

FILED

JUL 25 2014

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
P.O. BOX 40250
SPokane, WA 99220-0250

No. 31771-4-III

WASHINGTON STATE COURT OF APPEALS
DIVISION III

NORTH TOWN MALL, LLC, a Delaware limited liability company,

Plaintiff/ Respondent,

vs.

WHOLESALE SPORTS USA, INC., a Utah corporation; ALAMO
GROUP, LLC, a California limited liability company,

Defendants/Appellants.

APPELLANTS' REPLY BRIEF

C. MATTHEW ANDERSEN
WSBA No. 6868
COLLETTE C. LELAND
WSBA No. 40686
WINSTON & CASHATT, LAWYERS, a
Professional Service Corporation
601 W. Riverside, Ste. 1900
Spokane, Washington 99201
Telephone: (509) 838-6131

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I. INTRODUCTION

This appeal presents a simple question of settled law. May a landlord seek forfeiture and claim breach for an assignment of the lease after it has accepted future rent payments with knowledge of the alleged breach? The answer has long been a resounding “no”.

It is undisputed that North Town Mall, LLC (North Town) demanded and accepted rent payments with knowledge of Alamo Group, LLC’s (Alamo) purchase of Wholesale Sports USA, Inc.’s (Wholesale Sports) stock (Transfer) and all the other facts North Town now paints in such a sinister light. Controlling Washington law holds that by accepting rent, North Town manifested its consent to the Transfer and waived its right to seek forfeiture based upon any known prior breach “as fully and completely as by written consent provided for in the lease.” *Batley v. Dewalt*, 56 Wash. 431, 433, 105 P. 1029 (1909); *Wilson v. Daniels*, 31 Wn.2d 633, 640-41, 198 P.2d 496 (1949).

North Town’s response to the settled law and undisputed facts is to invite this Court to find unlawful detainer based upon alleged breaches which were never identified as bases for unlawful detainer as required by RCW 59.12.030(4). Although North Town argues at length for this Court to affirm the Trial Court based upon other breaches, this Court has no jurisdiction to do so. *See Housing Auth. of City of Everett v. Terry*, 114

Wn.2d 558, 560, 789 P.2d 745 (1990) (holding the trial court has no jurisdiction absent statutory notice). North Town's dramatic portrayal of nefarious plots and misdeeds is simply irrelevant to the issues before this Court.

Seeking to avoid the consequences of its own manifestations of consent, North Town distorts the settled definition of waiver to argue waiver cannot occur without a corresponding cure. North Town claims waiver by acceptance of rent can only apply to breaches of the obligation to pay rent and can only occur during the statutory cure period. This stands the definition of waiver on its head. A landlord waives its right to forfeiture through the landlord's own acceptance of rent; while a tenant cures its breach through the tenant's correction of the breaching condition. Waiver, therefore, applies to **any** breach of which the landlord has knowledge at the time of acceptance of rent and eliminates the need to cure. Though North Town alleges that this rule will leave landlords helpless to remove a "cancerous tenant", this is nonsense. The landlord need only cease the acceptance of rent and follow the statutory requirements for removal.

Nevertheless, with full knowledge of the Transfer, and all the other breaches alleged here, North Town continued to demand and accept rent payments. This central and undisputed fact requires this Court to reverse

the Trial Court, hold that North Town consented to the Transfer and waived its right to forfeiture, and remand this matter for a hearing to determine Alamo and Wholesale Sports' damages.

II. RESPONSE TO NORTH TOWN'S STATEMENT OF FACTS

North Town has submitted a dramatic and largely unsupported version of the events giving rise to this appeal and the litigation pending before Spokane Superior Court as Case No. 13-2-01201-9 (Breach Case). Despite its literary license, North Town's own version of events establishes it had knowledge of each act or intent of which it now complains, yet continued to demand and accept rent.

Indeed, North Town's first response to notice of the Transfer and a newspaper article claiming Wholesale Sports intended to leave its location at North Town (Premises), was to demand that Wholesale Sports continue paying rent and operating the Premises. CP 158. Shortly thereafter, Greg Sullivan, acting on behalf of North Town, claims to have learned details regarding the Transfer, including Alamo's plan to conduct a liquidation sale and close the Premises. CP 271-72. North Town responded by accepting rent for March. CP 158, ¶¶6, 7; 159, ¶10.

