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STATE OF WASHINGTON

Civil Appeal No. 49617-8
COURT OF APPEALS,
DIVISION II,
OF THE STATE OF WASHINGTON

BY  DEPUTY

MARC LANDRY, an individual,

Appellant-Plaintiff

v.

PORT OF PORT TOWNSEND, a Washington municipal corporation;
LARRY CROCKETT, both as an individual and as an agent and / or
Executive Director of PORT OF PORT TOWNSEND; JIM PIVARNIK,
both as an individual and as an agent / Deputy Director of PORT OF
PORT TOWNSEND; PT MARINE ENTERPRISES LLC dba as
GOLD STAR MARINE and its co-owner / officer / agent at all relevant
times, JIM HECKMANN; and DOES 6 through 15. Inclusive,

Respondent-Defendants.

ON APPEAL FROM JEFFERSON COUNTY SUPERIOR COURT

(Hon. Keith C. Harper, Judge)

APPELLANT'S BRIEF

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ORIGINAL.

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I. INTRODUCTION

This Case involves a dispute over a derelict vessel fee deposit that was illicitly obtained from the Appellant MARC LANDRY (“Landry”) as a precondition for his renewed tenancy for his personal property boat at the Respondent-Defendant THE PORT OF PORT TOWNSEND (“Respondent PORT”), and the damages, including economic harm, sustained by Landry when the Respondent PORT, without any true legal right to withhold Landry’s deposited money and bereft of powers as a landlord by reason of its having obtained such deposited money illicitly, refused any release of said deposit money to Landry. The Respondent PORT not only refused to disclose these facts to the lower court, as well as deliberately, manifestly and unjustly retained such deposited money, but ultimately proceeded to order and have performed the demolition of Landry’s boat despite having been in full knowledge (RP 65, lines 17-25; RP 66, lines 1-5) that Landry’s boat could not have been moved, given its size and stage of its restoration process and / or remaining work required to “float” the boat.

Landry filed his suit (CP 1-28) primarily on grounds that he was entitled to the Respondent PORT’s return to him of said deposit money and, additionally, but irrespective of the fact that his contract of renewed tenancy did not contain a severability clause or that the Respondent PORT’s Rules only included a severability clause as to those Rules but not contracts to which Respondent PORT was a party, that the subject contract in renewal of tenancy involved an illegal principal term and

thus was void ab initio as against public policy.

One group of the above captioned Defendants filed a Motion for Summary Judgment, as did Landry prior thereto (CP 38-54), and the remaining majority of the above captioned Defendants jointly filed a Civil Rule (“CR”) 12 Motion to Dismiss (CP 58-66) Landry’s case. On August 24, 2016, Judge Keith C. Harper (“Judge Harper”) entered an Order (CP 80-93) which (i) granted the Motion for Summary Judgment that had been filed by the Respondent-Defendants PT MARINE ENTERPRISES LLC dba as GOLD STAR MARINE and its co-owner / officer / agent at all relevant times, JIM HECKMANN (“GOLD STAR Defendants”); (ii) granted the Motion for Summary Judgment that had been filed by the Respondent-Defendants, PORT OF PORT TOWNSEND, a Washington municipal corporation; LARRY CROCKETT, both as an individual and as an agent and / or Executive Director of PORT OF PORT TOWNSEND; JIM PIVARNIK, both as an individual and as an agent / Deputy Director of PORT OF PORT TOWNSEND (“Respondent PORT Defendants”); (iii) denied Landry’s Motion for Summary Judgment and (iv) dismissed, with Prejudice, Landry’s case against the above captioned Respondent Defendants, which Landry had brought upon having discovered that he had been charged said derelict vessel fee deposit arbitrarily and illicitly as out of accordance with the internal rules and procedures established by the Respondent PORT delineating the basis for such a charge, and as inapplicable to

Patrol No.1. (See also, CP 362-364, 359-361)

Landry appeals from the Final Order (CP 362-364; RP 70-80) based upon Judge Harper's Order in Dismissal (CP 80-93; RP 67-68) of his case, and argues to this Court that reversal of that Final Order must be Ordered by this Court given that: (i) said Order of Dismissal was, as to the majority of grounds in his case, an abusive exercise of judicial discretion, and, as to remaining matters, an exercise of judicial discretion where no such judicial prerogative existed; (ii) Judge Harper's Order's grant of the Respondent PORT Defendants' Motion for Summary Judgment and denial of his Motion for Summary Judgment were also erroneous; (iii) the Findings of Fact on which said Order of Dismissal as well as Order on both the Respondent PORT Defendants' and Landry's respective Motions for Summary Judgment were based were also erroneous as both lacking in substantial evidence and as not support of the Conclusions of Law said Orders were also based; and (iv) that the Order granting the Respondent PORT Defendants' Motion for Summary Judgment and the Final Order of Dismissal, with Prejudice, of Landry's case was obtained by Fraud upon the Court. Landry's Appeal does not seek review of the lower court's Order granting summary judgment to the GOLD STAR Defendants.

On Appeal, Landry seeks reversal of the lower court's Order granting the Respondent PORT Defendants' Motion for Summary Judgment and in Dismissal of his case, and that the case be remanded to the lower court for adjudication by a

visiting judge, given Judge Harper's unequivocal bias in favor of the Respondent PORT Defendants, as argued herein below.

