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COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

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DIVISION II  
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STATE OF WASHINGTON  
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WILLIAM HOLDNER, RANDAL HOLDNER AND HOLDER FARMS  
WASHINGTON,

Appellants,

vs.

PORT OF VANCOUVER, USA, A WASHINGTON MUNICIPAL  
CORPORATION,

Respondent.

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**RESPONDENT'S BRIEF**

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## I. INTRODUCTION

Appellants William Holdner, Randall Holdner, and Holdner Farms Washington's (collectively, "Holdner") claims for damages arising from the lawful termination of their Lease failed as a matter of law because Holdner never offered sufficient, admissible evidence to sustain the claims and because the law does not support the claims. Holdner's actions at the time of the termination, and just before Respondent Port of Vancouver, USA lawfully removed their property, are inconsistent with the damage claims. Holdner's property was destroyed as a result of their own actions and the actions of Holdner's tenant. Holdner has no cause to blame the Port under the law or the facts. The trial court correctly entered summary judgment dismissing the claims. This Court should affirm.

Holdner entered into a written lease agreement (the "Lease") under which Holdner leased land located on the Columbia River from the Port. The Lease allowed the Port a right to early termination if it deemed it necessary for future development. This Court, in a previous appeal, confirmed the Port legally terminated the Lease pursuant to the early termination clause.<sup>1</sup>

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<sup>1</sup> *Holdner Farms v. Port of Vancouver*, No. 35556-6-II (Div. II, February 5, 2008).

In this appeal, Holdner challenges the Port's actions following the Lease termination, including having Holdner removed from the premises. In particular, Holdner challenges the Port's removal of a mobile home that was left on the Port's property following the end of the Lease. Holdner also asserts that the Port directed the local public utility district to shut off electrical power to the property. Holdner alleges that silage harvested from the property rotted because a pump ceased working when the power was terminated. The evidence shows a different story: the power was terminated because Holdner and/or their tenant failed to pay the monthly utility bills for the property. Once the Port learned that the power was terminated, it immediately took steps to have it turned back on.

The Port moved for summary judgment dismissal of Holdner's breach of contract, breach of implied duty of good faith and fair dealing, and negligence claims. After a hearing on the Port's summary judgment motion, the trial court ruled that the Port did not owe any duty to Holdner to preserve the mobile home following termination of the Lease. Holdner also failed to meet their burden of showing that the Port was responsible for any loss to the silage. Holdner's claims were dismissed with prejudice. Summary Judgment in favor of the Port is appropriate and this Court should affirm dismissal of Holdner's claims.

## II. STATEMENT OF ISSUES

The Port does not assign any errors, but restates the issues on appeal as follows:

1. Unless a lease or statute provides otherwise, a party owes no duty to the other party following the lawful termination of a lease. Here, the Lease between Holdner and the Port did not place any duty on the Port, and no statute placed a duty on the Port, to preserve Holdner's property following the termination of the Lease. Did the Port owe any duty to Holdner to protect and preserve their personal property following the lawful termination of the Lease?

2. A trial court's decision to exclude hearsay evidence is reviewed to determine whether the trial court abused its discretion. Here, the trial court granted the Port's motion to strike and excluded hearsay testimony and other evidence that lacked foundation. Did the trial court abuse its discretion in refusing to admit hearsay testimony or evidence that lacked foundation?

## III. COUNTERSTATEMENT OF THE CASE

The Port offers the following counterstatement of the case.<sup>2</sup>

### A. The Port lawfully terminated the Lease with Holdner.

On November 26, 1997, Holdner entered into a written agreement

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<sup>2</sup> The Port incorporates this Court's Ruling from *Holdner Farms v. Port of Vancouver*, No. 35556-6-II (Div. II, February 5, 2008).

under which Holdner would lease land located on the Columbia River from the Port.<sup>3</sup> The Lease noted in a recital that “the Port intends eventual use of the property to be consistent with its light industrial/industrial park zoning, but such use is not anticipated for many years[.]”<sup>4</sup> The Lease contained an express provision allowing the Port the right of termination for industrial development or other Port activities.<sup>5</sup>

In the event the Port chose to terminate the Lease, the Port was required to provide Holdner with 90 days written notice and “an opportunity to remove all of its growing crops or in lieu thereof, the Port shall pay [Holdner] the value of said crops which cannot be harvested by reason of the early termination of said Lease.”<sup>6</sup>

On May 12, 2006, pursuant to Section 15 of the Lease, the Port provided notice to Holdner stating that the Port intended to terminate the Lease in 90 days.<sup>7</sup> Holdner disputed the Port’s authority to terminate and filed a lawsuit seeking a declaratory judgment and damages.<sup>8</sup> The Port ultimately filed an unlawful detainer complaint, against which Holdner

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<sup>3</sup> CP 146; 149-162

<sup>4</sup> CP 149 (some capitalization omitted).