After the Transfer closed without a formal request for consent or the provision of the Transfer documents and after Wholesale Sports allegedly began operating as a liquidator, North Town demanded payment

for April's rent and then accepted rent for May. Resp. Br. at 6, CP 134, 147, 368, ¶3. Even the mix-up over the letter of credit affirms North Town did not discontinue accepting rent once it had notice of the alleged breaches, but instead sought a guarantee from Alamo that rent would continue for six months. CP 272, ¶13.

North Town's Ten-Day Notice to Comply with Rental Agreement or Quit Premises (Notice) and its Complaint for Unlawful Detainer (Complaint) alleged only assignment without landlord consent and failure to keep the Premises continuously open as bases for unlawful detainer. CP 6-7, ¶¶9-13, 102. North Town has filed no subsequent notice.

III. ARGUMENT

Because North Town is unable to dispute its own manifestation of consent through the acceptance of rent, it asks this Court to consider and rule on issues of fact and law pending in a separate litigation, apply abuse of discretion to the Trial Court's determinations of law, find unlawful detainer based upon alleged breaches that were not included in any statutory notice, redefine waiver to be synonymous with cure, and shift to the tenant the burden to prove no breach in an unlawful detainer action, even after the tenant has put forth facts establishing consent and waiver. Wholesale Sports and Alamo urge this Court to instead simply apply settled law to the undisputed facts of this case.

A. North Town’s unsupported statements of fact should be disregarded for purposes of this review.

The purpose of Rules 10.3(a)(5) and 10.4(f) is to enable the court and opposing counsel “efficiently and expeditiously to review the accuracy of the factual statements made in the briefs.” *Litho Color, Inc. v. Pac. Employers Ins. Co.*, 98 Wn. App. 286, 305-06, 991 P.2d 638 (1999). These rules require parties to support each factual statement with a correct citation to the record and to exclude argument from the statement of facts. RAP 10.3(a)(5), 10.4(f). The record on review is limited to the report of proceedings, the clerk’s papers, exhibits, and certified records of administrative proceedings. RAP 9.1(a).

In violation of RAP 10.3(a)(5) and 10.4(f), North Town’s statement of the facts is rife with unsupported statements and argument. *See, Appendix I* (highlighting in yellow North Town’s statements lacking reference to the record or unsupported by the record on review, and North Town’s argument presented as fact in green). Appellate courts are not required to search the record on review for the portions that may support a party’s argument, and are required to disregard contentions which are unsupported by references to the record. *Mills v. Park*, 67 Wn.2d 717, 721, 409 P.2d 646 (1966); *Bruce v. Bruce*, 48 Wn.2d 229, 230, 292 P.2d 1060 (1956); *Housing Auth. of Grant County v. Newbigging*, 105 Wn. App. 178,

184-85, 19 P.3d 1081 (2001) (refusing to consider self-serving statements unsupported by the record).

Similarly, North Town presents argument and facts that do not answer the opening brief, but rather appear to be an effort to entice this Court to opine on North Town's claims in the separate Breach Case. *See* Resp. Br. at 29-32 (addressing whether court sitting in unlawful detainer may consider damages not incidental to unlawful detainer, which is not before this court) and at 44-45 (speculating that purpose of Transfer was to defraud North Town); RAP 10.3(b). Those statements should be disregarded as not answerable to the issues raised in the opening brief and outside the jurisdiction of both the Trial Court and this Court. RAP 7.1, 10.3(b); *Terry*, 114 Wn.2d at 560; *Angelo Prop. Co. v. Hafiz*, 167 Wn. App. 789, 808-09, 274 P.3d 1075, *rev. den'd* 175 Wn.2d 1012 (2012).

B. Because the material factual issues in the record are undisputed, this court should apply de novo review.

Errors of law are reviewed de novo. *In re Marriage of Fahey*, 164 Wn. App. 42, 55, 262 P.3d 128 (2011). Upon review from a summary proceeding, where the record contains no clear resolution of factual disputes, this court gives the decision of the trial court no deference and proceeds with de novo review. *W.R.P. Lake Union Ltd. P'ship v. Exterior Servs., Inc.*, 85 Wn. App. 744, 750, 934 P.2d 722 (1997). Although North

Town cites *Dolan v. King County*, 172 Wn.2d 299, 310, 258 P.3d 20 (2011), for the proposition that abuse of discretion applies to this case, the *Dolan* court departed from de novo review because of the enormity of the record reviewed by the trial court and the multiple credibility determinations by that same court. *Dolan* is distinguishable.