II. ASSIGNMENTS OF ERROR

1. The lower court committed error by entry, with Prejudice, of its Order in Dismissal of Landry's case against the Respondent PORT Defendants.
2. The lower court committed error by Ordering that the Respondent PORT Defendants were entitled to either Dismissal pursuant to CR 12 (b) (6) or, alternatively, to CR 56 Summary Judgment, in agreement with said Respondents' arguments that their Motion to Dismiss had, pursuant to CR 12 (b) (7), been automatically converted to.
3. The lower court committed error by entry, with Prejudice, of its Order in dismissal of Landry's case against the Respondent PORT Defendants as based upon Findings which were neither supported by substantial evidence to support said Order, nor in support the Court's conclusions of law.
4. The lower court committed error by entry of its Order in dismissal of Landry's case, having done so as a function of its own biased favor of the Respondent Port Defendants by and through its Finding of Fact that the Respondent PORT had intended to charge and had in fact charged Landry an ordinary rental

security deposit rather than the derelict vessel fee deposit that all of Landry's court documents asserted to have been made, and also that all of the Respondent PORT Defendants' court documents asserted to be the case, thereby rendering the subject Judgment and Order void as one procured by Fraud upon the Court.

5. The Order in Dismissal of Landry's Case, regardless as entered by Judge Harper upon granting the subject Respondent PORT Defendants' CR 12 Motion to Dismiss or CR 56 Motion for Summary Judgment, was procured through Fraud upon the Court by the Respondent PORT Defendants and their counsel of record, Carolyn Lake and Seth Goodstein, and therefore is both erroneous and void.

III. ISSUES PRESENTED

Issue(s) pertaining to Assignment of Error No. 1

Issue No. 1: Whether Judge Harper's Order in Dismissal of Landry's case pursuant to CR 12 (b) (6) for Landry's "failure to state a claim upon which relief can be granted" was entered beyond doubt without any factual content which might have allowed the court to draw the reasonable inference that the Respondent PORT is liable for the misconduct alleged by Landry in his Complaint?

Issue(s) pertaining to Assignment of Error No. 2

Issue No. 2: Whether Landry's Complaint presented any indisputable material issue of fact or law warranting disposition of his case in his favor?

Issue(s) pertaining to Assignment of Error No. 3:

Issue No. 3: Whether Judge Harper's adoptive Findings on which the subject Order of Dismissal was based on or were supported by substantial evidence?

Issue No. 4: Whether Judge Harper's adoptive Findings support the Conclusions of Law on which Dismissal was also based?

Issue(s) pertaining to Assignment of Error Nos. 1 through 4 :

Issue No. 5: Did the Respondent PORT comply with its own internal Policy and Rules for obtaining a derelict vessel fee deposit from Landry as a contractual term in the control of his renewed tenancy at its premises?

Issue(s) pertaining to Assignment of Error Nos.3 and 4:

Issue No. 6: Whether Judge Harper's Finding that the derelict vessel fee deposit paid by Landry, and acknowledged by the Respondent PORT Defendants, was intended by the parties to the subject contract in renewal of Landry's tenancy was made without substantial evidence supporting such Finding?

Issue No. 7: Whether Judge Harper's Finding that Landry was subject to the Respondent PORT's Writ of Restitution and plan for disposition of Patrol No.1 justifies the Conclusion of Law that Landry was collaterally estopped from raising that issue of the illicit derelict vessel fee deposit in his Complaint?

Issue No. 8: Whether Judge Harper's Finding that said derelict vessel fee deposit paid by Landry, and so acknowledged by the Respondent PORT Defendants, was made out of bias for those Defendants and / or constituted Fraud upon the Court?

Issue(s) pertaining to Assignment of Error No. 5:

Issue No. 9: Whether Landry's Complaint's causes of action and related claims were respectively either barred by the doctrine of Res Judicata or its collateral estoppel aspects?

Issue No. 10: Whether the Respondent PORT Defendants' assertions and / or Judge Harper's adoptive Conclusion of Law that Landry's causes of action and related claims were barred under the doctrine of Res Judicata and / or its collateral estoppel aspects constituted Fraud upon the Court?

IV. STATEMENT OF THE CASE

Landry is a Canadian citizen, who had traveled to and originally was a tenant at the Respondent PORT's premises in order to complete restoration of his personal

property boat, named Patrol No. 1, which was an original Seattle fire boat. Local newspapers had, at the time, praised Landry's initiative as restoration of an object of significant local maritime heritage (CP 9-10). Landry had sought to renew his tenancy at said Respondent PORT, following a period of tenancy at the Respondent-Defendant GOLD STAR MARINE to where Landry had temporarily moved Patrol No. 1 to conduct some more extensive repairs to Patrol No. 1 than could be accomplished at the Respondent PORT, at which time of sought renewed tenancy the Respondent-Defendants, purported Patrol No. 1 to be a derelict vessel according to its internal policy criteria in determination of such, and required Landry post a derelict vessel fee deposit in the amount of \$17,030.78 in addition to three-months advance rent totaling \$5,973.00 (CP 10, 26, 42). Though the Respondent PORT was authorized by Washington State RCW 79.100.005 mandate aimed at reducing costs associated with derelict vessels (CP 11), Patrol No. 1 did not meet the criteria under Washington State's RCW 79.100.010 (5) definition of a "derelict vessel" (CP 12, 44-45) any more than it met the criteria for a derelict vessel under the Respondent PORT's Port Policy 5.05.020.

