grounds* for termination, also provides authorization to issue termination *notices* that only comply with state law, and not also with subsection (d) regarding notice requirements, TRM is asking the court to interpret 24 C.F.R. § 882.511 in a manner that deletes subsection (d), rendering that portion regarding termination notices meaningless and inoperative. (BR 5-10) In accepting TRM's argument and failing to apply the federal notice requirements, the trial court clearly erred.² (CP 311-312)

TRM also relies on ¶ 1.11C of its Housing Assistance Payments ("HAP") Contract with the Tacoma Housing Authority as authority for its argument that termination notices based on an alleged violation of state law need not comply with HUD requirements for termination notices set forth in 24 C.F.R. § 882.511(d) and the lease.³ (BR 5-10) ¶ 1.11C of the

C.F.R. § 247.3; 24 C.F.R. § 882.511(c); 24 C.F.R. § 880.607(b); 24 C.F.R. § 881.601; 24 C.F.R. § 883.701; 24 C.F.R. § 884.216; 24 C.F.R. § 886.328; and 24 C.F.R. § 982.310.

² In ¶ 2.3 of the Findings and Conclusions, the trial court concluded that "In terminating the Defendant's tenancy, Plaintiff must comply with 24 C.F.R. 882.511." Whereas in ¶ 2.12, the trial court concluded that "Plaintiff was entitled to rely solely upon the state law nuisance notice provision under R.C.W. 59.12.030(5). 24 C.F.R. 882.511 allows Plaintiff to proceed under State law unlawful detainer notice provisions."

³ TRM erroneously cites this provision as ¶ 1.(c).

HAP Contract provides that: “Any eviction (dispossession of the individual from the dwelling unit) must be carried out through judicial process under State and local law.” (Ex. 1)

TRM's reliance on ¶ 1.11C of the HAP Contract is also misplaced. This provision does not state, or even imply, that owners receiving federal subsidies under the Section 8 MRP are free to disregard HUD requirements and rely solely on a state law unlawful detainer notice. Instead, it prohibits non-judicial self-help evictions. It is nearly identical to 24 C.F.R. § 882.511(e):

Eviction. All evictions must be carried out through judicial process under State and local law. “Eviction” means the dispossession of the Family from the dwelling unit pursuant to State or local court action.

A similar provision prohibiting self-help evictions and requiring evictions to be carried through judicial process pursuant to state law is also included in all, or nearly all, other HUD programs. *See e.g.*, 24 C.F.R. § 247.6(a); 24 C.F.R. § 982.310(f); 24 C.F.R. 966.4(l)(4).

TRM ignores other provisions of the HAP Contract that contradict its position. For example, TRM's argument disregards the requirement that “[t]he Owner may not terminate tenancy or evict an assisted individual except in accordance with HUD requirements.” HAP Contract, ¶ 1.11B. (Ex. 1). TRM also disregards the requirement that “[t]he Owner

must comply with applicable HUD requirements, including any amendments to HUD requirements. HAP Contract, ¶ 1.4 (Ex. 1).

TRM also claims that “*Terry* does not require both a federal and state eviction notice. . . . the only requirement is to give a notice pursuant to state law.” (BR 10) In *Terry*, our Supreme Court recognized that a termination notice must comply with federal law to be effective. *Housing Authority v. Terry*, 114 Wn.2d 558, 789 P.2d 489 (1990). However, the Court held that compliance with federal law *alone* was not enough. A termination notice must *also* comply with state law. The notice in *Terry* was sufficient to comply with federal law, and would have been sufficient as a state law notice had the case been brought as an action in ejectment. *Id.* at 566. However, it was insufficient as an unlawful detainer notice. The Court held that it is possible for a landlord to provide a notice that complies with both federal and state law. *Id.* at 568.

Federal law does not preempt the notice requirements of RCW 59.12.030 because an alternate cause of action in ejectment is available . . . and because it is possible to reconcile the two acts by providing a notice which satisfies the requirements of both.

