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No. 36907-2

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**COURT OF APPEALS, DIVISION NO. III  
OF THE STATE OF WASHINGTON**

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POORMAN ENTERPRISES, LLC  
Plaintiff/Appellant

v.

RST PARTNERSHIP, et al.  
Defendant/Respondent

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**APPELLANT'S REPLY BRIEF**

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## **A. ARGUMENT & AUTHORITY**

### **1. Introduction**

This Reply is Poorman’s consolidated response to both RST and the County. Much of this case turns on the issue of the alleged illegality of Poorman’s leases with RST. The way that the trial court addressed this issue resulted in a flawed summary judgment ruling that requires remand.

First, Poorman replies to the contention that this Appeal is moot. These issues are well beyond the academic, and there is available relief in the trial court, particularly if this Court agrees with Poorman and remands for consolidation of this matter with 17-2-00348-9 (*Poorman v. Chelan Co.*, the “348 case”).

Second, Poorman replies to RST’s arguments on the merits of summary judgment. The leases are lawful and enforceable, and the analysis on this point is far more detailed than RST contends. The leases are also enforceable against RST, particularly because they were not properly terminated. RST did not issue notice to cure, and Poorman could have cured the alleged breaches.

Next, Poorman addresses the critical issue with the illegality analysis that reveals why the Court erred in considering the County’s position on summary judgment. This portion also responds to RST’s argument concerning the differences between this case and the 348 case. In

short, the illegality issue is materially different for RST and for the County, and in such a way that the County's interest is immaterial for purposes of RST's summary judgment claim.

Finally, Poorman contends that the trial court should have consolidated these matters. The cases clearly share common issues of law and fact. While they do have some dissimilar claims, this is not fatal to consolidation. The trial court's reason for not consolidating the matters is untenable and unsupported; conversely, consolidation would save all parties significant time and expense.

## **2. This Appeal is not Moot.**

An appeal is mooted where it presents "purely academic issues" and it is "not possible for the court to provide effective relief." *Gorden v. Lloyd Ward & Associates, P.C.*, 180 Wn.App. 522, 560, 323 P.3d 1074 (2014). Frankly, this case does present some interesting academic issues, but the touchstone is whether the trial court can provide relief.

RST fails to mention that Poorman's claims are not based solely on lost crop revenue. As alleged in the Complaint, Poorman's claims involve the downgrading of its license from Tier 3 to Tier 2 as a result of RST's eviction. *CP* at 5. Poorman need not rely only on damages related to the 2016 crop season, but given the Commissioner's January 28, 2020 ruling in this matter, RST has not properly presented the issue. Regardless, Poorman

also lost the use of space that it could have put to a purpose related to the cultivation of cannabis (e.g. storing fertilizer). The notion that there is no relief available at the trial court level is meritless.

### **3. Summary Judgment Merits**

#### **a. The Leases were Lawful and Enforceable**

“[T]he general law in force at the time of the formation of the contract is a part thereof.” *Cornish College of the Arts v. 1000 Virginia Ltd. Partnership*, 158 Wn.App. 203, 223-24, 242 P.3d 1 (2010) (emphasis added; citations omitted<sup>1</sup>). This is the case “because the presumption is that the contracting parties know the law.” *Id.*

“Generally, contracts that violate a statute are illegal and unenforceable. But if a contract violates a business statute or regulation, the contract is not void unless the act expressly provides for invalidation of conflicting contract provisions.” *Parker v. Tumwater Family Practice Clinic*, 118, Wn.App. 425, 432-33, 76 P.3d 764 (2003) (emphasis added; internal citations and quotations omitted).

RST claims, without explanation that both leases were unlawful because they ran afoul of Resolution 2016-14. *RST’s Brief* at 15-16. For the Outdoor Roof lease (*CP* at 96-104), this is simply incorrect – the lease

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<sup>1</sup> This section of the *Cornish* opinion collects similar principles from other cases.

executed December 15, **2015** could not have run afoul of resolution 2016-14, enacted February 16, **2016**. *See CP* at 105 (contract), 226 (resolution).

