

FILED  
Court of Appeals  
Division III  
State of Washington  
11/14/2018 11:58 AM

NO. 35951-4-III

COURT OF APPEALS, DIVISION III

STATE OF WASHINGTON

Walla Walla Superior Court No. 16-2-00845-4

WA-HOLDINGS-01, LLC, a Washington limited liability company,

Respondent,

vs.

SNAKE RIVER STILL, LLC, a Washington limited liability company,  
d/b/a WALLA WALLA WEEDERY,

Appellant.

---

**APPELLANT'S REPLY BRIEF**

---

Christopher J. Marston, WSBA #30571  
DAVIES PEARSON, P.C.  
920 Fawcett Ave.  
Tacoma, WA 98402  
253-620-1500  
Attorneys for Appellant

**TABLE OF CONTENTS**

I. ARGUMENT ..... 1

    A. The Trial Court Abused Its Discretion in Entering a  
        Judgment Against the Supersedeas Amount..... 1

    B. The Trial Court Improperly Assessed Double Damages ..... 3

    C. The Trial Court did Abuse Its Discretion in Awarding the  
        Respondent its Requested Attorneys Fees and Costs. . . . . 5

II. CONCLUSION ..... 8

## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Bayley v. Lewis</i> , 236 P. 2d 350 (Wash: Supreme Court) (1951) .....	2
<i>Bowers v. Transamerica Title Insurance Company</i> , 100 Wn.2d 581, 593-601, 675 P.2d 193 (Wash. 1983) .....	7
<i>Eagle Point Condo. Owners Ass'n v. Coy</i> , 102 Wash. App. 697, 711, 9 P.3d 898, 907 (2000)....	6
<i>Scott Fetzer Co. v. Weeks</i> , 114 Wn.2d 109, 124, 786 P.2d 265 (Wash. 1990).....	6
<i>Hinckley v. Casey</i> , 45 Wn. 430 (1907).....	3
<i>Shepherd v. Cont'l Bank</i> , 28 Wn. App. 346, 350, 22 P.2d 1310 (1929) .....	1
<i>Sherman v. Lunsford</i> , 44 Wn.App. 858, 863, 723 P.2d 1176 (1986), <i>citing</i> <i>Kreger v. Hall</i> , 70 Wn.2d 1002, 425 P.2d 638 (1967)...	2
 <b><u>Statutes</u></b>	
RCW 59.12.170.....	3,4
 <b><u>Other Authorities</u></b>	
RAP 18.1 .....	9

## I. ARGUMENT

The Respondent argues that: (A) the trial court did not abuse its discretion in entering a judgment against the supersedeas amount; (B) the trial court properly awarded double damages; (C) the trial court did not abuse its discretion in awarding attorney fees and costs to the Respondent; and (D) the Respondent should be entitled to attorney fees on appeal. Appellant, Snake River Stills, LLC's ("Snake River"), provides the following reply.

### A. **The Trial Court Abused Its Discretion in Entering a Judgment Against the Supersedeas Amount.**

In its argument, Respondent focuses almost exclusively on the fact that the Stipulation and Order was entered with the Walla Walla Superior Court (the "trial court") allowing for the entry of a writ of restitution in the event Snake River failed to vacate the commercial premises by July 31, 2018. Respondent argues that, "A stipulation resolving all issues in a lawsuit "is an agreement for the final disposition of the case, directed to the court, which the court is bound to carry into effect . . ." until it is set aside." *See*, Respondent's Brief, Pg. 11, *citing*, *Shepherd v. Cont'l Bank*, 28 Wn. App. 346, 350, 22 P.2d 1310 (1929).

Respondent fails to point out that Snake River had asserted various affirmative defenses and counterclaims in the unlawful detainer action that

were not resolved by the Stipulation and Order. (CP 22-31) As such, when Respondent argues that the unlawful detainer proceeding had run its course, and there remained nothing left to be decided, the Respondent is incorrect in making this argument. The counterclaims had not been resolved through the Stipulation and Order. They had only been resolved through the execution of the Settlement Agreement between the parties. (CP 343-346)

As set forth in Snake River's opening brief, "One who is ready, willing and able to tender performance is relieved of that duty when the other party by word or act indicates that he will not perform." *Sherman v. Lunsford*, 44 Wn.App. 858, 863, 723 P.2d 1176 (1986), citing *Kreger v. Hall*, 70 Wn.2d 1002, 425 P.2d 638 (1967). Furthermore, a "party cannot enforce specific performance of a contract while in default of its terms." *Bayley v. Lewis*, 236 P. 2d 350 (Wash: Supreme Court) (1951). As a result, it was error for the Walla Walla Superior Court to enter judgment on the supersedeas amount when the issue over whether the Settlement Agreement was enforceable or not had not been determined. Given that it has now been determined that it was enforceable, the trial court should determine whether this justified Snake River's decision to remain in the premises past July 31, 2018.