Id. at 569. A notice to terminate a federally-subsidized tenancy must fully comply with the requirements of both state and federal law, and it is possible to satisfy the requirements of both by drafting a termination notice that complies with both. *Id.*

TRM's argument disregards the Supremacy Clause and claims the primacy of Washington's Unlawful Detainer Statute over contrary provisions of federal law. TRM's argument is plainly contrary to federal law. U.S. Const. Art. VI, cl. 2; *Testa v. Katt*, 330 U.S. 386, 67 S.Ct. 810 (1947) (Where federal law is applicable, its application is mandatory in all courts, state or federal); *Rodriguez v. Westhab, Inc.* 833 F.Supp. 425 (S.D.N.Y. 1993) (State courts have the power and responsibility to consider federal defenses in all cases in which they apply, and in eviction proceedings must consider federal defenses and apply federal law.) Compliance with relevant federal statutes, administrative regulations, and administrative handbooks, is mandatory. *Blakely v. Housing Authority of King Co.*, 8 Wn.App. 204, 505 P.2d 151(1973).

TRM's argument is also manifestly contrary to state law. *Gray v. Gregory*, 36 Wn.2d 416, 218 P.2d 307 (1950) (If a notice to vacate is contrary to the terms of the lease, it is ineffective to terminate the lease.) *Community Investments, LTD v. Safeway*, 36 Wn.App. 34, 671 P.2d 289 (1983) (A notice that complies with R.C.W. 59.12.030 but is contrary to the terms of the lease regarding termination notices, does not confer unlawful detainer subject matter jurisdiction and should result in dismissal.)

A. The Notice Failed to State the Reasons for Termination With Enough Specificity.

TRM failed to provide a notice that complied with the specificity requirement of 24 C.F.R. § 882.511(d)(2) and ¶ 9(f)(2) of the lease. (Ex. 6) Where a federally-subsidized landlord fails to comply with due process and HUD regulations requiring specificity, the unlawful detainer action must be dismissed. *King County Housing Authority v. Saylor*, 19 Wn. App. 871, 578 P.2d 76 (1978).

TRM argues that its notice complies with 24 C.F.R. ¶ 882.511(c)⁴ and ¶ 9(a)(3) of the lease. (BR 8, Ex. 5, Ex. 6) TRM confuses the requirement that a federally-subsidized landlord must have “good cause” to evict with the requirement of providing an adequate notice of termination that meets the standards of due process. TRM’s argument does not address the due process specificity of notice requirements for the Section 8 MRP set forth in 24 C.F.R. § 882.511(d)(2) and ¶ 9(f)(2) of the lease which were discussed in the Brief of Appellant. (BA 16-22, Ex. 6)

TRM attempts to distinguish *Saylor* on the ground that Housing Authority of King County is a government agency whereas TRM is a private entity. (BR 9) While it is undoubtedly true that there are substantial differences between the Conventional Public Housing program involved in

⁴ TRM mistakenly cites to 24 C.F.R. §882.5(c).

Saylors and the Section 8 MRP involved here, any differences with respect to their regulatory requirements for specificity of notice are insignificant. Due process notice requirements for conventional public housing tenants include the requirement that “the notice of lease termination to the tenant shall state specific grounds for termination.” 24 C.F.R. §966.4(1)(3)(ii). The due process notice requirements for tenants assisted under the Section 8 MRP involved here include that “the notice of termination must: (i) state the reasons for such termination with enough specificity to enable the Family to prepare a defense.” 24 C.F.R. § 882.511(d)(2). These minor differences provide no basis on which to distinguish the holding in *Saylors*.

Due process protections apply when a housing authority seeks to evict a conventional public housing tenant because a housing authority is a government entity. *See e.g. Saylors and Terry*. In the wake of the U.S. Supreme Court’s landmark decision in *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011(1970), courts determined that due process must be afforded to public housing tenants before they are evicted.⁵ Due to the interdependence of private federally-subsidized landlords with the federal government and the extent of the federal subsidies, courts have also extended due process protections to federally-subsidized privately-owned

housing.⁶ The 9th Circuit Court of Appeals held that even applicants for Section 8 programs possess a sufficient property interest to entitle them to due process protections. *Ressler v. Pierce*, 692 F.2d 1212 (9th Cir. 1982).