In this matter, the material facts before the Trial Court were few and the disputed facts even fewer. There was no dispute that the only basis for unlawful detainer before the Trial Court was the Transfer. CP 102, RP 6:9-20. There was also no dispute that North Town had demanded and accepted rent payments through the end of May 2013 with knowledge of the Transfer. CP 159, ¶10, 130, ¶14, 134, 135, 142-43, ¶10, 147. To the extent the nature of the Transfer remained material in the face of North Town's manifested consent and waiver, an issue of fact existed that should have been submitted to a jury. RP 4:23-5:10; RCW 59.12.130.

Although North Town raises issues of credibility on appeal, the Trial Court made no credibility determination in ruling waiver did not apply because delinquency of rent was not at issue (RP 29:24-30:2, 8), or in ruling the Transfer breached the Lease because North Town did not give its consent (RP 29-2-5). The Trial Court entered no findings of fact and failed to provide any reasoning in the Order for Writ drafted by North Town. (CP 321-22) Likewise, in rejecting Wholesale Sports' request for a

restitution bond, the Trial Court made no finding regarding Wholesale Sports' potential damages, but ruled no bond was required purely as a matter of law. RP 45:22-46:1. There is nothing in the record justifying a departure from the de novo standard of review.

C. Because the only uncured breach in the Notice was the Transfer, this Court may not find unlawful detainer based upon any other allegation of breach.

At the same time it urges review for abuse of discretion, North Town invites this court to find unlawful detainer based upon alleged breaches never identified in the Notice as required by RCW 59.12.030. Resp. Br. 28-29, 32, 34, 44-46; CP 102. Although this court may ordinarily affirm based upon theories not relied upon by the Trial Court, it may not waive the notice and cure provisions of the unlawful detainer statute because "there is no jurisdiction [over unlawful detainer] without statutory notice." *Terry*, 114 Wn.2d at 560.

A tenant can be found in unlawful detainer based only upon alleged breaches identified in the statutorily required ten-day notice. RCW 59.12.030(4). Proper notice, including identification of the alleged breaches, is a jurisdictional condition precedent to the commencement of an unlawful detainer action. *Christensen v. Ellsworth*, 162 Wn.2d 365, 372, 173 P.3d 228 (2007). Alleged breaches not identified in the ten-day notice are considered abandoned at trial. *Woodward v. Blanchett*, 36

Wn.2d 27, 31, 216 P.2d 228 (1950). North Town's allegations presented to this Court as alternate bases for unlawful detainer were beyond the jurisdiction of the Trial Court and abandoned by North Town. *Id.*; RCW 59.12.030(3), (4); *see also*, Resp. Br. at 1-3, 5-6, 8-10, 12-18, 13 n.4. North Town therefore cannot raise them on appeal.

Although North Town claims it raised violations of the Lease's use provisions as a basis for unlawful detainer, this is false. *See* Resp. Br. at 23-24, 23 n.13, 14, 32. In the Ten-Day Notice, North Town alleged only breaches of Articles 10 (Continuous Operation) and 19 (Assignment) as the bases for the unlawful detainer action. CP 27-28, 37-38, 102. Importantly, North Town did not base its claim to unlawful detainer simply on "use" as it now claims, but specifically identified the relevant section of the Lease as Article 10, which governs "Continuous Use". CP 27-28, 102. North Town did not include a claim of a breach of Article 9 (Use). *See* CP 26-27, 102. North Town represented to the Trial Court that the **only** remaining basis for the unlawful detainer action following the reopening of the Premises was the failure to obtain consent. *Compare* Resp. Br. at 23 n.13, 14 *to* RP 7:11-13. North Town is barred by RCW 59.12.030 and judicial estoppel from asserting on appeal that any other basis was properly before the Trial Court. *Johnson v. Si-Cor, Inc.*, 107 Wn. App. 902, 906, 28 P.3d 832 (2001)

The only basis for the writ of restitution before the Trial Court was the failure to obtain consent prior to the Transfer. North Town cannot avoid the consequences of its repeated acceptance of rent by asserting after-the-fact that there were other breaches which North Town also could have relied upon. *Angelo*, 167 Wn. App. at 811. Only the Transfer and North Town's subsequent acceptance of rent are material to whether North Town may prove unlawful detainer.