The Outdoor Ground Storage lease (*CP* at 105-113) presents a different issue because that contract was formed *after* Resolution 2016-14 went into effect. The issue here is whether Poorman falls within the grandfather provision in Resolution 2016-14, permitting uses that were “lawfully established and in actual physical operation prior to September 29, 2015” to continue until March 1, 2018. There does not seem to be a dispute that Poorman was in actual, physical operation at the Collins Fruit warehouse prior to that date.

**i. Poorman was in lawful operation.**

The County advances the argument that Poorman’s use was not lawfully established by September 29, 2015. In support below, the County cited a fence, observed by Ms. Hallman on July 7, 2016 (*Id.* at 260, 269); a Fire Marshall inspection in “October/November of 2015” (*Id.* at 260); and an extractor, received by Poorman in “October 2015” (*Id.* at 264). The County’s only argument pertaining to acts before the 9/29/15 cutoff date is the original permit “prior to the change of occupancy/use of the warehouse” – i.e. before Poorman moved in. *Id.* at 261. The County’s assertions of *later* code violations have no bearing on whether Poorman was in lawful operation in September of 2015.

As discussed in Poorman’s opening brief, the International Building Code (IBC) sections the County relies on in its Notice Letter (*CP* at 18) place the duty to acquire this permit on the owner or his authorized agent. *Id.* (IBC §105.1). RST was required to obtain the permit the County complains is missing.

Where a lessee is **required** to make improvements; he is an agent; where he is merely **authorized** to make improvements, he is not the lessor’s agent. *Markley v. General Fire Equipment Co.*, 17 Wn.App. 480, 484, 563 P.2d 1316 (1977). The Court in *Markley* went on to quote:

The test (of whether the lessee in constructing improvements, acts as agent of the owner) is whether the lessee, under the terms of the contract, has a privilege merely, or is obligated, to construct improvements.

*Id.* (quoting *Miles v. Bunn*, 173 Wn. 303, 305, 22 P.2d 985 (1933)).

RST argues that Poorman had such obligations under the lease and was its agent. *RST Brief* at 21-22. But the provisions of the lease they rely upon state the contrary:

4. USE OF THE PREMISES: LESSEE shall use the premises exclusively for the cultivation of medial<sup>2</sup> cannabis and related activity and no other purpose. LESSEE shall comply with all governmental laws, ordinances, regulations, orders and directives and all insurance requirements **applicable to LESSEE’S use of the premises** [...].

8. ALTERATIONS: LESSEE **may** make **minor** alterations,

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<sup>2</sup> Sic.

additions and improvements upon the leased premises at its sole cost and expense and with the prior written consent of the LESSORS. LESSEES agrees to hold the LESSORS harmless from any damage, loss or expense arising from such alterations, additions and improvements and **agrees to comply** with all building and safety laws, ordinances, rules and regulations. Upon termination of this Lease, all alterations, additions and improvements, shall remain upon the leased premises and be surrendered to the LESSORS.

*CP* at 68<sup>3</sup> (emphasis added).

Here, ¶8 states that the Lessee **may** make **minor** improvements; there is no obligation to make improvements to the property. Similarly, ¶4 imposes no obligation on Poorman to acquire permits, and even if it did, the obligation would be as to Poorman's *use* of the premises, not its *occupancy*.

In *Markley*, the Court found that the tenant was the agent of the landlord because the lease clearly spelled out an affirmative duty as a prerequisite to obtaining an occupancy permit. In that case, the plaintiffs leased the Sleepy Hollow Motel to Bridge Receiving Homes for use as supervised living for teenagers aged 17-19. *Markley*, 17 Wn.App. at 481.