In the Section 8 MRP, these due process protections, including the right to adequate notice stating the reasons for termination with specificity, are incorporated into the federal regulations at 24 C.F.R. 882.511 and into the lease.

In addition to *Saylors*, numerous other courts around the country have held that when a federally-subsidized landlord, whether a housing authority or a private owner, fails to provide a notice with requisite specificity, the eviction lawsuit must be dismissed. The required specificity includes names, dates, and places where alleged misconduct occurred. A number of other courts have applied this principle in the context of a housing authority conventional public housing eviction.⁷

⁵ *Escalera v. New York City Housing Authority*, 425 F.2d 853 (2d Cir.1970), cert. denied, 400 U.S. 853, 91 S.Ct. 54 (1970); *Caulder v. Durham Housing Authority*, 433 F.2d 988 (4th Cir. 1970), cert. denied, 401 U.S. 1003, 91 S.Ct. 1228 (1971).

⁶ See e.g. *Joy v. Daniels*, 479 F.2d 1236 (4th Cir. 1973); *McQueen v. Druker*, 317 F.Supp. 1122 (D.Mass. 1970), *affirmed*, 438 F.2d 781 (1st Cir. 1971); *Appel v. Beyer*, 39 Cal.App.3d Supp. 7 (1974); *Lopez v. Henry Phipps Plaza S. Inc.*, 498 F.2d 937 (2d Cir. 1974).

⁷ See e.g., *Cuyahoga Metropolitan Housing Authority v. Younger*, 93 OhioApp.3d 819, 639 N.E.2d 1253 (1994); *Escalera v. New York City Housing Authority*, 425 F.2d 853 (2nd Cir.1970), cert. denied, 400 U.S. 853, 91 S.Ct. 54 (1970); *Housing Authority of DeKalb Co. v. Pyrtle*, 167 Ga.App. 181, 183, 306 S.E.2d 9 (1983).

Many courts have also applied this principle in various types of privately-owned, project-based, federally-subsidized housing.⁸ Courts have also applied this same principle to termination notices in privately-owned, federally financed Section 8 MRP that is at issue in this case. *See, e.g. Nealy v. Southlawn Palms Apts.* 196 S.W.3d 386 (Tex.App. Houston 2006). There, the Court held that the termination notice failed to comply with the specificity requirement of 24 C.F.R. 882.511.⁹

The notice that TRM issued to Mr. Stewart was similarly deficient in specificity. (Ex. 5) It was vague, conclusory and failed to state the reasons for the termination with enough specificity to enable him to prepare a defense. (Ex. 5) The notice failed to identify time, date or place of any of the alleged incidents and failed to identify any alleged victim. (Ex. 5) The trial court therefore erred when it failed to dismiss this case due to inadequacy of notice.

⁸ *Swords to Plowshares v. Smith*, 294 F.Supp.2d 1067 (9th Cir. 2002); *Pleasant Hill Estates Associates v. Milovich*, 33 Pa. D. & C. 4th 74 (1996); *Moon v. Spring Creek Apartments*, 11 S.W.3d 427 (Tex.App. 2000); *Associated Estates Corp. v. Bartell*, 492 N.E.2d 841, 24 Ohio App. 3d 6 (1985).

⁹ Courts have also applied the same due process specificity of notice requirements in the context of a housing authority's termination of a Section 8 Housing Choice Voucher participant's housing subsidy. *See, e.g. Driver v. Housing Authority of Racine County*, 289 Wis.2d 727, 713 N.W.2d 670 (Wis. App. 2006); *Edgecomb v. Housing Authority of the Town of Vernon*, 824 F. Supp. 312 (D. Conn. 1993).

