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NO. 53916-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

Dimension Townhouses, LLC,

Plaintiff/Appellant,

v.

Jaile Montalvo,

Defendant/Respondent.

BRIEF OF RESPONDENT JAILE MONTALVO

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY.

The Honorable James Orlando.

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TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. STATEMENT OF ISSUES 1

III. STANDARD OF REVIEW 1

IV. STATEMENT OF THE CASE..... 2

V. ARGUMENT 7

A. Dimension obtained the order and writ based on Ms. Bodimer's misrepresentations..... 7

1. "Defendant has failed to identify her dog as agreed." 8

2. "She has refused to pay rent as agreed" 9

3. "So she has completely ignored the agreement." 10

B. CR 60(b)(4) covers innocent and willful misrepresentations.11

C. Dimension may not justify its December 27 motion through its new argument about payment of utilities.....12

D. Granting the order of limited dissemination was a proper exercise of the Superior Court's discretion. 16

E. Request for Attorney Fees and Expenses.....17

VI. CONCLUSION 17

TABLE OF AUTHORITIES

Page

State Cases

Buich v. Tadich Grill Devpt. Co.,
2020 WL 60310 (Wash. App. Jan. 6, 2020) 11

Esmieu v. Hsieh,
20 Wn. App. 455, 580 P.2d 1105 (1978) 9

First Union Mgmt., Inc. v. Slack,
36 Wn. App. 849, 679 P.2d 936 (1984) 9, 15

Housing Auth. of Grant Cnty. v. Newbigging,
105 Wn. App. 178, 19 P.3d 1081 (2001) 9, 15

Hydraulic Supply Mfg. Co. v. Mardesich,
57 Wn.2d 104, 352 P.2d 1023 (1960) 9

Malo v. Anderson,
62 Wn.2d 813, 384 P.2d 867 (1963) 15

Mitchell v. Wash. State Inst. of Pub. Policy,
153 Wn. App. 803, 225 P.3d 280 (2009) 13

Peoples State Bank v. Hickey,
55 Wn. App. 367, 777 P.2d 1056 (1989) 11

Roberson v. Perez,
123 Wn. App. 320, 96 P.3d 420 (2004) 13, 16

Rufin v. Seattle,
200 Wn. App. 1028 (Aug. 21, 2017) 11

Ryker v. Stidham,
17 Wn. App. 83, 561 P.2d 1103 (1977) 15

Sarvis v. Land Resources, Inc.,
62 Wn. App. 888, 815 P.2d 840 (1991) 11

Taylor v. Cessna Aircraft Co.,
39 Wn. App. 828, 696 P.2d 28 (1985) 13

Wallis v. Elliott,
154 Wash. 625, 282 P. 928 (1929).....15

Federal Cases

In re DePuy Orthopaedics, Inc.,
888 F.3d 753 (5th Cir. 2018) 11, 16

Rembrandt Vision Tech., L.P. v. Johnson & Johnson Vision Care, Inc.,
818 F.3d 1320 (Fed. Cir. 2016).....13

Rozier v. Ford Motor Co.,
573 F.2d 1332 (5th Cir. 1978) 13, 16

Statutes

Housing Act of 1937 Section 8, 42 USC § 1437f.....3

RCW 59.12.030 14

RCW 59.18.030 10

RCW 59.18.180 14

RCW 59.18.230 14

RCW 59.18.367 .....1, 7, 16

Laws of 2019 ch. 356.....10

Other Authorities

CR 60 .....1, 6, 8, 11, 15

GR 14.1 11

RAP 18.1 17

I. INTRODUCTION

Based on a false declaration, Plaintiff/Appellant Dimension Townhouses obtained an ex parte writ of restitution and evicted Defendant/Respondent Jaile Montalvo and her four-year-old son. Mother and son endured seven months of homelessness as a result. When Ms. Montalvo brought the false declaration to the attention of Pierce County Superior Court, the court vacated the writ and the order granting the writ. It also entered an order of limited dissemination. The court did not abuse its discretion in entering these orders.

II. STATEMENT OF ISSUES

1. Did the Superior Court abuse its discretion in determining that the December 27, 2018 Order for Writ of Restitution and the December 31, 2018 Writ of Restitution should be vacated pursuant to CR 60(b)(4)?