D. The Trial Court should be reversed because North Town accepted rent with knowledge of the Transfer, therefore no cure was required absent the cessation of the acceptance of rent accompanied by a second ten-day notice to cure.

As soon as North Town accepted rent with knowledge of the Transfer, it waived its right to object to the Transfer and assert forfeiture “as fully and completely as by the written consent provided for in the lease itself.” *OTR v. Flakey Jake's, Inc.*, 112 Wn.2d 243, 248, 770 P.2d 629 (1989) (quoting *Batley*, 56 Wash. at 433). Having manifested its consent to the Transfer, North Town is estopped from denying its validity. *Id.* Nonetheless, North Town seeks to avoid the consequences of its conduct by claiming waiver can only occur where the tenant has also effected a cure. CP 1159, ¶10, 130, ¶14, 134-35, 142-43, 147; Resp. Br. at 32-36.

Waiver is the voluntary and intentional relinquishment of a known right, whose requirements vary with the circumstances. *Lake Washington Schl. Dist. No. 414 v. Mobile Modules Northwest, Inc.*, 28 Wn. App. 59, 61, 621 P.2d 791 (1980). Where breaches of a lease are at issue, a landlord waives its right to object to an assignment of which it has knowledge and waives its right to declare a forfeiture based upon any breach of which it has knowledge by continuing to accept rent. *Chopot v. Foster*, 51 Wn.2d 406, 410, 318 P.2d 976 (1957); *Wilson*, 31 Wn.2d at 640-41.

“Cure”, on the other hand, is simply the correction of the alleged breach by the tenant. RCW 59.12.030(3), (4). The tenant’s possession does not constitute unlawful detainer unless and until the tenant continues beyond the statutory cure period without correcting the breaching event. RCW 59.12.030(3), (4); *MH2 Co. v. Hwang*, 104 Wn. App. 680, 685, 16 P.3d 1272 (2001). Therefore, if a breach has been cured, the landlord no longer has a right to forfeiture which it can relinquish; whereas, if a right to forfeiture has been waived, there is no requirement to cure in order to avoid forfeiture. *See id.* at 684-85. Further, because waiver results from the landlord’s own conduct, it cannot be limited to the tenant’s cure period as North Town contends. *See Resp. Br.* at 42; *Signal Oil Co. v. Stebick*, 40 Wn.2d 599, 603, 605 245 P.2d 217 (1952)(forfeiture waived where landlord continued to accept rent after the cure period expired).

In *MH2*, this Court differentiated between breaches that were waived and those which were cured. 104 Wn. App. 680. There, the landlord accepted payment for future rent with knowledge of two earlier months of nonpayment (First Breach). *Id.* The tenant cured a subsequent period of nonpayment (Second Breach) by “tender[ing] the two newer months rent prior to the 10 days.” *Id.* This Court held the First Breach was waived by acceptance of rent, stating this was “logical because possession is no longer an issue after acceptance of rent for the forthcoming month.” *MH2 Co.*, 104 Wn. App. at 684. The Second Breach, however, was cured by payment of past rent, such “that no statutory unlawful detainer occurred.” *Id.* at 685; RCW 59.12.030(3), (4).

North Town mischaracterizes *MH2* and *Commonwealth Real Estate Services v. Padilla*, 149 Wn. App. 757, 205 P.3d 937 (2009), by claiming this Court held only a breach by failure to pay rent can be waived by acceptance of rent. *See* Resp. Br. at 35. Both *MH2* and *Padilla* address only breaches by failure to make rent payments and so cannot be read in isolation to narrow waiver by acceptance of rent to breaches for failure to pay rent. *MH2*, 104 Wn. App. at 680; *Padilla*, 149 Wn. App. at 75. Had this Court limited waiver to defaults in rent in either case, that holding would have been contrary to multiple cases finding waiver of a variety of lease provisions. *See, e.g., Signal Oil*, 40 Wn.2d at 600-01; *Wilson*, 31

Wn.2d at 636-37. Those cases show waiver is limited to those breaches of which the landlord had knowledge, but is not limited to breaches for failure to pay rent. *Signal Oil*, 40 Wn.2d at 600-601; *Wilson*, 31 Wn.2d at 636-37.