Landry and Patrol No. 1, had been subject to a March 1, 2016 Amended Writ of Restitution (CP: 42, footnote 1); RP pgs. 54-55) following the Respondent PORT's having, at the Jefferson County Superior Court, prevailed upon its unlawful detainer action (CP 41, line 2) for the eviction, without cause, of Landry and Patrol No. 1 from its premises, when Landry discovered that he had been illicitly charged the

subject derelict vessel fee deposit, which, in any case was not being returned to him, much less even mentioned in any of the Respondent PORT's filings. Patrol No. 1 in possession of the Respondent PORT subsequent to the subject Judgment and Orders entered by Judge Keith C. Harper ("Judge Harper") at the Jefferson County Superior Court ("lower court") was demolished, pursuant to Judge Harper's April 22, 2016 Order approving the Respondent PORT's plan for disposition as a consequence of the Respondent Port's refusal to return that derelict vessel fee deposit as due and owing and so to facilitate the removal of that personal property boat from its premises and other money damages due and owing to Landry including, but not limited to, consequential damages and damages for infliction of emotional distress.

Landry filed a Motion for Summary Judgment (CP 38-54) on his Complaint pursuant to CR 56 (CP: 43).

The Jefferson County Superior Court ("lower court") dismissed, with Prejudice, the action that Landry filed against the above captioned Respondent-Defendants, in which Landry sought the return of his aforementioned personal property boat, the return of his derelict vessel fee deposit and money damages. Landry filed a Motion for Reconsideration (CP 311-335) with newly discovered evidence in support of his Complaint's causes of action and related claims, specifically a Supplemental Conditions of Tenancy (CP 333) imposing the derelict vessel fee deposit, which he signed as part of his subject contract of renewed tenancy, and, additionally a copy of the check in the amount of \$17, 038.78 that Landry had posted with the Respondent

PORT on his behalf as his derelict vessel fee deposit (CP 335). Additionally, Landry had filed a Motion, pursuant to CR 60 (b) (1,4, 5 & 11) for Relief from, and to Vacate (CP 212-246) Judge Harper's Order of Dismissal, which Motion to Vacate had specifically also argued that the inspection of a boat suspected of being or becoming a derelict vessel under Respondent PORT's PORT POLICY / Rule number 5.05.010 was not conducted per Respondent PORT's PORT POLICY protocol set forth by PORT POLICY Rule 5.05.030 (CP 217-219) in relation to Patrol No. 1, and which Motion to Vacate included in its appendices a true and correct copy of the "Derelict Vessel Agreement & Deposit Form" (CP 279) also in addition to the Supplemental Conditions of Tenancy (CP 249).

Landry's Motion for Reconsideration also presented Judge Harper with more specific reasons to Reconsider and reverse his Order of Dismissal of Landry's case, primarily on said Motion's additional legal evidence that the derelict vessel fee deposit imposed on Landry was obtained out of accord with the Respondent PORT's PORT POLICY, proving that:

As a precondition for renewed month-to-month tenancy for his boat, Patrol No. 1, the Respondent-PORT Defendants knowingly illicitly obtained the aforementioned derelict vessel fee deposit from Landry without following the protocol and procedures by which the Respondent-Defendant PORT was bound under its own internal rules and bylaws and per statute, which derelict vessel fee deposit was illicitly obtained. The Respondent PORT's Policy 1.02.03 definition of a derelict

vessel¹ is ample proof that Patrol No. 1 could in no legitimate way have been determined as a derelict vessel since the boat's break up / salvage value was well in excess of \$30,000.00 (Thirty Thousand Dollars). Landry argued all of this at the lower court to Judge Harper (RP p. 15, lines 6-22). Landry, wishing to complete restoration of Patrol No. 1, proceeded to have such deposit posted to his account, and thereby took up a renewed month-to-month tenancy at the Respondent PORT have the required derelict vessel fee deposit posted.

After the Respondent PORT prevailed on its unlawful detainer action to have Landry evicted without cause and after the lower court granted Respondent PORT a Writ of Restitution, the Respondent PORT Defendants sought for Landry to remove Patrol No. 1 from the Respondent PORT's premises, while refusing to address the derelict vessel fee deposit Landry had made and the issue of the release of said monies to Landry. Landry had never been more than 30 (thirty) days late on his rent at any time prior to said unlawful detainer action.

Landry's instant lawsuit sought, inter alia, declaratory relief in the form of a declaratory judgment that the Respondent PORT's contract of renewed tenancy was void ab initio as a matter of public policy based upon its term of the derelict vessel fee deposit having been an illegal and fraudulently obtained contractual term for continued tenancy, as well as the return of the derelict vessel fee deposit and Patrol

¹ The Respondent PORT's Policy 1.02.03 defined a derelict vessel as meaning: "Any vessel whose fair market value is less than the cost of disposal of said vessel commonly known as a tipping fee at the county landfill, combined with the cost of demolition and transportation from the Port facility to the Jefferson County Landfill."

No. 1.