2. Did the Superior Court abuse its discretion in determining that dissemination of the record in this action should be limited pursuant to RCW 59.18.367?

III. STANDARD OF REVIEW

Ms. Montalvo agrees with Dimension that the applicable standard of review as to both issues is abuse of discretion. See Brief of Appellant at 6, 14. "The appellate court considers whether it can be said no

reasonable [person] would take the view adopted by the trial court." Id. at 6 (internal quotation and citation omitted).

IV. STATEMENT OF THE CASE

Dimension is the landlord of the multifamily residential property where Ms. Montalvo lived. On November 1, 2018, Dimension brought this unlawful detainer action against Ms. Montalvo, alleging that she was keeping an unauthorized pet in violation of the lease. CP 1. In fact, Ms. Montalvo, who suffers from PTSD and depression, has a dog as an emotional support animal, which she had reported to Dimension's agent at the commencement of the lease. CP 61 (¶5), 85 (¶2), 89.

Despite Ms. Montalvo's notice of her support animal, Dimension obtained a writ of restitution against Ms. Montalvo on November 20, 2018. Ms. Montalvo moved to vacate the judgment and stay the writ on the grounds that she had not received notice of the order to show cause and that Dimension's action was without merit. CP 15. On November 26, 2018, the Pierce County Superior Court issued an order to show cause why Ms. Montalvo's requested relief should not be granted and set a hearing for December 3, 2018.

On December 3, the parties reached an agreement to resolve their dispute, which was documented in an Agreed Stipulation and Order ("the settlement agreement") entered that day. By the terms of that agreement,

the writ of restitution was stayed, Ms. Montalvo would vacate the property by January 31, 2019, the judgment would be deemed vacated, and Dimension would agree to issuance of an order of limited dissemination upon the following conditions:

1) Ms. Montalvo would pay rent and utilities assessments for December and January; and

2) Ms. Montalvo "will provide her support animal's Pierce County animal license number within 14 days."

The settlement agreement provided that ***if*** Ms. Montalvo breached those conditions, Dimension could obtain a writ of restitution without notice to Ms. Montalvo. CP 20-22.

Ms. Montalvo, who is disabled and has little income, received rent assistance from Pierce County Housing Authority under Section 8 of the Housing Act of 1937. PCHA regularly paid the $975 monthly rent due from Ms. Montalvo to Dimension, including her December rent. CP 54-57, 61-63 (¶¶9, 15), 65.

Ms. Montalvo also paid the utilities assessments Dimension's online portal told her she owed. After consulting the portal, she paid $78 to Dimension on December 5. Dimension accepted and recorded the payment that day. It did not dispute that she had paid the correct amount or tell her she owed more. CP 76, 86 (¶4).

On December 10, Ms. Montalvo's purse was stolen. She lost, among other things, the mailbox key Dimension had provided to her. CP 62 (¶11).

Pursuant to the settlement agreement, Ms. Montalvo obtained a license for her service animal from the City of Lakewood, which the city mailed to her on December 14, 2018, before the expiration of the 14-day period specified in the settlement agreement. CP 62 (¶10), 67, 85-86 (¶3). Ms. Montalvo told Mary Bodimer, Dimension's on-site manager, that her key had been stolen and she needed access to her mailbox in order to get, and give to Dimension, the animal license. CP 62 (¶12). Ms. Bodimer told Ms. Montalvo that Ms. Montalvo would need to request the key through Dimension's online portal. Id. Ms. Montalvo attempted to do so, but the request was "canceled" by the portal. CP 62 (¶12), 69. Ms. Montalvo asked Ms. Bodimer to open the mailbox so that Ms. Montalvo could get the animal license to give to Ms. Bodimer, but Ms. Bodimer refused. CP 62-63 (¶¶13, 16).

On December 27, 2018, Dimension moved for issuance of a writ of restitution, without notice to Ms. Montalvo. CP 23. The grounds for seeking the writ were set forth in Ms. Bodimer's declaration of that date, which stated: "As of today's date, Defendant has failed to identify her dog

as agreed, and she has refused to pay rent as agreed; so she has completely ignored the agreement." CP 25 (¶5).