Although the alleged violation of the Assignment provision was not cured by payment of rent, no cure was necessary because North Town had accepted payment with knowledge of the Transfer, just as the landlord had in *MH2*. 104 Wn. App. at 684. In fact, North Town's acceptance waived its rights as to all then-known breaches. *See, e.g., Signal Oil*, 40 Wn.2d at 600-01; *Wilson*, 31 Wn.2d at 636-37. North Town's claim that its waiver had no effect unless the known breaches were cured must be rejected as contrary to the definition of waiver and settled law.

E. North Town errs in arguing no new statutory notice is required after waiver where the breach is continuing or where the landlord alleges breach is futile.

Because North Town cannot dispute its acceptance of rent, it argues no new statutory notice is required after a waiver if the breach is continuing in nature or if notice is futile. Resp. Br. at 33, 42. Essentially, North Town asserts waiver is limited to one-time breaches and therefore cannot apply to the Transfer or the alleged liquidation sale.

North Town has cited no cases supporting its claim that the Transfer was a continuing breach. North Town's own Lease describes

transfers and assignments as completed events. CP 37-38. Cases addressing breach by assignment treat such transfers as completed events by holding that acceptance of rent is equivalent to the landlord's written consent to the assignment. *OTR*, 112 Wn.2d at 249; *Batley*, 56 Wash. at 433; *D'Ambrosio v. Nardon*, 72 Wash. 172, 120 P. 1029 (1913). Because the Transfer was a single and complete event of which North Town had knowledge when it accepted rent, North Town has forever discharged its right to relief based upon the Transfer. *Wilson*, 31 Wn.2d at 640.

Even assuming, however, that the one-time Transfer of stock could conceivably be considered a continuing breach, the statutory notice requirements still apply. In *Wilson*, the landlord claimed it was not required to send out a second notice after it ceased accepting rent payments because the tenant's breaches of provisions governing use and condition of the premises were of a continuing nature. *Wilson*, 31 Wn.2d at 637, 642-43. The Washington Supreme Court rejected this argument, holding the landlord must wait and serve a subsequent notice after the old breaches continue or new breaches occur. *Id.* at 643-44. The landlord, like North Town, instead served the notice, while at the same time accepting rent. *Id.* at 643. Because the landlord failed to meet the statutory notice requirements after his acceptance of rent had ceased, no unlawful detainer occurred as to any continuing breach. *Id.* at 643-44.

North Town also attempts to avoid the statutory notice requirements by arguing no notice was required because notice would have been futile. Resp. Br. at 42. North Town's futility argument concedes the Transfer was not a continuing breach in that it relies upon its assertion that the Transfer "could not be remedied." *Id.* Regardless, the unlawful detainer statute is in derogation of common law and must be strictly construed in favor of the tenant. *Terry*, 114 Wn.2d at 563. Even if North Town had not waived its right to forfeiture, landlords do not have discretion to dispense with the notice and cure requirements simply because they believe the tenant will not avail itself of the opportunity to cure. *Id.* at 568. Rather, the landlord may not prove the tenant unlawfully detains the premises **unless and until** it first provides an opportunity to cure through strict compliance with RCW 59.12.030. *Id.* at 569.

North Town did not wait for a new or continuing breach after it cashed its last rent check on May 20, and did not serve a subsequent notice to cure. North Town defends its lapse by claiming Alamo and Wholesale Sports failed to timely raise the issue. CP 114, 1122-23; Resp. Br. at 42-43. Even assuming tenants are required to instruct landlords in the proper procedures for eviction, North Town misstates the record. Appellants specifically argued to the Trial Court that if a landlord waives its right to forfeiture by acceptance of rent, "[t]he landlord must wait until a new or

continuing breach occurs and send a new notice based upon those breaches.” CP 122 (citing *Signal Oil*, 40 Wn.2d at 604); RP 10:23-11:1.

North Town also attempts to recast the requirement of a subsequent notice to begin an unlawful detainer proceeding as to new or continuing breaches as a challenge to sufficiency of service of process in **this** action. Resp. Br. at 42-43. Sufficiency of process was never at issue in this case, except as it related to the propriety of Alamo’s inclusion as a party. CP 121-22. Further any challenge to the sufficiency of the Notice as to any continuing or new breaches would have been premature because North Town conceded the only breach before the Trial Court was the Transfer and not yet alleged new or continuing breaches as a basis for a forfeiture. North Town’s waiver and preservation of error argument has no basis in fact or law.

