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NO. 52222-5-II

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

**(Thurston County Superior
Court No. 18-2-02847-34)**

**KRISTIE J. TEDFORD,
Respondent (Plaintiff)**

v.

**CHARLES L. GUY and ANGIE C. MATTLER
Appellants (Defendants)**

**OPENING BRIEF OF APPELLANTS
CHARLES L. GUY and ANGIE C. MATTLER**

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1. INTRODUCTION

The Appellants Charles Guy and Angie Matter, through their attorney Ben D. Cushman of Deschutes Law Group, PLLC submit their Opening Brief in this matter. Appellants bring this appeal to overturn rulings by the Thurston County Superior Court granting an order terminating a lease and evicting the Tenant despite evidence that the lease was terminated in retaliation against the Tenant for demanding smoke detectors. Smoke detectors are required by RCW 43.44.110 (and thus by RCW 59.18.060(1)) and RCW 59.18.060(12).

There had been a series of problems with the condition of the property and the exchange of documents, which had been mostly addressed by text messages (as the Landlord was in Florida). However, the Landlord appears to have made the decision, following the text exchange about the smoke detectors, that the Tenants were going to be demanding and insistent on their rights, and therefore took steps to terminate their tenancy. This is unlawful retaliation under RCW 59.18.240. RCW 59.18.240 is one of the few defenses that applies to protect tenants from termination of month-to-month leases and evictions based on that termination.

However, rather than consider the defense of retaliation, the Court Commissioner, based on incomplete findings failing to recognize and account for key facts, ruled that the parties had a month-to-month lease that was properly terminated by Plaintiff and that the Defendants' defense of

retaliation was not substantiated. This ruling is completely erroneous. The Commissioner's basis for her ruling was that there had been no "demand" for smoke detectors. That ruling fails to recognize the purpose and intent of the Tenant's text exchange with the landlord about smoke detectors, which cannot be interpreted as anything other than a demand for smoke detectors even though express words of demand are never used.

In upholding the Commissioner, the reviewing judge affirmed and incorporated this error, compounding it with a second error by ruling that the fact that the Tenant did buy and install smoke detectors, bringing the Landlord into compliance on that issue, meant that the subsequent actions of the Landlord to remove the Tenant were not retaliatory. This confuses compliance with nonretaliation. A person forced to comply may be in compliance, but may nonetheless retaliate against the person who made them comply. That is what happened here.

2. ASSIGNMENTS OF ERROR

2.1 The Commissioner and Reviewing Judge erred in dismissing the Tenants' Retaliation claim without trial based on a limited evidentiary hearing on an unrelated issues (lease duration) at which no evidence on retaliation was allowed to be heard.

2.2 The Commissioner erred in ruling that there was no evidence that Tenants made any demand for smoke detectors and thus there was nothing for Landlord to retaliate against.

2.3 The Reviewing Judge erred in incorporating the errors of the Commissioner and in further ruling that the Landlord's compliance with Tenants' demand for smoke detectors (by allowing the Tenants to buy and install smoke detectors) defeated Tenants' Retaliation claim.

3. ISSUES RELATED TO ASSIGNMENTS OF ERROR

3.1. Is a trial necessary on Tenants' retaliation claim when no evidence has been taken or heard on the parties' intent or understanding of text messages concerning the lack of smoke detectors at the rental premises?

3.2 Did tenants' make a demand for smoke detectors sufficient to raise the presumption of Retaliation under RCW 59.18.240-.250?

3.3 Does compliance with a demand defeat a claim of subsequent retaliation against the person who made the demand?

4. STATEMENT OF THE CASE

The parties entered a lease in January 2018 under which the Defendants would lease the Landlord's property at 816 Foote St. NW. The lease was signed by the Defendants, but not signed by the Landlord or her agent, and the individual pages and handwritten terms were not initialed. (CP 21, 25-28.) The Landlord's agent and the Defendants, however, did sign a handwritten addendum to the lease regarding the deposit. (CP 10.)

The parties disagree about what the lease duration term in the lease document was. (CP 6 and CP 22, 25.) Each has submitted what they contend is an accurate copy of the lease and each contends that the other has submitted an altered document. Testimony was taken on this point (and only on this point). (RP 7/6/18, p.3, 1.19 to p.8, 1.22.) The Landlord's only evidence that Defendant's document was a forged document was her

own testimony. (CP 108-109; RP 7/6/18, p.11, l.10 to p.12, l.3; p.26, l.16 to p. 27, l.21.)