Despite Landry's having produced the Addendum to his contract of renewed tenancy, which Addendum clearly and distinctly states that a derelict vessel fee deposit is being charged Landry, and Landry's having proven that said deposit fee was not in accord with the Respondent PORT's own rules, requirements and procedures as set forth in its Rules with the Respondent PORT, Judge Harper granted the Respondent PORT Defendants' Motion to Dismiss pursuant to CR 12 (b) (1) & (6) (CP 60-61, 61-65). Notably, Landry's Opposition to the Motion to Dismiss did not contest the Respondent PORT Defendants' CR 12 (b) (1) grounds (CP 60-61) for dismissal as to his claims based upon fraud, having acknowledged therein that he failed register his fraud-based tort claims to duly comply with Washington's Claim Filing Statute, RCW Chapter 4.96

The administrative remedy provided by the Respondent- Defendant PORT's PORT POLICY not only did not apply in the context of the dispute surrounding Landry's eviction, but in fact also did not apply to Landry's renewed tenancy contract and derelict vessel fee deposit since at the time of said renewal Landry believed the Respondent-PORT Defendants had required a derelict vessel fee deposit under and according to applicable rules of the Defendant PORT, as a precondition of his renewed tenancy. Following the lower court's granting the Defendant PORT a Writ of Restitution for its having prevailed against Landry.

Landry also filed a Motion for Reconsideration (CP 311-335) of Judge Harper's September 9, 2016 Final Order, which Motion specifically pointed out to Judge

Harper that the Respondent PORT Defendants' arguments relied solely on PORT POLICY 5.05.030 without "any mention of, as in purposeful avoidance of, Port Policy / Regulation numbers 5.05.010 and 5.05.020, which, respectively, set forth the required protocols that the Defendant PORT was bound to follow in order to (a) inspect and then (b) be in determination of whether a boat is derelict in order to exact a derelict vessel fee deposit from a prospective tenant or other party seeking 'transporting in . . . for storage in the Port yards' a vessel suspected of being derelict. Port Policy / Rule number 5.05.010 states in pertinent part that:

" Inspection of Suspect Vessels. The Harbormaster or Yard Manager shall inspect any vessel which could be considered a derelict vessel (i.e., "suspect vessel") as defined herein. Inspections shall occur prior to transporting in or hauling out a vessel for storage in the Port yards or before receiving a regular moorage or guest slip assignment. It shall be the duty of the Hoist Operator or Moorage Clerk to notify the Harbormaster when a vessel which might be considered a derelict vessel has requested haul out or moorage at the Port facility." [Reissued by Exec. Dir. 10/15/13]

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Port Policy / Rule number 5.05.020 states in pertinent part that:

“Derelict vessel determination. A. When the Harbormaster or Yard Manager is notified by a Port Employee that a vessel is suspected to be a derelict vessel, the owner shall be notified that the Harbormaster or Yard Manager is required to inspect the inside and/or outside of said vessel. If the owner refuses to allow such inspection, the Harbormaster or Yard Manager may refuse to allow the boat to be hauled out and placed in dry storage at the Port facility, and/or refuse moorage. The owner shall immediately remove the vessel from the premises of the Port facility. B. In conducting the inspection in order to make the determination of whether the vessel is derelict, the Harbormaster or Yard Manager shall consider the following nonexclusive criteria in making his evaluation:

1. General seaworthiness; 2. Recent history of use of the vessel; 3. Whether the vessel is equipped with a working generator, holding tank, engine, and electrical system; 4. The extent of the repairs necessary to make the vessel seaworthy and to bring the vessel in compliance with current Coast Guard Regulations governing such vessel; and 5. Other factors bearing on the value of the vessel in comparison with the cost of demolition, transportation and disposal.” [Reissued by Exec. Dir. 10/15/13]”

Landry also filed a Motion to Certify (CP 383-411) Judge Harper’s Order of Dismissal that states (CP 390) that at no time prior to Landry’s signing the subject contract in renewal of his month-to-month tenancy, which contained the term imposed on him by Defendant JIM PIVARNIK, was Landry ever provided a copy of as required by Port Policy number 5.05.060 which states as follows:

Copy of chapter to be provided to owners of suspect vessels. A copy of this Chapter 5.05 shall be provided to the owner of any suspect derelict vessel and the procedures set forth herein shall be explained briefly to that owner when a suspect derelict vessel requests moorage and/or haul-out as the Port facility. [Reissued by Exec. Dir. 10/15/13; formerly Appendix "E", #100.7]

Said Motion for Reconsideration reiterates that under the Respondent PORT's own Policy protocols, none of the Respondent PORT Defendants could require of any owner of a boat suspected of being derelict, indiscriminately or as part of a targeted approach or even any conspiracy to fleece such an owner out of a derelict vessel fee deposit by and through an eviction without cause by some unlawful detainer action right in the middle of said owner's restoration of a boat for which reason Landry was clearly hogtied and unable to move his boat unfit as such to be moved.

