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NO. 369072

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

POORMAN ENTERPRISES, LLC,

Appellant,

v.

RST PARTNERSHIP

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

Respondent, RST Partnership (“RST”), through undersigned counsel, hereby moves this Court to dismiss this appeal for mootness. In the alternative, RST files this Respondent’s Brief.

RST owns the Collins Fruit Warehouse (the “Warehouse”) in Monitor, Chelan County, Washington. The Appellant, Poorman Enterprises, LLC (“Poorman”) is a Tier 3 cannabis producer/processor licensee. Between April 1, 2014 and November 1, 2016, RST and Poorman entered into seven different lease agreements which authorized Poorman to grow cannabis inside the Warehouse, on its roof and on vacant ground east of the Warehouse. Of those seven lease agreements, only two are at issue in this appeal – the Roof Lease and Exterior Lease (together, herein referred to as the “**OUTDOOR** Leases”).

This case arose after Chelan County (the “County”) adopted Resolution 2016-14 (“Res. 2016-14”) which declared a prohibition on cannabis growing operations in Chelan County and rendered both of Poorman’s outdoor grows illegal. On September 29, 2016, in an effort to comply with Res. 2016-14, RST gave Poorman written notice that its Roof Lease and Exterior Lease would terminate on October 31, 2016. Prior to vacating its grow operations on the Warehouse roof and vacant ground, Poorman harvested its 2016 outdoor cannabis crop.

II. STATEMENT OF ISSUES

1. Courts may dismiss a case that is moot at any stage of litigation where relief is no longer possible. Poorman failed to respond to RST's requests for admissions, admitting it suffered no loss of profits or other damages from the 2016 cannabis crops it grew under the **OUTDOOR** Leases. Does the absence of damages render Poorman's appeal moot?

2. An agreement with an unlawful primary purpose is void and unenforceable. The primary purpose of the **OUTDOOR** Leases was to grow cannabis or related activity. Poorman could not lawfully grow cannabis or engage in related activity because its outdoor growing operations were not lawfully established prior to September 29, 2015. Should the trial court's decision to grant RST's motion for summary judgment be affirmed?

3. Under CR 42(a), trial courts are afforded significant discretion in deciding whether to grant or deny a motion to consolidate. The trial court denied Poorman's motion to consolidate on the grounds that the two cases were at vastly different stages and consolidation would cause unnecessary and substantial delay. Did the trial court abuse its discretion?

4. Should this Court award RST the attorneys' fees it incurred in responding to this appeal?

III. RESTATEMENT OF THE CASE

1. Relevant Background of the OUTDOOR Leases.

In May, 2015, approximately one year after entering into the first three indoor leases, as described on pages two and three of Poorman's Brief (the three leases for indoor space are herein collectively referred to as the "INDOOR Leases"), RST and Poorman entered into the first lease agreement for growing cannabis on the roof. CP 96-104. The 2015 crop year progressed without significant incident and on December 10, 2015, RST and Poorman entered into the second lease agreement for the Warehouse roof space¹ (the "Roof Lease"). CP 104.

On May 10, 2016, RST and Poorman entered into a lease agreement for vacant ground located just east of the Warehouse (the "Exterior Lease") so Poorman could expand the size of its cannabis grow operation up to the maximum allowable size of 30,000 square feet. CP 105-113. The Exterior Lease had an effective date of July 1, 2016. CP 105.

The **OUTDOOR** Leases are the two leases at issue in this case. The **INDOOR** Leases are not at issue.

Except for the location within the Warehouse, the monthly rent, and the repair and upkeep provisions, the operative provisions of the Roof Lease

¹ All of the lease agreements between RST and Poorman are printed on RST's standard lease form which pre-dated the production of cannabis at the Warehouse and contain the title "Storage Space Lease Agreement."

and Exterior Lease are essentially identical. CP 96-113. With respect to the matters before this Court, both **OUTDOOR** Leases contain the exact same provisions regarding the lease term, the use of the premises, default and breach, and remedies for default and breach. *Id.* Of particular importance in this case are the following Paragraphs which provide, in relevant part:

2. TERM: This Lease shall be year to year and either party may terminate the lease with advance written notice.

4. USE OF THE PREMISES: LESSEE shall use the premises exclusively for the cultivation of 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, 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.

[16]. DEFAULT OR BREACH. Each of the following events shall constitute a default or breach of this Lease by LESSEES:

...

(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.²

18. **LESSOR'S REMEDIES ON DEFAULT:** In the event of default or breach of LESSEES, the LESSORS shall have the following remedies:

(a) LESSORS shall have the right to cancel and terminate this Lease by giving LESSEES not less than thirty (30) days notice of cancellation. Upon expiration of the time fixed in such notice, this Lease shall terminate in the same manner and with the same force and effect, except as to the LESSEE'S continuing liability for damages proximately caused by the default or breach, as if the date fixed on the notice of cancellation were the end of the term. On cancellation LESSEES shall be liable to LESSORS for all damages resulting from LESSEE'S breach or default, including the cost of recovering the leased premises and LESSOR'S attorney fees, and the difference between the present value of this Lease and the fair market rental value of the leased premises for the remainder of the lease term. Such sums shall be immediately due and payable by LESSEES to LESSORS.