B. The Notice Fails to State the Date On Which the Tenancy Shall Terminate.

TRM contends that because no unlawful detainer notice provision of R.C.W. 59.12.030 requires the termination notice to state explicitly the date when the tenancy terminates, it need not comply with the unambiguous requirement of 24 C.F.R. § 882.511(d)(1) (incorporated into the lease at ¶9(f)(1)) that any termination notice must explicitly state the date the tenancy terminates. (BR 6-7); 24 C.F.R. § 882.511(d)(1); Lease ¶9(f)(1) (Ex. 6); *see also*, 24 C.F.R. § 247.4(a)(1). TRM fails to distinguish the requirement to *state* the date of termination explicitly in a termination notice from the several three-day, ten-day or twenty-day notice periods provided in R.C.W. 59.12.030 for various types of unlawful detainer notices. Although R.C.W. 59.12.030 does not explicitly require landlords to state the date of termination, both 24 C.F.R. § 882.511(d)(1) and the lease ¶ 9(f)(1) require an explicitly-stated date of termination.¹⁰

Compliance with the number of days required under any of the several subsections of R.C.W. 59.12.030 alone prior to commencing an unlawful detainer action is insufficient to demonstrate compliance with

¹⁰ It is possible to satisfy the requirements of state law and federal law notice requirements by drafting a termination notice that complies with both. *Terry*, at 568-69.

federal law and the lease. TRM's argument is contrary to federal supremacy and contrary the state law requirement to comply with lease terms.

IV. TRM Did Not Meet Its Burden of Proving a Cause of Action for Nuisance Under R.C.W. 59.12.030(5).

Even if this Court is persuaded that, by issuing a nuisance notice, TRM was not obligated to follow federal notice requirements, and even if the notice was sufficient to provide jurisdiction and to allow the trial court appropriately to reach the merits, TRM failed to meet its burden of proving a nuisance.

In its Brief, TRM cites no reported Washington unlawful detainer nuisance cases in support of its arguments. This lack of cited authority is understandable. In the one hundred and nineteen years since the statutory provision, now codified at R.C.W. 59.12.030(5), was first enacted as part of Washington's Unlawful Detainer Act in 1890, Laws 1890, c. 73, §3, there have been no reported Washington unlawful detainer cases in which a three-day nuisance notice has been applied to a residential tenancy. Moreover, there have been only a handful of reported Washington unlawful detainer cases in which a three-day nuisance notice has been applied to a commercial tenancy.¹¹

For example, in *Ridpath v. Spokane Stamp Works*, 35 Wash. 320,

93 P. 416 (1908), the Supreme Court held that the operation of stamp machines on the ground floor of a hotel that vibrated and shook the entire building and was extremely noisy, constituted a nuisance that the landlord/hotel owner could abate by terminating the tenancy with a three-day nuisance notice. *See also, Spokane Stamp Works v. Ridpath*, 48 Wash. 370, 93 P. 533 (1908); *But see, Jurek v. Walton*, 135 Wash. 105, 236 P. 805 (1925) (noise and vibrations from meat market's refrigeration plant was not a nuisance as between landlord and tenant where lease authorized use of premises as meat market and use of refrigeration was ordinary and usual equipment in that business).

TRM correctly points out that R.C.W. 59.12.030(5) has no language restricting evictions under that provision to commercial tenancies. Nevertheless, *Ridpath* and other Washington precedent on nuisance in a landlord-tenant setting suggests that a very substantial interference with the landlord's ability to use the property is required.

Moreover, our Supreme Court recognizes that “*none* of the provisions of RCW 59.12.030 seem to address *behavior* of tenants,” (emphasis added) including the nuisance under subsection (5). *Terry*, at 569. Such matters are best addressed by the legislature. *Id.*

¹¹Some cases brought under R.C.W. 59.12.030(5) involve waste or unlawful business activity rather than nuisance.

Since *Terry*, the legislature has amended the RLTA so that certain *behaviors* of a residential tenant are statutory grounds for commencing an unlawful detainer action, possibly under R.C.W. 59.12.030(5), for example, engaging in gang or drug-related activity at the premises, or being arrested for activity at the premises that entails physical assaults or the unlawful use of a deadly weapon. R.C.W. 59.18.130(6), (8) and (9). (*See*, BA 33-37) None of these behaviors were even alleged in this case.

