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STATE OF WASHINGTON

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No. 43810-1-II

IN THE COURT OF APPEALS
STATE OF WASHINGTON

OLD CITY HALL, L.L.C., a Washington corporation,
Appellant,

v.

PIERCE COUNTY AIDS FOUNDATION, a Washington non-
profit corporation,
and
PEGGY FRAYCHINEAUD GROSS, ATTORNEY AT LAW, a
Washington sole proprietorship,
Respondents.

AMENDED APPELLANT'S OPENING BRIEF

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ORIGINAL

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I. INTRODUCTION AND RELIEF REQUESTED

This case arises out of two lease agreements between Appellant Old City Hall, LLC (“OCH”), as landlord, and Respondents, tenants Pierce County AIDS Foundation (“PCAF”) and Peggy Fraychineaud Gross (“Ms. Gross”), for the occupancy of premises located at 625 Commerce St., Tacoma, WA 98402 (the “Premises”). When PCAF and Ms. Gross abandoned their leased premises before the end of their lease terms, OCH sued them for breach of lease and damages. As an affirmative defense to OCH’s claims, PCAF and Ms. Gross alleged constructive eviction.

To assert the affirmative defense, a trier of fact must determine whether and when OCH had constructively evicted Respondents, and/or whether and when Respondents had waived their right to assert this defense by failing to abandon the premises in a timely manner. But instead of conducting this inquiry by evaluating all evidence at trial, the trial court granted Respondents’ motions for summary judgment on the issues involving constructive eviction. The trial court also did so without allowing OCH an opportunity to depose an essential witness, State Representative Jeannie Darnielle, who served as PCAF’s Executive Director and decision-maker during much of the relevant timeframe in this case.

The trial court erred (1) in denying OCH's motion for a continuance of the hearing date for PCAF's motion for summary judgment until after its noted deposition of Rep. Darnielle, and (2) in granting PCAF's and Ms. Gross's motions for summary judgment on liability. The Court should remand the case and allow OCH the opportunity to depose Rep. Darnielle, and order that the trial court conduct a full trial to make the appropriate findings of fact as to whether and when Respondents waived their ability to assert the defense of constructive eviction.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in denying OCH's motion for a continuance under CR 56(f) and denying OCH the opportunity to depose Rep. Darnielle.

2. The trial court erred in granting summary judgment when disputes of material fact exist regarding *whether* OCH constructively evicted Respondents.

3. The trial court erred in granting summary judgment when disputes of material fact exist regarding *when* OCH constructively evicted Respondents.

4. The trial court erred in granting summary judgment when disputes of material fact exist regarding *whether* Respondents waived their ability to assert the affirmative defense of constructive eviction.

5. The trial court erred in granting summary judgment when disputes of material fact exist regarding *when* Respondents waived their ability to assert the affirmative defense of constructive eviction.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in denying OCH's motion for a continuance under CR 56(f) and denying OCH the opportunity to depose Rep. Darnielle.

2. Whether the trial court erred in granting summary judgment when disputes of material fact exist regarding *whether* OCH constructively evicted Respondents.

3. Whether the trial court erred in granting summary judgment when disputes of material fact exist regarding *when* OCH constructively evicted Respondents.

4. Whether the trial court erred in granting summary judgment when disputes of material fact exist regarding *whether* Respondents waived their ability to assert the affirmative defense of constructive eviction.

5. Whether the trial court erred in granting summary judgment when disputes of material fact exist regarding *when* Respondents waived their ability to assert the affirmative defense of constructive eviction.

IV. STATEMENT OF THE CASE

OCH purchased the building containing the Premises in the spring of 2005, intending to convert the building into residential condominium units. CP at 3. As owner of the building, OCH became the successor in

interest to the seller's lease agreements with all the OCH tenants, including the agreement with PCAF and Ms. Gross. CP at 9-63. In the fall of 2005, OCH offered the tenants of the Premises a stipend and assistance in finding alternative space, as an inducement to them to terminate their leases. CP at 677. Many of the existing tenants accepted this offer, and vacated the Premises. *Id.* PCAF and Ms. Gross chose to remain at the Premises. CP at 363; 719.

From 2005 on, the parties engaged in ongoing discussions regarding the potential relocation for Ms. Gross and PCAF, but the parties did not reach a final agreement. CP at 295; 720-24. During 2005-2008, Rep. Darnielle served as the Executive Director of PCAF -- in this capacity, she handled the negotiations with OCH and was involved in PCAF's decision making. *Id.* Because OCH was unable to depose Rep. Darnielle before the motion's hearing date, there is a gap in the facts between 2005 and November 2007 when Mr. Wilkerson succeeded Representative Darnielle as Executive Director of PCAF.

