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DIVISION ONE

JUN 14 2011

Court of Appeals No. 66027-6-I

**IN THE COURT OF APPEALS,
DIVISION ONE
OF THE STATE OF WASHINGTON**

EDWARD PRYOR, JR, and VAN PRYOR,

Appellants

vs.

MHM&F, LLC,,

Respondents

BRIEF OF RESPONDENT

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II. ANSWER TO APPELLANTS' BRIEF

A Introduction

What to do when a tenant is chronically and repeatedly “a day late and a dollar short”— as the old saying goes. That was the dilemma facing Respondent and is the issue presented to the court in this case. How much leeway, how much indulgence must the owner give; how many hurdles must he jump and how much delay must he endure before it is finally fair and just to say, “Enough is enough”?

B Respondent's Counter-Statement of the Case

Appellant's bland statement of the case does not tell the whole story. It fails to convey the full impact, the significance of Appellant's delinquencies.

In the fewest words possible, the general legal relationships and circumstances involved here can be summarized this way:

A unique set of relationships between the parties was created in three connected contracts (Ex. 1, 2 and 3). The contracts provided for mobile home owners essentially to the buy the spaces in the mobile home park where their homes were

situated. The home owners could do this by purchasing from a seller 100 shares of corporate stock of the park owner, a mutual corporation. The corporation then leased individual spaces on 99 year renewable terms to stock purchasers. In order for stock purchasers to continue to own and occupy their mobile home spaces they had to keep up their stock purchase payments to the seller.

The purchaser in this case failed to keep up his stock purchase payments, and his right to occupy his mobile home space was thereby forfeited according to the terms of the contracts. No longer being a stock purchaser, he thereby became a tenant of the seller. The seller pursued the unlawful detainer process to evict the tenant.

Now the main specifics:

Plaintiff/Respondent, MHM&F, LLC (MHM), is the successor of seller Ed Wellington (now deceased). Ed Wellington was the successor of the original seller, Manufactured Homes Management & Financial Co., Inc. (Manufactured Homes). This corporation was dissolved some years ago but Ed Wellington continued to conduct business under the d/b/a of "Manufactured Homes Management & Financial Co." (FOF ¶ A. 1)

MHM was formed in the probate of Ed Wellington's estate and Jonathan Wellington, one of Ed Wellington sons, is the managing member of MHM (RP 96).

The mobile home park is located in Bothell, Washington, and is known as Thunderbird Mobile Home Park (the Park). The landowner of the Park is Thunderbird Estates Mobile Home Association, a mutual corporation (the Association), although MHM, as successor of Ed Wellington, owns about half of the spaces in the Park (RP 126).

The story of this case starts on October 30, 1982, when Manufactured Homes sold 100 shares of the Association's stock to Edward Pryor, Sr. (now deceased). He is the father of Defendant/Appellant Ed Pryor, Jr. Pryor, Sr.'s shares of stock, entitled him to use and occupy Space 65 in the Park as long as his monthly stock purchase installments of \$190.24 were timely paid. (Ex. 1 & 2).

Pryor Jr., continued to reside in the Space 65 after his father's death and continued to pay, or attempted to pay, to the seller, Ed Wellington, payments that his father had been making.

After a series of defaults and delinquencies in Pryor, Jr.'s stock purchase payments, Ed Wellington brought an unlawful detainer suit against Pryor, Jr. and his wife in the Snohomish County Superior Court on October 30, 2007. After a bench trial on March 11, 2008, that case was dismissed without prejudice because Pryor, Jr. had not been personally served with a five-day notice as required by RCW 59.20.150 of the Mobile Home Landlord Tenant Act (MHLTA). As to where he he he he he he will only way we so what's happening in Ed Wellington, the plaintiff in that case, and present counsel mistakenly believed that the notice provisions of the Pledge and Trust Agreement (Ex. 2) controlled. Judge Bowden concluded instead that since "Pryor, Jr. was nevertheless a tenant of the Park" he was subject to provisions of the MHLTA "because no steps were ever taken by Pryor, Jr. or anyone else to establish his status as a legal successor to Prior Senior's rights under the stock purchase agreement." (Ex 26, 1st trial COL ¶ 2)

Almost 2 years to the day later MHM (as the successor to Ed Wellington) brought a second unlawful detainer case against Pryor, Jr. That case resulted in a judgment for MHM and a decree granting a writ of restitution to MHM. Appellant has appealed that decision.

Delinquencies in Pryor, Jr.'s stock purchase payments that led to this decision commenced as early as June 19, 2006, and reached a critical mass in March 2007, when a \$200.00 payment for "March" failed to cure prior delinquencies, followed by a total failure to pay the April and May installments (Ex 33). That triggered the Notice of Default of May 15, 2007 (Ex 13), which claimed a delinquency of \$467.00 and, according to the Pledge and Trust Agreement (Ex. 2), gave Pryor, Jr., 10 days to cure the default.

Pryor, Jr. made a tender of \$400 on May 31, 2007, which was six days late and at least \$44 short of curing the delinquency. By that time the April payment was 62 days overdue. Pryor Jr.'s tender was therefore rejected and returned to him.

Since that time Pryor Jr. has never tendered an amount sufficient to bring current the monthly accrual of \$190.24 plus \$5.00 late charges (Ex 33). Therefore it follows that Pryor, Jr. and his wife have lived in and occupied a mobile home on Space 65 of the Park since May 1, 2007 — a period of over 39 months — without paying a cent to Wellington or MHM — or to anyone else, for that matter. The trial court concluded that Pryor, Jr. owed MHM \$7,419.36 unpaid rent (FOF ¶ J. 1.).

Pryor Jr. testified at the second trial that he tendered the sum of \$3,438 to MHM on November 10, 2009 (Ex. 37), but Jonathan Wellington denied ever having received it (RP 84). The trial court obviously believed that Jonathan Wellington in fact did not receive any such tender.

Pryor, Jr.'s counsel argued to the trial court and now, however, that Pryor, Jr. was not a tenant, but is instead a valid contract purchaser — a successor to his deceased father — and is therefore a stockholder of the Association in good standing entitling him to continue to occupy Space 65 under his father's 99 year lease.