In addition to the testimony of Angie Mattler that the Landlord's, not the Defendants', document was the forged document, Defendants offered further evidence relating to the apparent mismatch of handwriting on the lease duration term of the Landlord's document when compared with the handwriting on the rest of the document. (CP 21-23; RP 7/6/18 p.15, l.7 to p.22, l.22; p.28., l.9-13; p.29, l.19 to p.33, l.17.) As seen in the cited testimony, the parties agree that all the handwriting should be that of Angie Mattler and therefore it should all be the same handwriting. However, the lease duration paragraph on the document attached to the Complaint appears to have been written in a different hand. This was one of the two disputed points in the case. However, tenants have since moved from the house, making the dispute about the lease duration moot.

Following execution of the lease (whichever lease was the true one), the Tenants conducted an inspection of the house prior to moving in. The Landlord's agent had not allowed them to conduct a more thorough inspection prior to lease execution. There were serious problems with the house that prevented it from being occupiable in February 2018, when the lease began. There was garbage and human waste in the house that needed to be cleaned up before the Tenants could move in. (RP 7/6/18 p.28, l.14 to p.29, l. 14.) Angie Mattler communicated these issues in text conversations

with the Landlord. (CP 6, 37-59 (esp. 45 concerning bucket of human waste).)

This communication, like virtually all Landlord/Tenant communication in this case, was by text (CP 33-76). Despite the seriousness and grossness of the issues, the tone of the text exchange about the garage cleanup was very cordial on both sides.

Further, although the texts from Tenant never contain forceful words such as “We, the Tenants, demand that the Landlord clean the garbage and waste from the property,” and although the Tenants did not send a formal paper letter to Landlord demanding repairs, both Landlord and Tenants recognized and treated the texts as a formal written request for repair under RCW 59.18.070. Landlord promised that her agent, Ben Amidon, would clean the property. He failed to do so for more than ten days, even though the unsanitary condition was such that must faster correction is required by RCW 59.18.070. Ultimately, at the end of February, the Tenants completed the cleaning of the property and sent the Landlord a dump bill. The Landlord expressed surprise that her agent had not cleaned the property, but she accepted the bill and provided a proper credit. (CP 59.)

Thereafter, in early March 2018, the Tenants moved into the property. They quickly discovered and reported to the Landlord that there were no smoke detectors or carbon monoxide detectors in the house.

Specifically, Angie Mattler texted the Landlord, “Hi Kristie, I noticed that there’s no smoke alarms in the house. Are you planning on hiring someone to install them? For safety reasons is why I’m asking.” Angie Mattler also said that she had a carbon monoxide detector, “So no biggie on that.” (CP 62-64.) This exchange was not materially different in tone or syntax from the exchange about the unsanitary condition in the house and was, and should have been, treated as a request for repair under RCW 59.18.070. The smoke detector issue was resolved with Angie Mattler, with approval of the Landlord, buying and installing smoke detectors and sending the bill for them as a request for credit.

However, at that point the relationship between Tenant and Landlord soured. This appears to have followed immediately on and been motivated by the Tenants’ texts about the smoke detectors, as all other issues in discussion predated that event. The smoke-detector incident may have been the “straw that broke the camel’s back” for the Landlord, making the Landlord decide that these would be over-demanding and difficult tenants. Nonetheless, the tone of the Landlord’s texts became hostile and the Landlord soon initiated a termination and eviction process. The precipitating event of that change appears to have been the Tenants’ demand for smoke detectors.

Procedure and Rulings Below

This matter came for hearing on the original show cause on June 15, 2018. The Tenants appeared, with counsel, to show cause and had filed a memorandum with supporting declarations contesting the accuracy of the lease document relied on by Landlord and raising the defense of unlawful retaliation. Landlord appeared through counsel, and also submitted a reply to Tenants' response. Landlord's Reply, and argument at the show cause hearing, consisted of three points: (1) the unlawful detainer was based on a termination of a month-to-month lease, not a based on tenant noncompliance; (2) the Tenants were properly served; and (3) the accurate and binding lease was the one submitted by the Landlord and attached to Landlord's Complaint. Notably, the Landlord did not argue that there was any defect, including any lack of signature, in the lease document or deny the retaliation defense. (See RP 6/15/18 generally.)

The Commissioner continued the hearing to July 6, 2018 to allow the Landlord to make a more complete response and to appear in person and to specifically allow testimony about which of the submitted lease documents was accurate. Trial was also set for "the week of July 16."

