

No. 48451-0-II

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

ROBERT HOWARD,

Appellant,

v.

PSCC, INC. d/b/a PUBLIC STORAGE; SHURGARD STORAGE
CENTERS, LLC d/b/a PUBLIC STORAGE,

Respondent,

and

JOHN DOE,

Defendant.

BRIEF OF RESPONDENT PUBLIC STORAGE

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I. INTRODUCTION

This case arises from the February 2015 public auction of property stored in respondent PSCC, Inc.'s ("Public Storage") self-service storage facility by appellant Robert Howard. After Howard defaulted on his monthly rent, Public Storage properly enforced its statutory and contractual lien by selling the contents of Howard's unit at auction.

Howard filed suit against both Public Storage and the purchaser of his unit after learning of the auction. He asserted causes of action for negligence, conversion, replevin, and civil conspiracy. Public Storage moved to summarily dismiss the claims asserted against it based on an exculpatory clause in Howard's lease/rental agreement. The trial court granted Public Storage's motion and denied Howard's motion for partial summary judgment.

Howard now appeals, arguing the trial court erred by summarily dismissing his conversion, negligence, and conspiracy claims. He contends Public Storage violated Washington's Self-Service Storage Facilities Act, RCW 19.150 *et seq.* ("Act"), by failing to search through his storage unit to find his personal papers and photographs to withhold them from the auction. He maintains the exculpatory clause in the lease/rental agreement does not apply

because Public Storage remained liable for any losses caused by willful violations of the law. He also argues the trial court erred by dismissing his replevin claim. According to Howard, he prevailed on that claim prior to the summary judgment hearings by securing a show cause order in his favor. He claims the order became the law of the case.

Howard's arguments are unavailing. The trial court properly dismissed Howard's claims as a matter of law. Howard expressly waived the right to recover from Public Storage in an unambiguous and enforceable exculpatory clause. He also bargained for and was bound by additional rights, duties, and obligations created in the lease/rental agreement that allocated responsibility for identifying and labeling any personal property stored in the unit. He admits he failed to label property he deemed personal as required by his lease/rental agreement. Finally, Howard misrepresents the outcome of the replevin proceedings and fails to demonstrate that Public Storage unlawfully deprived him of his personal property. Dismissal was appropriate. The Court should affirm in all respects.

II. COUNTERSTATEMENT OF THE ISSUES

Public Storage acknowledges Howard's assignments of

error;¹ however, the issues associated with that error are more appropriately formulated as follows:

1. Did the trial court appropriately dismiss the negligence and conversion claims a tenant brought against a self-storage facility as a matter of law where the tenant expressly waived those claims in his lease/rental agreement and failed to comply with a requirement that he clearly label his personal property to prevent its sale in the event of a default?
2. Did the trial court correctly dismiss the replevin claim a tenant asserted against a self-storage facility as a matter of law where the tenant misrepresented the court's earlier order and the court did not enter an order granting the tenant's requested relief?

III. COUNTERSTATEMENT OF THE CASE

Howard's statement of the case is inadequate, failing to fully apprise the Court of the factual and procedural history of this case. Public Storage does so now.

Howard signed a lease/rental agreement ("Agreement") with Public Storage for a self-storage unit on September 2, 2014. CP 39-42. In the Agreement, Howard listed a Port Orchard address on Lincoln Avenue, a contact telephone number, and alternate

¹ Howard repeatedly refers to "findings" from the trial court and even goes so far as to assign error to them. Br. of Appellant at 2, 7, 10-11, 13. Even assuming *arguendo* the court made such findings, they are superfluous on summary judgment. See, e.g., *Hubbard v. Spokane County*, 146 Wn.2d 699, 706 n.14, 50 P.3d 602 (2002).

contact information. CP 39. According to the Agreement, Howard agreed to notify Public Storage in writing of a “change of physical address or email address” or a change in the alternate contact’s name or address within ten (10) days of the change. CP 41. Howard also signed an insurance addendum (“addendum”), which became part of the Agreement. CP 164. By signing the addendum, Howard elected to secure insurance for the contents of his unit from a third-party insurer. *Id.*