A. **The Court's Findings Do Not Support the Conclusion That Stewart's Behavior Constituted a Nuisance On Or About the Premises.**

Under R.C.W. 59.12.030(5), a tenant can enter the status of unlawful detainer if he or she “erects, suffers, permits, or maintains *on or about the premises* any nuisance.” (Emphasis added.) The findings in ¶ 1.10 (CP 309) and ¶ 1.22 (CP 311) concerning Stewart’s demeanor during trial cannot support the conclusion that Stewart maintained a nuisance *on or about the premises*. (CP 312) The incident was in court, not on or about the premises, and was several months after the notice was issued. (Ex 5)

Similarly, none of the findings contained in ¶ 1.10 pertaining to conduct occurring prior to the commencement of Stewart’s tenancy with TRM on January 3, 2006 can support a conclusion that Stewart maintained

a nuisance *on or about the premises*.¹² The premises at issue are limited to Stewart's apartment and perhaps some portion of common areas within the building. Evidence of incidents prior to the commencement of Stewart's tenancy with TRM at distant locations cannot support a conclusion that Stewart maintained a nuisance *on or about the premises* actually at issue.

Moreover, neither the incident during trial nor any incident prior to the commencement of the tenancy were alleged in the notice (Ex 5). TRM cannot rely on grounds not specified in the notice. (*See*, BA 18-19)

Even if verbal threats by one tenant to another could amount to a nuisance rather than be considered either a lease violation or merely the subject of civil action between the individual tenants, the findings in this case do not support the conclusions that Stewart maintained such a nuisance *on or about the premises*. The trial court found that Stewart had made two verbal threats to Mr. M. in July 2007 "away from the JSA", once at Nativity House and once at New Start.¹³ (CP 309-310, ¶ 1.10, ¶ 1.15) There is no finding that Stewart made a verbal threat to Mr. M at the JSA. The trial court found Stewart made a verbal threat to Mr. B at an

¹² The eviction occurring "immediately preceding Defendant moving into the Jefferson Square Apartments" evidently occurred in 2005, not 2006, since Stewart resided at the Jefferson Square Apartments from January 3, 2006 until he was evicted in February 2008.

¹³ The reference in CP 309 ¶ 1.10 to July 2008 is mistaken. It should read July 2007, i.e. prior to the October 9, 2007 notice. *See*, ¶ 1.15.

unnamed site five or six blocks away from the JSA some time in 2006, i.e. between ten and twenty two months prior to the October 9, 2007 notice. (CP 309-310, ¶ 1.10, ¶ 1.16) The only specific threat the court found that did occur *on or about the premises* involved a perceived threat by Ms. B. in 2005 soon after Stewart moved in, and at least twenty two months prior to the October 9, 2007 notice. (CP 309, ¶ 1.10, ¶ 1.11) “[D]uring a lengthy conversation, she felt that Defendant, without saying anything overtly threatening or antagonistic, blocked her from breaking away from the conversation, causing her to feel trapped and intimidated due to Defendant’s considerable size and intensity.” CP 309, ¶ 1.10, ¶ 1.11)

In announcing his oral decision and explaining his rationale for admitting, over objection, evidence of bad acts occurring prior to the commencement of the tenancy, the trial judge acknowledged that most of the complained-of behavior did not occur on or about the premises. As he stated:

I can't use a lot of the testimony and evidence in this case as evidence of character; I can only use it as evidence of habit, and that's what I did. But what prompted me to reach the conclusion I did is that ***Mr. Parsons made a strong argument that the behavior of Mr. Stewart*** that the tenants were concerned about was behavior that ***occurred*** outside the Jefferson Square Apartments, ***outside the premises of Jefferson Square Apartments, or*** it was conduct that ***was essentially remote in time***, if it actually occurred at the Jefferson Square Apartments. And ***while he might be right about that***, Mr. Stewart, right here in the courtroom,

displayed what I believe is his habit of responding to a certain situation, and I think that proves that he has a habit of certain behavior.

(RP 6-7) The Court's findings that Stewart had a "habit of certain behavior" do not support the conclusion that Stewart maintained a nuisance *on or about the premises*.