...

CP 96-104, 105-113.

2. Termination of the OUTDOOR Leases.

On February 16, 2016, the Chelan County Board of Commissioners passed Res. 2016-14 which effectively prohibited cannabis production and processing operations in the County. CP 124. Under Res. 2016-14, cannabis production and processing operations that were lawfully established prior to September 29, 2015, such as Poorman's indoor operations, were granted an

² The **OUTDOOR** Leases both contain two sections numbered Paragraph 29, the Paragraph 29 relevant to default or breach is located where Paragraph 16 should be. The Paragraph 29 that is numbered correctly is titled "Prior Agreements."

extended termination period and allowed to remain in business until March 1, 2018. *Id.*

Conversely, cannabis operations that were not lawfully established or that were established after September 29, 2015, such as Poorman's rooftop and exterior ground operations, were required to cease operations. *Id.* Finally, Res. 2016-14 expressly stated that the County would no longer grant any applications for building permits, occupancy permits, tenant improvement permits, fence permits, variance, conditional use permits or other development permit. *Id.*

On September 21, 2016, Chelan County sent RST a letter notifying it that Poorman's cannabis growing operations on the Warehouse property constituted a violation of Res. 2016-14 for a variety of reasons. *Id.*

To comply with the County's demand relative to the **OUTDOOR** leases, RST sent Poorman a written notice of termination for the **OUTDOOR** Leases on September 27, 2016. CP 134. RST did not sent Poorman a notice of termination for the **INDOOR** Leases which later expired by their terms on October 1, 2018. CP 86.

Specifically, the written notice of termination stated: "Pursuant to the written lease agreement for the Rooftop and Outdoor [identified as Roof Lease and Exterior Lease herein] areas of the premises, Lessor can terminate it by giving you written notice." *Id.* The date for termination of the Roof Lease and

Exterior Lease was set for October 31, 2016. *Id.* By allowing Poorman more than one month to vacate the Roof and Exterior spaces, RST ensured Poorman could harvest its 2016 outdoor crop.

On October 31, 2016, Poorman refused to vacate the Roof and Exterior areas. *See* CP 46. Poorman eventually removed the fences and took most of its personal property out of the Roof and Exterior spaces on or around March 18, 2017. CP 46. Because Poorman did not remove all of its property from the roof and exterior spaces, however, RST delivered notices of default for violations of the Leases on March 22, 2017, December 6, 2017 and on February 1, 2018. CP 135-38.

3. Relevant Procedural Background of Poorman v. RST Cause No. 17-2-00191-5.

On March 13, 2017, Poorman filed its Complaint against RST in Chelan County Superior Court case no. 17-2-00191-5 (hereafter “Case 191”). Through its first counsel, Charles Steinberg, RST filed its Initial Answer with Counterclaims in Case 191 on October 17, 2017. CP 8-13. During Mr. Steinberg’s tenure as counsel for RST, the parties completed a significant amount of discovery exchanging interrogatories and requests for production.

On August 13, 2018, Mr. Steinberg withdrew from representing

RST³ and RST retained J. Patrick Aylward of Jeffers, Danielson, Sonn & Aylward, P.S. (“JDSA”) as substitute counsel.

On September 10, 2018, RST requested and Poorman stipulated and agreed to allow RST leave to amend its answer to Poorman’s complaint and to bifurcate and continue the trial scheduled for October 15, 2018. CP 37.

On September 26, 2018, RST filed and served its Motion for Summary Judgment in Case 191. CP 38-39. Initially, RST noted the hearing on its Motion for Summary Judgment for December 11, 2018, however, due to the resignation of the Judge assigned to the case in November, 2018, RST was forced to re-note the summary judgement hearing for February 22, 2019. CP 63.

On September 27, 2018, Poorman filed its Answer to RST’s Amended Counterclaims and Third-Party Complaint for contribution against the County. CP 57-62.

On December 11, 2019, Poorman filed its Motion to Consolidate Case 191 with Chelan County Superior Court case no. 17-2-00348-9 (hereafter, “Case 348”). At that time, Case 191 was scheduled for a summary judgement on RST’s motion for February 22, 2019, for trial on

³ Mr. Steinberg withdrew from representing RST because of time restraints, he was running for a position as a Chelan County Superior Court Judge.

the issue of liability on March 25, 2019 and for trial on the issue of damages on May 30, 2019.