Howard agreed to pay a monthly rental fee of \$129 for the storage unit, paid in advance on or before the first of each month, plus additional late fees for late payment. CP 39. In the event of non-payment, he agreed that property stored in the unit would be subject to a lien in favor of Public Storage:

When any part of the rent or [sic] other charges remains unpaid for six (6) consecutive days, Owner deny Occupant the right to enter the Premises and to access the personal property being stored therein. If Occupant is still in default forth-two (42) days after the date when Rent and/or other charges became due, the Owner may enforce the lien and the personal property stored in the Premises (except boxes clearly labeled “personal papers” and/or “personal effects”) may be sold or otherwise disposed of to satisfy the lien. Prior to the lien sale, Owner will mail Occupant lien notices. By INITIALING HERE . . . Occupant acknowledges that he has read and understands Owner’s lien.

CP 40 (paragraph 3(a)) (emphasis in original). Howard initialed this paragraph, acknowledging that he read, understood, and agreed to it. CP 40.

The Agreement required Howard to clearly label any boxes containing personal papers or personal effects and stated: **“Occupant agrees that under no circumstances will the total value of all personal property stored in the Premises exceed, or be deemed to exceed, \$5,000.”** CP 40 (emphasis in original).

Paragraph 5 specifically advised that the storage unit was:

not suitable for the storage of heirlooms or precious, invaluable or irreplaceable property such as, but not limited to, books, records, writings, contracts, documents, personalized or other DVDs or videos, works of art, objects for which no immediate resale market exists, objects which are claimed to have special meaning or emotional value and records or receipts relating to the stored goods.

CP 40 (emphasis in original). Howard understood and acknowledged this limitation by initialing the paragraph. CP 40.

Paragraph 7 of the Agreement further limited Public Storage’s liability in the event of loss:

Owner and Owner’s Agents will have no responsibility to Occupant or to any other persons for any loss, liability, claim, expense, damage to property or injury to persons (“Loss”) from any cause, including without limitation, Owner’s and Owner’s Agents [sic] active or passive acts,

omissions, negligence or conversion, unless the Loss is directly caused by Owner's fraud, willful injury or willful violation of law Occupant agrees that Owner's and Owner's Agents' total responsibility for any Loss from any cause whatsoever will not exceed a total of \$5,000.

CP 41 (emphasis in original). Howard also initialed this paragraph, acknowledging that he understood it and agreed to it. CP 41.

Paragraph 6 of the Agreement contained a full release of liability for damage or loss of property that could have been insured:

ALL PERSONAL PROPERTY IS STORED AT OCCUPANT'S SOLE RISK. OCCUPANT IS OBLIGATED UNDER THE TERMS OF THIS LEASE/RENTAL AGREEMENT TO INSURE HIS OWN GOODS AND UNDERSTANDS THAT OWNER DOES NOT PROVIDE ANY TYPE OF INSURANCE WHICH WOULD PROTECT THE OCCUPANT'S PERSONAL PROPERTY FROM LOSS BY FIRE, THEFT, OR ANY OTHER TYPE CASUALTY LOSS. IT IS THE OCCUPANT'S RESPONSIBILITY TO PROVIDE SUCH INSURANCE. To the extent Occupant's insurance lapses or Occupant does not obtain insurance coverage for the full value of Occupant's personal property stored in the Premises, Occupant agrees Occupant will personally assume all risk of loss. **Owner and Owner's agents, affiliates, authorized representatives and employees ("Owner's Agents") will not be responsible for, and Occupant hereby releases Owner and Owner's Agents from any responsibility for, any loss, liability, claim, expense or damage to property that could have been insured (including without limitation any Loss arising from the active or passive acts, omission or negligence of Owner or Owner's Agents) (the "Released Claims").** Occupant waives any rights of recovery against Owner or Owner's

Agents from the Released claims, and Occupant expressly agrees that the carrier of any insurance obtained by Occupant shall not be subrogated to any claim of Occupant against Owner or Owner's Agents. The provisions of this paragraph will not limit the right of Owner and Owner's Agents under paragraph 7 By **INITIALING HERE** , Occupant acknowledges that he understands the provisions of this paragraph and agrees to these provisions and that insurance is Occupant's sole responsibility.