V. APPLICABLE AUTHORITY AND DISCUSSION

A. Jurisdiction over the subject matter of this Appeal:

Landry timely filed a Notice of Appeal from Judge Harper's August 24, 2017 joint Order of Dismissal of his case and Order granting the Respondent PORT Defendants' Motion for Summary Judgment on which Dismissal was, along with Judge Harper's adoptive Findings of Fact and Conclusions of Law therein also, based. A necessary prerequisite to appellate jurisdiction is the timely filing of the notice of appeal." Buckner, 89 Wash. App. at 911, 951 P.2d 338. "An appellant generally has 30 days from the entry of judgment to file its appeal." Buckner, 89 Wash. App. at 911, 951 P.2d 338 (citing RAP 5.2(a)). But the filing of a timely motion for reconsideration will extend that deadline. Columbia River Gorge Comm'n Schaeferco, Inc. v. 121

Wash.2d 366, 368, 849 P.2d 1225 (1993); *Buckner*, 89 Wash. App. at 916, 951 P.2d 338; RAP 5.2(a), (e). “[F]ailure to note the motion at the time it is served and filed does not affect the extension of time for appeal under RAP 5.2(e).” *Buckner*, 89 Wash. App. at 916, 951 P.2d 338. RAP 2.2, provides in pertinent part that:

“(a) Generally. Unless otherwise prohibited by statute or court rule and except as provided in sections (b) and (c), a party may appeal from only the following superior court decisions: (1) Final Judgment. The final judgment entered in any action or proceeding, regardless of whether the judgment reserves for future determination an award of attorney fees or costs. . . . (3) Decision Determining Action. Any written decision affecting a substantial right in a civil case that in effect determines the action and prevents a final judgment or discontinues the action”

RAP 2.2, DECISIONS OF THE SUPERIOR COURT THAT MAY BE APPEALED.

RAP 2.5 provides in pertinent part that:

“(a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: . . . (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right.”

B. Standard for Review:

Review in the context of the August 24, 2016 Order in Dismissal of Landry’s case, as based upon, as comprised, inter alia, therein, Judge Harper’s August 24, 2016 Order granting the Respondent PORT Defendants’ CR 12 (b) (6) Motion to Dismiss

and / or as converted, pursuant to CR 12 (b) (7), and Order in denial of Landry's own Motion for Summary Judgment, and August 24, 2016 adoptive Findings of Fact and Conclusions of Law signed on August 24, 2016, and upon all of which the lower court's September 9, 2016 Final Order was in turn also based, granting Respondents' CR 12 (b) (6) Motion to Dismiss for "failure to state a claim upon which relief can be granted" is de novo. Gaspar v. Peshastin Hi-Up Growers, 131 Wn. App. 630, 634, 128 P.3d 627 (2006). Dismissal under CR 12(b)(6) is proper where "it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief." Lawson v. State, 107 Wn.2d 444, 448, 730 P.2d 1308 (1986) (internal quotation marks omitted) (quoting Bowman v. John Doe, 104 Wn.2d 181, 183, 704 P.2d 140 (1985)).

For the purposes of a CR 12 (b) (6) motion, the "[plaintiff's complaint's] allegations are presumed to be true." Cutler v. Phillips Petroleum Co., 124 Wn.2d 749, 755, 881 P.2d 216 (1994) and each of the Plaintiff's claims supporting those allegations is to be deemed plausible if its factual content "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009). "The nature of a claim for relief is determined by the facts alleged in the Complaint and as adduced thereunder, and by the relief requested." Silver Surprise, Inc. v. Sunshine Mining Co., 74 Wn. 2d 519, 522, 445 P. 2d 334 (1968).

In determining whether dismissal is warranted, this Court may consider

hypothetical facts outside of the record. Burton v. Lehman, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005). Being that the Respondent PORT Defendants argued matters “outside the pleadings” (CP 64), their CR 12 (b) (6) converted to a motion for summary judgment per CR 56. Kelley v. Pierce Cty., 179 Wn. App. 566, 573, 319 P. 3d 74 (Div. 2, 2014).

Thus, the legal propriety of Judge Harper’s Order of Dismissal alternatively may proceed by this Court’s determination of whether there was any genuine issue as to any material fact and whether the Respondent PORT Defendants as motion party were entitled to summary judgment as a matter of law. Walston v. Boeing, 181 Wn. 3d 391, 395, 334 P. 3d 519 (2014) (citation omitted).

Summary judgment must have only been granted if, given the evidence, reasonable persons could reach only on conclusion. Walston, 181 Wn. 2d at 395. This Court must engage in the same inquiry as the lower court with questions of law are reviewed de novo (Gormley v. Robertson, 120 Wash. App. 31, 36, 83 P.3d 1042 (2004) with the facts and all reasonable inferences from the facts viewed in the light most favorable to Landry as nonmoving party.

Christenson v. Grant County Hosp. Dist. No. 1, 152 Wn. 2d 299, 305, 96 P. 3d 957 (2004). “Under CR 56, the Respondent PORT Defendants bear the initial burden of showing the absence of any material issues of fact and that the moving party is entitled to judgment as a matter of law. Young v. Key Pharmaceutical, Inc., 112 Wn. 2d 216, 225, 770 P. 2d 182 (1989)” (CP 64-65).

The Findings of Fact on which basis Judge Harper, on August 24, 2016, granted the Respondent PORT Defendants' CR 12 Motion and Ordered Dismissal, with Prejudice, of Landry's case, as well as on September 9, 2016 entered his Final Order as entered are reviewed under a substantial evidence standard. Brewer v. Fibreboard, 127 Wash. 2d 512, 525, 901 P.2d 297 (1995). Evidence is substantial if it is sufficient to persuade a rational, fair-minded person of the factual finding. Pardee v. Jolly, 163 Wash.2d 558, 566, 182 P.3d 967 (2008) (citing Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wash.2d 873, 879, 73 P. 3d 369 (2003)).