The lease contained a specific affirmative duty:

to make all the repairs required by the building, fire or wire codes of the County of Spokane, State of Washington, in order to obtain a certificate of occupancy or to meet the requirements of any other governmental agency to maintain or operate a group home

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<sup>3</sup> Because the claimed illegality arises from the initial use/occupancy permitting, Poorman references the initial lease between the parties.

*Id.* The lease in that case was signed on May 1, 1975; the fire marshal inspected on June 25, 1975; and the installation of the required equipment was complete on July 31, 1975. *Id.* at 481-82.

The lease in this case has no affirmative requirement to construct improvements or make repairs. Had RST wished to foist their permitting obligations on Poorman, this needed to be spelled out in the lease. There is no agency relationship between Poorman and RST created by the lease, and particularly not as to the initial use/occupancy permit.

Here, also unlike *Markley*, the occupancy permit issue laid dormant, despite ample notice to the County. Both RST and the County admit in briefing that Poorman began its tenancy in **2014**. *County Brief* at 4; *RST Brief* at 1; *See also CP* at 67 *et seq* (initial lease beginning 4/1/14). Poorman's marijuana license was approved in May of **2015** (and it must have begun the application process before then). *CP* at 14. It was not until September 16, **2016** that the County sent its Notice Letter (*CP* at 14-20).

The County's Notice Letter indicates that Poorman was first issued a Tier 3 Producer/Processor license on May 8, 2015 for the Collins Fruit location owned by RST. *CP* at 14. The County had clear notice that Poorman was beginning operations. The marijuana licensing process requires applicants to, among other things, post conspicuous notice of their application. WAC 314-55-020(3). The LCB is required to notify the County

legislative authority prior to issuance of a new marijuana license and give the County twenty days to object. RCW 26.50.331(7)(a)-(b). The County apparently did not object. The County was notified of the issuance of Poorman's license as well. RCW 69.50.331(7)(d). What is important here is that the statutory grounds for objection are similar to the issue the County raises here:

The ... county legislative authority... has the right to file with the state liquor and cannabis board... written objections against the applicant **or against the premises** for which the new or renewed license is asked.

RCW 69.50.331(7)(b) (emphasis added).

The County was twice notified of Poorman's intent to begin marijuana operations at the Collins Fruit warehouse and given specific opportunity to raise objections about the premises. Instead of raising an objection at the proper time (during Poorman's application process), the County sat on the issue for nearly a year and half.

RST and the County are fundamentally mistaking RST's improper performance for illegality. A party may perform a perfectly legal contract in an illegal manner. For example, a contract for A to supply B with peanuts (for consideration) is perfectly legal; if A steals the peanuts to provide to B, this does not render the contract illegal. Had RST obtained the proper

permits, there would be no issue – there is nothing in the lease itself the runs afoul of the building code.

**ii. Regardless, the lease is not illegal for lack of an occupancy permit.**

The First Restatement of Contracts provides a much better framework for approaching this issue than the Second Restatement. In the First Restatement, Chapter 18 is entirely devoted to the subject of illegal bargains. In the Second Restatement, this organization has disappeared in favor of a more outcome-based approach – for example, limitations on remedies and enforcement.

The First Restatement helpfully explains:

A bargain may be illegal because, 1, the **consideration** for a promise in it **is an illegal act or forbearance**, or, 2, because it is **illegal to make some promise** in the bargain, even though what is promised might legally be performed, or, 3, because some **performance promised is illegal**, or, 4, because of a **provision for a condition that is in violation of law**.

Rest. 1st., Contracts §512, cmt. d (1932) (emphasis added). Here, the alleged illegality concerning the use/occupancy permit touches none of these factors. The Restatement goes on to say:

In some cases a bargain is illegal, though the conduct promised is not illegal. **It is the attempt to become antecedently bound to pursue that line of conduct that is illegal**. Thus, there is no impropriety in morals or in law in refraining from competition with another to an extent beyond that which could legally be promised. **More often, however, when a bargain is illegal it is because the consideration or**

**the performance of a promise is opposed to public policy.**

*Id.*, cmt. e (emphasis added). Poorman and RST were not attempting to pursue some illegal course of conduct. This was an ordinary commercial lease for a perfectly lawful purpose.