CP 40. Howard initialed this paragraph. *Id.*

Howard authorized Public Storage to automatically charge his credit card for his monthly rent payment. CP 35, 46. His December 2, 2014 credit card payment was declined. *Id.* Howard cannot and does not dispute that he defaulted on his payments to Public Storage. Br. of Appellant at 3. He made no attempt to pay his rent once his credit card payment was declined. CP 35.

Public Storage attempted to contact Howard or his alternate contact by telephone five times between December 3 and December 31, 2014 to advise Howard that his account was past due. CP 35, 45-46, 249. It was unsuccessful. *Id.* Public Storage also emailed Howard on December 18, 2014. CP 35, 249. It made seven more attempts to contact Howard or his alternate contact by telephone between January 4 and January 31, 2015. CP35,44-45, 250. Howard never answered his telephone and did not

establish the voicemail for his primary telephone number. *Id.* Howard also listed a disconnected telephone number for his alternate contact. *Id.*

Public Storage sent Howard preliminary delinquency notices on December 31, 2014, January 8, 2015, and January 12, 2015. CP 36, 259. On January 20, 2015, Public Storage mailed Howard notice of a lien sale to advise him that it intended to sell the contents of his unit because his account was overdue. CP 36, 257-58. Public Storage sent the lien notice to Howard's Lincoln Avenue address via certified, return receipt mail. CP 36, 44, 48. The United States Post Office returned the unclaimed letter on February 17, 2015 after making three attempts to deliver it. *Id.*

Public Storage made eight more attempts to contact Howard or his alternate by telephone between February 5, 2015 and February 19, 2015. CP 36-37, 44. It sent two additional emails on February 8 and February 17, 2015. CP 36-37. The morning of the auction, Public Storage made one final attempt to reach Howard or his alternate by telephone. CP 37, 44. Public Storage was again unsuccessful. *Id.*

Howard never contacted Public Storage. He failed to keep Public Storage apprised of a change in his or his alternate's

residence address, as required by paragraph 13(a) of the Agreement.

Due to his delinquency, Public Storage sold the contents of Howard's unit at a public auction on February 20, 2015. CP 15, 37. The sale resulted in a credit of \$60 to Howard and left a balance due to Public Storage of \$599.40. *Id.*

The purchaser of Howard's unit is a regular bidder at Public Storage auctions.² CP 38. The purchaser signed an agreement and a certification of public sale on February 20, 2015 requiring the return to Public Storage of "photos, documents (e.g., birth certificates and passports), and other personal items ("Personal Property")." CP 277-80. Public Storage provided the purchaser 48 hours to empty the unit. CP 37.

Howard appeared at Public Storage's office on March 3, 2015, to demand the return of his personal items 11 days after the sale. CP 13, 37, 46. This was the first time Public Storage learned that Howard claimed to have stored personal property in his unit. *Id.*; CP 277. Public Storage called the purchaser of Howard's unit. The purchaser explained that he did not see any personal

² Although Public Storage knows the identity of the successful bidder, company policy prevents it from releasing that person's name absent a court order. CP 32, 37. Howard has never sought such an order.

effects when he sorted the contents of the unit. CP 32, 43.