A second step of this Court's review of Judge Harper's Findings of Fact on which he based Dismissal of Landry's case with Prejudice shall proceed in determination of whether Judge Harper's adoptive Findings of Fact support the Conclusions of Law he stated in his August 24, 2016 Order dismissing Landry's case. Landmark Development, Inc. v. City of Roy, 138 Wash.2d 561, 573, 980 P. 2d 1234 (1999). "A trial court's findings of fact must justify its conclusions of law." Hegwine v. Longview Fibre Co., 162 Wash.2d 340, 353, 172 P.3d 688 (2007). Washington State appellate courts defer to the fact finder and "consider all of the evidence and reasonable inferences in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority" (Cingular Wireless, 131 Wash. App. at 768, 129 P.3d 300), and "[w]e reserve credibility determinations for the fact finder and do not

review them on appeal.” J.L. Storedahl & Sons, Inc. v. Cowlitz County, 125 Wash. App. 1, 11, 103 P.3d 802 (2004).

Review of the Conclusions of Law on which Judge Harper based his Order of Dismissal, including, specifically, as to the question of law of whether Landry’s action was barred by the doctrine of res judicata and its collateral estoppel aspects is a question of law we review de novo. Gormley, 120 Wash. App. supra at 36, 83 P.3d 1042 (2004); see also, Kuhlman v. Thomas, 78 Wn. App. 115, 120, 897 P.2d 365 (1995); see also, Atl. Cas. Ins. Co. v. Or. Mut. Ins. Co., 137 Wn. App. 296, 302, 153 P.3d 211 (2007).

- C). *(pertaining to Assignments of Error Nos. 1-5)*
The lower court’s Order of Dismissal of Landry’s case, and with Prejudice, was erroneously entered

No genuine issue as to material fact capable of dispute has been presented in regard to the illegality of the subject contract in renewal of Landry’s month to month tenancy at the Respondent PORT, thus summary judgment was appropriate and warranted in favor of moving party Landry, who was thereby entitled to judgment as a matter of law. See, Dept. of Labor Indus. V. Frankheuser, 121 Wn. 2d 304, 308, 849 P. 2d 1209 (1993).

- D) *(pertaining to Assignments of Error Nos. 1-5)*
The Findings are not supported by Substantial Evidence and do not support the Ultimate Decision at the lower court, and the Conclusions of Law

Judge Harper erroneously granted the Respondent PORT Defendants’ CR 12

Motion to Dismiss Landry's case, primarily pursuant to CR 12 (b) (6) on grounds that Landry's Complaint did not set forth any claim upon which any of the relief requested in that Complaint could be granted to Landry.

Judge Harper single-handedly facilitated and ensured that his decision would give the appearance that justice had been dispensed given that he alone, once cornered by substantial evidence in Landry's favor that Landry had indeed been charged a derelict vessel fee deposit, imposed his "judgment" that the Respondent PORT had meant for such deposit to have been a mere "security" deposit condition for Landry's renewed tenancy (RP 58, lines 19-25; 59, lines 1-7). This official Report of Proceedings evidence unequivocally shows that Judge Harper improperly interceded and corrupted the evidentiary function of the lower court in determination of Landry's claim not only as to the fact that he was indeed charged and had posted a derelict vessel fee deposit, but also that this deposit was illicitly charged as without applicable Respondent PORT policy basis. Judge Harper did so to circumvent the indisputable legal argument and legal fact asserted by Landry that, given such, the contract in renewal of Landry's month to month tenancy was procured illicitly without applicability of the Respondent PORT policy criteria and procedure for identifying a boat as a potential derelict vessel justifying imposition of a derelict vessel fee deposit.

Even more alarming, and as grounds for Judge Harper to be sanctioned if not

removed from the bench, is that the Respondent PORT Defendants and their own counsel argued the case without question of and even in admission that a derelict vessel fee deposit had been charged Landry as a condition for his renewed tenancy on the Respondent PORT's premises (RP 53, lines 14-21). "Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty or property." See Carey v. Piphus, 435 U.S. 247, 259 (1978)." (CP 50)

The record clearly supports and compels that this Court make the legal conclusion that Judge Harper's action was done in biased desperation once it had become evident that Landry had correctly argued that the Respondent PORT policy on derelict vessel fee deposit procedures were neither applicable to Patrol No. 1 nor had been adhered to by the Respondent PORT Defendants.

The derelict vessel deposit fee was charged Landry illicitly. The Addendum to his renewal of tenancy contract was an illegal instrument that that renewal contract was intimately connected to or incorporated as an illegal term of renewal. A contract that is intimately connected to an illegal agreement is void. Sherwood, 67 Wn. 2d supra at 637, citing to Cascade Timber Co. v. N. Pac. Ry., 28 Wn. 2d 684, 708, 184 P. 2d 90 (1977). The state of Washington hold all illegally made contracts void against public policy, Bankston v. Pierce County, 174 Wn. App. 932, 301 P. 3d 495, citing to In re Marriage of Hammack, 114 Wn. App. 805, 810-811, 60 P. 3d 663.

