

No. 62517-9-I

King County Superior Court No. 08-2-29431-KNT

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON  
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PAPINI BROTHERS, LLC

Plaintiff/Respondent,

v.

JAUKESIA LAWRENCE  
and JOHN DOE, et al.,

Defendant/Appellant.

REPLY BRIEF OF APPELLANT

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## I. INTRODUCTION

Because its three day notice to pay rent or vacate included late fees in the amount of rent due, Papini Brothers, LLC (the "Landlord") failed to properly inform Jaukesia Lawrence of the manner in which she could comply with RCW 59.12.030(3) to avoid eviction. For this reason, the Superior Court lacked jurisdiction to hear the subsequent unlawful detainer action, and the judgment below should be vacated.

Yet, if it deems the notice sufficient, the Court nevertheless should reduce the amount of the judgment by \$400 because the late fee was so high that it bears no reasonable relation to the Landlord's estimated or actual damages—a fact that the Landlord apparently does not contest. Thus, the late fee is substantively unconscionable. It is void and should be severed from the lease.

## II. REPLY ARGUMENT

### A. **The Landlord Did Not Substantially Comply with RCW 59.12.030(3) When It Demanded Late Fees as "Rent"**

The Landlord did not substantially comply with RCW 59.12.030(3) when it included late fees in its three day pay or vacate notice ("Three Day Notice"). CP 15. Because of this, Ms. Lawrence was not informed that she could respond to the Three Day Notice, and avoid eviction, by paying back rent only—as RCW 59.12.030(3) on the face

provides. The instant case is similar to those where notices to remedy a breach or vacate have been held jurisdictionally defective because the landlord did not give the tenant a proper, and statutorily mandated, opportunity to remedy the defect before eviction. *Housing Authority of the City of Everett v. Terry*, 114 Wn.2d 558, 564, 789 P.2d 745 (1990) (failure to give tenant opportunity to remedy breach deprived court of jurisdiction); *Truly v. Heuft*, 138 Wn. App. 913, 921-22, 158 P.2d 1276 (2007) (failure to inform tenant she could answer by mail and facsimile deprived court of jurisdiction); *Cnty. Invs., Ltd. v. Safeway Stores, Inc.*, 36 Wn. App. 34, 37, 671 P.2d 289 (1983) (providing 19 days' notice to remedy breach, rather than 20 as provided for in lease, deprived court of jurisdiction).

The cases chiefly relied on by the Landlord are distinguishable.<sup>1</sup> In *Sowers v. Lewis*, 49 Wn.2d 891, 307 P.2d 1064 (1957), the landlord requested insurance premiums in a three day notice *separately* from its request for rent. *Id.* at 895. Unlike here, the demand to pay insurance premiums could be severed from the demand for payment of rent, making the notice as to the demand for rent valid. *Id.* Nor is *Foisy v. Wyman*, 83

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<sup>1</sup> In *Buchanan v. Kettner*, 97 Wn. App. 370, 984 P.2d 1047 (1999), the tenant apparently did not raise a jurisdictional challenge to the three-day notice, and the Court did not consider the issue.

Wn.2d 22, 515 P.2d 160 (1973) on point, because—unlike here—the three day notice in that case involved a request only for payment of rent.<sup>2</sup>

The Landlord's attempt to avoid the consequences of the defect in its Three Day Notice by characterizing late fees as "rent" is unavailing. First, while the Landlord asserts that the parties "agreed" that the late fees would be considered rent, the evidence suggests that the lease was a contract of adhesion, as it is a pre-printed form created by the Landlord, a commercial entity, which was offered to the tenant, an individual. *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 347, 103 P.3d 773 (2004) ("We have established the following factors to determine whether an adhesion contract exists: "(1) whether the contract is a standard form printed contract, (2) whether it was 'prepared by one party and submitted to the other on a 'take it or leave it' basis', and (3) whether there was 'no true equality of bargaining power' between the parties."). Thus, Ms. Lawrence cannot be deemed to have "agreed" to this contract language as a result of negotiation.

Second, the fact that the boilerplate language in the Landlord's lease states that late fees become rent does not transform late fees into "rent" under RCW 59.12.030(3). The Court of Appeals, Division 2,

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<sup>2</sup> *Foisy* involved a dispute over the amount of rent due. The landlord stated in the three day notice the amount it believed in good faith was due. Although the Supreme Court found this amount was overstated, under the circumstances it found the landlord's approach to be reasonable and in substantial compliance with the statute.

reached a similar conclusion in *First Union Mgmt, Inc. v. Slack*, 36 Wn. App. 849, 857 n.7, 679 P.2d 936 (1984), when it held that a lease could not expand the meaning of the statutory term "rent" under RCW 59.12.070, the damages portion of the Unlawful Detainer statute.