4. Relevant Procedural Background of Poorman v. Chelan County, et. al. Cause No. 17-2-00348-9.

Poorman filed its Complaint against the County and Commissioners Keith Goehner, Doug England, Ron Walter, Kevin Overbay and Doug Lewin (collectively, the “County”) in Case 348 on April 24, 2017. *Motion to Supplement, Exhibit A.* The County filed their Answer, Affirmative Defenses and Counterclaims on May 19, 2017, naming RST as a counterclaim defendant. *Motion to Supplement, Exhibit B.*

RST filed its Answer in Case 348 on September 27, 2018. *Motion to Supplement, Exhibit C.* A short time later, the County notified JDSA that the County believed JDSA’s representation of RST in Case 348 constituted a conflict of interest due to JDSA’s ongoing representation of the County in unrelated matters. JDSA withdrew from representing RST in Case 348 effective December 11, 2018. *Motion to Supplement, Exhibit D.*

Unlike Case 191, Case 348 had remained essentially dormant for nearly two years and was not scheduled for a trial date. CP 180. As of January 15, 2019, no party had filed substantive motions or initiated any substantial discovery efforts. *Id.* When the trial court reviewed Poorman’s Motion to Consolidate on January 18, 2019, in light of the time necessary to complete discovery, schedule and conduct necessary depositions, prepare

and argue dispositive motions and prepare for trial, Case 348 was likely many months, if not a year, away from being ready for trial. *Id.*

IV. MOTION TO DISMISS AS MOOT

Rule 18.9(c)(2) of the Rules of Appellate Procedure provides: “The appellate court will, on motion of a party, dismiss review of a case... if the application for review is frivolous, moot, or solely for the purpose of delay.” RAP 18.9(c)(2).

1. Facts in Support of Motion to Dismiss.

On March 12, 2019, RST propounded Requests for Admission on Poorman by certified mail (“Original RFAs”). *Motion to Supplement, Exhibit E.* On March 15, 2019, RST withdrew the Original RFAs, and propounded a revised set of requests for admission on Poorman (the “Revised RFAs”) by certified mail. *Motion to Supplement, Exhibit F.*

The Revised RFAs asked for four admissions related to Poorman’s 2016 cannabis crop, the Roof Lease, and the Exterior Lease:

- REQUEST FOR ADMISSION NO. 1: Admit that in 2016 POORMAN harvested the cannabis crop from the property described in the ROOF LEASE.
- REQUEST FOR ADMISSION NO. 2: Admit that in 2016 POORMAN harvested the cannabis crop from the property described in the EXTERIOR LEASE.
- REQUEST FOR ADMISSION NO. 3: Admit that Poorman suffered no loss of profit on the cannabis crop harvested in 2016 from the property described in the ROOFTOP [*sic*] LEASE as a result of the termination of the ROOFTOP [*sic*] LEASE.

- REQUEST FOR ADMISSION NO. 4: Admit that Poorman suffered no loss of profit on the cannabis crop harvested in 2016 from the property described in the EXTERIOR LEASE as a result of the termination of the EXTERIOR LEASE.

Motion to Supplement, Exhibit F.

By April 17, 2019, 33 days had come and gone, but Poorman did not request an extension to respond from the trial court and never responded to the Revised RFAs.

2. Poorman’s Appeal is Moot Unless it can Identify Some Form of Relief Available to it at the Trial Court.

Irrespective of the problems with Poorman’s arguments on the merits, it must first overcome the fact that its claims against RST are moot. Unless Poorman can show a favorable appeal will allow it to obtain some form of relief against RST *besides* its now unavailable claim for damages from the 2016 cannabis crop, its appeal is moot.

Washington’s mootness doctrine empowers courts to dismiss cases at any stage of the litigation where relief is no longer possible. Washington appellate courts generally decline to review cases which become moot. *E.g.*, *Orwick v. City of Seattle*, 103 Wn.2d 249, 253, 692 P.2d 793 (1984). “A case is moot if a court can no longer provide effective relief.” *Orwick v. City of Seattle*, 103 Wn.2d 249, 253, 692 P.2d 793 (1984) (citing *State v. Turner*, 98 Wn.2d 731, 733, 658 P.2d 658 (1983); *In re Cross*, 99 Wn.2d 373, 377, 662 P.2d 828 (1983)). Because mootness is directed at the jurisdiction of

the court, the issue may be raised at any time—including for the first time on appeal. *Citizens for Financially Responsible Gov't v. City of Spokane*, 99 Wn.2d 339, 350, 662 P.2d 845 (1983).

At the trial court, Poorman admitted that it did not suffer damages related to its 2016 cannabis crop due to RST's termination of the Outdoor Leases. RST served the Revised RFAs on Poorman on March 15, 2019. Poorman's responses were due April 17, 2019, 33 days later. CR 36(a) (30 day deadline to respond to requests for admission); CR 6(e) (adding 3 days to deadline when notice or paper is served by mail).

Poorman did not respond to RST's Revised RFAs. And Poorman failed to request or obtain an extension to respond from the trial court. Therefore, every proposition sought by the Revised RFAs is deemed admitted. CR 36(a); *Melby v. Hawkins Pontiac, Inc.*, 13 Wn. App. 745, 748, 537 P.2d 807 (1975) (holding that requests for admissions not timely answered must be treated as admitted.) By failing to respond, Poorman's concedes four points that are fatal to its claims against RST:

- Poorman admits it harvested the 2016 cannabis crop from the property described in the Roof Lease.
- Poorman admits it harvested the 2016 cannabis crop from the Property described in the Exterior Lease.
- Poorman admits it suffered no loss of profit on the 2016 cannabis crop harvested from the property described in the Roof Lease as a result of RST terminating that lease.