<sup>5</sup> CP 156.

<sup>6</sup> CP 156 (some capitalization omitted).

<sup>7</sup> CP 223-224; *see also Holdner Farms v. Port of Vancouver*, No. 35556-6-II, which arose out of the Port’s unlawful detainer action (CP 225-239).

<sup>8</sup> CP 311-312.

raised affirmative defenses, and the two lawsuits were consolidated into this action.<sup>9</sup>

In that action, the trial court ruled that the Port acted within its legal rights in terminating the Lease and entered a final judgment on its ruling on November 6, 2006.<sup>10</sup> The trial court issued a writ of restitution restoring possession of the land to the Port.<sup>11</sup> This Court, in an unpublished opinion, affirmed the trial court's rulings.<sup>12</sup> Holdner is no longer challenging the Port's legal right to terminate the Lease.<sup>13</sup>

**B. Holdner failed to notify the Port that they wanted to remove the mobile home or silage from the property.**

On November 9, 2006, the Clark County Sheriff executed the writ of restitution, and the Port retook possession of the land.<sup>14</sup> The Port discovered a large number of items of property remaining on the land, even though six months had passed since the Port first provided Holdner with its lawful notice of termination.<sup>15</sup> Appellant Randy Holdner was present on the premises on that day, and, although the Port had no obligation to do so, it worked with Mr. Holdner to assemble a list

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<sup>9</sup> CP 404-406 (Unlawful Detainer Complaint); CP 426-427 (Order Consolidating Cases).

<sup>10</sup> CP 111-114.

<sup>11</sup> CP 108-110.

<sup>12</sup> CP 225-229.

<sup>13</sup> Appellant's Brief, p.2.

<sup>14</sup> CP 115-117; CP 146.

<sup>15</sup> CP 146; CP 163-164.

identifying the items of property remaining on the land that Mr. Holdner indicated they owned and wanted to remove from the Property.<sup>16</sup> The list prepared by Mr. Holdner and the Port contained many large items, including several hundred head of cattle, several trucks, an above ground diesel tank (1,000 gallon capacity), fencing materials, two tractors, and water troughs (600+ gallon capacity).<sup>17</sup>

That list was typed and delivered to Holdner's counsel with a letter from the Port's counsel dated the following day—November 10, 2006— noting that the previous day “Randy assisted the Port in identifying your clients’ property and to compile the enclosed inventory list. These items therefore reflect those items that Randy identified as belonging to Holdner Farms and that he wanted removed from the property.”<sup>18</sup> Counsel's November 10, 2006, letter enclosed a notice that the listed property would be disposed of in 45 days if it was not removed from the property.<sup>19</sup> The letter further stated that the Port was assuming that all other items not listed by Randall Holdner did not belong to them or that they did not want to keep those items.<sup>20</sup>

Mr. Holdner did not identify the mobile home or silage as property belonging to them and that they wished to remove from the premises.<sup>21</sup>

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<sup>16</sup> *Id.*; CP 167.

<sup>17</sup> CP 167.

<sup>18</sup> CP 163-164.

<sup>19</sup> CP 163-166.

<sup>20</sup> CP 163-164.

<sup>21</sup> CP 167.

Had Mr. Holdner identified the mobile home as such, the Port would not have demolished the mobile home.<sup>22</sup> Randall and William Holdner's deposition testimony was consistent with those facts. At his deposition, counsel asked Randall Holdner, "Did you ever walk through the property with anybody from the Port to identify items that Holdner Farms or you personally wanted to keep?"<sup>23</sup> Randall Holdner responded, "It's possible. I don't actually recall it, but it's possible."<sup>24</sup> And William Holdner testified that he had no personal knowledge regarding Randall Holdner's and the Port's discussions regarding Holdner property, because William Holdner was not present on the property on November 9, 2006.<sup>25</sup>

As stated above, the list of items that Mr. Randall Holdner indicated were owned by Holdner and which Holdner wanted to remove from the land *did not include* the two pieces of property at the center of this appeal—the mobile home and the silage.<sup>26</sup>

C. **After Holdner failed to identify the mobile home as their property, the Port tore it down because it was a nuisance and had no value.**

Following the execution of the writ of restitution and the walkthrough of the premises with Randall Holdner, the Port removed the mobile home because of its dilapidated condition and because Holdner

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<sup>22</sup> CP 146-147; 163-164.

<sup>23</sup> CP 278.

<sup>24</sup> *Id.*

<sup>25</sup> CP 129.