**B. The Trial Court Improperly Assessed Double Damages.**

The Respondent next argues that it was entitled to double the amount of the rent. Respondent's argument ignores the plain language of the unlawful detainer statute, and the case law interpreting the statute.

RCW 59.12.170 provides that:

The jury, or the court, if the proceedings be tried without a jury, shall also assess the damages occasioned to the plaintiff by any forcible entry, or by any forcible or unlawful detainer, alleged in the complaint and proved on the trial, and, if the alleged unlawful detainer be after default in the payment of rent, find the amount of any rent due, and the judgment shall be rendered against the defendant guilty of the forcible entry, forcible detainer, or unlawful detainer *for twice the amount of damages thus assessed and of the rent, if any, found due.*"

(Emphasis Added) Based on a plain reading of the statute, a landlord is only entitled to double the rent, if any, is found due. In *Hinckley v. Casey*, 45 Wn. 430 (1907), the *Hinckley* court confirmed this interpretation by stating that, "The plain reading of the statute is that the court or jury shall assess the damages, and find the amount of rent due if the action is prosecuted for the non-payment of rent, and that the court shall thereupon double the amount of the damages and rent." *Hinckley*, 45 Wn. at 431.

In this case, when the Respondent sought and obtained the writ of restitution, based on the Stipulation and Order, no rent was due and owing to the Respondent. Snake River had paid the \$25,000.00 per month for June and July. Thereafter, it paid the \$25,000.00 per month for August

and September, and it would have paid the pro-rated amount for October had the Respondent agreed to accept the pro-rated amount. (CP 817-839) The trial court ignored the plain language of RCW 59.12.170 and erred by awarding the Respondent double the amount of rent for August, September, and the pro-rated amount for October, totaling \$59,677.42.

Before the trial court, the Respondent never submitted any evidence supporting its position that it was actually harmed by Snake River staying past July 31, 2018, by two months and six days. On the other hand, Snake River submitted evidence showing that it was actually paying the Respondent multiple times the rental market rate for the leased premises. (CP 841-854) Snake River also submitted evidence showing that Respondent leased the premises to another marijuana retailer, after Snake River vacated the premises, for only \$8,000 per month, for the first six months, a full \$17,000.00 less than Snake River was paying to the Respondent. (CP 888-905)

As such, the Respondent did not and could not show that it suffered any damages as a result of Snake River remaining in the premises past July 31, 2018, and was not entitled to double the rent because the rent had been timely paid.

**C. The Trial Court did Abuse Its Discretion in Awarding the Respondent its Requested Attorney Fees and Costs.**

The trial court refused to delay hearing the Respondent's motion for judgment on the supersedeas amount until after the Pierce County Superior Court ruled on the enforceability of the Settlement Agreement. The Respondent argues that this was proper to do so, because the enforceability of the Settlement Agreement had nothing to do with the unlawful detainer proceeding, which is incorrect. The Settlement Agreement had everything to do with resolving the unlawful detainer proceeding, including the counterclaims asserted by Snake River.

In the Settlement Agreement, the parties had agreed to resolve all of their pending claims before the Walla Walla Superior Court and before the Pierce County Superior Court. Snake River incurred a substantial amount of time and expense seeking to enforce the terms of the Settlement Agreement, and the majority of the time and expense was incurred while the matter was being litigated before the Walla Walla Superior Court. *See*, May 31, 2018, Declaration of Christopher J. Marston, filed with the Pierce County Superior Court. Despite Snake River's request to postpone a decision on the Respondent's motion, the Walla Walla Superior Court refused to do so. If it had postponed its decision, then it could have considered the impact of the Pierce County Superior Court's decision to

enforce the terms of the Settlement Agreement over the objection of the Respondent.

Without the benefit of knowing whether the Settlement Agreement would be held to be enforceable, the Walla Walla Superior Court could not determine whether the Respondent had unnecessarily incurred attorney fees in opposing Snake River's position that the Settlement Agreement was enforceable. It could also not weigh the defense Snake River had raised to moving out of the premises by July 31, 2018, as a result of the Respondent's refusal to abide by the terms of the Settlement Agreement. Finally, the trial court could not determine whether any of the fees and costs it awarded to the Respondent should have been offset by the fees and costs Snake River incurred in enforcing the terms of the Settlement Agreement.