- Poorman admits it suffered no loss of profit on the 2016 cannabis crop harvested from the property described in the Exterior Lease as a result of RST terminating that lease.

In light of its successful harvest and no loss of profits from its 2016 cannabis crop, Poorman cannot claim lost profits from or damages to that crop as a measure of damages. So, even if Poorman prevails on this appeal, it will not be able to obtain monetary damages on remand to the trial court for claims related to its 2016 cannabis crop.

Accordingly, unless Poorman can demonstrate that a favorable ruling will allow it to seek some other form of relief, it has no remedy awaiting at the trial court. Without a remedy, Poorman's appeal is nothing more than an academic question, rendering it moot. *Harvest House Rest., Inc. v. City of Lynden*, 102 Wn.2d 369, 373, 685 P.2d 600 (1984) ("It is a general rule that, where only moot questions or abstract propositions are involved, or where the substantial questions involved in the trial court no longer exist, the appeal ... should be dismissed.") (quoting *Sorenson v. Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972)).

For the foregoing reasons, RST respectfully requests this Court dismiss this appeal for mootness under RAP 18.9(c)(2).

This brief proceeds to the merits in the event the Court does not dismiss this appeal as moot.

V. AUTHORITY AND ARGUMENT

1. Summary Judgment Standard of Review.

When reviewing summary judgment, this Court engages in the same inquiry as the trial court and reviews the evidence de novo. *Fischer-McReynolds v. Quasim*, 101 Wn. App. 801, 6 P.3d 30 (2000). This Court may affirm an order granting summary judgment “on any basis supported by the record.” *Coppernoll v. Reed*, 155 Wn.2d 290, 119 P.3d 318 (2005). Summary judgment is proper if the pleadings, depositions, and affidavits show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Hearst Commc’ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 115 P.3d 262 (2005).

To defeat a defendant’s motion for summary judgment, the plaintiff must come forward with sufficient competent evidence of specific facts on which a jury could reasonably find for plaintiff on the essential elements of his or her claims. *Young v. Key Pharms.*, 112 Wn.2d 216, 770 P.2d 182 (1989). Failure of proof concerning an essential element of a plaintiff’s claim renders all other facts immaterial and the defendant is entitled to judgment as a matter of law. *Fischer-McReynolds, supra at 808*.

Here, RST set forth undisputed evidence that Poorman had not lawfully established its cannabis growing operations on the roof or in the exterior ground outside the Warehouse before September 29, 2015, thereby

frustrating the principle purposes of the Roof and Exterior Leases and rendering both Leases void and unenforceable as unlawful agreements.

2. The Roof Lease and Exterior Lease Were Unlawful and Unenforceable.

From the outset of the American judicial system, the United States Supreme Court made clear that illegal agreements are unenforceable: “The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract.” *Kaiser Steel Corp., v. Mullins*, 455 U.S. 72, 77, 102 S.Ct. 851 (1982) (quoting *Mullen v. Hoffman*, 174 U.S. 639, 654 (1899)). Similarly, the Washington Supreme Court has held illegal agreements unenforceable:

No principle of law is better settled than that a party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out; nor can he set up a case in which he must necessarily disclose an illegal purpose as the groundwork of his claim. The law in short will not aid either party to an illegal agreement.

Wright v. Corbin, 190 Wash. 260, 267, 67 P.2d 868 (1937) (quoting 13 C.J. 492, § 440). An illegal contract is void even if both parties knew of the illegality at the time of formation.” *Bankston v. Pierce County*, 174 Wn. App. 932, 938-39, 301 P.3d 495 (2013).

Here, Poorman sought to enforce the **OUTDOOR** Leases, both of which were illegal under Chelan County Resolution 2016-14. The Roof Lease and the Exterior Lease amount to illegal agreements that could not be

enforced. Therefore, there could be no breach of the leases since the leases were unenforceable.

3. The Roof and Exterior Leases Were Unenforceable Under the Frustration of Purpose Doctrine.

The Roof Lease and Exterior Lease were also unenforceable under the frustration of purpose doctrine. The frustration of purpose doctrine excuses performance by the parties under the premise that performance is no longer possible. *Felt v. McCarthy*, 130 Wash. 2d 203, 207-08, 922 P.2d 90, 92 (1996). Application of the doctrine is a question of law. *Id.* Pursuant to the Restatement (Second) of Contracts § 265, titled “Discharge by Supervening Frustration” provides:

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.

Restatement (Second) of Contracts § 265 (1979).

In this case, the principal purposes of the **OUTDOOR** Leases are indisputably limited to the production of cannabis and related activities with no room for any other use. CP 96-104, 105-113. Poorman argues the frustration of purpose doctrine is inapplicable to the **OUTDOOR** Leases because the parties anticipated further cannabis regulation by the County. App. Br. 19. Although they 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.

The County's September 21, 2016 letter put RST and Poorman on direct notice that Poorman's grow operations under the **OUTDOOR** Leases were unlawful. CP 45, 131-133. Cannabis production was the principle purpose of both Leases. As such, the principal purpose of both Leases was substantially frustrated rendering both Leases unenforceable, and discharging RST's duties under the Leases through the frustration of purpose doctrine.