<sup>26</sup> CP 284-285.

failed to identify the mobile home as being an item that they wanted to remove.<sup>27</sup> Holdner had plenty of notice and time to remove any personal property from the premises, including the mobile home. A timeline of the events shows exactly how much notice Holdner was provided:

- **Early 2006:** Holdner denies the Port access to the property to place hydrology monitoring wells necessary for the Port's future industrial development plans.<sup>28</sup>
- **May 12, 2006:** The Port provides Holdner with a formal written notice of intent to terminate the lease in 90 days pursuant to the Lease's early termination provision.<sup>29</sup>
- **August 15, 2006:** Lease terminated pursuant to the Port's 90-day notice of termination. Holdner fails to comply with notice and remains on the property.
- **August 16, 2006:** The Port files its unlawful detainer complaint seeking a writ of restitution to restore possession of the property to the Port.<sup>30</sup>
- **November 6, 2006:** Trial court issues its final judgment holding that the Port lawfully terminated the Lease, that the Lease was terminated effective August 15, 2006, and that the Port is entitled to restoration of possession of the land.<sup>31</sup>
- **November 9, 2006:** The Clark County Sheriff executes

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<sup>27</sup> CP 147.

<sup>28</sup> CP 226-228. In early 2006, the Port's development plans required hydrology monitoring wells to be placed on the property to coordinate environmental mitigation on two parcels of the property and marine-oriented development on a third parcel. Time was of the essence, because a failure to timely sink the monitoring wells on the property would delay the Port's development and mitigation plans. Holdner refused to allow the Port to place monitoring wells on the property in 2006.

<sup>29</sup> CP 223-224; CP 156 (the early termination provision of Lease permitted the Port to terminate the Lease "at any time" the Port "needs [the property] to carry on its industrial development or other Port activities").

<sup>30</sup> CP 404.

<sup>31</sup> CP 111-114.

the writ of restitution, and the Port retakes possession of the land.<sup>32</sup>

Although six months had passed since the Port first made Holdner aware that the Lease would be terminated, and three months had passed since the actual termination date, Holdner failed to use that time to remove their personal property from the premises.

**D. The silage was destroyed because Holdner's tenant failed to pay his electricity bill.**

According to Holdner, in late November or early December 2006, well after the Lease was terminated, “a pump on the [premises] that kept wastewater from overflowing ceased operation, resulting in an overflow of wastewater that ran into the silage pit where the previously harvested [sudan grass] was stored[,]” allegedly fouling the grass such that it could no longer be used as feed for cattle.<sup>33</sup> Holdner traces the cause of the overflow of that wastewater to the disconnection of electrical power to the premises on or around December 1, 2006, which cut off electricity to the water pump.<sup>34</sup> Because Holdner failed to introduce admissible evidence to support their claim, the only admissible evidence refutes Holdner's claims.

Clark Public Utilities records confirm that power was disconnected from the property on December 1, 2006.<sup>35</sup> The Clark Public Utilities account for which service was disconnected was registered in the name of

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<sup>32</sup> CP 108-110; CP 115-117; CP 147.

<sup>33</sup> CP 432, ¶ 5.4.

<sup>34</sup> *Id.*, ¶ 5.3.

<sup>35</sup> CP 294-305.

Eduardo Ribaya, a caretaker hired by Holdner and a former subtenant of Holdner on the Port's property.<sup>36</sup> No payment had been made on that account since July 17, 2006, a month before the Port filed its unlawful detainer action, and nearly three months before the Port executed the writ of restitution to retake possession of the premises.<sup>37</sup> Clark Public Utilities disconnected electrical services to the premises because its bills had not been paid.<sup>38</sup> Contrary to Holdner's contention, the Port did not instruct Clark Public Utilities to terminate electrical services to the property.<sup>39</sup>

**E. Trial court granted Port's Motion For Summary Judgment.**

The Port moved for summary judgment on all of Holdner's claims. On March 21, 2014, the trial court entered an Order Granting Defendant Port of Vancouver's Motion for Summary Judgment and dismissed all of Holdner's claims with prejudice. Holdner filed their Notice of Appeal on April 16, 2014, appealing the trial court's granting of the Port's Motion for Summary Judgment.

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<sup>36</sup> CP 294-305.

<sup>37</sup> CP 300-305.

<sup>38</sup> CP 307-308 (noting that address subject to "credit disconnect" for failure to pay bill); *see also* CP 305.

<sup>39</sup> CP 148. In fact, when a Port employee discovered that electricity had been disconnected from the property, the Port employee called Clark Public Utilities to have electrical services restored. (*See* CP 309, noting that Port employee Todd Krout called to have power restored.)

#### IV. ARGUMENTS

A. **The summary judgment standard of review is de novo; the evidentiary ruling is reviewed for abuse of discretion.**

An appellate court reviews a summary judgment de novo.<sup>40</sup>

Summary judgment is proper when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.<sup>41</sup> An appellate court considers all facts and reasonable inferences from them in the light most favorable to the nonmoving party.<sup>42</sup>

An appellate court reviews a trial court's evidentiary rulings, such as whether to admit or exclude evidence, under an abuse of discretion standard.<sup>43</sup> A court only abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds.<sup>44</sup>

B. **The Port had no contractual obligation to preserve the mobile home or the silage.**

To survive summary judgment on its breach of contract claim against the Port, Holdner must prove "that there exists a contract imposing a duty on the [Port], and that the [Port] failed to fully perform that duty."<sup>45</sup>

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<sup>40</sup> *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004).