As of December 27, when the motion and Bodimer Declaration were filed, (1) Ms. Bodimer had been told that the City of Lakewood had issued and sent to Ms. Montalvo the animal license requested by the settlement agreement; (2) Ms. Montalvo could not gain access to the license because she did not have a key to the mailbox; (3) Ms. Bodimer and Dimension would not issue Ms. Montalvo a replacement key; and (4) Ms. Bodimer would not herself open the mailbox to retrieve the license. CP 62-63 (¶¶12, 13, 16), 67, 85-86 (¶3).

As of December 27, when the motion and Bodimer Declaration were filed, PCHA had paid Ms. Montalvo's rent for December. CP 54-57, 61-63 (¶¶9, 15), 65. Dimension knew Ms. Montalvo's rent was current.

Ms. Bodimer's assertions that Ms. Montalvo had "failed" to "identify her dog" (i.e., obtain the animal license), had "refused" to pay her rent, and had "completely ignored" the settlement agreement were false. CP 54-57, 61-63 (¶¶9-13, 15, 16), 67, 85-86 (¶3). These assertions were the sole bases for Dimension's motion. CP 23-25.

Based upon Dimension's motion and the Bodimer Declaration, the Superior Court entered an order granting the motion on December 27, 2018. The writ of restitution issued on December 31, 2018. The sheriff

executed the writ in January, before the January 31, 2019, move-out date agreed to in the settlement agreement. CP 101, 103, 108.

As of January 2, 2019, Ms. Montalvo and PCHA were not aware that Dimension had obtained the December 27 order and December 31 writ. On January 2, PCHA paid Dimension the rent for January and Ms. Montalvo tendered a money order for the utilities in the amount the portal indicated was due. Dimension has kept the rent payment for the entire month, though it evicted Ms. Montalvo and her son before the end of the month. Ms. Bodimer refused to accept the money order for the utilities, telling Ms. Montalvo she was "in eviction status." CP 54-57, 61-62 (¶9), 86 (¶6), 93.

Following their eviction, Ms. Montalvo began searching for new housing for herself and her son. Potential new landlords repeatedly turned her down because the order and writ indicated she had been evicted and owed money to her former landlord, Dimension. CP 63 (¶18), 87 (¶9). She eventually found housing in August 2019. Before then, Ms. Montalvo and her son were homeless for approximately seven months, mostly sleeping in cars, bus stops, shelters, and homes of friends. CP 87 (¶¶8-9).

In June 2019, Ms. Montalvo, now represented by counsel, filed a motion for relief from the order and writ and a motion for limited dissemination of the order. CP 29, 47. The motion for CR 60 relief

argued that Dimension had obtained the prior writ on the basis of Ms. Bodimer's misrepresentations. The motion for limited dissemination argued that "the plaintiff's case was sufficiently without basis in fact or law." (quoting RCW 59.18.367).

The court granted both motions. CP 94, 96. The court specifically found that "Plaintiff's unlawful detainer action was without basis in fact or law." CP 94. Dimension then appealed both orders.

V. ARGUMENT

A. Dimension obtained the order and writ based on Ms. Bodimer's misrepresentations.

Dimension obtained the December 27 order and the December 31 writ on the basis of the following statements by its manager Ms. Bodimer: "As of today's date [December 27], [1] Defendant has failed to identify her dog as agreed, [2] and she has refused to pay rent as agreed; [3] so she has completely ignored the agreement." CP 25 (¶5). These statements provided the sole factual basis for Dimension's motion. They were all false. Indeed, on this appeal, Dimension has either conceded the falsity or declined to assert the alleged truth of each of the three statements. We address each in turn below. Because of these misrepresentations, vacation

of the December 27 order and December 31 writ was appropriate under CR 60(b)(4).[1]

1. "Defendant has failed to identify her dog as agreed."

Ms. Montalvo had, in fact, obtained the license for her dog and attempted to deliver it to Ms. Bodimer, but had been prevented from doing so by Ms. Bodimer herself. CP 62-63 (¶¶10-13, 16), 85-86 (¶¶2, 3). Dimension argued below that Ms. Montalvo was also required to obtain an additional support animal license, CR 73, 74 (¶5), but the Superior Court rejected that argument and Dimension has not renewed it on appeal.[2] Nor has Dimension's opening brief made any attempt to argue that Ms. Bodimer was telling the truth or that Ms. Montalvo did not obtain the license or try to provide it to Ms. Bodimer. In fact, Dimension concedes

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[1] Ms. Montalvo's opening brief in Superior Court referenced CR 60(b)(1) as an alternate ground for relief, but the briefing and argument of both parties focused on the misrepresentations under CR 60(b)(4).