Ms. Gross, on the other hand, began to record various alleged deficiencies with the Premises, including monitoring the building temperature, maintenance of common areas, as well as construction noise in the units being renovated. CP at 733-35. Ms. Gross found the building conditions so obtrusive that in an e-mail dated October 2, 2006, she asked OCH, "[i]s it your intent to seek to constructively evict me? This is very disturbing and it concerns me greatly that this conduct is what I have to

look forward to over the months to come unless I take some action to protect my business.” *Id.* In another e-mail dated November 28, 2006, Ms. Gross tells OCH “I regularly feel as if you are trying to make the conditions so unbearable that I just leave.” CP at 602. During these years, Ms. Gross had been actively searching for a new property for her law office. CP at 720-21. As early as 2005, Ms. Gross considered purchasing an office building with her husband, or moving to other properties in the area. CP at 728-30. She visited 10-20 properties, and decided she did not like any of them. CP at 720-21, 731. In 2006, Ms. Gross secured a new space but still refused to leave OCH unless OCH reimbursed her moving costs and other expenses. CP at 732.

In June 2007, despite all of her previous complaints about the Premises, Ms. Gross exercised her option to renew her lease in 2008 for another five years. CP at 722-24; 736. But at this point she and her husband had already purchased an office building, and had taken the first steps to prepare the property for occupancy. *Id.* On August 4, 2008, months after Ms. Gross had stopped paying rent for her occupation of the Premises, Ms. Gross wrote OCH to inform OCH that she intended to vacate the premises in October 2008. CP at 155-56. In this e-mail, Ms. Gross requested that OCH waive all unpaid rents for 2008, and pay her \$25,000 to vacate the premises and relocate. *Id.* In October 2008, OCH offered to release Ms. Gross from her lease obligations if she would pay rent owed for her occupation of the Premises in 2008. *Id.* Ms. Gross

refused and eventually vacated the building without paying her back rent. CP at 725-26. In late 2009 PCAF also vacated the Premises, and OCH brought this lawsuit for breach of contract. CP at 1-7, 391-93.

The parties engaged in some discovery proceedings including the depositions of Ms. Gross and PCAF's current director, Duane Wilkerson. During Mr. Wilkerson's deposition, it became clear that Rep. Darnielle, PCAF's then-director, had substantial knowledge of the factual basis for PCAF's constructive eviction claim. Furthermore, Rep. Darnielle had conducted much of the negotiations with OCH between 2005 and 2008. CP at 660-61. OCH sought to take the deposition of Rep. Darnielle, and made numerous efforts to accommodate both the witness's limited availability during the legislative session, and the parties' schedules. CP at 679- 701. After months of effort, OCH was able to schedule Rep. Darnielle's deposition for April 10, 2012. *Id.* All parties agreed upon this date for her deposition. *Id.*

Despite this agreement, on February 23, 2012, Respondents filed simultaneous motions for partial summary judgment on liability against OCH. CP at 94-114, 545-561. The Respondents' motions alleged OCH constructively evicted them and requested a finding of liability against OCH. *Id.* Because OCH had no opportunity to depose Rep. Darnielle before the hearing of the motion, it requested a continuance of the hearing until Rep. Darnielle could be deposed. CP at 659-88. Specifically, OCH argued it was entitled to discover what complaints PCAF had during 2005-

2007, and why it chose to stay at the building despite the supposed deterioration of the Premises and availability of other office space. *Id.* OCH argued it could not proceed without this information. *Id.*

In addition to a request for a continuance of the hearing, OCH argued material issues of fact existed as to whether and when OCH constructively evicted Respondents, and also whether and when Respondents waived their right to assert this defense by failing to abandon the Premises in a timely manner. CP at 659-668, 702-710. Because these determinations involved highly-disputed issues of fact, OCH argued these matters could not be resolved on summary judgment. *Id.*

On March 30, 2012, the Pierce County Superior Court heard oral argument on the parties' motions. CP at 765-775. At the outset, the trial court denied OCH's motion for a continuance to depose Rep. Darnielle. CP at 765-66. The trial court later granted Respondents' motions for summary judgment on liability on May 14, 2012. CP at 765-775.