It is clear that neither party believed they were engaged in illegal activities. In fact, the execution of the Outdoor Roof Lease in December of 2015 with an effective date of April, 2016 (to avoid any issues with Resolution 2015-94), was the parties' way of *complying* with the law. Not only this, but after Resolution 2016-14 passed, the parties went on to execute *two more* leases. *See CP* at 105-13 (May 10, 2016); 114-23 (October 12, 2016).

The four factors from §512 of the First Restatement fall into two general categories: (1) an unlawful act or forbearance or a promise for the same; and (2) illegal subject matter or provisions. This bifurcation finds support in articulations of this principle that follow the *Second* Restatement:

If a **contract is illegal** or flows from an **illegal act**, a court will leave the parties as it finds them. An **agreement to violate a statute** or municipal ordinance is void, except when the agreement is not criminal or immoral and the statute or ordinance contains an adequate remedy for its violation.

*Evans v. Luster*, 84 Wn.App. 447, 450, 928 P.2d 455 (1996) (emphasis added). But Poorman and RST did none of these things. The contract did

not flow from the lack of the use/occupancy permit; there is no agreement to violate a statute or ordinance.

Neither RST nor the County has explained how the lack of a use/occupancy permit touches or concerns the subject matter of the contract in any way. There must be illegality in the consideration, promise, performance<sup>4</sup>, or provisions of the parties' agreement. This nexus is missing here – the asserted illegality is entirely tangential to the bargain.

**iii. Permits are not conditions.**

RST and the County also argue that the lease is illegal because Poorman failed to acquire permits other than the use/occupancy permit. This argument fails because there was no requirement that Poorman obtain the permits in order to obtain the lease.

A condition is an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due.

Restatement 2d., Contracts, §224. The reverse is true – Poorman had to obtain the lease in order to obtain the permits.

A licensed marijuana business must seek prior approval from the Liquor Cannabis Board (LCB) to change its operating plan. WAC 314-55-

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<sup>4</sup> RST's improper performance of failing to obtain the use/occupancy permit illustrates an important distinction. Even if this failure was unlawful, this was not a promised condition of performance or part of the parties' agreement. To be illegal performance, the promise itself must be illegal (e.g. a hitman, where both the promise (criminal conspiracy) and the performance (murder) are unlawful).

020(11)(b). The operating plan requires “a floor plan or site plan drawn to scale which illustrates the entire operation being proposed.” WAC 315-55-020(11)(a). To make use of the Roof and Outdoor Ground spaces, Poorman was required to show the LCB a proposed layout.

But to acquire the LCB’s go-ahead to make these areas part of the “licensed premises,” Poorman was required to submit evidence that it has “leasehold rights as listed in the property lease” to the LCB. WAC 314-55-010(17).

The County’s grievance with the fencing permits also falls under IBC §105.1 (*CP* at 18). Again, the language, “Any owner or authorized agent<sup>5</sup>...” is important. The lease does not spell out the obtaining of any permits as a precondition to possession. The contract becomes executory with or without the permits. *See* Rest. 2d Contracts, §224. Poorman could not be required to obtain the *permits first* because it is the *lease* that places Poorman in privity with RST and makes Poorman the “authorized agent<sup>6</sup>” under IBC 105.1.

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<sup>5</sup> IBC §105.1 is quoted by the County in two places at page 18, Clerk’s Papers. However, the quotes are not identical. While not in the record, on information and belief, the correct quotation is *without* “owner’s,” but in context likely makes no difference.

<sup>6</sup> This is not to say that the parties could not have contracted in this way. RST could have authorized Poorman to acquire and build fencing without and completely independently of the lease, but this is not the case at bar.