[2] There is no separate "support animal license." Ms. Montalvo had previously obtained – and provided to Ms. Bodimer – a certificate confirming that she required a support animal. CP 85-86 (¶¶2-3), 89. Presumably for that reason, the December 3 settlement agreement called for Ms. Montalvo to "provide her support animal's Pierce County animal license number," CP 20 (¶2), not to provide additional proof the animal was a support animal.

that "Ms. Bodimer may have blame placed upon her" for the dog license.[3] Brief of Appellant at 12. Dimension has abandoned this issue.

2. "She has refused to pay rent as agreed" The declarations of Ms. Montalvo and Tamara Meade of PCHA established that Dimension received full payment for Ms. Montalvo's rent. CP 54-55 (¶¶3-8), 57, 61-63 (¶¶9, 15), 65. A landlord may not base an eviction on nonpayment of rent if it has accepted the rent payment in question. *Housing Auth. of Grant Cnty. v. Newbigging*, 105 Wn. App. 178, 186-87, 19 P.3d 1081 (2001); *First Union Mgmt., Inc. v. Slack*, 36 Wn. App. 849, 855-56, 679 P.2d 936 (1984). There can be no dispute that Ms. Bodimer's statement that Ms. Montalvo "has refused to pay rent as agreed" was a misrepresentation.

Dimension has now conceded that the rent was fully paid. Brief of Appellant at 4, 10. It has attempted to defend Ms. Bodimer's misrepresentation by suggesting that what Ms. Bodimer really meant was that Ms. Montalvo had not paid her utility assessments. But rent and utilities are two different things, *Slack*, 36 Wn. App. at 857 n.7, as the

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[3] Dimension may not contend that Ms. Montalvo failed to deliver the license when Dimension prevented the delivery. *See, e.g., Hydraulic Supply Mfg. Co. v. Mardesich*, 57 Wn.2d 104, 105, 352 P.2d 1023 (1960); *Esmieu v. Hsieh*, 20 Wn. App. 455, 457-61, 580 P.2d 1105 (1978) (landlord's "deliberate frustration" of tenant's ability to perform).

parties' agreement recognized. CP 20 (¶4). Ms. Bodimer claimed that the rent had not been paid. She did not claim the utilities had not been paid.[4]

Dimension also seeks to defend Ms. Bodimer's misrepresentation by saying that "Ms. Bodimer is correct that Montalvo, herself, failed to pay rent as agreed." Brief of Appellant at 12. This statement ignores the fact that the parties knew PCHA would be paying the rent when they entered into the settlement agreement. When Ms. Bodimer told the court that Ms. Montalvo "has refused to pay rent as agreed," she intended to mislead the court into believing that Ms. Montalvo had breached the agreement and that Dimension had not received the December rent payment. Ms. Bodimer was telling the court that Ms. Montalvo had refused to pay the rent when Dimension knew it had received the rent.

3. "So she has completely ignored the agreement." As demonstrated above, the statement that Ms. Montalvo had "completely ignored the agreement" was untrue and was known by Ms. Bodimer to be untrue. Dimension's opening brief makes no attempt to argue that the statement was true.

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[4] After the events in issue, the legislature amended the definitions in the Residential Landlord Tenant Act to provide that rent "means recurring and periodic charges identified in the rental agreement for the use and occupancy of the premises, which may include charges for utilities." RCW 59.18.030(28); Laws of 2019 ch. 356, §2. The parties' settlement agreement treated rent and utilities as separate items. CP 20 (¶4).

B. CR 60(b)(4) covers innocent and willful misrepresentations.

Dimension makes two additional arguments in support of its appeal. First, it argues that a misrepresentation under CR 60(b)(4) must be made with specific knowledge and intent. Brief of Appellant at 7. This argument is flawed both as a matter of law and as a matter of fact.