Pryor, Jr. may claim to be a purchaser rather than a tenant, but, in the first trial of this matter between these same parties or their predecessors,¹ this Court said otherwise. George N. Bowden, Judge of the Snohomish County Superior Court specifically and unequivocally held in his Conclusions made on January 8, 2010, that Pryor **was a tenant** and “had no ownership interest in the property or the association that owns the park.” (Ex. 26, 1ST trial COL ¶ 1.) This was because, as Judge Bowden concluded, “no

¹ Thunderbird Estates Mobile Home Association, et al v. Successors in Interest to Edward Pryor, deceased, et al, Cause No. 07-2-08397

steps were ever taken by Pryor, Jr. or anyone else to establish his status as a legal successor to Pryor Senior's rights under the stock purchase agreement." (Ex. 26 & Appellant's Brief, Appendix C, 1st trial COL ¶ 2.). In the second trial Judge Wilson came to the same conclusion (FOF ¶ D.2.)

Moreover, Judge Wilson also found that Pryor, Jr.'s putative interest in his father's shares was foreclosed on after his failure to timely and adequately cure the default existing on May 15 2007 (FOF ¶¶ 3 & 4).

To summarize then, Judge Wilson found, based on substantial evidence that:

1. Pryor, Jr. made no payments for April and May, 2007, (Ex. 33);
2. Willie Wellington, on behalf Manufactured Homes, mailed a Notice of Default (Ex. 13) to Pryor, Jr. by certified mail on May 15, 2007 (Ex. 14);
3. Pryor, Jr. failed to make a valid tender of any money within the 10-day deadline stated in the May 15, 2007 Notice of Default (deadline being May 25, 2007), which

was issued and served according to section 8. C. of the Pledge & Trust Agreement (Ex. 2);

4. Foreclosure was thereafter completed by sale of Pryor's shares to Ed Wellington at a private sale without notice held on May 30, 2007 (Ex. 17) — all as authorized in paragraph 8 A. of the Pledge and Trust Agreement (Ex. 2);
5. Willie Wellington, as agent for the Association, took the next step required by Article IV of the Proprietary Lease, by giving Pryor, Jr. Notice of Termination of Lease on July 26, 2007(Ex. 23);
6. Pryor, Jr. tendered nothing whatsoever at any time
 - i. after the first trial between these parties or
 - ii. after the issue of his status as a tenant was finalized in the Findings & Conclusions of Judge Bowden from the first trial on January 8, 2010, and
7. Pryor, Jr. tendered nothing since receiving a written demand for rent and being offered a one-year lease by MHM on January 21, 2010 (Ex. 27)

8. Pryor, Jr. refused MHM's offer of a one-year lease (Ex. 29)
9. Pryor, Jr. has been found at the first trial to be a mobile home tenant (Ex. 26):
10. Pryor, Jr. was properly served with a 5-day notice to pay rent or vacate on February 11, 2010, as specified in RCW 59.20.080 (1) (b)

The trial court therefore correctly concluded that Edward Pryor, Jr. was properly and lawfully evicted under that statute.

III. ARGUMENT IN RESPONSE TO APPELLANT

Appellant has plastered the wall in this appeal with 16 Assignments of Error, nine numbered issues pertaining to the Assignments of Error, and no less than 20 separately identified legal arguments — all of this apparently in the hope that one of them might stick. That makes it difficult to know which is worth serious consideration. Respondent must give serious consideration to each one of them. Respondent will do so in the order presented by Appellants, adopting Appellant's outline organization and section numbering almost exactly, while changing somewhat the topic

headings. Respondent believes that none of Appellants' arguments has merit and will amply demonstrate it.

A The Trial Court's Findings Are Given Deference and If They Support the Conclusions the Trial Court Decision Will Not Be Disturbed On Appeal

There is a presumption in favor of the trial court's findings, and the party claiming error has the burden of showing that a finding of fact is not supported by substantial evidence. *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 369, 798 P.2d 799 (1990).

The trial court's findings of the underlying facts supporting or not supporting jurisdiction are reviewed by the same deferential standard that applies to other factual findings according to *Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777, 779 (9th Cir. 1991) where the court upheld factual findings underlying a jurisdictional issue because they were not clearly erroneous.

Appellate courts review bench trial decisions in two steps: first the court asks whether substantial evidence supports the trial court's challenged findings of fact; and then it asks whether those findings of fact support the court's conclusions of law. *Landmark*

Dev., Inc. v. City of Roy, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999) and if this standard is satisfied, the appellate court will not substitute its judgment for the trial court's. *Sunnyside Valley Irr. Dist. v. Dickie*, 73 P.3d 369, 149 Wash.2d 873 (Wash., 2003).

The appellate court in *San Juan County v. Ayer*, 604 P.2d 1304, 24 Wn.App. 852 (Wash. App., 1979) was confronted with a multitude of factual issues argued by both parties. The opinion explained that the reason that appellate courts in this state have become less willing to retry the factual issues is “because such retrial inevitably usurps the function of the trier of the fact to evaluate the credibility and the weight of the evidence.” So the appellate court will not disturb the trial court findings if they are supported by substantial evidence. *id.*

B The Court Had Subject Matter Jurisdiction

Respondent has no quarrel with Appellant's general statement of the requirement of subject matter jurisdiction but all jurisdictional requirements have been met in this case.

1 The Form Of Summons Served Was Appropriate

Appellant gets off to a shaky start in contending that the form of summons served on Pryor, Jr. failed to meet the specific formal

requirements of RCW 59.18.365 (1). That section of the Residential Landlord-Tenant Act, Chapter 59.18 RCW (RLTA), requires that a summons must advise the defendant that the defendant may reply by facsimile and it must list a fax number. The summons in this case did not have any such notice. But RCW 59.18.365 does not pertain to cases governed by the Mobile Home Landlord Tenant Act (MHLTA) Chapter 59.20 RCW.

According to RCW 59.20.040 certain parts of Chapter 59.12 RCW, the unlawful detainer statutes, are incorporated by reference into the MHLTA and certain parts of the Residential Landlord Tenant Act (RLTA), Chapter 59.18 RCW, are otherwise incorporated into it by reference. A close look at RCW 59.20.040 shows that RCW 59.18.365 is not one of them. For whatever reason the legislature omitted §365 from the list of RLTA sections that are incorporated into the MHLTA. There are no express requirements for the form of summons in mobile home landlord tenant cases. RCW 59.18.365 is not referred to anywhere in Chapter 59.20 and the word "summons" does not appear anywhere in that chapter either. This then leaves the form of summons described in RCW 59.12.080 as the only authorized form of summons applicable to cases under the MHLT A. The summons in

this case substantially and more than adequately complies with all of the requirements of §080 of Chapter 59.12 RCW, the unlawful detainer statutes.