**iv. Resolution 2016-14 does not make the Leases illegal.**

Resolution 2016-14 is a regulatory action over the marijuana business. The distinction in *Parker* controls:

[I]f a contract violates a business statute or regulation, the contract is not void unless the act expressly provides for invalidation of conflicting contract provisions.

*Parker*, 118, Wn.App. at 432-33. Resolution 2016-14 has no express provision that would invalidate conflicting contract provisions. Regardless, as above, the lack of a permit does not touch and concern the parties' bargain where it is not a condition of the lease.

For these leases, the Roof Lease predates the Resolution; it cannot be illegal thereunder because illegality is analyzed as of the time of formation; later events invoke frustration or impracticality. *See Cornish*; Rest. 2d. Contracts, §261-265.

The Ground Lease is not made illegal by Resolution 2016-14 because the Resolution is a business regulation that does not expressly invalidate contracts and none of the claimed illegalities have anything to do with the parties' bargain. Poorman was in lawful, actual, and physical operation by September 29, 2015.

**b. The purpose of the Leases was not frustrated.**

As in the trial court, RST improperly relies on §265 of the Restatement 2d., Contracts. While this section (discharge by supervening

frustration) is generally on-point, the correct section is §264 (prevention by governmental regulation or order)<sup>7</sup>. It matters little here, however, because RST cannot show the essential “non-occurrence-basic-assumption” factor from *either* section of the Restatement:

If the performance of a duty is made impracticable by having to comply with a domestic or foreign governmental regulation or order, that **regulation or order is an event the non-occurrence of which was a basic assumption** on which the contract was made.

Restatement 2d, Contracts §264<sup>8</sup> (1981) (emphasis added).

RST claims that “Although [Poorman and RST] anticipated further cannabis regulation from the County, RST and Poorman entered into the **OUTDOOR** Leases with the basic assumption that the regulations would not result in the prohibition of cannabis production.” *RST Brief* at 16-17 (bold caps original). This assertion defies credulity and reality.

At the time the Roof Lease was executed (December of 2015), there was *then-presently* County regulation (Resolution 2015-94) prohibiting the

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<sup>7</sup> It is *indirect* government action that invokes §265 – see illustration 4 thereto (neon signs later forbidden). In that illustration, the government regulation is not as to a specific type of business, but rather to all signage. Where the government action is *direct*, as here (by targeting marijuana businesses exclusively), the proper section is §264 – see cmt. B thereto.

<sup>8</sup> For comparison - §265: “Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the **occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made**, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.” (emphasis added).

“siting of licensed...marijuana...production and processing...” *CP* at 218-19. The parties *contracted around* that resolution.

At the time the Ground Lease was executed (May of 2016), Resolution 2016-14 was in effect. The parties are presumed to know the law at the time of the formation of the contract, and such law becomes part of the contract. *Cornish*, 158 Wn.App. at 223-24. RST has done nothing to combat this presumption.

RST and Poorman did not have the basic assumption that the County would not prohibit cannabis production. One lease was executed during a marijuana siting moratorium and the other was executed after the *actual prohibition of cannabis production* that RST now expeditiously claims was unanticipated. These issues are fatal to RST’s frustration argument.

**c. The Leases were improperly terminated.**

RST admitted at the summary judgment hearing that it did not issue a ten-day cure notice as required by the lease. *VRP* at 95:24-96:10. Now, as then, RST argues that it did not need to do so because the default was incurable and notice would be useless. *See RST Brief* at 18-19.

RST’s basis for eviction was noncompliance with the conditions in ¶4 of the lease. *Id.* at 17. This type of default is defined by ¶16(d) of the lease:

(d) If LESSEES shall fail to perform or comply with any of the conditions of this Lease and if the non-performance shall continue for a period of ten (10) days after notice and demand

by LESSORS to LESSEES, or, if the performance cannot be reasonably had within the ten (10) day period, LESSEES shall not in good faith have commenced performance within such ten (10) day period and shall not diligently proceed to completion of performance.