Specifically, the trial court issued a letter opinion finding that OCH constructively evicted PCAF "on or about December 30, 2009," and relieved PCAF of "any and all liability to the plaintiff under the lease." *Id.* With regard to Ms. Gross's claims, the court found OCH failed to ensure quiet enjoyment of the Premises and constructively evicted Ms. Gross on September 23, 2008. *Id.*

In light of the court's finding on liability, the parties agreed a trial on the damages issue alone would be an unnecessary expenditure of time

and expense. CP at 776-89. OCH did not object to Respondents' claims for damages, and the parties submitted a stipulation in which OCH specifically reserved its right to pursue this appeal. *Id.* On July 30, 2012, the parties stipulated to damages for purposes of entry of final judgment on this matter. *Id.* OCH filed a notice of appeal of the trial court's order on August 8, 2012. CP at 790-809.

V. ARGUMENT

A. Standard of Review

On appeal from summary judgment, the standard of review is *de novo* and the appellate court performs the same inquiry as the trial court. *Mayer v. Huesner*, 126 Wn. App. 114, 120, 107 P.3d 152 (2005). Parties moving for summary judgment bear the burden of demonstrating "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." CR 56(c). In Washington, courts strictly enforce this standard, considering all the material evidence and all reasonable inferences from the evidence in the light most favorable to the nonmoving party. *Scott v. Pac. W. Mountain Resort*, 119 Wn.2d 484, 502-03, 834 P.2d 6 (1992); *Mountain Park Homeowners Ass'n v. Tydings* 125 Wn.2d 337, 341, 883 P.2d 1383 (1994). Summary judgment should be granted only if all reasonable persons could reach only one conclusion regarding the material facts. *Pac. W. Mountain Resort*, 119 Wn.2d at 502; *Teagle v. Fischer & Porter Co.*, 89 Wn.2d 149, 152, 570 P.2d 438 (1977).

**B. The Trial Court's Denial of OCH's Motion for 56(f) Continuance
Constituted a Manifest Abuse of Discretion**

A court may grant a continuance on a motion for summary judgment under CR 56(f) where a party demonstrates the existence of a material witness or evidence and shows good reason why they cannot obtain the evidence in time for the summary judgment proceeding. *Turner v. Kohler*, 54 Wn. App. 688, 693, 775 P.2d 474 (1989) (citing *Lewis v. Bell*, 45 Wn. App. 192, 196, 724 P.2d 425 (1986)). Courts may deny such motions only where: (1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party does not state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact. *Id.* (citing *Lewis*, 45 Wn. App. at 196). The trial court's denial of such a motion is reversible if it constituted a manifest abuse of discretion. *Jankelson v. Cisel*, 3 Wn. App. 139, 473 P.2d 202 (1970).

**1. There Was Good Reason for the Delay in Obtaining Rep.
Darnielle's Deposition**

Here, there was good cause for OCH's delay in obtaining Rep. Darnielle's deposition. OCH had been trying to schedule a deposition with Rep. Darnielle since November 2011. CP at 728-35. Unfortunately, given Rep. Darnielle's conflicts with the legislative session and the schedules of all three parties' counsel, the deposition was continually

delayed. *Id.* OCH, however, never abandoned its efforts, and repeatedly followed-up with both Rep. Darnielle's offices and those of PCAF's and Ms. Gross's counsel to attempt to find a time that accommodated all parties' schedules.¹ *Id.* The deposition was scheduled for April 10, 2012, and a subpoena had been served on Rep. Darnielle. *Id.* No party may claim it did not know OCH considered Rep. Darnielle's testimony to be relevant and was in the process of scheduling it.

2. The Evidence OCH Intended to Obtain was Specific and Material

After OCH approached the tenants about the possibility of terminating their existing leases, Rep. Darnielle participated on behalf of PCAF. In an e-mail from Mr. Wilkerson dated May 14, 2009, Mr. Wilkerson states "[t]here is more than ample documentation that shows PCAF was willing to move and identified several different locations." CP at 389. OCH's correspondence to PCAF also indicate that there had been negotiations in 2005-2007 to move PCAF, but these efforts were abandoned. *Id.* In another communication from PCAF dated June 3, 2009, PCAF alleges that the Premises have been "in a state of disrepair, decline, and neglect *for years*, despite the Foundation's repeated and continual complaints and requests for action," and enumerates a sample of its complaints since OCH took over the Premises in 2005. CP at 386-87.

¹ OCH had secured a date for Rep. Darnielle's deposition on January 24, 2012, and issued a notice of deposition for Rep. Darnielle. At the last minute, Rep. Darnielle had a conflict with the legislative session and had to reschedule.