<sup>41</sup> CR 56(c).

<sup>42</sup> *City of Lakewood v. Pierce County*, 144 Wn.2d 118, 125, 30 P.3d 446 (2001).

<sup>43</sup> *Veit v. Burlington N. Santa Fe Corp.*, 171 Wn.2d 88, 99, 249 P.3d 607 (2011).

<sup>44</sup> *Mayer v. STO Industries, Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006); *In re Marriage of Tang*, 57 Wn. App. 648, 653, 789 P.2d 118 (1990).

<sup>45</sup> *Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 757 n 3, 162 P.3d 1153 (2007); *see also Lehrer v. The Dept. of Soc. and Health Servs.*, 101

Holdner bases their breach of contract claim on the Lease by asserting that the loss of the mobile home and the silage resulted from the Port's breach of its obligations under the Lease. The material question is whether Holdner can point to any specific contract term that the Port violated when the mobile home was demolished on November 13, 2006, nearly three months after the Lease terminated on August 15, 2006.<sup>46</sup> And, Holdner must also prove that the Port breached a contract term with regard to the silage.

Holdner's claim that the Port breached the Lease fails as a matter of law for at least two reasons. First, the damages that Holdner allege occurred *after* the Port had lawfully terminated the Lease. The Port's lawful termination of the Lease is established conclusively by the final judgment previously on November 6, 2006, in the prior unlawful detainer proceeding, which Holdner *does not challenge*. That judgment provides that the Port "was entitled by its Notice dated May 12, 2006, to terminate the Lease between the [Port] and [Holdner], effective August 15, 2006."<sup>47</sup> The judgment provides further that Holdner "ha[s] been (and continue[s] to be) in unlawful detainer of the property as of August 15, 2006," and that

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Wn. App. 509, 516, 5 P.3d 722 (2000) ("Generally, a plaintiff in a contract action must prove a valid contract between the parties, breach, and resulting damage.").

<sup>46</sup> See *Holdner Farms v. Port of Vancouver*, No. 35556-6-II (Div. II, 2008) (holding that Lease lawfully terminated on August 15, 2006, and that Holdner had been in unlawful detainer of the property since that time); see also *Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 757 n 3, 162 P.3d 1153 (2007) (noting requirement of contractual obligation to support breach of contract claim).

<sup>47</sup> CP 113.

“[t]he tenancy by which [Holdner] holds the premises . . . is terminated and the Port is restored immediate possession of the property.”<sup>48</sup>

As shown by the November 6, 2006 Judgment, the contractual relationship between the parties was extinguished not later than August 15, 2006. Accordingly, the Port simply was not subject to any contractual obligation that it could have breached at the time of the loss of the mobile home and the silage.

Holdner’s breach of contract claim fails for a second, related reason. Specifically, even assuming arguendo that the Lease was still in effect at the time of Holdner’s alleged damages, no term of that agreement obligated the Port to preserve the mobile home or the silage. Only a few provisions of the Lease are potentially relevant. First, the Lease obligated the Port to provide Holdner with 90 days’ notice of intent to terminate the Lease.<sup>49</sup> As this Court previously held, the Port complied fully with that obligation.<sup>50</sup>

Second, with regard to Holdner’s claims related to the silage, the Lease only required the Port to provide Holdner “an opportunity to remove all of [their] *growing crops* or in lieu thereof, the Port shall pay [Holdner] the value of said crops *which cannot be harvested* by reason of the early termination of” the Lease.<sup>51</sup> However, that Lease term has no

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<sup>48</sup> *Id.*

<sup>49</sup> CP 156.

<sup>50</sup> *Holdner v. Port of Vancouver*, No. 35556-6-II (Div. II, 2008).

<sup>51</sup> CP 156 (emphases added).

application to Holdner’s claims because it unambiguously applies only to “growing crops” which “cannot be harvested” as a result of early termination.<sup>52</sup> The silage—which no longer was growing because it already had been harvested—is not within the scope of that provision of the Lease (and Holdner has dropped any claim for silage that was unharvested).<sup>53</sup>

Finally, Holdner has not and cannot identify any contractual obligation that the Port had a duty to comply with in preserving the mobile home. The only Lease provision that Holdner points to is paragraph 5, which allowed them to “add[] special leasehold *improvements* . . . and other improvements on” the property, and also entitled Holdner to “remove all or any of the *improvements* placed on said property by [Holdner] upon the termination of” the Lease.<sup>54</sup>

Any reliance on paragraph 5 is misplaced for at least three reasons. First, the mobile home was *personal* property: It therefore is not an improvement within the scope of paragraph 5.<sup>55</sup> Second, paragraph 5, by its terms, applies only to “improvements *placed on said property by [Holdner]*.”<sup>56</sup> The undisputed evidence in this case is that the mobile was

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<sup>52</sup> Cf. *Condon v. Condon*, 177 Wn.2d 150, 163, 298 P.3d 86 (2013) (“Courts will not revise a clear and unambiguous agreement[.]”).