Appellants' counsel, somewhat inconsistently, the argues at page 20 of his brief that this case does not meet the requirements of the RLTA, Chapter 59.18 RCW. So if appellant's argument is correct, *i.e.* that Chapter 59.18 is inapplicable, then it follows that RCW 59.18.365 does not apply to this case either.

2 It Was Not Necessary To join The Association As A Named Party To This Lawsuit

Appellant asserts that the Association was a necessary party to this case, as Judge Bowden held it to be in the first lawsuit. Failure to join the Association as a party to this case, Appellant contends, deprives the court of subject matter jurisdiction.

This is wrong for three reasons.

a. MHM Was an Owner/Landlord

First, Appellants' argument proceeds on the false assumption that the Association, being the owner of the Park, was the only party having an ownership interest in Space 65 of the Park. Remember that according to the unchallenged testimony of witness Richard L Hutchins:

Q: ...So almost half the park is owned by the LLC?.

A: Yes. (RP 126)

To that extent MHM is *an* owner of the Park. Apparently the legislature in defining "Landlord" as "*the* owner of a mobile home park" in RCW 59.20.030 (4) did not conceive that there might be more than one owner or that there might be joint ownerships or more than one type of ownership of a mobile home park.

Puget Sound Investment Group, Inc. v. Bridges, 92 Wn. App. 523, 526, 963 P.2d 944 (1998), cited at page 19 of Appellant's Brief, is not helpful because that case only said that the *tenant* was a necessary party. It did not discuss the landlord's status.

In any event, when Ed Wellington purchased Pryor's shares of stock he became the *owner* of Space 65 and Pryor, Jr. became his — and subsequently MHM's — tenant subjecting Pryor Jr. to these unlawful detainer proceedings.

b. MHM Had an Assignment of the Association's Claim and Was Its Agent

The other flaw in Appellant's theory is that the Association granted MHM a broad form of assignment of all its claims, including the right to evict Edward Pryor, Jr. and other occupants of Space 65 (Ex. 32). There is no reason why this assignment was not valid

and effective as of its date, April 19, 2010, and at the trial and beyond. Appellant challenges the assignment, contending that "It is not binding on Pryor, Jr, until he received notice of the assignment," citing *Stansbery v. Medo-Land Dairy*, 5 Wn.2d 328, 337, 105 P.2d 86, 90 (1940). But the rule of that case only means that if Pryor, Jr. had done something inconsistent with or contrary to the assignment, for example sold his interest in Space 65 before he had notice of the assignment, the sale would be effective and the assignment would not stop the inconsistent transaction. In this case, however, Pryor, Jr. took no action contrary to the assignment or infringing the rights of the assignee.

Besides, RCW 59.20.030 (4) defines "Landlord" to include "the agents of a landlord." The assignment could not be more comprehensive in the giving MHN the rights of an agent to pursue this action on behalf of the Association. Earlier Willie Wellington was appointed and acted as agent for the Association (Ex. 13).

c. If The Association Was a Necessary Party It Should Have Been Joined by Order of the Trial Judge

If the Association was indeed a necessary party the trial court should have ordered that it be joined under CR 19 (a). As the court said in *Orwick v. Fox*, 828 P.2d 12, 65 Wn.App. 71 (Wash.

App., 1992) “Appellate courts have generally required a clear determination by the ruling court that a party is both necessary and indispensable before allowing dismissal under CR 19(b), and have also required an order that any necessary parties be joined.” While Appellants' did not specifically argue in their Trial Brief that the Association was a "necessary party" they nevertheless asserted the same or similar defense under the doctrine of "standing." Either way, it is clear that if the trial court was to dismiss on that ground it should have ordered that the Association be joined, which it easily could have. By failing to clearly argue and seek a dismissal for failure of MHM to join the Association as a party plaintiff, Appellants' waived that defense.

3 There Was a Landlord-Tenant Relationship Making Unlawful Detainer an Appropriate Remedy

Appellants' counsel relentlessly pursues the notion that MHM was simply a secured party attempting to realize on its security which it should have done through ejectment. Appellants cite *Bar K Land Co. v. Webb*, 72 Wn. App. 380, 385, 864 P.2d 435 (1993), but reliance on that case begs the question. The court held in *Bar K* that the vendor-purchaser relationship continued and therefore the action for unlawful detainer did not lie. The

relationship of the parties is different here in this case because the buyer-seller/secured party-debtor relationship was unequivocally terminated by the forfeiture of Pryor's shares of stock. That relationship no longer existed. It was replaced by the landlord-tenant relationship and the court simply had the job of applying landlord-tenant law to that relationship, which it did.

The relationship of landlord and tenant is established where the owner of the premises permits another to take possession thereof for a determinate period of time. *Hughes v. Chehalis School Dist. No. 302*, 377 P.2d 642, 61 Wn.2d 222 (Wash., 1963)

Appellant's cite *Puget Sound Investment Group, Inc. v. Bridges*, 92 Wn. App. 523, 526, 963 P.2d 944 (1998), to support their argument that MHM is a secured party and not a landlord. But that case is unhelpful. The distinguishing feature of Puget Sound, that distances itself from this case, is that there was a question, a contested and unresolved issue of Puget Sound's title, that remained unresolved in the trial. The defendant had color of title and the plaintiff failed to present evidence to dispose of that issue. The court noted that had the prior determination of title "been raised below, the record might have developed differently." That was not

so here. There was no unresolved issue about MHM's title or status as landlord and MHM was suing as such and not as a secured party.

4 MHM Met All Necessary Requirements For An Unlawful Detainer Action

a. The Residential Landlord-Tenant Act, Ch. 59.18 RCW Does Not Apply To This Action

As suggested earlier, Respondent agrees that the Residential Landlord-Tenant Act, Chapter 59.18 RCW, does not apply to this case.

b. Required Elements of Unlawful Detainer Under Chapter 59.12 RCW Existed

This chapter of our landlord-tenant statutes is the earliest and fundamental general unlawful detainer regimen.