*CP at, e.g., 109.* This provision has two important components. First, it establishes a **conjunctive** condition for default or breach requiring noncompliance that also continues after notice. Here, notice is a condition of default or breach. RST admits this is lacking, and so the analysis, under the summary judgment standard, ends there.

The “useless act” argument *does* apply to contracts, but RST has certainly not carried its burdens of proof or persuasion on this point. RST’s argument begins with a false dichotomy and then proceeds to confuse contract noncompliance and bargain illegality while straining the cited caselaw and the lease itself to reach the conclusion they desire.

First, the “primary purpose” of the lease is spelled out: “for the cultivation of cannabis **and related activity** and no other purpose.” *CP at 106 (¶4)* (emphasis added). RST’s argument attempts to draw a line between growing plants and the other ancillary activities that are required to support this. Poorman is not arguing for some *alternative* use; Poorman is arguing that it could have cured the default by putting the space to use *within the primary purpose* of the lease – just not growing plants.

Second, RST misapprehends *Nolte* (citing *Yakima Cy. Fire Protection Dist.*), confusing noncompliance for illegality. *See RST Brief* at

19. The Court in *Nolte* said:

When part of an agreement is **illegal** and thus unenforceable, but part is legal and enforceable, a court may enforce the legal part only where the **unenforceable portion is not an essential part of the consideration** given to support the contract. Whether the unenforceable portion is an essential part of the consideration given depends on whether the parties would have formed the agreement without it.

*Nolte v. City of Olympia*, 96 Wn.App. 944, 958, 982 P.2d 659 (1999) (emphasis added)<sup>9</sup>. RST claims that ¶4 is illegal but does not explain why. *RST Brief* at 19-20. *Nolte* does no work for RST and is inapplicable to this circumstance – the requirement of notice to cure is an issue of default or breach, not illegality.

There are two additional factors that bear on RST’s useless act argument. First, the cure provision (¶16(d)) has an express exception for cure that may take longer than ten days; Poorman would have only had to *start* to cure within ten days and diligently proceed to fully cure.

Second, RST does not address another important provision: ¶8. RST complains that the “construction of security fences” was an “unquestionable incurable default.” *RST Brief* at 19. But ¶8 of the lease required Poorman to

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<sup>9</sup> The *Nolte* court was faced with an agreement that contained unlawful fee provisions which formed part of the consideration for the agreement. *Id.* at 957-58.

get RST's written permission to install the fences. RST is equitably estopped<sup>10</sup> from claiming this as a basis for eviction.

Third, RST's argument here makes little sense. RST argues that WAC 314-55-075 requires a fence that the County forbids. This is yet another false dichotomy. The only circumstance where this would present an incurable default would be if Poorman was *affirmatively required* to grow marijuana on the roof. It is plain from the language of the lease that this is not the case.

Poorman could have cured the alleged default by conducting activity related to the cultivation of marijuana that did not involve growing plants on the roof. This is within the primary purposes of the lease. As below, Poorman contends that this issue is controlled by *DC Farms, LLC, v. Con-Agra Foods Lamb Weston, Inc.*, 179 Wn.App. 205, 224, 317 P.3d 543 (2014).

*DC Farms* contains a discussion of the "useless act" maxim. *Id.* at 223 *et seq.* The Court notes: "Washington courts have explicitly refused to apply the maxim to excuse a party from providing a notice of default required by a notice-and-cure provision, however." *Id.* Upon invitation to reconsider

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<sup>10</sup> RST's act in authorizing the fences is inconsistent with its claim of breach; Poorman relied on RST's authorization by constructing the fences; and Poorman would be injured if RST can repudiate the lease on the basis of its own authorized act. *Kramarevcky v. DSHS*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993) (reciting elements of equitable estoppel).

this application, the Court declined: “In light of this clear and controlling precedent, we cannot adopt the reasoning of *Stacey*<sup>11</sup>. We are also convinced that requiring compliance with the notice-and-cure provision is the better rule.” *Id.* at 226.