<sup>53</sup> Appellants’ Brief, p.5.

<sup>54</sup> CP 152 (emphasis added); Appellants’ Brief, p.3, ¶ 3.

<sup>55</sup> See Appellants’ Brief, pp.2-3; see also *SSG Corp. v. Cunningham*, 74 Wn. App. 708, 710, 875 P.2d 16 (1994) (distinguishing between improvements and personal property).

<sup>56</sup> CP 152 (emphasis added).

already on the property when Holdner's Lease began; the prior owner of the mobile home transferred title to Holdner Farms as a gift (according to William Holdner): Holdner did not *place* the mobile home on the property.<sup>57</sup> Third, and most importantly, the Lease between the parties was terminated as of August 15, 2006. Even assuming that paragraph 5 applied to the mobile home, that term of the Lease entitled Holdner to remove it from the property on termination; nothing in that provision suggests that Holdner was entitled to store the mobile home on the land for an indefinite period of time after the Lease—and any possessory interest that Holdner had in the property—had terminated.<sup>58</sup>

Holdner next argues that the Port had a statutory obligation to preserve the mobile home and the silage. Holdner appears to invoke RCW 59.18.310, arguing that it establishes an obligation on the part of the Port to preserve all of their personal property for 45 days after providing notice of intent to dispose of that property.<sup>59</sup> But RCW 59.18.310 is a provision of Washington's "*Residential* Landlord-Tenant Act;" that statute does not apply to commercial leases such as the one in this case.<sup>60</sup> And no authority suggests that commercial leases give rise to the obligations imposed by

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<sup>57</sup> CP 368-370 (37:13-39:13).

<sup>58</sup> CP 152.

<sup>59</sup> See Appellants' Brief, p.3, discussing the Port's 45-day notice. Holdner alleges that the Port owed a "statutory obligation" to preserve the personal property; however, no statute is cited by Holdner. The Port believes Holdner relies on RCW 59.18.310 based upon the reference in the Statement of Authorities.

<sup>60</sup> Indeed, the Lease itself expressly excludes any residential use of the premises, providing that Holdner "shall use the premises solely for agricultural and farming purposes." CP 151.

RCW 59.18.310.<sup>61</sup>

Holdner argued to the trial court that the Port took upon itself the obligations imposed by RCW 59.18.310 when it sent to them the list of property that Randall Holdner had identified as belonging to them and that they wished to have more time to remove from the property. The problem with this argument is that *neither the mobile home nor the silage was on the list*.<sup>62</sup> In other words, to the extent the Port had any obligation to store Holdner's property for 45 days, that obligation only extended to property identified by Randall Holdner as property they wished to relocate. The mobile home and the silage were not on that list—so the Port had no obligations analogous to those imposed on residential landlords by RCW 59.18.310. Holdner may argue that the items were so large or obvious that they did not need to be on the list. But such an argument fails when the list is examined and it reveals large items that are listed—including the cattle, trucks, troughs, tractors, etc.

As a matter of law, the Port had no contractual or statutory obligation to preserve the mobile home or the silage. It follows that Holdner's claim for breach of the Lease fails as a matter of law.<sup>63</sup>

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<sup>61</sup> *Cf. Parker v. Taylor*, 136 Wn. App. 524, 529, 150 P.3d 127 (2007) (acknowledging obligations imposed on *residential* landlords by RCW 59.18.312, and suggesting that no authority imposed a similar obligation prior to the enactment of the landlord-tenant act).

<sup>62</sup> CP 146 (noting walkthrough of property with Randy Holdner to identify Holdner property to be removed); CP 163-164 (letter forwarding list of property identified by Randall Holdner); *see also* CP 278, 49:2-6 (Randall Holdner testifying, "It's possible" that he walked the property with the Port to identify Holdner property, though he did not "actually recall it").

<sup>63</sup> *Cf. Jacob's Meadow Owners Ass'n*, 139 Wn. App. at 757 n 3 (noting that

C. **Holdner's claim for breach of the implied duty of good faith and fair dealing also fails because the Port had no contractual duty to preserve the mobile home or silage.**

Holdner's Complaint alleged the Port violated the implied duty of good faith and fair dealing. Holdner appears to concede this claim as they do not address it in the Appellant's Brief. Although Holdner does not devote any portion of his brief to this argument, out of an abundance of caution, the Port submits this claim also fails because of a lack of contract between the parties at the time the claims allegedly arose.