At the July 6, 2018 hearing, the parties appeared to present evidence on the accuracy of their respective documents and did so. This was the strict limit of the hearing. No evidence was allowed on the allegations about retaliation. When Defendants' counsel called Defendant Charles

Guy to present evidence related to the retaliation defense, the Court refused to hear that testimony, ruling that it was “irrelevant” to that proceeding. After hearing the evidence, the Court focused on what was a new issue, not previously raised, relating to the lack of the Landlord’s signature on the original lease documents. The Commissioner then ruled that the lack of signatures on the lease was fatal to the lease, meaning that there was no written lease. Default lease terms are month-to-month, meaning the termination was proper. (RP 7/6/18, p.49, 1.9-25.) The Commissioner failed to consider whether the Landlord’s forging of the lease counted as a Landlord signature (ruling, contrary to all evidence, that there was an “honest mistake” rather than an “altered document) and failed to consider the signature on the addendum. (RP 7/6/18, p.49 1.5-8.) The Commissioner then, erroneously (based on her own logic) ruled that this also disposed of the retaliation defense, supporting that ruling with a further ruling that (because she refused to hear evidence) there was no evidence that Tenants had made a formal demand that the smoke detectors be installed. (RP 7/6/18, p.49, 1.25 to p.50, 1.8.)

The Tenants sought Revision of the Commissioner’s Ruling. That Motion was heard before a Superior Court Judge on 8/3/18, with the Judge affirming the Commissioner, thus incorporating the errors of the Commissioner’s Ruling into his own, while adding an additional point of error. In addition to incorporating the Commissioner’s errors, the Judge

ruled that there had been no retaliation against Tenant based on Tenant's demand for the fire alarms because the fire alarms were ultimately installed. In making that ruling, the Judge failed to recognize that compliance and retaliation are different things. A person who grudgingly complies with an obligation can nonetheless retaliate against the person who made them do so. (RP 8/3/18 p.16, l.14 to p.18, l. 25; p.30, l.1-10.)

5. SUMMARY OF ARGUMENT

Therefore, timing and the text message record makes clear that this termination and eviction process was done for the purpose of removing demanding tenants (although the Tenants did not demand anything more than what they were entitled to receive by operation of RCW 59.18). The devices are required by RCW 43.44.110 (and thus by RCW 59.18.060(1)) and RCW 59.18.060(12). Rather than comply with her statutory duties, when faced with Tenants that promptly and consistently demanded that she do so, the Landlord initiated termination and eviction proceedings. This is unlawful retaliation under RCW 59.18.240. That is one of the few defenses that applies to protect tenants from termination of month-to-month leases and evictions based on that termination.

Further, that statute entitles a tenant, in addition to dismissal of the improper and unlawful eviction action, to a recovery of attorney's fees under RCW 59.18.250. Tenant reserves the right to seek these fees on separate motion.

This Court considers this matter de novo, but on the record, and that is a problem in this case. The Commissioner limited the Defendants' presentation of their evidence, specifically impairing the Defendants' ability to present the evidence supporting their retaliation defense, and then ruled that the retaliation defense is inapplicable due, in part, to lack of evidence. In the Response, Plaintiff has repeated and exploited this error. Specifically, the Commissioner refused to hear testimony from Guy Charles on the NSF checks. Mr. Charles was prepared to explain that the NSF checks were the result of a banking error in his setting up an automatic payment, which was resolved prior to the conflict that produced the eviction. Further, he was to offer testimony confirming that the NSF checks had been covered prior to the termination, so there was no longer any breach of, or noncompliance with, the lease terms by the Tenants at the time of eviction. Therefore, the rebuttable presumption of retaliation by the Landlord, which Landlord failed to refute, applies in this case. RCW 59.18.240-.250.

This evidence is missing only because the Defendants were not allowed to present it. The Commissioner refused to hear, ruling that it was irrelevant. However, the Plaintiff's argument, that the history of NSF checks is a lease breach that defeats the rebuttable presumption of retaliation makes that testimony highly relevant. At a minimum, this case should be remanded to the Commissioner for a proper unlawful detainer

trial on which that testimony can be taken in a full and fair hearing on the merits.