Howard filed suit against Public Storage and the purchaser of his unit on March 23, 2015, asserting causes of action for negligence, conversion, replevin, and civil conspiracy. CP 2-9; 19-26. Howard immediately filed a motion for order to show cause, requesting an order of replevin and return of his personal property. CP 10-11, 16-17, 27-30. Public Storage opposed the motion and argued that RCW 19.150.060 did not apply for two reasons. First, there was no personal property in the unit at the time of the auction. Second, Public Storage did not come into possession of any personal property from Howard's unit. CP 31-33, 111-12. The trial court issued an amended order to show cause on April 3, 2015 requiring Public Storage to "immediately return any personal effects as per 19.50.060 to [Howard] should they come into [Public Storage's] possession at any time in the future as per RCW 19.150.060." CP 52. Importantly, the court did *not* enter an order of replevin as Howard now suggests. *Compare* CP 52 *with* Br. of Appellant at 1, 7.

On these facts, Public Storage moved to summarily dismiss Howard's claims on August 26, 2015. CP 64-77. Howard opposed

the motion and cross-moved for partial summary judgment on his negligence and conversion claims. CP 113-131. But he did not present any evidence that would create a factual dispute as to these events. His declaration consisted of conclusory allegations that he placed irreplaceable personal property in the storage unit; however, he did not dispute that he failed to put his personal effects in boxes and properly label them “personal property.” CP 166-68. Nowhere did Howard state he did not receive Public Storage’s written notices or telephone calls or explain his failure to update his address and telephone number as the Agreement required. *Id.*

The trial court took the motions under advisement. CP 288. On November 15, 2015, the trial court granted Public Storage’s summary judgment motion with prejudice. CP 289-90. Thereafter, Howard moved pursuant to CR 41 to voluntarily dismiss the purchaser without prejudice. CP 291-92. The court granted the motion on November 23, 2015. *Id.* Howard’s appeal followed. CP 293-94.

IV. ARGUMENT

A. Standards of Review

The standard of review for cases resolved on summary judgment is a matter of well-settled law. This Court reviews a trial

court's summary judgment decision *de novo*, engaging in the same inquiry as the trial court. *See, e.g., Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

B. The Trial Court's Decision To Grant Summary Judgment To Public Storage Was Appropriate

1. Howard expressly waived the right to recover from Public Storage for negligence, conversion, and civil conspiracy

Howard maintains he produced undisputed evidence showing that he placed personal property in his storage unit. Br. of Appellant at 7-10. According to Howard, the trial court erred by granting summary judgment to Public Storage on his negligence, conversion, and civil conspiracy claims because: (1) the Act safeguarded his personal property from sale; and (2) the Act prohibited Public Storage from selling his personal property upon his default.³ Br. of Appellant at 7-10. Howard is mistaken. He

³ Howard provides little in the way of supporting authority. More than half of the cases in his brief address the standard of review rather than the merits of his case. The Court need not consider any arguments unsupported by authority. *See, e.g., Beal for Martinez v. City of Seattle*, 134 Wn.2d 769, 777, 954 P.2d 237 (1998) ("The City cites no authority for this proposition and, thus, it is

expressly waived the right to recover from Public Storage for negligence and conversion.⁴

Howard misses two important points. First, the Agreement he signed contained a clear and enforceable exculpatory clause:

Owner and Owner's Agents will have no responsibility to Occupant or to any other persons for any loss, liability, claim, expense, damage to property or injury to persons ("Loss") from any cause, including without limitation, Owner's and Owner's Agents [sic] active or passive acts, omissions, negligence or conversion, unless the Loss is directly caused by Owner's fraud, willful injury or willful violation of law Occupant agrees that Owner's and Owner's Agents' total responsibility for any Loss from any cause whatsoever will not exceed a total of \$5,000.

CP 41 (emphasis in original). Second, the Agreement also contained a full release of liability for damage or loss of property:

Owner and Owner's agents, affiliates, authorized representatives and employees ("Owner's Agents") will not be responsible for, and Occupant hereby releases Owner and Owner's Agents from any responsibility for, any loss, liability, claim, expense or damage to property that could have been insured (including without limitation any Loss arising from the active or passive acts, omission or negligence of Owner or Owner's Agents) (the

not properly before us.”).