The logic of *Slack* is especially apparent in a case like this where, as discussed below, the late fees are so high as to be unconscionable. Thus, even if the late fees could be characterized as rent, the Landlord's Three Day Notice provided Ms. Lawrence no certainty as to how much she needed to pay to avoid eviction pursuant to RCW 59.12.030(3). Accordingly, the rule in *Slack* is not only consistent with the plain meaning of RCW 59.12.030(3), but it provides certainty and clarity for tenants as to what they must do within three days to avoid eviction.<sup>3</sup>

Finally, the issue is not, as the Landlord asserts, whether the Superior Court had authority under RCW 59.12.070 to enter a judgment for damages occasioned by the unlawful detainer. *See* Landlord's Brief at 5. The issue is whether the Superior Court had jurisdiction to hear the unlawful detainer action where the Three Day Notice did not substantially comply with RCW 59.12.030(3) . Because, for the reasons set forth in Ms. Lawrence's opening brief and this reply, the Three Day Notice did not

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<sup>3</sup> If late fees could be considered rent, then, here, there would be questions of fact—as in *Foisy*—as to whether the amount sought was accurate and, if not, whether the amount was sought in good faith and whether Ms. Lawrence was prejudiced by the amount sought.

substantially comply with the statute, the Superior Court lacked jurisdiction, and the judgment below should be vacated. *See Little v. Catania*, 48 Wn.2d 890, 893, 297 P.2d 255 (1956) ("As much as we regret to reverse a case for what on first impression may be called a technicality, on the other hand the very thing which instills in the mind of the thinking person a confidence and respect for the courts is the fact that they jealously guard against acting in any manner where jurisdiction may be lacking and is not apparent upon the face of the record.") (internal quotation marks and citation omitted) (reversing judgment of unlawful detainer where the statutory three-day notice was not pled or proved, despite fact that parties appeared on a special twelve-day summons to determine possession).

**B. The Late Fees Are Unconscionable**

If, however, the Court determines—despite the plain language of RCW 59.12.030(3)—that there was substantial compliance with the statute, the judgment below should still be reduced by \$400 (the amount of late fees imposed) because of the unconscionable nature of those fees.

In its response brief, the Landlord attempts to justify the late fee by arguing that Ms. Lawrence contractually agreed to it. But, as discussed above, Ms. Lawrence cannot be deemed to have agreed to that provision. It was buried in the fine print of the lease which was a preprinted form

prepared by the Landlord, a commercial entity, and given to Ms. Lawrence. Non-negotiated and non-negotiable promises like this cannot be deemed a product of agreement. *Adler*, 153 Wn.2d at 347 (a contract of adhesion exists where contract is a "standard form printed contract . . . prepared by one party and submitted to the other on a 'take it or leave it' basis" and where there was not equal bargaining power).

Yet, even if the late fee clause had been a subject of negotiation, it would still be void as substantively unconscionable because it bears no reasonable relation to the Landlord's damages. *See Wallace Real Estate Inc. v. Groves*, 124 Wn.2d 881, 893, 881 P.2d 1010 (1994); *Adler*, 153 Wn. 2d at 344 ("Substantive unconscionability involves those cases where a clause or term in the contract is alleged to be one-sided or overly harsh . . .").

The Landlord fails to explain—indeed, cannot explain—how a late fee of \$50 imposed on the third day after the due date plus \$10 for each additional day bears any "reasonable relation" to its damages, whether estimated or actual. It did not even try at the Show Cause Hearing or in its brief to this Court. The Landlord's only argument is that actual damages were difficult to estimate at the time of contracting and that the "liquidated damages" clause was appropriate because the "*possibility*" of damages from an unlawful detainer by the tenant "can be foreseen only in a general

sense." Response Brief at 7 (emphasis added). Yet, the crucial test—  
ignored by the Landlord—is whether the "liquidated damages" clause is a  
*reasonable* estimate of damages as assessed at the time of contracting.  
*Wallace Real Estate Investment, Inc. v. Groves*, 124 Wn.2d 881, 890-91,  
881 P.2d 1010 (1994). It clearly was not.<sup>4</sup>

Moreover, although this is not a case of usury, the fact that the late  
fees far exceed the rate of usury is a helpful benchmark, as the late fees  
bear no reasonable relation to the unpaid rent or the interest that could  
have been earned on the unpaid rent. *See Spring Valley Gardens*  
*Associates v. Earle*, 447 N.Y.S.2d 629, 630 (1982).

The stipulated damages clause should accordingly be severed from  
the lease as unconscionable and the award of the late fees vacated.

### III. CONCLUSION

For the reasons set forth above and in her opening brief,  
Ms. Lawrence respectfully requests that the Court find that the Superior  
Court lacked jurisdiction over the unlawful detainer action and vacate the  
judgment against her. If it does not do so, Ms. Lawrence respectfully  
requests that the Court find that the amount of late fees provided for in the

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<sup>4</sup> Indeed, it is difficult to imagine that the Landlord's damages are much more than the  
lost interest on the rent for the amount of time it was late, making the 480% interest rate  
reflected in the late fee provision a far cry from the Landlord's damages. The late fee  
cannot be justified by claiming it covers the cost of eviction because the rental agreement  
includes a separate \$140 charge for these anticipated costs.

Rental Agreement is void on grounds of unconscionability and reverse the award of \$400 in late fees.

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**CERTIFICATE OF SERVICE**

I certify that on June 11, 2009, I caused to be delivered by courier a true and correct copy of *Reply Brief of Appellant* in the above-captioned proceedings to attorney for respondent:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 11th day of June, 2009 at Seattle, Washington.



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Colin Donohue  
Legal Secretary

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