RCW 59.12 .030 applies to "a tenant" — so the issue is:

Was Pryor, Jr. "a tenant" of MHM at the time the notice to pay rent was served?

Appellants make the circular argument that Chapter 59.12 RCW does not apply because, they say, they were not tenants. But the statute does not provide a definition to answer that ultimate

question — and Appellants offer no explanation either, other than asserting the ultimate conclusion that they were not tenants.

Parts of this statute clearly do apply in the present case by virtue of the cross-reference to it in RCW 59.20.040, regarding the applicability of other landlord-tenant statutes to the MHLTA. That statute incorporates a general comprehensive reference to Chapter 59.12 RCW which it states “shall be applicable only in implementation of the provisions of this chapter....” It then goes on to expressly exclude from the coverage of the MHLTA the provisions of RCW 59.12.090, 59.12.100 and 59.12.170.

Moreover subsections 1, 3 and 6 of RCW 59.12.030 clearly, or at least arguably, do fit the facts of this case. Those sections are:

(1) holds over after expiration of the term

(3) defaults in payment of rent

(6) enters without permission of the owner

When Pryor’s shares were forfeited and sold to Ed Wellington on May 30, 2007, Pryor, Jr. was no longer a stock purchaser. So, what was he? Not a tenant? Was he nothing?

As previously noted, Pryor, Jr. is a tenant under RCW 59.04.050.

c. The MHLTA Applies To This Action

Appellants argue that the MHLTA does not apply to Respondent's action because "the Association is the owner of the park" rather than MHM. In doing so Appellants have somewhat repackaged their prior "necessary party" argument, *i. e.* that MHM does not fit within the definitions of RCW 59.18.030 (1)

But MHM has an assignment of the Association's right to evict Pryor, Jr. and, as already noted, MHM is *owner* of about half the spaces in the Park, including the owner of Space 65. As such MHM is "*the owner*" of the relevant part of the Park and is thus a "landlord" within the meaning of RCW 59.20.030 (4).

Curiously, under RCW 59.20.080 (relating to grounds for termination of tenancy or occupancy in a mobile home park) the scope of the MHLTA is not limited to tenants. It also includes "an occupant." The landlord may evict an *occupant* for any of the 13 reasons listed in that statute, including subsection (b), for non-payment of rent. An "occupant" is defined in RCW 59.20.030 as "... Any person..., *other than a tenant*, who occupies a ...mobile home lot." [Emphasis added]. Subsection 080 (1) provides that: "A

landlord shall not terminate or fail to renew a tenancy of a tenant or the occupancy of an *occupant*, of whatever duration, except for one or more of the following reasons: [then the 13 reasons, (a) through (m) follow] [emphasis added]

Therefore, an “occupant“ who is not a tenant is subject to eviction under the MHLTA.

Also under RCW 59.20.030 (18) a tenant is "any person, except a transient, who rents a mobile home lot."

Again, for Appellants to simply posit that they are not tenants begs the question.

Under ARTICLE IV, ¶ 1 of the Proprietary Lease (Ex.3), entitled "Expiration Of Lease." It clearly states that the stock purchaser can no longer be a tenant of the Association once the tenant no longer owns any shares of stock of the Association. That section provides that:

"If upon, or at any time after, the happening of any of the events mentioned in subparagraphs A through H, inclusive of this paragraph 1, the lessor shall give the lessee a notice stating that the term hereof will expire on a date at least 10 days thereafter, *this lease shall expire* on the date so fixed in such notice, and *all right, title and interest of the lessee*

hereunder shall wholly cease and expire... Expiration shall occur:

A. If *at any time* during the term of this lease the *Lessee shall cease to be the owner of all of the shares owned by the Lessee ...* [Emphasis added]

Pryor, Jr. was given such notice on July 26, 2007 (Ex. 23).

So Pryor, Jr. was no longer a tenant of the Association according to this provision of the Proprietary Lease on and after July 26, 2007. Ed Wellington, the purchaser of Pryor's shares, then became the owner of the shares to Space 65 and a tenant of the Association and Pryor, Jr. thereby became a subtenant of Mr. Wellington, either as a "holdover" or a "tenant by sufferance" and owed Wellington reasonable rent, the amount of which was determined to be \$190.24 by Judge Wilson, who said in his oral decision that "If these payments were converted to rent by the conclusions of Judge Bowden and recharacterized as rent, clearly, they owed those, obviously, to the landlord, who's the creditor." (RP 202). Judge Wilson went on to conclude that "...clearly the testimony once he was making two payments, one to the association for maintenance fees and one to MHM&F Company for rent, or purchase payments which are now *converted to rent*. [Emphasis added] (RP. 243).

In the second trial Judge Wilson found —and was compelled to find — that the decision of Judge Bowden in the first trial determined that Pryor, Jr. was a tenant "in no uncertain terms." (RP 201).

Interestingly, as Judge Bowden found in the first trial, Pryor, Jr. was not subject to the MHLTA because he had not “perfected” ownership of his deceased father's shares in the manner required by ARTICLE III, paragraph 6. E. of the Proprietary Lease. According to Judge Bowden, then, Pryor, Jr. was a tenant subject to the MHLT. He was also a tenant, as previously pointed out, because his interest in his father's shares of stock had been foreclosed on and sold. Once his shares were gone he became a tenant of Wellington. At least he became a subtenant of Wellington and later MHM under his/its rights as the new owner of 65. Alternatively and at a minimum, Pryor, Jr. was an "occupant" of Space 65 and was subject to eviction under RCW 59.20.080 (1)

Consistent with that and contrary to the Appellants' contention, Respondent was not seeking past due stock purchase payments in this case, but instead sought rent (CP 115 – 124). Past due stock purchase payments would not be recoverable once

the shares of stock were sold. The foreclosure sale would extinguish any claim for unpaid stock purchase installments.

d. Ejectment Was Not The Exclusive Form Of Action

Appellant next argues that under the *Bar K Land Company* case² that Respondent "was at most a secured party" and therefore ejectment was the only remedy that Respondent could pursue. But there is no evidence that MHM became a secured party. MHM already realized on its security – that was done, completed and not subject to dispute under the clear evidence in this case as found by Judge Wilson. MHM only sought possession of Space 65 in this suit after Pryor, Jr. was relegated to the status of a tenant or occupant of Space 65 .