It is true that "there is a duty of good faith and fair dealing implied in all existing contracts" in Washington.<sup>64</sup> But the duty of good faith implied in every contract "does not inject substantive terms into the parties' contract or create a free-floating duty of good faith unattached to the underlying legal document."<sup>65</sup> Instead, the duty of good faith and fair dealing "exists only in relation to the performance of *specific contract terms* to which the parties have agreed."<sup>66</sup>

Holdner contended before the trial court that the loss of the mobile home and the silage resulted from a breach of contract by the Port. But Holdner cannot identify any "specific contract term[]" that obliged the

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breach of contract claim requires proof of existing contract that imposes a specific duty on the defendant).

<sup>64</sup> *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 177, 94 P.3d 945 (2004).

<sup>65</sup> *Tacoma Auto Mall, Inc. v. Nissan North America, Inc.*, 169 Wn. App. 111, 128 n 2, 279 P.3d 487 (2012) (citing *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 569-70, 807 P.3d 356 (1991); accord *Keystone Land*, 152 Wn.2d at 177).

<sup>66</sup> *Tacoma Auto Mall*, 169 Wn. App. at 128 n 2 (emphasis added) (citing *Badgett*, 116 Wn.2d at 570).

Port to preserve those items. Holdner also cannot point to any specific contract term that the Port failed to perform in good faith.<sup>67</sup> For these reasons, Holdner has no valid breach of contract (breach of the implied duty of good faith and fair dealing) claim against the Port.

**D. Holdner’s negligence claim fails as a matter of law because the Port had no independent duty to preserve the mobile home and the silage.**

“In all negligence actions the plaintiff must prove [that] the defendant owed the plaintiff a duty of care.”<sup>68</sup> “Whether a duty is owed is a question of law” for the court.<sup>69</sup> As a general matter, Washington courts have distinguished between two types of duties: (1) the duty of a defendant who engages in affirmative conduct to exercise reasonable care to protect others from unreasonable risks of harm created by the defendant’s conduct (so-called “misfeasance”); and, (2) the duty of a defendant to act when the defendant has assumed a duty of care towards another (so-called “nonfeasance”).<sup>70</sup>

At the outset, this Court has already held that the Port acted within its legal rights to terminate the Lease between the Port and Holdner, and to

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<sup>67</sup> *cf. Badgett*, 116 Wn.2d at 570 (“As a matter of law, there cannot be a breach of the duty of good faith where a party simply stands on its rights to require performance of a contract according to its terms.”).

<sup>68</sup> *Washburn v. City of Federal Way*, 169 Wn. App. 588, 610, 283 P.3d 567 (2012) (quoting *Donaldson v. Seattle*, 65 Wn. App. 661, 666, 831 P.2d 1098 (1992)).

<sup>69</sup> *Washburn*, 169 Wn. App. at 610.

<sup>70</sup> *See Robb v. City of Seattle*, 176 Wn.2d 427, 435-37, 295 P.3d 212 (2013) (discussing that distinction).

retake possession of the property.<sup>71</sup> The Port has found no Washington appellate court decision that stands for the proposition that a commercial landlord's lawful termination of a commercial lease creates any independent duty giving rise to a potential negligence claim.<sup>72</sup>

Holdner cannot rely on the Port's act of lawfully terminating the Lease as conduct giving rise to potential negligence liability. Holdner completely fails to identify any independent duty on the part of the Port to preserve the mobile home at the time that it was destroyed or to somehow have a duty to protect the silage.<sup>73</sup> Holdner appears to argue that the Port had a statutory duty pursuant to RCW 59.18.310 to preserve all of their personal property for 45 days following the termination of the tenancy on August 15, 2006. More shockingly, Holdner apparently believes that the Port had a duty to preserve their personal property long after that— as the demolition of the mobile home did not occur until nearly three months

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<sup>71</sup> *Holdner Farms v. Port of Vancouver*, No. 35556-6-II (Div. II, 2008).

<sup>72</sup> *Cf. Affiliated FM Ins. Co. v. LTK Consulting Serv., Inc.*, 170 Wn.2d 442, 449, 243 P.3d 521 (2010) (noting that damages resulting from conduct in performing a contract must also be traceable to an independent tort duty in order to be potentially actionable in negligence). The decision of the Washington Court of Appeals, Division Three, in *Parker v. Taylor*, 136 Wn. App. 524, 150 P.3d 127 (2007), is instructive on that issue. There, the court held that a provision in Washington's *Residential Landlord-Tenant Act* imposes an affirmative duty on the part of the residential landlord to store the residential tenant's personal property upon executing a writ of restitution. *See id.* at 526 (citing RCW 59.18.312(1)). Of course, that statute does not apply to leases of commercial property and, in reaching its holding in that case, the court discussed no other source of law imposing such a duty on *either* a residential or commercial landlord; in fact, the court suggested that there was no other authority on that point. *See id.* at 529 (noting that "[i]f it was ever true that the landlord had no responsibility for items [left by a residential tenant], that is no longer true," in light of the legislature's enactment of RCW 5.18.312).