⁴ Although Howard asserts the trial court erred by dismissing his conspiracy claim, he offers no argument to justify reversing that decision. Br. of Appellant at 11. The Court need not consider that unsupported argument. *Beal*, 134 Wn.2d at 777. Howard apparently now recognizes his error; namely, that he cannot sue a good faith purchaser of goods sold at auction even if Public Storage failed to comply with the Act. RCW 19.150.110.

“Released Claims”). Occupant waives any rights of recovery against Owner or Owner’s Agents from the Released claims[.].

CP 40 (emphasis in original). Enforcement of these provisions rendered Howard’s negligence and conversion claims unenforceable as a matter of law.

The general rule in Washington is that exculpatory clauses are enforceable unless: (1) they violate public policy, or (2) the negligent act falls greatly below the standard established by law for protection of others, or (3) they are inconspicuous. *Vodopest v. MacGregor*, 128 Wn.2d 840, 848, 913 P.2d 779 (1996); *Eifler v. Shurgard Capital Mgmt. Corp.*, 71 Wn. App. 684, 690, 861 P.2d 1071 (1993). Here, Howard essentially concedes that neither (2) nor (3) of the above standards is applicable by failing to argue for their application here. Thus, the only issue is whether enforcement of the release would violate public policy. *See Scott v. Pac. W. Mt. Resort*, 119 Wn.2d 484, 834 P.2d 6 (1992).

The factors to be considered in determining whether an exculpatory clause violates public policy were set forth first by the California Supreme Court and then later adopted in Washington in *Wagenblast v. Odessa Sch. Dist.*, 110 Wn. 2d 845, 851-51, 758 P.2d 968 (1988). Paraphrased, those six factors consider

whether:

(1) the agreement concerns an endeavor of a type generally thought suitable for public regulation; (2) the party seeking exculpation is engaged in performing a service of great importance to the public, often one of practical necessity; (3) the party provides the service to any member of the public or to any member coming within established standards; (4) there is a decisive inequality of bargaining power between the parties; (5) the release is a standardized adhesion contract that makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence; and (6) the party seeking to invoke the release has control over the person or property of the person seeking the service.

See Wagenblast, 110 Wn.2d at 851-52 (citing *Tunkl v. Regents of the Univ. of California*, 60 Cal. 2d 92, 32 Cal. Rptr. 33, 383 P.2d 441 (1963) (signposts added for clarity)). Courts generally use these factors as a balancing test: the more factors present, the more likely the agreement will be declared invalid on public policy grounds. *Id.* at 972.

Here, Howard had the burden to demonstrate the *Wagenblast* factors dictated that the limitation clause in the Agreement violated Washington's public policy. *See, e.g., Am. Nursery Prods. v. Indian Wells Orchards*, 115 Wn.2d 217, 797 P.2d 477 (1990); *Shields v. Sta-Fit, Inc.*, 79 Wn. App. 584, 903 P.2d 525

(1995). He did not do so.⁵

Neither the first nor the second *Wagenblast* factor is present here. The self-storage industry is not heavily regulated. Lien and foreclosure requirements are codified in the Act; however, mere codification of a small, narrow aspect of a particular business does not equate to public regulation of the industry. Moreover, the self-storage industry is not a service of great public importance, or a matter of practical necessity. *Taylor v. Public Storage*, 2012 U.S. Dist. LEXIS 126967 (W.D. Wash. Sept. 6, 2012) (analyzing identical contract language, including paragraph 7, and enforcing exculpatory agreement).

Courts have found exculpatory agreements to be void as against public policy where essential public services are involved; namely, hospitals, housing, public utilities, and public education. *Shields*, 79 Wn. App. at 589 (citations omitted). A self-storage facility does not provide “essential public services.” It merely provides a convenience for a portion of the public, including those in-transit between housing who need to temporarily store some of their personal possessions. *Taylor*, 2012 U.S. Dist. LEXIS.

⁵ Public Storage concedes the third *Wagenblast* factor is present because it provides self-storage units to the public; however, it does not admit the five remaining factors.