4. The Roof Lease and Exterior Lease Were Properly Terminated.

Alternatively, if the Roof Lease and the Exterior Lease were not unenforceable because they were illegal or because of the doctrine of frustration of purpose, the illegality of Poorman's roof and exterior grow operations constituted an incurable default under Paragraph 4 of each lease.

Pursuant to Paragraph 18(a) in both the Roof Lease and the Exterior Lease, entitled "Cancellation," in the event of default or breach by Poorman, RST had the right to terminate the Leases upon 30 days written notice of cancellation. RST provided 30 days' written notice of cancellation on September 27, 2016. By this notice, RST properly terminated the leases.

Poorman argues the 30 day notice of cancellation was ineffective because it was not preceded by the 10 day notice and opportunity to cure contained in the Default or Breach Paragraph of the leases. This is not a persuasive argument. Washington law “does not require someone to do a useless act.” *Moratti v. Farmers Ins. Co. of Wash.*, 162 Wn. App. 495, 504-05, 254 P.3d 939 (2011), *citing Willener v. Sweeting*, 107 Wn.2d 388, 395 (1986) (where performance is a condition precedent to the right of action or another’s performance, a party need not tender performance if the other will not perform its part of the agreement); *see also, Music v. United Ins. Co. of America*, 59 Wn.2d 765, 768-69, 370 P.2d 603 (1962) (strict performance of contract terms not required if performance would be futile, a literal interpretation of such a provision would be to exalt the letter of the law while submerging the spirit of the contract.); *but see, DC Farms, LLC v. Conagra Foods Lamb Weston, Inc.*, 179 Wash. App. 205, 224, 317 P.3d 543, 552 (2014) (failure to give notice of default prior to notice of termination constituted a breach where question of default was disputed fact for jury to determine whether the breach was curable).

Poorman could not have cured its default under the leases. This indisputable fact easily distinguishes this case from *DC Farms* where the question of whether the default was curable was a disputed question of fact for the jury. There is no dispute that Paragraph 4 of the **OUTDOOR** Leases

required Poorman to comply with all applicable laws, rules and governmental regulations. While Poorman was in violation of several applicable laws, rules and governmental regulations, it theoretically could have cured most of those violations. However, Poorman's construction of security fences around the roof and exterior grow operations, as required by WAC 314-55-075, without a building permit from Chelan County constituted an unquestionable incurable default.

Poorman argues that even if it could not grow cannabis outdoors, the Leases authorized ancillary activities related to growing cannabis. App. Br. at 20-21. Under Poorman's logic, switching to an ancillary activity would cure the violation and make the Leases enforceable. *Id.* This argument is not persuasive because: 1) Growing cannabis was *the primary purpose* of the Leases; and 2) Poorman failed to offer such a cure.

Theoretically possible alternatives will not save a contract if the illegal and unenforceable portion of the contract is a primary purpose of the consideration, such that the parties would not have formed the agreement without it. *Nolte v. City of Olympia*, 96 Wash. App. 944, 958, 982 P.2d 659, 667 (1999) (citing *Yakima Cy. Fire Protection Dist. No. 12 v. Yakima*, 122 Wash.2d 371, 396, 858 P.2d 245 (1993)).

In this case, the illegal and unenforceable portion of the **OUTDOOR** Leases is found in Paragraph 4, which established that the

primary purpose of the Lease(s) was “cultivation of cannabis and related activity.” CP 96, 106. It is undisputed that Poorman is a cannabis producer and processor and that the primary purpose of its business is to grow and process cannabis for sale into the recreational market. It is undisputed that Poorman signed the Leases with the intention of expanding its plant canopy to maximize the plant canopy available under its license. *Id.* Therefore, theoretically possible ancillary uses, like selling hydroponic equipment, are insufficient to save the Leases.

Poorman also received RST’s notice of termination on September 29, 2016, more than thirty days before October 31, 2016, when Poorman had to vacate the roof and outdoor grow areas. Despite having more than a month to devise a cure for its violations, Poorman never offered to switch its use of the rooftop and outdoor areas from growing cannabis to a permissible ancillary use. Further, Poorman did not assert this claim in their complaint. The first time Poorman raised this argument was in its untimely response in opposition to RST’s motion for summary judgment filed on February 16, 2019. As such, RST’s duty to provide a ten day notice of default was discharged as a requirement for a useless act.

5. Invoking the Severability Clause Could Not Have Saved the OUTDOOR Leases.

Courts may rewrite an agreement pursuant to a severability clause if the illegal provision can be easily excised without essentially rewriting the

agreement. *McKee v. AT & T Corp.*, 164 Wash. 2d 372, 191 P.3d 845 (2008). However, rewriting is only possible where the balance of the agreement can stand on its own. *Id.* at 403.

Poorman concedes that if the trial court had invoked the severability clause and rewritten the **OUTDOOR** Leases to allow for some other ancillary cannabis related activity to serve as the primary purpose, it “would have obviously frustrated the purpose of the lease.” App. Br. at 23. Nonetheless, Poorman erroneously argues that Resolution 2016-14 does not prohibit “related activity to the cultivation of cannabis.” *Id.* at 22.