As a matter of law, the governing standard under CR 60(b)(4) is that "[i]t is immaterial whether the misrepresentation was innocent or willful." *Peoples State Bank v. Hickey*, 55 Wn. App. 367, 371, 777 P.2d 1056 (1989). Dimension relies on *Sarvis v. Land Resources, Inc.*, 62 Wn. App. 888, 893, 815 P.2d 840 (1991), for the proposition that intent is required. Though no reported decisions after *Hickey* and *Sarvis* address the issue, the most recent unreported decisions, cited here for their persuasive value pursuant to GR 14.1, and decisions under the comparable federal rule, to which Washington courts look for guidance, *Hickey*, 55 Wn. App. at 371, confirm that *Hickey* sets forth the correct rule. *See, e.g.*, *Buich v. Tadich Grill Devpt. Co.*, 2020 WL 60310 at *6 (Wash. App. Jan. 6, 2020); *Rufin v. Seattle*, 200 Wn. App. 1028 at *3 (Aug. 21, 2017); *In re DePuy Orthopaedics, Inc.*, 888 F.3d 753, 790 (5th Cir. 2018).

As a matter of fact, a requirement that a misrepresentation must be intentional would not benefit Dimension in this case. Ms. Montalvo communicated directly with Ms. Bodimer regarding the animal license, so

Ms. Bodimer knew that Ms. Montalvo had the license and would have delivered it, but for the fact that she was prevented from doing so by Ms. Bodimer herself. CP 62-63 (¶¶ 13-16). The payment of the December rent was reflected in Dimension's own internal ledger, CP 76, and would have been known to Ms. Bodimer before she told the court that Ms. Montalvo had refused to pay the rent. And the statement that Ms. Montalvo had "completely ignored the agreement" was plainly untrue in light of Ms. Montalvo's efforts to provide the animal license, the payment of the December rent, and the December utilities payment.

C. Dimension may not justify its December 27 motion through its new argument about payment of utilities.

Dimension also argues that, though it misrepresented the facts about the animal license and rent payment, it still would have been entitled to the December 31 writ because Ms. Montalvo did not pay for utilities in December 2018. This argument is unavailing for at least four reasons.

First, the support for the December 31 writ was the false representations regarding the animal license and the rent, not the alleged nonpayment of utilities, first raised by Dimension six months later. These misrepresentations undermine the writ, without considering the probable impact of the misrepresentations on the outcome, i.e., without regard to whether Dimension could have relied on some other ground or whether

doing so would have produced the same or a different result. *Mitchell v. Wash. State Inst. of Pub. Policy*, 153 Wn. App. 803, 825, 225 P.3d 280 (2009); *Roberson v. Perez*, 123 Wn. App. 320, 336, 96 P.3d 420 (2004); *Taylor v. Cessna Aircraft Co.*, 39 Wn. App. 828, 836-37, 696 P.2d 28 (1985) (citing *Rozier v. Ford Motor Co.*, 573 F.2d 1332 (5th Cir. 1978)). That is because "[t]his subsection of the Rule is aimed at judgments which were unfairly obtained, not at those which are factually incorrect." *Rozier*, 573 F.2d at 1339. "Proof that the result of the case would have been different but for the fraud or misconduct is not required." *Rembrandt Vision Tech., L.P. v. Johnson & Johnson Vision Care, Inc.*, 818 F.3d 1320, 1324 (Fed. Cir. 2016). Thus, a party that obtains an order through misconduct "is not entitled to the benefit of calculation . . . as to the extent of the wrong inflicted upon his opponent." *Roberson*, 123 Wn. App. at 336 (internal quotations omitted). An order obtained by misrepresentation must be vacated; the wrongdoer may not rely on a new, alternative ground in support of the order.

Second, Dimension has not produced any evidence that it billed Ms. Montalvo for the amounts it claims she should have paid. Dimension has supplied only its internal ledger, CP 76, which is not a document Ms. Montalvo ever saw. CP 86-87 (¶7). To the contrary, when Ms. Montalvo reviewed Dimension's online portal on December 5, after the dates of the

alleged charges (Nov. 28: $89.11; Dec. 1: $75), she saw that it said she owed $77.74 for utilities, and she paid $78 by money order the same day. CP 86 (¶4). Dimension accepted the payment and recorded it that day. CP 76. It did not dispute $78 was the correct payment; nor did it tell Ms. Montalvo it thought she owed more. If it had, she would have paid any additional amount owed. (She also tendered an additional $186 on January 2, covering the amount the portal stated was due for utilities as of that day.) CP 86 (¶¶4-6), 91, 93. It is not possible for a tenant to make a payment she does not know she owes and which the landlord has not told her she owes. The law required Dimension to notify Ms. Montalvo she owed these alleged charges and give her the opportunity to pay them before evicting her, a requirement that could not be waived. RCW 59.12.030(3), (4); RCW 59.18.180(2); RCW 59.18.230(1). Dimension may not rely post hoc on an alleged unpaid charge if it did not tell Ms. Montalvo she owed for that charge.