e. Summary: There Was Ample Statutory Authority Supporting This Action

There is plenty of statutory authority for bringing an unlawful detainer action in this case under any or all of the following legal relationships:

- Pryor, Jr. was a tenant by sufferance under RCW 59.04.050 or under RCW 59.12.030 (6)

² *Bar K Land Co. v. Webb*, 72 Wn. App. 380, 385, 864 P.2d 435 (1993)

- He was a "holdover" under RCW 59.12.030 (1)
- He was an "occupant" under RCW 59.20.080 (1)
— “occupant” being defined in RCW 59.20.030 (20) and thereby being subject to eviction according to RCW 59.20.080 (1)

In any of these circumstances Pryor, Jr. was subject to eviction because, undeniably, he did not pay rent — either any agreed or implied amount of rent or the reasonable amount of rent for his use and occupancy of Space 65 .

Appellants' counsel amazingly tries to squeeze Pryor, Jr. through some tiny crack in the multiple layers and categories of tenancies — a tiny crack that none of the drafters of our landlord-tenant law had ever envisioned, leaving the status of Pryor, Jr., by counsel's analysis, in limbo. Pryor, Jr. has become the great invisible escapist. He and his wife lived on Space 65 for some 39 months without paying anything to anyone for their occupancy of that space and counsel says they are not tenants and can't be evicted under the unlawful detainer statutes.

C Judge Bowden's Conclusions Are Binding

The questions raised here are: Are Judge Bowden's conclusions of law in the first trial binding on Judge Wilson in the second trial? If not, how much weight should be given to Judge Bowden's conclusions? How is his conclusion that Pryor, Jr. was "a tenant of the park" to be interpreted? Is it ambiguous?

1 Judge Bowden Concluded That Pryor, Jr. Was a Tenant of the Park

While it is true that Judge Bowden's decision left it unclear whether Pryor, Jr. was a tenant of MHM or of the Association, he clearly concluded that Pryor, Jr. was a "tenant." This conclusion, as far as it goes should be given collateral estoppel treatment. What that means about MHM *vis a vis* the Association as the landlord, Judge Bowden left up in the air.

Ironically, Appellants' counsel argued to Judge Wilson at page 19 of his Trial Brief (CP 45-78) that Judge Bowden's decision in the first trial should be given collateral estoppel treatment. Citing ample authority, Appellants' counsel outlined the requirements of *res judicata* and *collateral estoppel* and contended that "Here these requirements are satisfied." Appellants' now reverse course and contend in this appeal that Judge Bowden's conclusions of law do

not constitute *res judicata* binding on Judge Wilson in the second trial. (Appellants' Briefs, p. 24)

Appellants change course once again at page 25 of their appeal brief and appear to be arguing inconsistently that Judge Bowden's decision that the Association was "a necessary party" was binding on Judge Wilson. This is a return to the necessary party arguments already dealt with in section B 2 above.

Appellants argue that:

Clearly the only way the Respondent could possibly be the landlord of Pryor, Jr. is if the foreclosure sale were valid and Respondent obtained ownership of their 100 shares of stock and sublease lot number 65 to Pryor, Jr.. But Judge Bowden Made No Such Finding or Conclusion. Judge Bowden specifically did not reach the issue of whether the foreclosure sale of stock was valid.

What this passage ignores is that Judge Bowden left that issue up for later determination at Conclusions of Law 8 where he "declines to make a ruling thereon" and ruled that "Plaintiffs' claims of forfeiture of shares of stock are therefore denied *without prejudice*." [Emphasis added] (Ex 26). Judge Wilson, on the other hand, did reach that issue and decided in Respondent's favor based on substantial evidence. He stated, "Judge Bowden says

he's not going to reach those issues, which seems to be an inherent contradiction. But I believe I have the ability to reach that issue, and I'm going to."

Appellants interject at this point in a footnote at page 26 of their appeal brief that "Pryor, Jr. had no signed rental agreement with MHM & F, LLC..." But it must be noted that MHM sent Pryor, Jr. a one-year lease (Ex 27) that he refused to sign (Ex. 29).

2 Appellants Were Tenants Of MHM

Appellants then argue at page 26 of their appeal brief that "appellant was clearly a tenant of the Association..." This argument revisits the argument Appellants' presented and that Respondent has dealt with in section B 4c. above, which should be referred to in response to Appellants' defense under this heading. It should be sufficient to remind the court here that MHM *became* a landlord and Pryor, Jr. it's tenant when it was established that Pryor, Jr. was no longer a stock purchaser. Judge Wilson, as noted above, characterized payments made by Pryor, Jr. after his rights under the stock purchase agreement were terminated on July 26, at the latest (Ex. 23) as "converted to rent." (RP 243).

3 Judge Bowden's Rulings Should Be Given Collateral Estoppel Effect

Respondent relies on and incorporates by reference the authorities cited by Appellants at page 19 of their Trial Brief and including *Hansen v. City of Snohomish*, 121 Wn.2d 552, 561, 852 P2 295 (1993).

a. Appellants Deprived Themselves Of Having A "Full And Fair" Opportunity To Present Their Case.

Appellants complain that they did not have a full and fair opportunity to present their case and thus collateral estoppel does not apply. This argument seems to lack merit on its face because it was Appellants' own motion to dismiss and their decision to stand on the court's dismissal, terminating the case at that point, that they now say deprived them of the chance to present their case fully. So it was Appellants' choice, their own decision that created the unfairness of which they now complain — which one might call something like the doctrine of invited error.

b. If Judge Bowden's Decision Is Not Binding There's Still the Default

As previously noted, there was nothing ambiguous about Judge Bowden's conclusion that Pryor, Jr. was a *tenant*. But, even if Judge Bowden's Conclusions of Law were ambiguous or

contradictory or not binding in some ways it doesn't matter. While Judge Wilson did give them collateral estoppel effect (COL 11A.), he nevertheless independently made his own rulings and treated Judge Wilson's conclusions in such a way as to make them superfluous.