The fourth and fifth *Wagenblast* factors are likewise not present. There was no inequality of bargaining strength. Howard had other options for storing his possessions. For example, he could have stored his property with a different self-storage company. He also could have stored his possessions with his family or friends. He could have walked away without renting a unit from Public Storage.

The Agreement Howard signed was not a contract of adhesion because Public Storage encouraged him to insure his property and even made available insurance at its facility. Under similar facts, this Court held in *Eifler* that a contract of adhesion did not exist because the tenant was not deprived of a fair opportunity to protect the value of his property. 71 Wn. App. at 694.

The same analysis applies here. The Agreement that Howard signed was not a contract of adhesion and did not violate public policy in Washington because Public Storage emphatically offered Howard the opportunity to purchase insurance from a third-party insurer and made clear when he signed the Agreement that he had other insurance options available. CP 40 (paragraph 6). The Agreement that Howard signed stated, in bold, capital letters: **“ALL PERSONAL PROPERTY IS STORED BY OCCUPANT AT**

OCCUPANT'S SOLE RISK." *Id.* (emphasis in original). It also said:

. . . OWNER DOES NOT PROVIDE ANY TYPE OF INSURANCE WHICH WOULD PROTECT THE OCCUPANT'S PERSONAL PROPERTY FROM LOSS BY FIRE, THEFT, OR ANY OTHER CASUALTY LOSS. IT IS THE OCCUPANT'S RESPONSIBILITY TO PROVIDE SUCH INSURANCE. To the extent Occupant's insurance lapses or Occupant does not obtain insurance coverage for the full value of Occupant's personal property stored in the Premises, Occupant agrees Occupant will personally assume the risk of all loss. **Owner and Owner's agents . . . will not be responsible for, and Occupant hereby releases Owner . . . from any responsibility for, any loss, liability, claim, expense or damage to property that could have been insured (including without limitation any Loss arising from the active or passive acts, omission or negligence of Owner[.]**

Id. (emphasis in original). The addendum that Howard signed stated that Public Storage would not be responsible for loss to Howard's property, that Public Storage was not providing insurance that would cover loss, and that Howard could purchase insurance from a third-party insurer or elsewhere. CP 164. The addendum also contained an application for insurance showing that Howard purchased \$3,000 in coverage. *Id.* Under these circumstances, a contract of adhesion depriving Howard of a fair opportunity to protect the value of his property does not exist. *See Eifler*, 71 Wn. App. at 694. But even assuming *arguendo* the Agreement was an adhesion contract, the true concern remains the disparate

bargaining power. *Shields*, 79 Wn. App. at 590. And that in turn is related to the essential nature of the services being provided. Again, as detailed above, self-storage is not essential and the bargaining power is not so disparate as to militate against enforcement of the Agreement.

The final *Wagenblast* factor is also not present. Arguably, Howard's property was placed under the control of Public Storage when Howard placed his property in the unit. But he voluntarily submitted to that control. This is not like the school, the hospital, housing or other necessary public services. *Shields*, 79 Wn. App. at 590. Other storage options were available to Howard, but he chose not to pursue them.

Only one of the six *Wagenblast* factors is arguably present in this case. As a result, public policy does not militate against enforcement of the Agreement. The trial court properly enforced the limitation of liability clause contained in the Agreement. Summary judgment was appropriate.

2. Howard bargained for and was bound by an agreement that expressly created additional rights, duties, and obligations on the parties

Howard also argues the trial court erred by dismissing his claims because Public Storage breached its statutory duty by failing

to retain his personal property for six months post-auction and by selling it in violation of RCW 19.150.060. Br. of Appellant at 11-13. He further contends the exculpatory clause is invalid because Public Storage is still liable pursuant to the Agreement for losses caused by willful violations of the law. *Id.* at 16.

Howard misses the mark. He bargained for and was bound by the terms of the Agreement, which created additional rights, duties, and obligations for himself and for Public Storage.