While the *DC Farms* opinion speaks to breaches that are material enough to allow rescission where the purpose of the contract is substantially defeated (*Id.* at 230), this does not apply here. This is fundamentally a jury question:

A party who has bargained for a notice-and-cure provision to protect against forfeiture and litigation is entitled to have that bargained-for protection honored. And if the party who seeks to terminate the contract truly believes that the default cannot be cured, then giving notice—with the result that any steps actually taken and proposals actually made will be in evidence—will produce a more reliable and thereby fairer basis for deciding whether the breach was curable. Where, as here, the notice-and-cure provision is breached, **the jury is required to decide the disputed cure issue based on contrasting theories of “what might have been.”**

*Id.* at 226 (emphasis added). Additionally, further government action like the County’s Notice Letter is a risk that the parties assumed when contracting these leases in light of Resolutions 2015-94 and 2016-14.

Finally, RST implies that Poorman should have cured if it was going to do so. This attempt to foist the burden to Poorman ignores a critical fact.

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<sup>11</sup> *Stacy v. Redford*, 226 S.W.3d 913, 918 (Mo.Ct.App. 2007).

Poorman was given a terse notice of termination. *CP* at 134. The notice says nothing about an opportunity to cure or whether an attempt to do so would even be honored.

**4. The Court erred by considering the County's argument.**

RST and the County are both interested in the issue of whether Poorman was lawfully established by September 29, 2015. But these interests are materially different.

In the 191 case, Poorman sued RST for breach of contract by wrongful eviction. Separately, Poorman sued the County in the 398 case, alleging damages and seeking a writ of mandamus to compel the County to perform inspections for marijuana businesses until March 1, 2018.

RST's interest is as to whether the lease is enforceable. If Poorman falls into the lawfully established grandfather clause, this immediately terminates RST's interest. The County's interest, on the other hand, is as to whether they bear any liability for treating marijuana businesses differently under Resolution 2016-14. If Poorman is *not* within the grandfather clause, the County avoids liability because Poorman would have been required shut down in February of 2016.

Whether the County is required to perform inspections and permitting is unrelated to whether the Leases are enforceable. As discussed above, the County cannot establish a nexus between the alleged illegality and the

bargain between RST and Poorman. Without this nexus, the County's position is immaterial for purposes of RST's summary judgment motion. By the time that this case reached the summary judgment hearing, Poorman and RST had signed (o) March 11, 2019) a Stipulation and Order for Partial Dismissal of Claims Without Prejudice (entered March 13). *CP* at 473-74. This stipulation was RST's dismissal of claims against Poorman and Poorman's dismissal of claims against the County, without prejudice, as a CR 41. *Id.* After Poorman's voluntary nonsuit on its mooted-by-stipulation contribution action, the County had a vestigial counterclaim and fourth-party complaint still "hanging," without a hook to the underlying claims between RST and Poorman. *CP* at 149.

The County filed its Answer in the 348 case on May 19, 2017. *See Supplemental Clerk's Papers (CP Supp.)* at Ex. B. In the 348 case, the County counterclaimed against Poorman, Evergreen Production, and RST, alleging two causes of action: "Declaratory judgment regarding public nuisance and violation of County codes and regulations" and "Warrant of abatement, lien, and costs." *Id.* at 11.

The County's counterclaim/fourth party complaint in the 191 case, filed November 21, 2018 (*CP* at 184), brings claims against Poorman, Evergreen Productions, and RST alleging two causes of action: "Declaratory judgment regarding public nuisance and violation of County

codes and regulations” and “Warrant of abatement, lien, and costs.” *CP* at 153-54.

This is why Poorman asserts that the priority of action doctrine is analogously applicable here. The County already made its claims in the 348 case more than a year prior to asserting the same claims in the 191 case. The County had no business in the 191 case.

Considering the County’s argument was improper because the County’s argument was moot for purposes of the issues present. This allowed the County an unfair practice run of the 348 case in the 191 case summary judgment hearing.