Judge Wilson in his oral decision said in part:

Ultimately, I'm going to find that Pryor, Jr. – I don't want to say did not perfect, but any interest Pryor, Jr. had in the shares were foreclosed upon by the notice of foreclosure for past due payments as indicated in Exhibit 13 (RP 239).

He went on to hold that:

But the perfection of the interest is of little import to me, because even if the interest was perfected, we still have a default. (RP 240)

It therefore makes little difference what Judge Bowden concluded since Judge Wilson decided that Pryor, Jr.'s interest in his father's stock was sold and forfeited — and done so appropriately according to the provisions of the governing documents, particularly paragraph 8.C. of the Pledge and Trust Agreement (Ex. 2). He was a tenant not just because his interest

was not "perfected" but also because, as Judge Wilson said, "we still have the default."

D Pryor, Jr. Became a Tenant of MHM Because MHM Foreclosed His Interest in Shares of Stock

The trial court's conclusion that Pryor, Jr.'s rights under the Stock Purchase Agreement were rightly foreclosed upon was correct based upon findings that were supported by substantial evidence.

1 The Foreclosure Sale Was Valid

a. Ed Wellington Was the "Seller" of Pryor's Shares.

Ed Wellington, doing business as "Manufactured Homes Management & Financial Co.", was the successor of the corporation of the same name and was therefore the seller of the shares of stock to Edward Pryor, Sr. He had stepped into the shoes of the former corporate seller. Judge Wilson so found (FOF ¶ A. 2.) Appellants' argument that the seller was defunct and not authorized to conduct business is spurious and as far as Respondent can, tell has been raised by Appellants for the first time on this appeal. No assignment of error has been made to Finding ¶ A. 2.

b. The Five Day Notice Was Not Defective in Any Way

Appellant complains that the notice was addressed to "the Estate of Edward Pryor" but there was no such entity and no one to receive notice of a nonexistent estate." Ed Pryor, Jr., however, had no trouble understanding the notice (Ex. 13) and in fact tendered a payment of \$400.00 dated May 31, 2007 (Ex. 18) (albeit late and insufficient in amount) payable to "M.H.M. & F Co, Inc." Contrary to Appellants' assertion, Wilie Wellington's capacity on the Default Notice of May 15, 2007 (Ex 13) is not stated and the notice is *not* made by the Corporation, but instead is by "Manufactured Homes...[etc.] Co." — not "Inc." In spite of Appellants' protestations to the contrary, there is nothing in Exhibit 13 to compel one to believe the notice was on behalf of a corporation, defunct or not.

Please note too that the notice was also sent to Betty DuPray at an address in Arizona. Betty DuPray is the surviving spouse of Edward Pryor, Sr. and would therefore be the only other potential successor to or representative of Pryor, Sr. (RP 27, Ex. 14)

**c. Acts of the Trustee Were All Proper and Consistent
With His Duties Under the Pledge and Trust
Agreement**

If the roles of Ed and Willie Wellington were interchangeable any such anomalies are trivial and immaterial. Their changing roles did not affect the substance of the notices, any of their dealings or communications with Pryor, Jr. or his defaults or delinquencies or the foreclosure procedure. These parties had no difficulty communicating with each other on a understandable business basis. Ed and Willie were not lawyers; just a couple of small businesspeople trying to prepare papers on their own (that probably would have been done better by lawyers). But the legal communications, positions and notices communicated between all parties as layman were clearly understandable by each.

There is no showing that Pryor, Jr. was in any way misled, confused or prejudiced by the designations or roles of Ed and Willie Wellington or that he would have done anything any differently if their roles were fixed, clearer and unchanging.

There was nothing in these so-called "conflicting roles" that prevented Willie Wellington, acting as Trustee, from acting capably and fairly as a trustee under the documents and no evidence to

support Appellants' speculation of impropriety. The trial court found his acts proper. (FOF ¶ 4, COL ¶ C. 2.2)

d. The Trustee Had No Conflict of Interest

Appellants contend that Willie Wellington in his role as trustee had such a severe conflict of interest as to require the court to reverse the trial court on this ground alone. They cite *Cox v. Helenius*, 103 Wn.2d 383,389, 693 P.2d 683 (1985) in support of this contention. But the Cox case and other authorities cited by Appellants all arise out of the context of Deeds of Trust Trustees's Sale – and not out of sales under customized set of private agreements. Deeds of trust foreclosures are all strictly controlled by the statutory regime set forth in Chapter 61.24 RCW. The Helenius case is one where the court found actual wrongdoing, including the fact that the trustee knew that the grantors had filed a suit for damages and were contesting the foreclosure. The trustee proceeded with the sale anyway. The only reference the court made to conflict of interest was when it said that "Where an actual conflict of interest arises, the person serving as trustee and beneficiary should prevent a breach by transferring one role to another person." In the case now before the court there is no evidence of wrongdoing or an actual conflict of interest. Moreover,

as previously suggested, there is no showing of prejudice or impropriety or that an independent, disinterested trustee would have acted any differently.

Appellants argue that the Trustee should have exercised discretion in allowing Pryor, Jr. more time to cure his default. But the Trustee in this case had no such discretion. The default had occurred and was not cured. There was no provision for a cure after that in the governing documents. Foreclosure was irreversible at that time and the Trustee was obligated – he had a mandatory duty to foreclose under paragraph 8. C. of the Pledge and Trust Agreement (Ex 2) which provides that "the trustee shall give written notice of default to the purchaser..." And "Trustee **shall commence** foreclosure of this pledge after ten (10) days have elapsed since the mailing of the notice of default to the Purchaser and the Seller." [Emphasis added]

The Trustee, it should also be noted, owes duties to the Seller as well as the Buyer — to act promptly to protect the rights of the Seller to insist on prompt and full performance by the Buyer and to protect the Seller's security interest.

The John R Hansen, Inc. case³ and others cited by Appellants' all deal with real estate contract forfeitures, which are essentially equitable in nature. They are not unlawful detainer cases.

The John R Hansen case suggests that in order to avail oneself of the principles of equity the buyer must offer to pay the balance owed or to at least tender enough to cure the delinquency. Appellants concede that "... a forfeiture can be avoided by a simple tender of overdue payments" (Appellants' Brief Page 36). Pryor, Jr. never did that, nor has he ever tendered the balance.