6. ARGUMENT

Because this matter was based on an eviction following termination of a month-to-month lease, rather than based on tenant noncompliance, eviction is proper only if (1) the lease was a month-to-month lease AND (2) there is no proper defense of unlawful retaliation. (While there was originally an allegation of noncompliance, the Landlord withdrew that allegation and it is undisputed that the Tenants were in compliance with the lease terms prior to the time of the original notices and throughout these proceedings. Further, the retaliation defense operates if (1) Tenants asserted some right under RCW 59.18 within the ninety days prior to the eviction proceeding unless (2) Landlord presents evidence sufficient to overcome the rebuttable presumption of retaliation. RCW 59.18.250.

Thus, Tenants would have prevailed if the lease were a year lease, rather than a month-to-month lease, because, in that case, there would have been no proper eviction pending. (The Commissioner ruled against the Tenants on this point and the issue is moot because Tenants have vacated.) A tenant should also prevail if they assert some right within the ninety days prior to the eviction proceeding unless Landlord can overcome the rebuttable presumption of retaliation. Here, Tenants asserted that the text messages concerning the smoke detectors, especially when read in light of

the previous text messages about the garbage and human waste, was a written assertion of a right under RCW 59.18.060, triggering the presumption of retaliation, and that Landlord's self-serving testimony is not sufficient to overcome that presumption. The Commissioner and Reviewing Judge erred in ruling in favor of the Landlord, especially without a full and fair trial on the Retaliation claims, in this case.

6.1. The Commissioner Improperly and Prematurely Struck Trial on the Tenants' Retaliation Claim
(Issue 3.1; Error 2.1)

As seen in the logic above, to defeat the Tenants' case, the Landlord would have to make out two counter-cases: (1) that the lease was month-to-month AND (2) that there was no improper retaliation. These are independent of each other, and Landlord's victory on one does not dispose of the other.

It is fair to say that the Landlord prevailed on the issue of whether the lease was a month-to-month lease. Evidence was taken on this issue (and only on this issue) and the Commissioner ruled that the leases presented to her lacked a binding Landlord signature and were therefore invalid, reverting the lease agreement to that available on oral terms. In Washington, a lease on oral terms is presumed to be month-to-month. That resolves, in Landlord's favor, the first of the two contests.

However, it does not resolve the second. No evidence was heard on the second argument – that Landlord was retaliating against Tenants for

Tenants demanding things they are entitled to receive as Tenants (in the final instance, working smoke detectors). Despite there not having been any evidence taken on this point (specifically, no evidence concerning how the parties understood their text exchanges about the smoke detectors), the Commissioner ruled that, as a matter of law, there had not been a “demand” for anything because the language used by the Tenants was not strident or demanding in tone. This is addressed in the next section.

Aside from the substantive error in the Commissioner’s interpretation of the texts, there was a procedural due process error. Tenants were not allowed to present testimony to support their Retaliation claim. The only testimony allowed was about the lease duration terms in the lease documents, which became a red herring issue when the Commissioner ruled that none of leases were effectively executed by the Landlord. The Commissioner, having resolved only half the case, improperly struck the trial. This Court should reverse and remand this case for trial on the remaining half of the case – the Retaliation claim – and allow a full and fair airing of the evidence on Retaliation.

6.2 The Commissioner Improperly Ruled that Tenants had Not Asserted any Right in the Text Exchange about Smoke Detectors (Issue 3.2; Error 2.2)

The Landlord's actions here, including this eviction action, appear to be in retaliation against tenants for Tenants’ asserting their right to have smoke and carbon monoxide detectors in the home (possibly in

combination with Tenants' earlier complaints about the garbage and waste, and arising from the Landlord's desire not to have tenants willing to assert their statutory rights). These devices are required by RCW 43.44.110 and RCW 59.18.060. Rather than comply with her statutory duties, when faced with a demand that she do so, Landlord initiated eviction proceedings. This is unlawful retaliation under RCW 59.18.240 entitling tenant, in addition to dismissal of the improper and unlawful eviction action, to a recovery of attorney's fees under RCW 59.18.250.

The Commissioner ruled that there was no evidence that the Tenants had actually asserted a right to smoke detectors. The Commissioner ruled that there was no evidence of a "demand" in the record and therefore there was no triggering act on which the retaliation defense could be based. However, especially when read in light of the previous communications about the garbage and waste, it is impossible to see Angie Mattler's text to the Landlord ("Hi Kristie, I noticed that there's no smoke alarms in the house. Are you planning on hiring someone to install them? For safety reasons is why I'm asking." (CP 63)) as anything other than an assertion of a right to smoke detectors. The termination and eviction followed swiftly from this demand and appears, in the following texts, to have been motivated by the Landlord's exasperation with the Tenants' demanding a home that lawfully complies with the requirements for leased premises in Washington.