(emphasis added). PCAF's own motion for summary judgment raises such issues, stating that OCH had a "long history of repeated HVAC problems," dating back to 2005. However, PCAF never specifies the reason for its decision to vacate the premises nearly four years later, in 2009.

OCH is entitled to address these complaints and explore PCAF's actions regarding the Premises -- specifically, whether and/or when OCH constructively evicted PCAF, and whether and/or when PCAF waived its right to assert this affirmative defense. As the record stands now, the only evidence relevant to these issues is Mr. Wilkerson's post-November 2007 testimony. OCH was entitled to explore the circumstances of PCAF's continued tenancy for the previous two years, particularly where PCAF alleges "years" of neglect.

In short, OCH should have been allowed to ask the decision-maker at PCAF during 2005-2007 about its decision, and the basis of that decision, to remain on the Premises despite its frequent complaints and the possibility of alternative space. Such evidence could not be more central to the parties' claims. Under these circumstances, the trial court erred in denying OCH's motion for a continuance of the hearing date for PCAF's motion for summary judgment.

**C. There are Disputed Issues of Material Fact Regarding Plaintiff
PCAF's and Ms. Gross's Waiver of Their Right to Assert
Constructive Eviction**

The trial court inappropriately assumed the role of fact-finder on motions for summary judgment. Specifically, the trial court based its legal conclusions regarding constructive eviction and waiver on a cursory citation of various evidence offered by Respondents, without addressing the issue of whether Respondents had shown their delay in vacating the Premises was reasonable where they remained in the building for years after the alleged defects became apparent. In addition, Respondents' refusal to vacate the Premises after years of numerous complaints about their conditions should be considered evidence that the Premises was fit for Respondents' needs. The trial court's legal conclusions lacked adequate factual findings and should be vacated.

Leased premises are "untenable" for purposes of constructive eviction where they are "unfit for the purpose for which they are leased." *Tucker v. Hayford*, 118 Wn. App. 246, 254 n. 8, 75 P.3d 980 (2003). The determination of whether a landlord constructively evicted a tenant is an issue for the trier of fact. *Olson v. Scholes*, 17 Wn. App. 383, 394, 563 P.2d 1275 (1977); *Fuller Market Basket, Inc. v. Gillingham & Jones, Inc.*, 14 Wn. App. 128, 135-36, 539 P.2d 868 (1975). *See generally Thompson v. R. B. Realty Co.*, 105 Wash. 376, 382, 177 P. 769 (1919); *White v. Ivy*, 63 A.D.3d 1236, 1237-38, 880 N.Y.S.2d 374 (2009) (noting that summary

judgment was not appropriate for constructive eviction cause of action due to questions of fact).²

Specifically, courts have found

[w]hether the premises are untenantable is a question of fact for the trier, to be decided in each case after careful consideration of the situation of the parties to the lease, the character of the premises, the use to which the tenant intends to put them, and the nature and extent by which the tenant's use of the premises is interfered with by the injury claimed.

Welsch v. Groat, 95 Conn. App. 658, 662-63, 897 A.2d 710 (2006)(citation omitted). See e.g. *Sengul v. CMS Franklin, Inc.*, 265 P.3d 320, 323-24 (Alaska 2011) (affirming trial court's findings regarding whether and when landlord's actions constituted constructive eviction of tenant); *Baum v. Ragozzino*, 23 Misc. 3d 1104(A), 2009 WL 884663 at *3 (N. Y. Sup. 2009) (finding summary judgment inappropriate because the evidence presented "questions of fact as to whether the alleged conduct of defendant's constructively evicted [tenant]"); *Townhouse Co. v. Plotkin*, 12 A.D.3d 269, 269, 784 N.Y.S.2d 365 (2004) (affirming denial of motion for summary judgment on constructive eviction claim, noting that the parties' acts were subject to the trier of facts); *Melbourne Leasing Co. v. Jack LaLane Fitness Ctrs., Inc.*, 211 A.D.2d 765, 767, 621 N.Y.S.2d 682

² There is a dearth of Washington state case law on the issue of constructive eviction and waiver. But the parties' claims of constructive eviction and waiver are based on common law principles paralleled in other states. As such, OCH cites case law from other states as persuasive authority to supplement this brief.

(1995) (“Whether a partial or constructive eviction has occurred is generally a question of fact for the trier of fact”).