For example, paragraph 3(a) of the Agreement imposes additional obligations on Public Storage tenants by requiring them to keep any personal items and personal effects in clearly labeled boxes to avoid the potential disposal of those items at auction:

If Occupant is still in default forth-two (42) days after the date when Rent and/or other charges became due, the Owner may enforce the lien and the personal property stored in the Premises (except boxes clearly labeled “personal papers” and/or “personal effects”) may be sold or otherwise disposed of to satisfy the lien.

Id. (emphasis in original). Howard did not present evidence that he kept his personal items and personal effects in clearly labeled boxes as the Agreement required.

Paragraph 5 of the Agreement strongly discourages Public Storage tenants from storing personal items in their units.

Paragraph 5 states:

USE OF PREMISES AND PROPERTY AND COMPLIANCE WITH LAW **Occupant acknowledges and agrees that the Premises and the Property are not suitable for the storage of heirlooms or precious, invaluable, or irreplaceable property,** such as, but not limited to, books, records, writings, contracts, documents personalized or other DVDs or videos, works of art, subjects for which no immediate resale market exists, objects which are claimed to have special or emotional value and records or receipts relating to the stored goods.

CP 40 (emphasis in original).

Public Storage is statutorily entitled to create additional obligations in the Agreement. RCW 19.150.140 specifically permits parties to create “additional rights, duties, and obligations which do not conflict with [the Act].” Here, paragraph 3(a) of the Agreement unequivocally *imposed an affirmative duty on Howard* to clearly label boxes as personal papers or personal effects to avoid their sale if he defaulted on his rental payments. CP 40. This duty is consistent with paragraph 5 discouraging the storage of such property. *Id.* Despite the duty articulated in paragraph 3 and reinforced in paragraph 5, Howard admits he did not clearly label any boxes as personal papers or personal effects to prevent their sale at auction.

The requirement that a tenant clearly label his or her

personal papers and personal effects is for the protection of both the tenant and Public Storage. It would be unduly burdensome and nearly impossible for Public Storage employees to sift through boxes of its tenant's abandoned property following a default. It would also be nearly impossible for Public Storage employees to search for papers and effects and make determinations about the items that may be personal to the defaulting tenant. Any such requirement would promote frivolous allegations of mishandling and theft by Public Storage and would increase the risk of potential on-site accidents as many storage spaces are quite large and carry heavy items. Howard understands this and has acknowledged the potential risk to Public Storage if its employees were required to go through each unit before sale. Br. of Appellant at 10. For these reasons, Public Storage contractually requires its tenants to clearly label any boxes the tenant considers personal.

RCW 19.150.060 does not impose a duty upon self-storage facilities to inspect each unit for personal papers and photographs. Conspicuously absent from the statute is any guidance on how "personal papers" are to be identified and by whom. Howard cannot point to any language in the statute or in the case law placing the burden of identifying such information on the self-

storage facility. “[I]f a statute is silent on an issue, [courts] generally decline to read into the statute what is not there.” *Birgen v. Dep’t of Labor & Indus.*, 186 Wn. App. 851, 859, 347 P.3d 503 (2015). *See also, Spokane Research v. City of Spokane*, 155 Wn.2d 89, 103, 117 P.3d 1117 (2005) (declining to read into a statute what was not there).

Far from being a “willful and knowing violation” of the statute, Public Storage’s common-sense policy of relying on its tenant to clearly label “personal papers” and “personal effects” is a reasonable and faithful implementation of RCW 19.150.060. It places the burden of identifying personal papers and effects on the person most knowledgeable about the contents: the tenant. Washington courts carefully protect the principle of freedom to contract and establish the terms of the contract. *GMAC v. Everett Chevrolet, Inc.*, 179 Wn. App. 126, 147, 317 P.3d 1074 (2014). Because RCW 19.150.060 does not impose a duty on Public Storage to identify personal papers, the parties were free to agree upon the proper allocation of responsibility. The Agreement allocated that responsibility to Howard.