The undisputed facts are this: There was only one breach relied upon by North Town. CP 102; RP 6:9-20. The alleged breach was a single completed Transfer which occurred prior to North Town’s request for, and acceptance of, rent through May 2013. CP 129, ¶5, 130, ¶11, 134, 147. No statutory notice was ever given as to the alleged violation of the Lease’s use provision. CP 102. Under Washington law, North Town had discharged all known breaches by accepting future rent and was required to wait for new breaches or for old breaches to continue before

recommencing the procedures required by chapter 59.12 RCW. North Town has never asserted it met this requirement. Thus, according to governing law, North Town waived its right to relief by its own actions and failed to take any steps to prove unlawful detainer as to any breach not discharged by North Town's prior acceptance of rent.

F. The nonwaiver provision of the Lease does not negate North Town's manifestation of consent because it does not include explicit language addressing the acceptance of rent.

Because acceptance of rent is the equivalent of written consent to the tenant's continuing possession, general non-waiver provisions are insufficient to overcome the landlord's actions. *Batley*, 56 Wash. at 433; *Wilson*, 31 Wn.2d at 641; *MH2*, 104 Wn. App. at 684-85. To prevent waiver, the Lease must contain an "express stipulation by the parties that the acceptance of rent [does] not constitute waiver of any prior breaches." *Wilson*, 31 Wn.2d at 642.

North Town relies upon a general nonwaiver provision that states: "No provision of this lease shall be deemed to have been waived by the Landlord unless such waiver be in writing and is signed by the Landlord." CP 54; *compare to*, *Wilson*, 31 Wn.2d at 634; *MH2*, 104 Wn. App. at 682. Because the nonwaiver provision in the Lease does not include language specifically addressing waiver by acceptance of rent, it is insufficient to

overcome North Town's own manifestation of consent to the Transfer and Wholesale Sports' continuing possession of the Premises.

G. The Court should not presume breach where the facts before the Trial Court established consent and waiver and where Appellants suggested other remaining issues between the parties should be resolved through discovery.

A tenant is presumed to lawfully possess its leasehold. The landlord has the burden of overcoming that presumption by a preponderance of the evidence. *Padilla*, 149 Wn. App. at 763. Even if the presumption were in favor of the landlord, however, the burden does not shift to the tenant to prove the negative. *Gillingham v. Phelps*, 11 Wn.2d 492, 500, 119 P.2d 914 (1941).

Here, Appellants established before the Trial Court that North Town accepted rent payments with knowledge of the completed transfer, estopping North Town from claiming breach and waiving its right to forfeiture based upon the transfer. *OTR*, 112 Wn.2d at 248; *Signal Oil*, 40 Wn.2d at 603-04. North Town's own actions had thus made the nature of the Transfer immaterial to the determination of whether North Town had a right to forfeiture.

Under these circumstances, Alamo and Wholesale Sports' suggestion that the issues of breach might be worked out through discovery cannot be construed as waiver or withholding evidence as North

Town urges. *See* RP 19:16-20:5.; *see also*, *Bowman v. Webster*, 44 Wn.2d 667, 669, 269 P.2d 960 (1954) (defining waiver); *Wright v. Safeway Stores, Inc.*, 7 Wn.2d 341, 352-53, 109 P.2d 542 (1941) (limiting the negative inference from the failure to produce evidence to “only when under all the circumstances of the case the failure to produce such [evidence], unexplained, creates a suspicion that the failure to produce was a willful attempt to withhold competent testimony.”); *Krieger v. McLaughlin*, 50 Wn.2d 461, 464, 313 P.2d 361 (1957) (limiting inference from a failure to provide evidence to those cases in which the plaintiff presents a prima facie case). Nor does invited error or judicial estoppel apply where the Trial Court rejected Appellants’ argument. *See Angelo*, 167 Wn. App. at 823; *Si-Cor*, 107 Wn. App. at 907 (holding judicial estoppel only applies if the litigant was successful in maintaining its prior position).

RCW 59.12.130 requires a trial by jury where there is a factual dispute. Where the landlord admits it does not know whether there was a breach and admits to facts constituting waiver, the tenant can have no obligation to prove a negative and no inferences may flow from its failure to do so. Should this Court find North Town’s acceptance of rent did not manifest its consent to the Transfer or waive its right to forfeiture, this

matter must be remanded for a jury to determine the issues of fact regarding the Transfer.

H. North Town cannot circumvent the restitution bond by seeking forfeiture in a show cause hearing, only to finish prosecution of its claims in a separate proceeding.