Judge Harper’s biased act re-categorizing Landry’s derelict vessel fee deposit as a mere security deposit, rather than adjudicate whether said derelict vessel fee deposit was lawfully charged denied Landry a full and fair hearing on the merit of his claims in violation of his Constitutional Fourteenth Amendment right to procedural due process of law. CP 50; see, Snyder v. Massachusetts, 291 U.S. 97, 116, 117 (1934). A void judgment includes a judgment that has been rendered in deprivation of a party’s right to due process. See Margoles v. Johns, 660 F. 2d 291, 295 (7th Cir. 1981) citing to VTA Inc. v. Airco, Inc., 597 F. 2d 220 at 224-25 (10th Cir. 1979) Washington State case law has long made it clear that where a contract is made illegally and contrary to governing law or statutory prohibition which regulate its formation as a matter of the public interest, not merely regulating it to ensure revenue for the state, a party to that contract cannot invoke the doctrine of estoppel to enforce it. See, Cooper v. Baer, 59 Wn. 2d 763 (1962), supra at 763-764, citing to State v. Northwest Magnesite Co., 28 Wn. 2d 1, 182 P. 2d 643. The “non-enforcement of illegal contracts is a matter of common public interest. Validity cannot be given to an illegal contract through any principle of estoppel . . .” *Id.*, at 764, citing to Reed v. Johnson, 27 Wash. 42, supra, 67 Pac. 381.

There was also no severability clause capable of being incorporated into Landry’s contract of renewal, given that the severability clause in the Respondent PORT’s Port Policy applies to the various Port Policy sections

only, and Landry argued this to Judge Harper in court (RP pgs. 67-68), and contrary to the Respondent PORT Defendants` argument that regardless of there being an improper derelict vessel fee deposit, Landry`s contract of renewal terms remained in legal force, and that Port Policy has binding effect as a local ordinance.

Judge Harper`s and Respondent PORT Defendants` counsel Seth Goodstein engaged in Fraud upon the Court in order to produce the Order of Dismissal and Final Order, as well as the Findings and Conclusions of Law on which they were based. Judge Harper`s nonchalant, arbitrary and outrageous characterization of the derelict vessel fee deposit posted by Landry as being an ordinary rental security deposit affected the integrity of the court`s normal process of adjudication, and such that the court would not focus on the merits of Landry`s claim but the very claim itself. Equally so, Judge Harper`s and Mr. Goodstein`s fraudulent statement, and with no proof or evidence offered, that Landry`s contract of renewal of his tenancy contained, by way of the Respondent PORT`s Port Policy severability provision, which actually only applied to Port Policy sections, a severability clause as "*incorporated from Port Policies*" by which it could in any case survive any illegal term such as the illicit derelict vessel fee deposit, and that the themselves, and that said Port Policy`s exhaustion of remedies policy regarding disputes over rental agreements only applied to a specific set of circumstances prior to tenancy. Port

Policy number 5.05.050 provides an “opportunity” to a boat owner who wishes to contest a derelict vessel deposit fee when he might feel inclined to do so.

Landry was not bound to Port Policy 5.05.050 as the exclusive means of a remedy for the purposes of standing to sue for declaratory relief under RCW 7.24 et seq., since (a) the Defendant PORT is not a governmental agency; (b) Landry was evicted before he even understood that if the derelict vessel fee deposit, being the additional consideration required by PORT DEFENDANTS, namely Defendant JIM PIVARNIK on behalf of the Defendant PORT, was illicitly exacted; and (c) the opportunity to contest the derelict vessel fee deposit per Port Policy 5.05.050 was not exhaustive and obviously was only available prior to finalization of the subject contract in renewal of Landry’s month-to-month tenancy.

"Fraud upon the court" as distinguished from fraud on an adverse party is limited to fraud which seriously affects the integrity of the normal process of adjudication. Gleason v. Jandrucko, 860 F.2d 556, 559 (2d Cir. 1988) (citations omitted); Transaero, Inc. v. La Fuerza Area Boliviana, 24 F.3d 457, 460 (2d Cir., 1994). The concept of "fraud on the court" embraces "only that species of fraud which does, or attempts to, defile the court itself, *or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases.*" Kupferman v. Consol. Research & Mfg. Corp., 459 F.2d 1072, 1078 (3d Cir. 1972) (citations omitted); Hedges v. Yonkers Racing Corp., 48 F.3d 1320, 1325 (2d Cir. 1995) (emphasis added).

By and through their submitted and part and parcel of such acts of Fraud upon the Court, the Respondent PORT Defendants' Goodstein Group counsel, Seth Goodstein and Carolyn Lake, violated the ethical rule requiring their duty of candor towards a tribunal (RP p. 68).