Poorman’s argument is off base. The issue before the trial court was not whether any laws, rules, regulations or the like prohibited activities ancillary to the cultivation of cannabis, the issue before the trial court was whether the **OUTDOOR** Leases could remain in full effect if the court wrote out their express primary purposes.

If the trial court had invoked the severability clause and rewritten the Roof and Exterior Leases to have a lawful purpose, the rewritten leases would have had a fundamentally different purpose. Therefore, rewriting the **OUTDOOR** Leases with the severability clause could not have saved them.

6. With Respect to Permits and Construction of Improvements, Poorman was RST’s Agent.

Poorman also argues that RST, as the property owner, had sole responsibility to secure the necessary building permits, theorizing that as a

tenant, Poorman was not an authorized agent of RST. App. Brief at 20. Poorman cites *Markley v. Gen. Fire Equip. Co.*, 17 Wash. App. 480, 484, 563 P.2d 1316, 1318 (1977) for the proposition that a tenant is the owner's agent only if the lease obligates the tenant to construct improvements. *Id.*

Pursuant to Paragraphs 4 and 8 of the **OUTDOOR** Leases, Poorman was obligated to secure permits, construct fencing and make other improvements in order to comply with all applicable laws, regulations, ordinances, orders and directives. CP 96-97, 106.

Under the rule stated in *Markley*, Poorman was RST's agent. Therefore, the responsibility to secure permits rested squarely on Poorman's shoulders. Ultimately, pursuant to Chelan County Resolution 2016-14, the County could not/would not issue any kind of building permit to cannabis producer/processors. Poorman could have complied with Chelan County's requirements by removing the fence or it could have complied with WSLCB regulations by keeping the fence. But there is no conceivable hypothetical situation where Poorman could have complied with both Chelan County building codes and WSLCB regulations.

7. RST's Arguments at the Trial Court Were Not Inconsistent with its Arguments in the Land Use Case.

In its brief, Poorman grossly misrepresents RST's arguments in the land use case that was before the trial court as Chelan County Case No. 17-2-00549-0. App. Br. at 19. Poorman argues that RST's arguments in that

case preclude RST from arguing “that Poorman was not lawfully established prior to September 29, 2015 because it had not obtained the necessary permits to move into the Warehouse. App. Br. at 19. In short, Poorman is attempting to confuse this Court by glossing over material facts and mucking up the important distinctions between the **INDOOR** Leases and the **OUTDOOR** Leases. This lawsuit is only about the **OUTDOOR** Leases. The LUPA petition is only about the indoor grow operations.

To clarify RST’s arguments in its Land Use Petition in Case 17-2-00549-0, RST argued the County’s land use action was erroneous and unsupported with respect to Poorman’s *indoor grow*. CP 315-326. RST did not assert the County erred with respect to Poorman’s rooftop or outdoor grows. *Id.* In fact, RST’s Land Use Petition expressly states that RST had terminated Poorman’s outdoor growing operations because of the County’s position. CP 325.

Further, the Hearing Examiner’s findings of fact provide “the parties stipulate and agree that the fourth violation related to the two 8 foot fences has been corrected by the removal of the fences.” CP 333. Poorman’s rooftop and outdoor grows were not at issue in the LUPA Petition and RST did not assert that the County’s land use action was improper as applied to those areas. If anything, RST conceded that the County’s actions were proper with respect to the rooftop and outdoor grows.

8. Motion to Consolidate

a. The Standard of Review - Abuse of Discretion.

A trial court's denial of a motion to consolidate is reviewed for an abuse of discretion. *State ex rel. Sperry v. Superior Court for Walla Walla Cty.*, 41 Wash. 2d 670, 671, 251 P.2d 164, 165 (1952). CR 42(a) confers substantial discretion on trial courts with respect to consolidation of matters sharing common questions of law or fact. *Leader Nat'l Ins. Co. v. Torres*, 51 Wash.App. 136, 142, 751 P.2d 1252 (1988) *aff'd*, 113 Wash.2d 366, 779 P.2d 722 (1989). The trial court's decision will be reversed only upon a showing of abuse and that the moving party was prejudiced. *Id.*

b. The Trial Court Did Not Abuse Its Discretion in Denying Poorman's Motion to Consolidate.

In light of the sheer volume of a trial court's cases, and the practical reality that they must arrange their trial calendars to expeditiously and fairly give justice to all of the parties, trial courts are afforded significant discretion in deciding how to process their cases. *See Sperry*, 41 Wn.2d at 671; *W.R. Grace & Co.--Conn. v. State, Dep't of Revenue*, 137 Wash. 2d 580, 590, 973 P.2d 1011, 1015 (1999). Trial courts may consolidate cases in certain circumstances, CR 42(a) provides:

(a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

CR 42(a).

The abuse of discretion standard is highly deferential to trial courts. *State ex rel. Carrol v. Junker*, 79 Wash.2d 12, 26, 482P.2d 775 (1971). Judicial discretion is a composite of, *inter alia*, conclusions drawn from objective criteria and sound judgment over what is right in the particular circumstances, without doing so arbitrarily or capriciously. *Id.* “Properly exercised judicial discretion is a choice based on reason rather than intuition from among permissible alternatives.” *State v. Hall*, 35 Wash.App 302, 311, 666 P.2d 930 (1983).