The purpose of a restitution bond is to ensure the tenant's costs and damages will be compensated if the writ should later be determined to have been issued in error. RCW 59.12.090; *IBF, LLC v. Heuft*, 141 Wn. App. 624, 636, 174 P.3d 95 (2007). North Town attempts to circumvent this requirement by arguing it cannot apply where the order for writ became the final order in the case for purposes of appeal.

In *IBF*, the landlord also argued that no restitution bond was required where judgment issued from a show cause hearing. *Id.* at 636. The *IBF* court, however, rejected this claim relying upon the purpose of the bond to cover the tenant's costs and fees "should future findings determine the eviction was wrongful." *Id.* Notably, the trial court referred to "future findings" even though the trial court had already ordered a judgment and there was no trial pending on the issue of possession. *Id.* at 630. As the matter before the trial court was final, the *IBF* court could only be referring to findings on appeal or remand. *Id.* at 630, 636. Indeed, RCW 59.12.090 includes no language limiting a determination that the

writ was issued in error to findings by the same court from which the writ was issued.

The restitution bond requirement pending appeal does not conflict with the stay bond provision. Chapter 59.12 RCW provides for both stay bonds and restitution bonds because they each serve a different purpose. While the restitution bond ensures the tenant will receive his damages if the order for writ should be reversed, the stay bond ensures the landlord continues to receive rent if the tenant desires to remain in possession pending appellate review of that decision. RCW 59.12.090, .200. While the stay bond serves no purpose until a notice of appeal is filed, the restitution bond continues to be necessary as long as the tenant's potential right to damages continues. The restitution bond thus remains necessary until the tenant has waived or exhausted its right to appeal.

Here, the order for writ became the final decision in this case as a result of North Town's decision to split its claim into two actions: one for unlawful detainer and the other for breach of lease based upon the same facts. *See* CP 1-107; RP 43:18-22. By splitting its claim, North Town ensured that although discovery and fact finding on the underlying breach would happen in the Breach Case, that determination would be divorced from a determination of whether the Trial Court erred in finding breach and issuing the writ. Wholesale Sports should not be denied its statutory

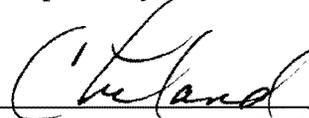
right to a restitution bond to ensure payment for its damages by North Town's tactical decision to split its claim.

IV. CONCLUSION

By accepting rent after it had knowledge of the Transfer, North Town manifested its consent to the Transfer and waived its right to forfeiture. North Town cannot now rescind its consent and resurrect its claim to forfeiture by raising the specter of alleged conduct that was known, but never included in a statutory notice. Although North Town complains that the law leaves a landlord powerless against a "cancerous tenant," only the landlord has the power to either waive its rights by accepting rent or retain its rights by rejecting rent and following the statutory notice requirements. In response to a parade of alleged breaches and the Transfer, North Town chose to accept rent. This Court therefore should reverse the Trial Court, hold that North Town consented to the Transfer and waived all known breaches, and remand this matter for a determination of damages.

DATED this 25th day of July, 2014.

Respectfully submitted,



C. MATTHEW ANDERSEN, WSBA No. 6868
COLLETTE C. LELAND, WSBA No. 40686
WINSTON & CASHATT, LAWYERS, a
Attorneys for Defendants/Appellants

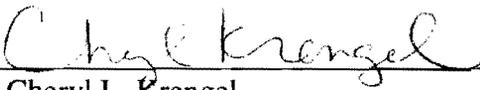
DECLARATION OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on July 25, 2014, I caused the foregoing document to be served on the following counsel in the manner indicated:

Gregory M. Miller	VIA REGULAR MAIL	<input checked="" type="checkbox"/>
Kenneth W. Hart	VIA CERTIFIED MAIL	<input type="checkbox"/>
Parker R. Keehn	HAND DELIVERED	<input type="checkbox"/>
Carney Badley Spellman, P.S.	BY FACSIMILE	<input type="checkbox"/>
701 Fifth Avenue, Suite 3600	VIA FEDERAL EXPRESS	<input type="checkbox"/>
Seattle, WA 98104-7010	VIA EMAIL	<input checked="" type="checkbox"/>

Attorneys for Plaintiff/Respondent

DATED on July 25, 2014, at Spokane, Washington.



Cheryl L. Kregel