B. TRM Cites No Authority Supporting the Notion that a Residential Tenant's Loud TV, Radio, or Voice, or Other Obnoxious Behavior is a Nuisance Rather Than an Ordinary Violation of the Lease or the RLTA.

The notice (Ex 5) alleges that noise from Stewart's TV, loud voices late at night, and slamming doors constitutes a nuisance. TRM cites no authority as to why such tenant behaviors should be considered a nuisance rather than ordinary lease violations or a violation of the RLTA. Indeed, TRM treated this as an ordinary lease violation when on January 12, 2007, it issued a ten-day comply or vacate notice stating "please keep your Radio/TV down to a reasonable level." (Ex. 10).

C. Stewart's Conduct Cannot Amount to Nuisance Because It Was Not Unlawful.

TRM argues that 24 C.F.R. §882.511(c)(2) authorizes it to evict for a violation of state law. (BR 6) The only state law that TRM alleges Stewart violated is a *procedural* unlawful detainer notice provision, RCW 59.12.030(5), providing for a three-day notice if a tenant maintains a nuisance on or about the premises. (BR 6) TRM cites the following

definition of nuisance:

Nuisance consists in *unlawfully doing an act, or omitting to perform a duty*, which act or omission either annoys, injures or endangers the comfort, repose, health or safety of others, offends decency, or unlawfully interferes with, obstructs or tends to obstruct, or render dangerous for passage, any lake or navigable river, bay, stream, canal or basin, or any public park, square, street or highway; or in any way renders other persons insecure in life, or in the use of property.

R.C.W. 7.48.120. (Emphasis added) In other words, in order for conduct to constitute a nuisance, there must be an act or failure to perform a duty that is itself unlawful. The court made no finding of fact or conclusion of law, and admitted no exhibit indicating any violation of criminal laws or civil laws, including any provision of R.C.W. 59.18.

D. A Notice With an Opportunity Cure Is Required Before a Landlord Can Evict a Residential Tenant For an Alleged Statutory Violation.

The court's findings of fact do not support the conclusions of law that Stewart can be evicted solely under R.C.W. 59.12.030(5) without regard to the state law requirement of providing at least one opportunity to correct a breach by giving a notice with an opportunity to cure. (CP 306-310) (See BA 37-43) In *Terry*, the housing authority argued that it would have been "futile" to issue a notice providing an opportunity to cure because the tenant could correct his behavior within the notice period and then subsequently engage in bad behavior. *Terry*, at 568. The Supreme

Court disagreed:

The question whether a landlord's efforts to evict under the statute may be permanently frustrated is not properly before the court at this time. Because of the deficient notice, Mr. Terry was not given an initial opportunity to correct his behavior. The Legislature has provided for a tenant to have *at least one* opportunity to correct a breach before forfeiture of a lease under the accelerated restitution provisions of RCW 59.12. Although RCW 59.12.030(4) seems to address breaches of covenants concerning physical conditions of premises, and none of the provisions of RCW 59.12.030 seem to address behavior of tenants, that is a problem best addressed by the Legislature. Judicial consideration should await an actual case of 'impossible' eviction. (Emphasis in original.)

Terry, at 568-69.

A notice with an opportunity to cure is required "if the tenant fails to comply with *any* portion of R.C.W. 59.18.130 or R.C.W. 59.18.140." (Emphasis added.) R.C.W. 59.18.180. The only exceptions to the opportunity to cure requirement are if drug-related activity is alleged (R.C.W. 59.18.180(2)), if gang-related activity is alleged (R.C.W. 59.18.180(4)), or if the tenant is arrested for physical assaults or for threats with a deadly weapon (R.C.W. 59.18.180(3)). None of these exceptions apply here.

V. **Acceptance of Rent Waives the Right to Declare a Forfeiture as a Matter of Law.**

Acceptance of rent waives a landlord's right to forfeit a tenant's lease as a matter of law. *Commonwealth Real Estate Services v. Padilla*.