**5. The Court should have consolidated.**

The County’s comments above cast the consolidation issue in clear light. There are common issues of law and fact in the 191 and the 348 cases – this is why Poorman tried to consolidate them in December of 2018, but this request was denied. RST “does not dispute that [191] and [348] share some common facts and a handful of similar legal issues.” *CP* at 164. To be clear, the cases share some *claims* and both based on the same series of transactions and occurrences. There is no question that the cases share the required nexus for consolidation. *See* CR 42(a). And indeed, the trial court found that “There are clearly common questions of fact and law...” *CP* at 180.

The claims between the 348 and 191 cases are not so different as RST insists. Much of *both* cases depends on the lawfully established issues discussed in this appeal. In short, these cases both arise because the County changed the rules for marijuana, refused to perform inspections or issue permits, and told RST to evict Poorman on the basis of missing permits, which RST did without proper notice to cure. Consolidating these matters would simplify the cases considerably.

The trial court's concern was unnecessary delay, but there is no reason to conclude that delay would have resulted. The Court's conclusion that consolidation would cause "substantial and unnecessary delay" (*CP* at 179-80) is not based on tenable grounds or tenable reasons. This reasoning failed to take into account that some parties had yet to Answer the County's November 21, 2018 fourth-party complaint at the time of the Court's January 31, 2019 ruling. *Id.* That same ruling acknowledged that trial was set for March 25, 2019; if the fourth party Complaint had not yet been *Answered* by the end of January, the case would not have been ready for trial in late March.

Moreover, consolidating the matters would *save* all parties considerable time and expense. Otherwise, the same, and other similar and related issues, would be litigated in two actions. Not only this, consolidation

would permit the parties to amend their complaints, simplifying complex claims and *eliminating* confusion.

A continuance of trial in the 191 case would not have subjected the parties to unnecessary delay because it was *already* necessary to continue the matter. Rather, a continuance, with consolidation, would have reduced the overall time all parties spent on these two cases and allowed for a faster resolution. The trial court's reliance on delay was abuse of discretion.

RST's claim of prejudice is somewhat suspect. If, as RST claims, the County objected to JDSA's representation in the 348 case and forced its withdrawal (*RST Brief* at 30), then the fact that the County brings an identical claim against RST in the 191 case raises that same issue. The County and RST are materially adverse parties here; the extent to which the County can apparently control JDSA's clients is not an issue on appeal, though it does seem to require their attention.

**6. RST is not entitled to fees beyond the contract.**

While RST is correct that ¶27 of the Leases provide for fees to the prevailing party, there is no other basis for fees. Poorman's appeal is certainly not frivolous, and there is a reasonable possibility of reversal on the issues presented. *See* RAP 18.9.

RST's argument that the lease is illegal and unenforceable, but nevertheless supports fees is meritless. Not only does *Herzog* provide no

support for RST's position<sup>12</sup>, RST's request is wholly inconsistent with the principle the a Court simply leaves parties to an illegal contract where it finds them. *Evans*, 84 Wn.App. 447 at 450.

Poorman did not request fees at the appellate level because the issues and defenses between the parties are obviously the subject of reasonable legal debate and because if Poorman wins on appeal, the case is returned to the trial Court for consistent proceedings where Poorman may yet prevail and seek fees.

## **B. CONCLUSION**

What this case boils down to is a commercial lease with a notice-and-cure provision that RST violated. The "useless act" excuse does not apply and the illegality argument fails to touch the parties' bargain. RST should have given Poorman the notice and time to cure that the lease required.

Poorman requests that this Court reverse and remand with directions to consolidate.

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<sup>12</sup> "Considering the remedial purpose behind the enactment of RCW 4.84.330, that **unilateral attorney fees provisions be applied bilaterally...**" is what "accordingly" leads to the conclusion RST cites.

Respectfully submitted this 17<sup>th</sup> of April, 2020

  
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