Third, on January 2, PCHA paid Dimension $975 for January rent, which Dimension has retained to this day, CP 54-55 (¶¶ 3-8), 57, even though it had already obtained the December 31 writ and even though it evicted Ms. Montalvo on January 25. The portion of the $975 Dimension kept that was attributable to the days after it evicted Ms. Montalvo ($188.71) was more than enough to pay the allegedly unpaid December

utilities ($164.11). Dimension may not retain the $188.71, sufficient to pay the December utilities, and then seek to justify an eviction based on nonpayment of that amount. *Newbigging*, 105 Wn. App. at 186-87; *Slack*, 36 Wn. App. at 855-56.

Fourth, even if it were assumed additional utilities were owing, albeit not communicated to Ms. Montalvo, the lack of payment was due to an honest and good faith belief on her part that she was current. Ms. Montalvo had no incentive to fail to pay what she owed. Her December 5 payment and January 2 tender show she was paying what she believed she owed. Under these circumstances, equity should have provided Ms. Montalvo the opportunity to cure the alleged nonpayment rather than forfeit her tenancy. *See, e.g.*, *Wallis v. Elliott*, 154 Wash. 625, 628-29, 282 P. 928 (1929); *Ryker v. Stidham*, 17 Wn. App. 83, 89-90, 561 P.2d 1103 (1977). The equities in this case particularly favor such relief, given that Dimension acted with unclean hands through its misrepresentations and given that the wrongfully obtained writ rendered Ms. Montalvo homeless for nearly seven months. *See, e.g.*, *Malo v. Anderson*, 62 Wn.2d 813, 816-18, 384 P.2d 867 (1963).

The first of these four points is dispositive. A party whose misconduct subjects it to a motion to vacate under CR 60(b)(4) "is not entitled to the benefit of calculation" as to whether its misconduct altered

the result or whether it might have obtained the challenged order on another ground. *Roberson*, 123 Wn. App. at 336 (internal quotation omitted); *accord DePuy*, 888 F.3d at 790 ("the misrepresentations need not be outcome-determinative"). The aim of the rule is to combat "judgments which were unfairly obtained," without regard to whether they were "factually incorrect," i.e., supportable on no other basis. *Rozier*, 573 F.2d at 1339. Having obtained the writ on the basis of misrepresentations concerning the animal license and rent, Dimension may not defend the writ on another ground, first raised six months after the fact.

D. Granting the order of limited dissemination was a proper exercise of the Superior Court's discretion.

Dimension's unlawful detainer was improper for the reasons discussed above. That the December 31 writ was the product of Dimension's misrepresentations provided more than ample ground for the Superior Court to find that limited dissemination was appropriate under RCW 59.18.367(1)(a) because "the plaintiff's case was sufficiently without basis in fact or law." Moreover, Dimension now appears to concede that issuance of the order of limited dissemination would have been appropriate under the "other good cause" provision of RCW 59.18.367(1)(c). See Brief of Appellant at 15 ("there is a catch all basis for an Order of Limited Dissemination that would allow the Trial Court to

grant such relief"). There was no abuse of discretion in granting the order of limited dissemination.

E. Request for Attorney Fees and Expenses

Pursuant to RAP 18.1 and section 16 "(Attorneys' Fees)" of the parties' lease, Ms. Montalvo requests recovery of her fees and expenses on this appeal.

VI. CONCLUSION

The Superior Court did not abuse its discretion in vacating the December 27 order and December 31 writ and in granting limited dissemination. Its decisions should be affirmed.

DATED this 7 day of April 2020.

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CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on this 7 day of April, 2020, I caused to be delivered via

mail and email, a true and correct copy of this BRIEF OF RESPONDENT JAILE MONTALVO, addressed to following:

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