The language used in this text exchange is, if anything, a more clear assertion of a right to smoke detectors than the previous exchange (about garbage in the garage) was an assertion of a right to a clean rental property. The Tenant here expressed safety concerns and noted that the smoke detectors should have been provided by the Landlord, but weren't. Under RCW 59.18.250, such a demand creates a rebuttable presumption of retaliation if an eviction is begun within the next ninety days (as happened here). Thus, Landlord had the burden to prove that she was not retaliating, and she did not do so.

6.3 Begrudging Compliance may Motivate Retaliation, but it Does Not Serve as a Defense to or Rebuttal of a Retaliation Claim. (Issue 3.3; Error 2.3)

In upholding the Commissioner's ruling, the Review Judge issued an additional ruling in support of the result – ruling that the fact that the Landlord allowed the Tenants to buy and install smoke detectors meant that the Landlord did not retaliate against the Tenants for demanding smoke detectors. This ruling mistakes compliance with retaliation. The fact of compliance does not rule out retaliation. (In fact, as every parent of a child who throws a tantrum knows, begrudging compliance can often motivate retaliation.)

This landlord does not want demanding tenants. Demanding tenants are more expensive and burdensome to have. They insist that the leased premises be maintained properly, which imposes costs on the

landlord. While it is true that the costs thus imposed are no more than the operating costs required by RCW 59.18, with undemanding tenants, landlords can reduce the carrying costs of their property by not performing maintenance and other work they are technically obligated to do. Thus, landlords have an incentive to evict demanding tenants and replace them with undemanding ones.

That is the very problem that the Legislature intended to address with RCW 59.19.240-.250, which protects demanding tenants by prohibiting retaliation and by placing the burden of disproving retaliation on the landlord if the landlord starts an eviction within ninety days of receiving a lawful demand or assertion of right from a tenant. Further, the statute applies this ninety-day presumption period from the date of demand and does not mention compliance with the demand at all. Compliance with the demand is not a defense.

To defeat the presumption of retaliation, a landlord must show that the eviction is for some other, proper purpose, rather than for the purpose of removing a demanding tenant. This landlord has failed to make any such showing and has therefore failed to rebut the presumption of retaliation under RCW 59.18.250.

7. ATTORNEY FEE PROVISIONS

Pursuant to RAP 18.1, Appellants request recovery of their attorneys' fees in having to bring this action. RCW 59.18.250 provides for a fee award for a tenant who is wrongfully evicted in an act of retaliation as defined in RCW 59.18.240. These Tenants were so wrongfully evicted and are therefore entitled to attorney's fees.

8. CONCLUSION

Appellant Tenants ask this Court to overturn rulings the Thurston County Superior Court granting an order terminating a lease and evicting the Tenants despite evidence that the lease was terminated in retaliation following the Tenants' lawful assertion of a right to smoke detectors required by RCW 43.44.110 (and thus by RCW 59.18.060(1)) and RCW 59.18.060(12). This is unlawful retaliation under RCW 59.18.240-.250, and the Tenants asserted this Retaliation claim. Rather than consider the defense of retaliation, the Court Commissioner, based on incomplete findings following an abbreviated hearing that did not allow airing of evidence of the Retaliation claim, granted the eviction and dismissed the Retaliation claim. This is error. The Tenants sought revision of the order, but the Reviewing Judge, incorporating the errors of the commissioner and compounding it was an erroneous conflation of compliance with non-retaliation, affirmed the Commissioner. This is also error.

This Court should rule that, on these facts, there is an unrebutted presumption of Retaliation and thus reverse the decisions below, granting attorney's fees to the Tenants under RCW 59.18.250, and remanding this case to the Superior Court for exoneration of the Tenants' bond and an award of attorney's fees incurred at the trial court level to Tenants. Alternatively, this Court should reverse and remand this case for trial on Tenants' Retaliation claim to allow a full and fair hearing of the evidence of retaliation and the parties' understanding of the purpose and import of their text exchanges concerning the smoke detectors and other issues.

DATED this 29th day of October 2018.

DESCHUTES LAW GROUP, PLLC



Ben D. Cushman, WSBA #26358
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on the date signed below, I caused the foregoing document to be e-filed with this Court, and served upon the Respondent's attorney by email and regular mail.

DECLARED UNDER PENALTY OF PERJURY ACCORDING TO THE LAWS OF THE STATE OF WASHINGTON.

Dated this 29 day of October, 2018, in Olympia, Washington.



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