The trial court properly enforced the terms of Howard’s agreement with Public Storage, including the additional provisions

for which Howard bargained. Summary judgment was appropriate.

3. Howard misrepresents the outcome of the replevin proceedings

Howard's final argument is that he prevailed on his replevin cause of action and the resulting order became the "law of the case" precluding summary judgment in Public Storage's favor. Br. of Appellant at 19. He contends the trial court erred by re-litigating the claim. *Id.* Howard misrepresents the nature of the trial court's earlier order and fails to recognize that he never demonstrated Public Storage unlawfully deprived him of his personal property.

The order the trial court entered after the show cause proceeding did *not* grant his request for replevin. CP 50-53. Instead, the court issued an amended order to show cause. *Id.* It did not make any findings of fact or conclusions of law and simply ordered Public Storage to return Howard's personal effects if they came into its possession. *Id.* More critically, the court struck through: (1) the title of the order as originally proposed; (2) the list of property Howard claimed was at issue; (3) the statement about the property's location; and (4) the statement that the sale violated RCW 19.150.060. *Id.*

Washington's replevin statute lists the requirements of an

order awarding possession. An order awarding possession shall:

(a) State that a show cause hearing was held; (b) describe the property and its location; (c) direct the sheriff to take possession of the property and put the plaintiff in possession as provided in this chapter; (d) contain a notice to the defendant that failure to turn over possession of the property to the sheriff may subject the defendant to being held in contempt of court upon application to the court by the plaintiff without further notice; (e) if deemed necessary, direct the sheriff to break and enter a building or enclosure to obtain possession of the property if it is concealed in the building or enclosure; and (f) be signed by the judge or commissioner.

RCW 7.64.035(2). The court's order failed to satisfy the requirements of the replevin statute because it did not contain the mandatory language. Howard did not prevail on his replevin claim as he now asserts. As a result, the claim remained vulnerable to summary disposition.

Howard never proved that Public Storage wrongfully detained his personal property. Public Storage submitted evidence that it did not have possession of Howard's personal property and that it had never come into possession of that property. Howard also did not submit any evidence that his property was wrongfully detained. The purchaser of Howard's unit confirmed that there was no personal property in Howard's unit. CP 32, 43. Public Storage never received any personal property of Howard's back from the

purchaser of the unit. Consequently, the trial court did not err by granting summary judgment to Public Storage.

The trial court did not err by granting summary judgment to Public Storage on Howard's replevin claim. Howard did not prevail on the claim such that the order at issue became the law of the case. He also failed to present evidence that Public Storage unlawfully detained his personal property. The claim remained ripe for summary determination. The trial court properly dismissed it as a matter of law. This Court should affirm.

C. This Court Should Not Award Howard Attorney Fees And Costs Incurred On Appeal Even If He Prevails

Under RAP 18.1(a), a party can recover attorney fees and costs on appeal if applicable law grants the right to such recovery and the party devotes a section of the opening brief to the request. RAP 18.1(a), (b). Here, Howard did not comply with RAP 18.1 because he did not devote a section of his opening brief to attorney fees. Thus he is not entitled to attorney fees and costs from this Court even if he prevails on appeal.

V. CONCLUSION

The trial court did not err by granting summary judgment to Public Storage. Howard was bound by the express limitations on liability established in the Agreement, which barred his claims for

negligence, conversion, and civil conspiracy as a matter of law. He did not prevail on his replevin claim such that it became the law of the case. The trial court properly dismissed it where Howard lacked any evidence that Public Storage unlawfully detained his personal property. This Court should affirm and award Public Storage its costs on appeal.

DATED this 15th day of July, 2016.

Respectfully submitted,

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DECLARATION OF SERVICE

On said day below I emailed a courtesy copy and sent by U.S. mail a true and accurate copy of the foregoing **Brief of Respondents PSCC, Inc.** in Court of Appeals Cause No. 48451-0-II for service on the following:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed this 15th day of July, 2016 at Seattle, Washington.

/s/ Julie J. Johnson
Julie J. Johnson

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