E) *(pertaining to Assignments of Error Nos. 4 and 5)*

The submitted and adoptive Conclusion of Law that Landry's Complaint's causes of action and related claims were barred under the doctrine of Res Judicata and its collateral estoppel aspects, is, like Judge Harper's and Mr. Goodstein's mendacious proposition that Landry's contract of renewal contained a severability clause incorporated from Port Policy, and that the derelict vessel fee deposit was merely intended to be a security deposit, tantamount to Fraud upon the Court, for which reason Judge Harper's Order of Dismissal and Final Order, having been procured thereby, are void and Landry's is entitled to fee, costs and damages including the value of is boat and emotional distress damages

Apart from the fact that Judge Harper stated at the August 24, 2016 hearing that the basis for his ruling in favor of CR 12 (b) (6) Dismissal / CR 56 Summary Judgment Dismissal "is going to be much simpler that [collateral estoppel]." (RP 62, lines 15-22), and in indication that he did not fully subscribe to the Respondent PORT Defendants' assertions (RP 49, lines 1-9; CP 64-66)² that Landry's derelict vessel fee deposit arguments fail as

² The Respondent PORT Defendants argued (RP 49, lines 10-14) that because Landry's defamation action (aka "Landry II" or "Landry 2") against them (CP 84) had raised the issue of whether said Respondent-Defendants had defamed him by statements to media that Patrol No. 1 was a derelict vessel, and the related sub-issue of whether said boat was indeed a derelict vessel as defined by the Respondent PORT's PORT POLICY. However, Judge Harper's reluctant embrace of collateral estoppel as the primary ground for Dismissal of Landry's case no doubt stemmed from the fact Landry's instant action (aka and as re-dubbed by Judge Harper, "Landry III" or "Landry 3") (CP 84; 1-28) was a contract action that involved the issue of term of an illicit derelict vessel fee deposit term in Landry's contract of renewal. Landry 2 matters were fully inapposite, and, additionally, Landry II was dismissed on procedural grounds since Landry did neither timely nor otherwise oppose its dismissal.

involving an issue previously adjudicated in the Respondent PORT's unlawful detained action against Landry, and yet thereby directly contradicting his own immediately previous statement on record regarding collateral estoppel that "the derelict vessel issue and that was a non issue . . . It had nothing to do with that [unlawful detainer] case as far as----as far as any basis to avoid being evicted . . . nothing to do with my decision in the eviction [without cause]" (RP 56, lines 2-9), Judge Harper's adoptive Findings of Fact and Conclusions of Law on which his Order of Dismissal of Landry's case was based do Conclude that "[c]ollateral estoppel is not the primary basis to dismiss this case, although issues set forth have been raised and litigated to various degrees in [Landry's defamation action against the Respondent PORT Defendants with the exception of the GOLD STAR Defendants, aka 'Landry II'].\" (CP 88, lines 1-3) In fact, the issue of or claims relating to the derelict vessel fee deposit have nothing to do with the landlord Respondent PORT's right to possession, and issues of fact even if raised as an affirmative case in an unlawful detainer action can only be raised if can defeat the landlord's right to possession, e.g. by excusing the tenant's failure to pay rents. Heaverlo v. Keico Indus., Inc., 80 Wn. App. 724, 728, 911 P.2d 406 (1996); Sprincin King St. Partners Conditioning Club, Inc., 84 Wn. App. 56, 67, 925 P.2d 217 (1996).

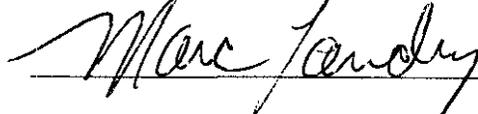
VI. CONCLUSION

The simple fact of the matter is that Judge Harper's Order of Dismissal is a product of flagrant Fraud(s) upon the Court which defiled the normal function of the adjudicative process to which Landry was entitled as to the legal propriety of the derelict vessel deposit fee as imposed on him, which issue was not required, under the doctrine of Res Judicata, to have been lodged by Landry in his defamation action against the Respondent PORT Defendants (in Landry 2 / II) and which issue is not barred in Landry's instant illegal contract-based claims for declaratory and other relief. Additionally, the indisputable circumstances are that the Respondent PORT Defendants imposed a derelict vessel fee deposit on Landry which they had no intention of ever returning to Landry. Judge Harper's legal grounds constituted by his Findings of Fact and Conclusions of Law on which he based his Order of Dismissal, and for Final Order in Dismissal of Landry's case, regardless whether according to CR 12 (b) (6) or CR 56 Summary Judgment, are devoid of substantial evidence, and such Findings do not support Judge Harper's Conclusions of Law, and therefore erroneous under the laws of the State of Washington. Accordingly: Landry respectfully submits that this Court should reverse the decision of the lower court dismissing his action, and remand to the lower court, with re-assignment to a judge other than Judge Hartman, possibly requiring a visiting judge or

removal to another venue, for determination on the issue of monetary damages to which Landry is entitled, including, but not limited to, money damages for the Respondent PORT Defendants infliction of emotional distress and demolition of Patrol No.1, enter such award in further judgment in favor of Landry.

DATED this 23rd day of May, 2017

MARC LANDRY, APPELLANT-PLAINTIFF, PRO SE

A handwritten signature in cursive script that reads "Marc Landry". The signature is written in black ink and is positioned above a horizontal line.

MARC LANDRY, Appellant-Plaintiff, Pro Se

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STATE OF WASHINGTON

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of May, 2017, I served a true and correct copy of the foregoing document upon counsel of record for The Port Respondent-Defendants, via the methods noted below, properly addressed as follows:

To Counsel for The Port Respondent-Defendants:

Seth Goodstein
c/o The Goodstein Group

(X) U.S. First Class Mail

501 S G St., Tacoma, WA 98121-2324

I, GARY D. FELDER declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 23rd day of May, 2017, at Port Townsend, Washington.

Gary D. Felder

print name here: GARY D. FELDER