Tenants waive their right to treat a landlord’s actions as constructive eviction if they decide to remain in possession of the leased premises. *Draper Mach. Works, Inc. v. Hagberg*, 34 Wn. App. 483, 486, 663 P.2d 141 (1983). The reasonableness of a tenant’s delay in vacating the premises “is generally a question of fact.” *JMB Props. Urban Co. v. Paolucci*, 237 Ill. App. 3d 563, 566-67, 604 N.E.2d 967 (1992).

To this end, courts have held:

Whether [tenant] failed to abandon the premises with reasonable promptness after the [landlord’s] alleged wrongful failure to provide services and perform acts called for under the parties’ leases, and thereby waived the right to claim constructive eviction, is an issue of fact.

Joseph P. Day Realty Corp. v. Franciscan Sisters for Poor Health Sys., 256 A.D.2d 134, 135, 681 N.Y.S.2d 511 (1998) (citing *Leider v. 80 William St. Co.*, 22 A.D.2d 952, 255 N.Y.S.2d 999 (1964)). The tenant bears the burden of proof that it abandoned the premises within a reasonable time after the “untenantable condition” occurs. *JMB Properties*, 237 Ill. 3d at 566 (citing *Automobile Supply Co. v. Scene-In-Action Corp.*, 340 Ill. 196, 172 N.E. 35, 69 A.L.R. 1085 (1930)). *See also Stevan v. Brown*, 54 Md. App. 235, 241-42, 458 A. 2d 466 (1983) (noting merit of tenants’ constructive eviction claim could not be disposed of on

summary judgment because issues of fact existed regarding whether tenants waived their right to allege constructive eviction by remaining in premises); *Maki v. Nikula*, 224 Or. 180, 186, 355 P.2d 770, 91 A.L.R. 632 (1960) (holding that tenants' failure to vacate premises after 26 months was an unreasonable amount of time to allege constructive eviction because length of time showed lack of "due diligence in securing another location").

The relevant case law is instructive. For example, in *Shaker & Associates, Inc. v. Medical Technologies Group, Ltd.*, after a commercial tenant stopped paying rent in an office building, a landlord commenced an unlawful detainer and collection action for breach of the lease terms. 315 Ill. App.3d 126, 128-29, 733 N.E.2d 865 (2000). The tenant alleged as a defense constructive eviction, claiming since the landlord took possession, the building suffered from various defects, including inadequate air conditioning and heating. *Id.* at 129. The tenant also claimed several employees fell ill and the office had to close due to this problem, and the cleaning and maintenance services were inadequate throughout the term of its lease. *Id.* The tenant had stopped paying rent, but did not move out for a few months. *Id.* at 134-35.

As would have been proper here, the *Shaker & Associates* court looked to the cumulative facts as presented by both parties. Reviewing the tenant's claim of constructive eviction, the court emphasized a tenant "who does not vacate within a reasonable time . . . is considered to have

waived the landlord's breach." *Id.* at 135 (citing *Dell'Armi Builders, Inc. v. Johnson*, 172 Ill. App. 3d 144, 149, 526 N.E.2d 409 (1988)). Because the tenant bears the burden of proof to show the reasonableness of the length of time that passed before it vacated the premises, the court considered evidence "such as reliance upon promises by the landlord to repair and the time required to find a new location." *Id.* In that case, the court concluded the tenant's delay of waiting 10 months was unreasonable and it had waived the right to assert constructive eviction. *Id.*

A California court of appeals upheld the same principles in *Petroleum Collections Inc. v. Swords*, where a trial court found a landlord's failure to repair a gas station tenant's large sign on top of the station breached the tenant's covenant of quiet enjoyment, where the sign remained broken and was eventually removed. 48 Cal. App. 3d 841, 122 Cal. Rptr. 114 (1975). But the appellate court reversed the trial court's finding, based on the fact that the tenant remained in possession of the gas station for 11-months following the removal of the sign. *Id.* at 848.

1. The Court Erred In Finding OCH Liable for Constructive Eviction of PCAF Without Adequate Findings of Fact

Here, viewing the facts in favor of the nonmoving party, the court's award of summary judgment on the issue of liability was inappropriate. Reasonable minds might differ as to whether and when OCH's and Respondents' actions constituted constructive eviction from

the premises, or waiver. For four years after OCH's 2005 announcement of its intention to convert the Premises into condominiums, PCAF remained in the building. PCAF's document production points to "years" of building deficiencies and problems with maintenance and the "deplorable" conditions at the Premises; yet it failed to abandon the Premises for years. Such may constitute a waiver of its ability to plead a defense of constructive eviction.