Under the abuse of discretion standard, a trial court’s decision will stand unless the appellant clearly shows the decision is manifestly unreasonable, based on untenable grounds or done for untenable reasons. *Carroll*, 79 Wash.2d at 26. A court’s decision is manifestly unreasonable if it is outside the range of acceptable choices given the facts and applicable legal standard; it is based on untenable grounds if the record does not support the court’s factual findings; and it is based on untenable reasons if the decision is based on an incorrect standard or the facts fail to meet the requirements of the correct standard. *State v. Rundquist*, 79 Wash.App. 786, 793, 905 P.2d 922 (1995) (citing Washington State Bar Ass’n, Washington Appellate Practice Deskbook, § 18.5 (2d ed. 1993)), *review denied*, 129 Wash.2d 1003, 914 P.2d 66 (1996).

In *Sperry*, the Washington Supreme Court affirmed the trial court's denial of a motion to consolidate three cases about three collisions with the same cause that occurred in rapid succession. *Sperry*, 41 Wn.2d 670 at 670. The Court highlighted the number of parties and complexity of each case's claims, counterclaims, cross-claims and affirmative defenses in support of the proposition that "we do not feel inclined to interfere with the method in which a trial court handles its own affairs." *Id.*

Here, the trial court did not abuse its discretion when it denied Poorman's motion to consolidate. In its brief, Poorman fails to address the key differences between the cases and omits analysis of how the differences would have resulted in unnecessary complications. Based on the pleadings that had been filed and served as of January 18, 2019, consolidation would have extended the timeline for resolution of Case 191 and caused unnecessary complications in both cases.

For example, in Case 348 Poorman asserted claims for unconstitutional interference with contractual relations, tortious interference with business expectancy, and requested declaratory relief on the constitutionality of Ordinance 2016-14 and the County asserted claims for declaratory relief and abatement of a nuisance. Conversely, in Case 191, Poorman asserted a fairly straight forward claim for breach of contract in connection with a real property lease while RST asserted claims related to

Poorman's holding over as a tenant and property damage. Case 348 is a complex dispute over land use and public interference with private businesses and proper legislative action; whereas, Case 191 is fundamentally about the interpretation of a real property lease between private parties.

c. RST was Entitled to Rely on the County's Interpretation of Res. 2016-14.

In its brief, Poorman argues the question over whether RST's termination of the Outdoor Leases was proper could not be decided until the trial court issued a decision on Poorman's claims against the County. App. Br. at 9. This argument lacks merit. Poorman's argument fundamentally asserts that RST should be prohibited from obtaining relief on Summary Judgment over a breach of contract claim between two private parties because the County may have acted improperly. Poorman is attempting to place liability for the County's allegedly improper actions on RST because RST complied with the County's demand to shut down Poorman's illegal rooftop and exterior grow operations.

RST's compliance with the County's September 21, 2016, Notice letter and its reliance on the County's interpretation of its own code was proper. An ordinance is presumed valid until proven otherwise through a legal challenge. *Louthan v. King Cty.*, 94 Wash. 2d 422, 428, 617 P.2d 977, 981 (1980).

RST's reliance on the County's interpretation is also justified by practical reasons. Our legal system functions because private parties adhere to the law and in those cases where a private party believes a law is invalid, our legal system provides the only avenue for a challenge. RST could not ignore the County's directive to end the outdoor and rooftop grows despite what Poorman's argument would suggest. If a private party could simply ignore an ordinance they thought invalid, our legal system would collapse.

The Chelan County Commission passed Res. 2016-14, which is presumed valid until proven otherwise. The County notified RST that it was in violation of Res. 2016-14 and demanded RST correct the violations. RST complied with the County's demand. If the County's actions were not lawful, Poorman's relief lies in its action against the County in Chelan County Superior Court Cause No. 17-2-00348-9.

See also, the County's briefing submitted on this issue.

d. The Differences Between Case 191 and Case 348 Were Substantial and Consolidation would have Prejudiced RST.

The differences between the cases was substantial. For instance, the factual situation had changed since Poorman filed its Complaints in the two cases. In Spring, 2017, Poorman was still an indoor tenant at the Warehouse. With respect to Case 348, Poorman and RST shared a common interest in the outcome because it would resolve whether or not Poorman could continue to operate its indoor grows at the Warehouse. However, as of

December 2018, Poorman is no longer a tenant of RST and as such RST has no interest in the success or failure of Poorman's claims against the County, nor does RST have any interest in the success or failure of the counterclaims the County asserted against Poorman.

Poorman's brief fails to acknowledge numerous material differences between the Case 191 and Case 348. Poorman's brief does not acknowledge that significant discovery had yet to take place in Case 348; that no deadlines were set in Case 348; no dispositive hearings or trial were scheduled; and RST's pending motion for summary judgment against Poorman, which was filed on September 26, 2018 and had already been delayed several months, was set for hearing on February 22, 2019. CP at 38-39; 63, 157-59; 179-80.