Moreover, Willie Wellington had already relented and waived one of Pryor's previous defaults in 2006 (RP 33).

Pryor, Jr. never provided any credible or substantial evidence of the value of Space 65, thus he failed to provide the court with the necessary evidence of what loss he would sustain from a forfeiture of his interest in Space 65. The only possible evidence of value of Space 65 was contained in Exhibit 10 which was a letter from Edward Pryor, Jr. to Ed Wellington dated November 6, 2006, and said he "would like to know if you would be

³ *John R. Hansen, Inc. v. Pacific International Corp.*, 76 Wn.2d 220,228-29,455 P.2d 946 (1969);

interested in buying my place back at the price of \$25,000..."

There is no showing that this was in fact a bona fide offer or that Pryor, Jr. had the financial ability to back it up. In view of Pryor, Jr.'s record of delinquencies and difficulties in paying monthly installments, the court would be justified in ignoring that offer as any kind of proof of the fair market value of Space 65.

The cases and arguments Appellants now present regarding equity were all presented to the trial judge and rejected. It was entirely within the trial court's discretion to grant or deny a grace period. The court declined to exercise equitable authority. It was not an abuse of discretion to decline. The trial judge had before him Pryor, Jr.'s deplorable record of chronic and repeated late and insufficient payments. One must wonder, as the trial judge must have, how much more leeway must a trustee grant under these circumstances. If additional time was in fact given it seems quite likely there would be other defaults in the future and another lawsuit.

Equitable remedies are addressed to the court not to the trustee. Here Appellants attempt to impose on the Trustee rules that are addressable to a court of equity. Counsel for Appellants cites cases involving equitable principles applicable to trial courts

as if they were mandated to a trustee under the circumstances of this case. This case is not a deed of trust foreclosure nor is it a real estate contract forfeiture.

Additionally, Appellants fail to point out any particular acts or omissions of Willie or Ed Wellington that deviated from the procedures called for in the Pledge and Trust Agreement or in any other contract documents.

e. There Was Nothing Unconscionable about the Sale of Pryor's' Shares

Appellants interject an "unconscionability" argument here (Appellants Brief p.37). Appellants seem to suggest that the Trustee should have put out notices and given an opportunity for others to bid. This, of course, is not required by the Pledge and Trust Agreement which expressly provides for private sale without notice. They say that the terms of the contracts, especially the Pledge and Trust Agreement, were substantively unconscionable. But no such argument or theory was presented to the trial court. None of the cases Appellants cite for the unconscionability doctrine were cited at the trial. The contract documents in this case had been in force since 1982. Pryor, Jr. had ample opportunity to read and understand what his obligations were and what the

consequences of default were under the contracts, so one might wonder how the trial court's discretion, in declining to grant a grace period could be overturned as an abuse of discretion.

f. The Trustee Acted Appropriately and Was Not Obligated to Accept a Late and Insufficient Tender

Appellants next object that "... there was no evidence that the trustee mailed a notice of default to the Seller of the shares, as required by paragraph 8 C." The objection is that Willie Wellington, sitting at a desk next to his brother, Ed Wellington, failed to mail a notice of default to him. As a general rule the law does not require the performance of a useless act. Clearly Ed Wellington had actual notice of the default. Again Pryor, Jr. was not prejudiced by any failure of the Trustee to, in essence, send a notice to his brother at the same address. Moreover, Appellant does not have standing to object to this alleged oversight if it was an oversight.

Appellant next objects to the delay in receipt of the Default Notice (Ex. 13) which was sent on May 15, 2007, and that Pryor, Jr. received on May 25th. He claims that the delay was caused by the notice being sent by certified mail. But there was evidence that the trial court was entitled to accept that the delay was due to Pryor, Jr.'s failure to promptly pick up the certified mail item from the post

office (RP 74). If Pryor, Jr. ignored and delayed in picking up the certified mail item it is not the fault of Ed Wellington or of the Trustee.

Besides, paragraph 9 of the Pledge and Trust Agreement authorizes and by inference recommends that notices be given by certified mail in the following words:

Any demand or notice which by any provision of this agreement is required or permitted to be given or served by Trustee on Purchaser shall be deemed to be sufficiently given or served for all purposes by being deposited as certified or registered mail with postage prepaid, in the post office letter box, addressed as follows ...

Under the circumstances, certified mail was certainly the prudent method for the trustee to use in mailing the Notice of Default.

Significantly, Pryor, Jr., even though he did not pick up the notice until the 25th of May, still had time to go and make a personal visit to Willie Wellington's office and hand-deliver a payment or to telephone him and ask for more time. He did neither. He waited another six days to mail a payment of \$400, which was both late and insufficient (Ex. 18). So Pryor, Jr. gets the notice on May 25 and — after numerous previous delinquencies which were

waived or excused — he does nothing until May 31 and now believes he should be granted a grace period in.

Appellants rely on *Albice v. Premier Mortgage Services of Washington, Inc.*, 157 Wn. App. 912, 934,239 P.3d 1148 (2010) for the proposition that insufficient tender by borrower required the trustee to reschedule the foreclosure sale and to “take reasonable and appropriate steps to avoid sacrificing the debtor's interest in the property.” It should first be noted that the Albice case is a deed of trust case, governed, as we have said, by the provisions of Chapter 61.24 RCW and the Albice court cited and relied particularly on RCW 61.24.030 (3) and (6), 61.24.040(2) and 61.24.090(3) none of which govern the conduct of Willie Wellington as Trustee in the instant case. Finally, the Albice case is distinguishable because the court there said there must be a gross discrepancy in the value of the property foreclosed upon compared to the selling price, plus other "unfair procedures" for the court to set aside a sale on equitable grounds. Again, it is worth noting that Pryor, Jr. failed to present credible proof or sufficient evidence of a gross discrepancy in the value of Space 65 — nor was there any evidence of other unfair procedures. If Judge Wilson was correct in declining to grant a grace period why would the Trustee be obligated to do so.

g. The Demand Of The Default Notice Was Substantially Correct

Appellants' complain that the demand of \$467 in the Notice of Default (Ex. 13) was an excessive amount because, they claim, that it included a charge of \$75 for "cost of service." But the trial court heard all the evidence and found that the demand of \$467 was correct. The appellate court is not the place to rehash this factual dispute. Even if the amount of \$467 was not exactly correct, it was substantially accurate. If the trial court had agreed with Appellants' contention that it was wrong to claim \$75 for the cost of service, the court could nevertheless have determined that two prior NSF charges of \$35 each plus a \$5 late charge would have fully reconciled the issue (See RP 30, 31 and 184; Ex. 6 and 33). For a full reconciliation of payment accounting for Space 65 according to calculations of Respondent's counsel, see the appendix to Plaintiff's Trial Brief (CP 79 – 102) entitled "Annotated Payment and Delinquency Accounting Ledger" which attempts a mathematical reconciliation of the payment accounting from Exhibit 33 and tracks the cumulative monthly delinquent balance to the sum of \$444.16 in arrears on May 15 2007, which, if accurate is still \$44.16 more than Pryor, Jr. tendered.