<sup>73</sup> *See Washburn v. City of Federal Way*, 169 Wn. App. 588, 610, 283 P.3d 567 (2012) ("In all negligence actions the plaintiff must prove [that] the defendant owed the plaintiff a duty of care.").

after the termination of the lease (well-more than the 45 days suggested by Holdner).<sup>74</sup>

As explained above, this was a commercial lease, not a residential one; accordingly, the obligations imposed on residential landlords by RCW 59.18.310 did not apply to the Port. And even if the Port assumed a similar obligation with respect to the property listed on the notice of intent to dispose, neither the mobile home nor the silage were on that list (the Port disputes that it had any involvement with the silage being destroyed as it had no responsibility for supplying electricity to the premises). To defeat a summary judgment motion, Holdner must show a proof of duty owed by the Port to Holdner. They simply failed to do so.<sup>75</sup>

Because Holdner has identified no legal duty on the part of the Port to preserve either the silage or the mobile home after nearly three months had passed from the date the Lease was terminated, Holdner's negligence claim fails.

- 1. Holdner is estopped from asserting that the Port had an independent duty to preserve the mobile home or the silage.**

“The doctrine of equitable estoppel is grounded in the principle ‘that a party should be held to a representation made or a position assumed where inequitable consequences would otherwise result to a party who has justifiably and in good faith relied thereon.’”<sup>76</sup> Equitable estoppel is

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<sup>74</sup> CP 147.

<sup>75</sup> See *Washburn v. City of Federal Way*, 169 Wn. App. at 610 (negligence claim requires proof of duty).

<sup>76</sup> *State v. Yates*, 161 Wn.2d 714, 737, 168 P.3d 359 (2007) (quoting *Wilson v.*

properly applied where (1) a plaintiff makes a statement or performs an act which is “inconsistent with the claim afterwards asserted,” (2) the defendant took some action “on the faith of such admission, statement, or act,” and (3) the defendant would suffer injury if the plaintiff is “permit[ed] to contradict or repudiate such admission, statement, or act.”<sup>77</sup>

Undisputed facts establish that Holdner is estopped from asserting that the Port had a duty to preserve the mobile home or the silage such that the Port could be liable in negligence for the loss of those items. Holdner represented to the Port that they had no interest in the mobile home or the silage when Mr. Holdner failed to identify those items as property owned by Holdner that Holdner wanted to remove from the land when he and Mr. Coleman walked the property with the specific purpose of identifying such property.

The Port relied on Holdner’s representations. Holdner’s failure to identify the silage left the Port with *no reason* to worry about preserving the silage, or more specifically understanding what risks the silage faced (such as the risk that a flood of wastewater would foul the silage) or taking steps to prevent those risks from manifesting.<sup>78</sup> And if the Port understood that Holdner owned the mobile home and intended to remove it from the

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*Westinghouse Elec. Corp.*, 85 Wn.2d 78, 81, 530 P.2d 298 (1975)).

<sup>77</sup> *Yates*, 161 Wn.2d at 737-38 (citing *Wilson*, 85 Wn.2d at 81).

<sup>78</sup> That is not to say that the Port would have had a duty to protect against those risks if Holdner had identified the silage. The Port does not concede that it assumed *any* duties with respect to *any* of the property that Holdner failed to remove from the land, including any property identified by Randall Holdner, save the duty not to affirmatively dispose of that property for 45 days.

property, the Port would not have demolished it.<sup>79</sup>

The Port would suffer injury if Holdner is now permitted to contradict or repudiate their prior representations by pursuing their negligence claim. Namely, after Holdner led the Port to believe that Holdner had no interest in the mobile home or the silage, Holdner now seeks to recover money damages from the Port for the loss of those items of property.

In light of the foregoing undisputed facts, Holdner is estopped from asserting that the Port had an independent duty to preserve the silage or the mobile home. Holdner's negligence claim accordingly fails as a matter of law.

**2. The Port assumed no duty with respect to the silage or the mobile home, and the trial court properly excluded the hearsay evidence submitted by Holdner.**

Holdner's negligence claim for the loss of the silage fails for a second reason. Holdner asserts, and for purposes of this appeal the Port does not dispute, that the silage was fouled by wastewater, which flooded when a water pump stopped working because electrical services to the property had been disconnected.<sup>80</sup> No competent evidence supports an inference that the Port took any affirmative action to have electrical services disconnected; the opposite is true.

Holdner admits in their deposition testimony that they can point to

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<sup>79</sup> CP 147.