Poorman discounts the prejudice RST would have suffered if the cases were consolidated and JDSA was forced to withdraw from representing RST due to a conflict of interest with the County. App. Br. 16. Despite Poorman's apparent confusion about JDSA's conflict of interest issue with the County, it is fairly simple. JDSA represents the County in certain limited matters. The County takes the position this gives them the authority to decide on a case by case basis whether they are going to object to JDSA's representation in cases in which the County is on the other side. Although JDSA may not always agree with the County's decisions, in an

effort to maintain a positive relationship with the County, avoid disciplinary complaints to the bar association and avoid dragging other clients into fights over representation, JDSA simply accepts the County's decision on a case by case basis.

The County had already objected to JDSA's representation of RST in Case 348 and forced JDSA to withdraw from that case on December 11, 2018. Importantly in this case, consolidation would have forced JDSA to withdraw and forced RST to suffer significant, material prejudice and incur extensive additional costs. RST had already lost its first counsel, Mr. Steinberg, for reasons unrelated to RST or the case. If the trial court had granted consolidation, JDSA would have been forced to withdraw and RST would have been on its third legal team in this case through no fault of its own requiring the unnecessary expenditure of additional attorneys' fees on top of the substantial funds RST had already expended with Mr. Steinberg and JDSA in this matter.

As the trial court explained in its written decision dated January 31, 2019, consolidating Case 191 with Case 348 would have caused an unnecessary and substantial delay in Case 191. CP at 179-80. Further, consolidation would not have had any substantive impact on the resolution of the parties' various disputes, particularly where Poorman's claims

against RST were dismissed a short time later through summary judgment, thereby.

The trial court reached its decision after considering the difference in the nature of the claims, the difference in scheduling and the prejudice to RST. *Id.* The trial court's decision was not manifestly unreasonable.

VI. RST'S FEE REQUEST

RST requests an award of the fees it incurred on appeal⁴ pursuant to RAP 18.9(a) for having to respond to Poorman's frivolous appeal over a dispute that has been rendered moot for lack of damages. The Court will dismiss review of a case "if the application for review is frivolous, moot or solely for the purpose of delay. RAP 18.9(c). The Court may order a party who uses the Rules of Appellate Procedure "for the purpose of delay, files a frivolous appeal ... to pay terms or compensatory damages to any other party." RAP 18.9(a).

An appeal is "frivolous" when "there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there is no reasonable possibility of reversal." *Streater v. White*, 26 Wn. App. 430, 434–35, 613 P.2d 197 (1980).

Here, Poorman's appeal is frivolous. Poorman has admitted that it

⁴ This Court may be curious why RST did not request fees at the trial court level but is requesting fees on appeal. The reason is that when Poorman filed its appeal, instead of a request for discretionary review, RST's motion for fees at the trial court level was pending resolution of the County's fourth-party claim against RST.

sustained no damages to its 2016 cannabis crop as a result of RST's termination of the Outdoor Leases. Without damages, Poorman's appeal is merely a time consuming and expensive academic exercise.

Alternatively, RST requests an award of its fees on appeal under RCW 4.84.330 and RAP 18.1(a). "In *any action on a contract or lease...* where such contract or lease specifically provides that attorneys' fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party... ." RCW 4.84.330. Although the Exterior Leases are unlawful and unenforceable, RST is entitled to its fees based on the mutuality of remedy doctrine which provides for an award of fees in any action in which it is alleged that a person is liable on a contract. *Herzog Aluminum, Inc. v. Gen. Am. Window Corp.*, 39 Wash. App. 188, 197, 692 P.2d 867, 872 (1984).

Here, Paragraph 27 of both Exterior Leases provide that "the prevailing party shall be entitled to recover the costs of such enforcement or costs of suit, including reasonable attorneys' fees." CP 103, 113.

Additionally, pursuant to RAP 18.1(b) this Court may not award Poorman attorneys' fees or expenses on appeal regardless of outcome. Poorman failed to devote a section of its opening brief to a request for fees or expenses as required by RAP 18.1. This requirement is mandatory. *Dep't of Labor & Indus. of State v. Kaiser Aluminum & Chem. Corp.*, 111 Wash.

App. 771, 788, 48 P.3d 324, 333 (2002). A request for attorneys' fees made for the first time in a Reply brief is not to be considered. *In re Marriage of Mull*, 61 Wash. App. 715, 724, 812 P.2d 125, 130 (1991).

VII. CONCLUSION

The Court should affirm the trial court's June 10, 2019 Order Granting Defendant's Motion For Summary Judgment and February 22, 2019 Order Denying Plaintiff's Motion to Consolidate. RST should also be awarded its attorneys' fees for this appeal. The Court should remand this case back to the trial court for a determination of whether RST is entitled to the fees and costs it incurred before the trial court.

RESPECTFULLY SUBMITTED AND DATED this 25th day of November, 2019.

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I, J. Patrick Aylward certify that on the 25th day of November, 2019 I caused a true and correct and copy of the foregoing to be filed with the Washington Supreme Court and copies were served to the following counsel of record and other counsel via the Washington State Appellate Courts' Portal system:

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