2 MHM Was Owner of Space 67 And Prior Was Its Tenant

Appellants' return once again to the theme that "neither Respondent nor its predecessor had a landlord-tenant relationship with Pryor, Jr." (Appellants' Brief Page 41). This argument has already been answered. Appellants neglect to recognize that the shares of stock purchased by Ed Wellington are for the mobile home Space 65. The owner of the shares owns the space — or at least the rights to occupy and use it on a 99 year renewable lease or to sublease it to another. Pryor, Jr. was occupying Space 65 for some 39 months after Ed Wellington acquired it without paying anything for its use and occupancy. Pryor, Jr. owed rent as a tenant by sufferance under RCW 59.0 4.060 or was a holdover under RCW 59.12.030 (1) and (3) or an "occupant" under RCW 59.20.080 (1).

E Appellants' Cannot Set-off Their Earlier Judgment for Attorneys Fees Against Rent In This Case

The Heaverlo⁴ case cited by Appellants at page 42 of their appeal brief in support of their claim for set-off contains the seeds of its own destruction. The court in Heaverlo stated the general

⁴ *Heaverlo v. Keico Industries, Inc.*, 911 P.2d 406, 80 Wn.App. 724 (Wash. App. Div. 3, 1996)

rule to be that counterclaims and set-offs are not permitted in unlawful detainer actions except that a tenant may assert a counterclaim or set-off if the covenant to pay rent is dependent on the covenant that the lessor has breached. The Court of Appeals took the decisive step of reversing the trial court's dismissal of an unlawful detainer action. The trial court dismissed the action based on the tenant's counterclaim that the landlord had breached a lease covenant by refusing to negotiate rent for a second term. The Court of Appeals reversed because the landlord's denial to negotiate a renewal did not deny the tenant access to the property and thus was not related to possession.

A counterclaim or set-off must arise out of and be related to the right of possession in order to be an excuse for failure to pay rent, otherwise the court has no jurisdiction to consider a counterclaim that is not necessary to determine the right to possession. *Josephinium Associates v. Kahli*, 45 P.3d 627, 111 Wn. App. 617, 111 Wash. App. 617 (Wash. App., 2002).

Appellants cite the quaint old case of *Reichlin v. First National Bank*, 184 Wash. 304, 313, 51 P.2d 380 (1935), for the supposed proposition that a judgment that the tenant had against the landlord could be set-off as a defense in the landlord's unlawful

detainer case. There are at least a couple of problems with the Reichlin case. For one thing, it appears that, although the action was denominated as one of unlawful detainer, the case actually was not an unlawful detainer case in that it did not involve an issue of possession. Instead it was an action to recover damages for the unlawful detention of certain farmlands. The court makes no mention that the plaintiff was seeking possession; it was only a claim for damages for the amount of the plaintiff's loss while the defendant grazed its cattle on plaintiff's land. The other shortcoming of the Reichlin case is that, as far as Respondent's counsel's research can determine, the case has only been cited once by a Washington appellate court and never for the proposition that Appellants contend it stands for.

Appellants, nevertheless argue that the judgment they obtained against Respondent's predecessor for attorneys fees in the previous lawsuit should be offset against MHM's claim for rent in this case. Adoption of that principle would be a devastating reversal of the consistent rulings of our appellate courts and would open the door to unlimited numbers and types of set-offs. The Appellants' judgment for attorneys fees in this case quite clearly did not arise out of or involve the rights of the parties to possession of

Space 65. If the claimed set-off were allowed in this case it would clearly allow a set-off where the tenant had a judgment against the landlord arising out of a tort claim or from the breach of a sales contract. If the landlord owed money to the tenant on a promissory note or on any other kind of transaction, any one of these could be interposed by the tenant, according to Appellants' position.

Respondents believe the court should firmly slam that dangerous door shut.

F Attorneys Fees Should Be Awarded to MHM

MHM should be awarded attorneys fees as the prevailing party on this appeal. RCW 59.20.110.

IV. Summary-Conclusion

In deciding cases involving enforcement or forgiveness of the rights, duties, burdens and obligations of the landlord and tenant the court must be always be very careful in balancing those interests. The courts must always be mindful that our economy functions best in an environment of reasonable certainty, predictability and that, while equity and forgiveness of defaults and delinquencies have their place and forfeitures are not favored, the rights of the landlord and the burden and loss of what a landlord is

entitled to expect out of clearly expressed contract obligations is very important too. There are already a host of rigorous built-in hurdles protecting tenants, presenting treacherous technical waters for landlords to navigate.

This case, obviously, has dragged on way too long and MHM has endured way too much delay, uncertainty and reversal of just expectations. No justice will be achieved by sending this case back for a third trial. Now is the time for the court to finally and decisively say to Pryor, Jr., "Leniency has its limits; enough is enough."

Dated this 13th day of June, 2011.



Jerome R. Cronk, WSBA #357
Attorney for Respondent

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

EDWARD PRYOR, JR.,

Appellant,

vs.

MHM&F, LLC,

Respondent.

No. 66027-6-1

DECLARATION OF
MAILING OF BRIEF

I, Jerome R. Cronk, certify under penalty of perjury pursuant to RCW 9A.72.085, that on this day I deposited in the mails of the United States of America a properly stamped and addressed envelope containing true copy of Respondent's Brief on Appeal directed to the regular office address of Dan R. Young, attorney of record for Defendants/Appellants.

Date: 6/13/2011

Place signed: Shoreline, Washington

Signed: 

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