___ P.3d ___, 2009 WL 1014584 (Wn.App. Div. 3). This has been the rule in Washington since at least 1891. *Pettygrove v. Rothschild*, 2 Wash. 6, 25 P. 907 (1891).

Acceptance of rent reaffirms and renews the tenancy. “The acceptance of rent *eo nomine* is ordinarily a recognition of the continuance of the tenancy, and where it is accepted after and with knowledge of the act of forfeiture by the tenant, it is a waiver of the forfeiture.” *Field v. Copping, Agnew & Scales*, 65 Wash. 359, 118 P. 329 (1911).

This century-old doctrine of Washington law, that acceptance of rent after knowledge of the grounds for forfeiture constitutes waiver, continues to be applied today.¹⁴ Most recently, in *Padilla*, the Court upheld the dismissal, on grounds of waiver, of an unlawful detainer action brought against a mobile home park tenant. ___ P.3d ___ 2009 WL 1014584. The tenant had been issued three or more fifteen-day notices to comply or vacate giving rise to a statutory cause of action for forfeiture and unlawful detainer under R.C.W. 59.20.080(1)(h). *See, Hartson Partnership v. Martinez*, 123 Wn.App. 36, 96 P.3d 449 (2004). The acceptance of rent operated as a waiver of the statutory grounds for

¹⁴ *See e.g., Stevenson v. Parker*, 25 Wn.App. 639, 608 P.2d 1296 (1980); *First Union Management, Inc. v. Slack*, 36 Wn.App 849, 679 P.2d 936 (1984); *Hwang v. McMahill*, 103 Wn. App. 945, 15 P.3d 172 (2000).

forfeiture as a matter of law. ___ P.3d ___ 2009 WL 1014584.

TRM's acceptance of August rent on August 3, 2007, waived all grounds for forfeiture of which TRM had notice or knowledge at that time. (CP 310, Ex. 21) TRM's acceptance of September rent on October 10, 2007, waived all grounds for forfeiture of which TRM had notice or knowledge at that time, and waived the October 9th notice. TRM's acceptance of rent every month prior to August, 2007 waived known grounds for forfeiture each time rent was accepted.

TRM's argument that acceptance of partial rent is not a waiver (BR 13-15) applies only in the context of monetary breaches, and not in the context of waiver of grounds for forfeiture for non-monetary statutory or lease violations. The two cases cited by TRM, *Housing Resource Group v. Price*, 92 Wn.App. 394, 958 P.2d 327 (1998) and *Hwang v. McMahill*, 103 Wn. App. 945, 15 P.3d 172 (2000), are based on pay rent or vacate notices and the tenant tendered only partial rent and still owed rent for periods prior to the notice.

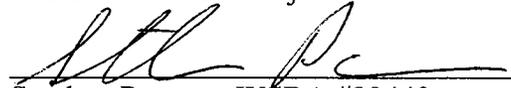
TRM's assertions that acceptance of rent was caused by Stewart's "continuous request for accommodations" and indications that he "would move voluntarily" are not supported by the findings, conclusions or citations to authority.

VI. Conclusion.

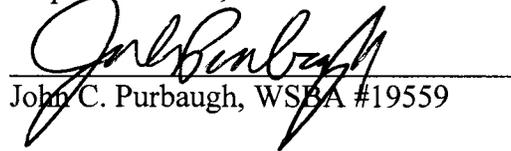
The judgment of the trial court should be reversed. The trial court's Judgment should be vacated and the action dismissed. Stewart should be restored to possession.

Dated: May 11, 2009.

James Stewart, by counsel
Northwest Justice Project



Stephen Parsons, WSBA #23440



John C. Purbaugh, WSBA #19559

CERTIFICATE OF SERVICE

I, Stephen Parsons, certify under penalty of perjury under the laws of the State of Washington that on May 11, 2009, I placed a copy of the foregoing Reply Brief of Appellant in the U.S mail, first-class postage prepaid, addressed to Everett Holum, P.S. at 633 N. Mildred Street, Suite G, Tacoma, WA 98406.

DATED this 11th day of May, 2009, at Tacoma, Washington


Stephen Parsons

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