When the alleged contract breaches at issue consist of several distinct and severable claims, a proportionality approach is more appropriate. *Eagle Point Condo. Owners Ass'n v. Coy*, 102 Wash. App. 697, 711, 9 P.3d 898, 907 (2000). In such a case, the court awards fees to the plaintiff for the claims the plaintiff prevails on, awards fees to the defendant for the claims he prevails on, and offsets the difference. *Id.* The court can then use the "lodestar" method as the means of determining reasonable attorney fees. *See, e.g., Scott Fetzer Co. v. Weeks*, 114 Wn.2d

109, 124, 786 P.2d 265 (Wash. 1990). The trial courts arrive at a lodestar figure by multiplying a reasonable hourly rate for the work involved by the amount of time the attorneys reasonably worked on the case. *See, Bowers v. Transamerica Title Insurance Company*, 100 Wn.2d 581, 593-601, 675 P.2d 193 (Wash. 1983). The figure could then be adjusted up or down based on various factors, including the risk involved in a contingency case and, in a very rare case, the quality of the work performed. *Id.*

These are factors that the Walla Walla Superior Court should have considered in determining whether any fee and cost award was appropriate and, if so, the amount. This is especially true given that the Pierce County Superior Court refused to award any of the fees and costs incurred by Snake River while this matter was pending before the Walla Walla Superior Court. *See, Pierce County Superior Court Transcript of June 8, 2018, Hearing.* Snake River incurred \$18,371.75 in attorney fees related to working on enforcing the terms of the Settlement Agreement while the matter was pending before the Walla Walla Superior Court and \$1,810.01 in costs. *See, Pierce County Superior Court, Declaration of Christopher J. Marston, dated May 31, 2018.*<sup>1</sup> The Pierce County Superior Court did not adequately explain its reasoning for why it refused to consider any of the

---

<sup>1</sup> These amounts were arrived at by subtracting out the highlighted time and costs incurred while the matter was pending before the Walla Walla Superior Court.

fees and costs incurred by Snake River while this matter was pending before the Walla Walla Superior Court. *See*, Pierce County Superior Court Transcript of June 8, 2018, Hearing.

Snake River has appealed the Pierce County Superior Court's award to Division II. Nevertheless, it believes that it would be appropriate for the Walla Walla Superior Court or this Court to determine whether the fee and costs incurred by the Respondent should be offset by the fees and costs incurred by Snake River to enforce the terms of the Settlement Agreement. If so, then the issue over whether the Pierce County Superior Court properly excluded those fees and costs would be moot. If not, then, at least, Snake River would be able to represent to Division II that none of the fees and costs incurred by Snake River while the matter was pending before the Walla Walla Superior Court will be considered by this Court or the Walla Walla Superior Court.

## **II. CONCLUSION**

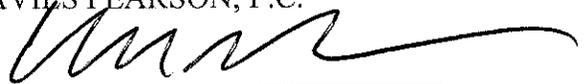
This Court should conclude that the Walla Walla Superior Court erred in entering judgment on the supersedeas amount. Accordingly, this Court should remand this matter to the Walla Walla Superior Court to consider: (1) whether Snake River's decision to remain in the commercial premises was justified as a result of Respondent's refusal to abide by the terms of the Settlement Agreement; and, if so, (2) whether Snake River is

entitled to its attorney fees and costs. Alternatively, this Court should reverse the trial court's decision to award double damages to Respondent, and either this Court should determine the amount of an offset Snake River should receive for the fees and costs it incurred in enforcing the terms of the Settlement Agreement against the fees and costs incurred by the Respondent or remand this matter to the trial court to make such a determination.

In accordance with RAP 18.1, and the contractual terms of the Settlement Agreement, this Court should further grant Snake River's request for its reasonable attorney fees and costs on appeal.

RESPECTFULLY SUBMITTED this 14<sup>th</sup> day of November, 2018.

DAVIES PEARSON, P.C.



Christopher J. Marston, WSB#30571  
920 Fawcett Avenue/P.O. Box 1657  
Tacoma, WA 98401  
(253) 620-1500  
Attorneys for Appellant

## DECLARATION OF SERVICE

Under penalty of perjury under the laws of the State of Washington, I declare that on this 14<sup>th</sup> day of November, 2018, a true copy of this document was served via e-service via the Court on:

### COUNSEL FOR RESPONDENTS:

Michael Feinberg  
Karr Tuttle Campbell  
701 Fifth Avenue, Suite 3300  
Seattle, WA 98104  
mfeinberg@karrtuttle.com; npaine@karrtuttle.com;  
kmejia@karrtuttle.com



KATHY A. BATES, Legal Assistant

**DAVIES PEARSON, P.C.**

**November 14, 2018 - 11:58 AM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 35951-4  
**Appellate Court Case Title:** WA-Holdings-01, LLC v. Snake River Stills, LLC  
**Superior Court Case Number:** 16-2-00845-4

**The following documents have been uploaded:**

- 359514\_Briefs\_20181114115742D3364824\_3059.pdf  
This File Contains:  
Briefs - Appellants Reply  
*The Original File Name was Appellants Reply Brief.pdf*

**A copy of the uploaded files will be sent to:**

- kbates@dpearson.com
- kmejia@karrtuttle.com
- mfeinberg@karrtuttle.com
- npaine@karrtuttle.com

**Comments:**

---

Sender Name: Kathy Bates - Email: kbates@dpearson.com

**Filing on Behalf of:** Christopher J Marston - Email: cmarston@dpearson.com (Alternate Email: )

Address:  
920 Fawcett Ave  
Tacoma, WA, 98402  
Phone: (253) 620-1500

**Note: The Filing Id is 20181114115742D3364824**