<sup>80</sup> Appellants' Brief, p.5; CP 432-436.

only one piece of alleged “evidence” to support their claim that the Port affirmatively took steps to have electrical services disconnected from the property. Specifically, William Holdner claims that Clark Public Utility employee Jason Hutcheson told him that the Port had instructed him to shut the power off.<sup>81</sup> When confronted with the fact that Jason Hutcheson offered no such testimony at his deposition, William Holdner asserted that Jason Hutcheson “lied” in his deposition testimony.<sup>82</sup>

Holdner’s assertion regarding what Jason Hutcheson said fails to create a genuine issue of material fact in this case. Among other reasons, William Holdner’s testimony about what Jason Hutcheson told him is inadmissible hearsay, and was properly excluded by the trial court.<sup>83</sup> Further, affirmative evidence properly admitted by the trial court shows that a Port employee took steps to have electrical services restored as soon as the Port discovered that the electricity had been disconnected.<sup>84</sup>

No evidence supports an inference that the Port assumed a duty to protect from harm the silage that Holdner had failed to remove from the property. In fact, the record suggests the opposite as Randall Holdner failed to identify the silage as property that Holdner wanted to keep and

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<sup>81</sup> CP 285 (28:6-9 making that claim); CP 288 (51:23-52:10 acknowledging that that claim is the sole evidence of affirmative conduct on the part of the Port); *but see* CP 148 (stating that the Port did not instruct Clark Public Utilities to terminate electrical services to the property.)

<sup>82</sup> CP 286, 30:6-12.

<sup>83</sup> ER 801 and 802 provide that out-of-court statements offered for their truth are generally inadmissible, and CR 56(e) requires that facts asserted in opposition to summary judgment motion must be “facts as would be admissible in evidence.”

<sup>84</sup> CP 309, 54:11-20.

remove from the land.<sup>85</sup>

The Port had no independent duty towards any of the property that Holdner failed to remove from the land.<sup>86</sup> Further, in its correspondence attaching the list of property that Mr. Randall Holdner had identified, the Port represented to Holdner *only* that the Port would not sell or otherwise affirmatively dispose of the listed property for 45 days. Accordingly, the Port did not assume any duties to protect from external harm any of the property remaining on the land, listed or otherwise. Nevertheless, to the extent that the list could be construed as an assumption of a duty by the Port to protect the listed property, the scope of the Port's assumed duty necessarily is limited to protecting the property that actually appears on the list. The silage and mobile home are not on the list. As a matter of law, the Port did not assume any independent duty with respect to the silage or mobile home, and it cannot now be held liable in negligence for its loss.

Holdner asserts just one "fact" as a basis for showing a genuine issue of material fact to defeat summary judgment: That William Holdner *was told* by Clark Public Utility (the "PUD") that the Port instructed the PUD to turn off the power, causing water to back up and damage the silage.<sup>87</sup> William Holdner admitted at his deposition that the sole piece of

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<sup>85</sup> CP 167.

<sup>86</sup> *Cf. Parker v. Taylor*, 136 Wn. App. 524, 526, 150 P.3d 127 (2007) (noting that provision of Washington's residential landlord-tenant act imposes affirmative duty on residential landlord's to store tenant's property, but suggesting that no other source of law provides for such a duty with respect to either residential or commercial leases).

<sup>87</sup> CP 38.

evidence that Holdner has to support their claims relating to the loss of the silage was what he was allegedly told by the PUD.<sup>88</sup> Unfortunately for Holdner, Mr. Holdner's testimony was excluded by the trial court as inadmissible hearsay, and it cannot form the basis for their claims.<sup>89</sup>

In the absence of that evidence, the sole admissible evidence relevant to this issue is Todd Coleman's uncontroverted representation that the Port did not, in fact, instruct the PUD to disconnect electrical services to the property.<sup>90</sup>

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<sup>88</sup> CP 288, 51:23-52:10.

<sup>89</sup> CP 390-391.

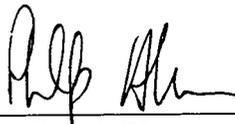
<sup>90</sup> CP 148.

V. CONCLUSION

The Port simply owed no duty, whether arising from the Lease, common law, or statutory law, to Holdner following the lawful termination of the Lease. Holdner's property was destroyed as a result of their own actions by failing to identify the mobile home as property they wanted to keep and by failing to pay their electric bill. No disputed issue of fact precludes the granting of summary judgment and dismissing Holdner's claims. The Port respectfully requests that this Court affirm the trial court's dismissal of all of Holdner's claims.

Dated: September 30, 2014

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 30th day of September 2014, I caused to be served the foregoing **RESPONDENT'S BRIEF** on the following party at the following address:

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STATE OF WASHINGTON  
BY DEPUTY

by delivering to him a true and correct copy thereof, certified by me as such, by way of U.S. Postal Service-ordinary first class mail.

  
\_\_\_\_\_  
Phillip J. Haberthur