There are issues of fact regarding whether and/or when OCH constructively evicted PCAF from the Premises. PCAF makes vague allegations regarding OCH's failure to provide consistent heating and air condition, security, cleaning services, and timely payments to utilities. But without specificity, such evidence does not prove constructive eviction. Instead, the finder of fact would need to weigh all of the cumulative evidence (including the deposition testimony of Rep. Darnielle), and determine whether PCAF has carried its burden of proving that the Premises were untenable, and if so, the precise time in the parties' four-year relationship the constructive eviction occurred. PCAF also bears the burden of proving it abandoned the Premises within a reasonable time after the supposedly "untenable" condition occurred.

These are various and multi-faceted issues for a trier of fact -- whether and/or when OCH constructively evicted PCAF, and whether and/or when PCAF waived its right to plead the affirmative defense of constructive eviction when it failed to abandon the Premises in 2005,

2006, 2007, or even in 2008. There are many issues of material fact that require a determination before the entry of a judgment would be appropriate. Specifically, the validity of PCAF's affirmative defense of constructive eviction is entirely dependent on the findings of a trier of fact, and a factual inquiry into whether its failure to abandon the Premises constitutes a waiver. The issue of whether it waived the affirmative defense by failing to abandon the Premises is inappropriate for disposition on summary judgment.

2. There Are Issues of Material Fact Regarding Ms. Gross's Failure to Vacate the Premises Within a Reasonable Time

Ms. Gross herself documented her theory that OCH had allowed the premises to fall into disrepair ever since it took possession of the building in 2005. The e-mail and factual history between the parties are rife with her complaints. In other words, she has complained of the same issues in her motion asserting constructive eviction since 2005. She had "endured" the same conditions for three years. The alleged deterioration of the Premises plateaued at some point early on; there was no final straw immediately before her departure that broke the camel's back.

Despite this, Ms. Gross renewed her lease for another five-year term to begin in 2008. Ms. Gross stopped paying rent for the Premises after April 2008; yet she remained in the Premises while she waited for renovation of her newly-purchased office building. Whether OCH had in

fact constructively evicted Ms. Gross or she alleged it as a pretext to move to the new building she had purchased, is an issue for a fact finder, as is the reasonableness of her failure to abandon the supposedly uninhabitable premises for three years. These are inappropriate issues for summary judgment.

The affirmative defense of constructive eviction requires that a tenant vacate the Premises in a reasonably prompt manner after they become allegedly uninhabitable. This defense does not permit tenants to occupy less-than-ideal premises, and then later claim no rent is owed. Ms. Gross's dislike of other available "habitable" office spaces does not allow her remain in Premises she now alleges was entirely uninhabitable. The argument that an office building that suited her particular needs did not come on the market until 2008 is meritless-- at that point she had renewed her lease term, and waived her right to assert constructive eviction.

Whether and when constructive eviction or waiver occurred are entirely fact-based inquiries. The trial court erred by acting as a fact-finder on motions for summary judgment, instead of applying the correct legal standard for determination of whether there were disputed issues of material fact. The orders granting Respondents' motions for summary judgment on liability should be vacated and the case remanded for further findings.

VI. CONCLUSION

The trial court erred by denying OCH the opportunity to depose Rep. Darnielle about PCAF's actions with regard to the lease from 2005-November 2007, and erred by preemptively granting summary judgment on the issue of liability. A trier of fact must determine whether and when OCH constructively evicted Respondents, and/or whether and when Respondents waived their right to assert this defense by failing to abandon the Premises in a timely manner. The Court should remand the case and allow OCH the opportunity to depose Rep. Darnielle, and then conduct a full trial on the merits of all claims: to make the appropriate findings of fact with regard to whether Respondents' breached their leases, whether they are liable for damages to OCH, whether and/or when OCH constructively evicted Respondents, and whether and/or when Respondents waived their ability to assert this affirmative defense by failing to abandon within a reasonable time.

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CERTIFICATE OF SERVICE

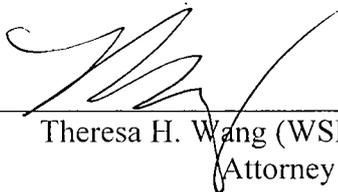
I hereby certify under penalty of perjury under the laws of the State of Washington that on the 1st day of November, 2012, I caused a true and correct copy of the foregoing document, "*Amended Appellant's Opening Brief*" to be delivered via email to the following counsel of record:

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Dated this 1st of November, 2012, at Seattle, Washington.

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