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No. 69305-1

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IN THE COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

SEAWEST INVESTMENT ASSOCIATES L.L.C., a Washington Limited  
Liability Company,

Plaintiff/Appellant,

v.

GEORGE CHARLES and WENDY CHARLES and the marital  
community composed thereof, SAM DIBELLO and RENEE DIBELLO  
and the marital community composed thereof, JILL JENSEN and  
JEREMY AMES and the marital community composed thereof, EMO  
ROWE and CAT ROWE and the marital community composed thereof,  
and NWREA, LLC, a Washington limited liability company,

Defendants/Respondents.

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PLAINTIFF / APPELLANT'S OPENING BRIEF

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## I. INTRODUCTION

Summary judgment is not properly granted when there are genuine issues of material fact and the moving party is not entitled to judgment as a matter of law. Respondents George and Wendy Charles, Sam and Renee DiBello and Emo and Cat Rowe entered a lease for commercial space in Kirkland, Washington in 2007 (the "Lease"). More than four years into the Lease term, and two years into a litigation initiated by Appellant Seawest Investment Associates L.L.C. to collect unpaid rent, Respondents first claimed that the Lease was void on its face due to the date of Seawest's signature. Despite multiple genuine issues of material fact and contrary law, the trial court granted summary judgment based on Respondents' new found claim, dismissed all claims against all Respondents, and ordered Seawest to pay all of their attorneys' fees and costs.

The trial court erred in granting summary judgment to all Respondents, and in entering final judgment in favor of Respondents Charles, DiBello and Rowe, in numerous respects. First, the trial court failed to apply the correct burden of proof. The trial court failed to place the burden of proof on the moving party, Respondents, and instead, improperly placed the burden of proof on Seawest to show that Respondents *were not* entitled to summary judgment.

Second, there is a genuine issue of material fact as to when the Lease was signed by Seawest. A provision in the Lease required signature by September 26, 2007. The signature page of the Lease is dated

September 26, 2007, and the manager of Seawest, Massoud M. Aatai, testified that he signed the lease on that date.<sup>1</sup> Respondents argued that because the notary's signature was dated September 27, 2007, the Lease was void on its face. The question of timing of the signatures on the Lease alone created an issue of material fact that should have precluded summary judgment.

Third, there is a genuine issue whether a lease amendment Respondents signed well into the tenancy incorporated the terms of the original written Lease, and bound the Respondents. This question also should have precluded a summary judgment award.

Not only are there genuine issues of material fact that should have precluded summary judgment, but Respondents were not entitled to judgment as a matter of law for many reasons. Primarily, Respondents were not entitled to judgment as a matter of law because they waived their right to object to the timing of Seawest's signature on the Lease, by performing under the terms of the written Lease for over four years without objection.

Respondents argue that they did not acquire any rights under the "void" lease, and therefore could not waive any rights, because the Lease never came into effect. However, Respondents cannot have it both ways. Respondents rely on a provision in the Lease requiring that it be mutually

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<sup>1</sup> Mr. Aatai testified that he signed the Lease on September 26, 2007 in a supplemental declaration, following the trial court's request for supplemental briefing from the parties. CP 764-766, 778-779. This declaration was not stricken from the trial court record.

accepted by a defined date, yet argue that no other provision in the Lease they performed under for years ever became effective. The Lease was in effect as soon as it was signed by all parties. Even assuming mutual acceptance and the formation of a contract did not occur by the stated deadline, Respondents had the right, which they clearly exercised, to waive any right to terminate and continue to perform under the terms of the written Lease.

Respondents not only waived any right to terminate the lease, but are also estopped from now claiming it is void. For years, Respondents took advantage of the benefits of the Lease, before materially breaching its terms. Respondents behaved in accordance with the specific Lease terms. Seawest reasonably relied on their conduct and representations. Allowing Respondents to now claim the Lease was void on its face and escape responsibility unjustly harms Seawest. Respondents are estopped from now claiming the Lease they used and abused is void.

In order to support their request for dismissal of all of Seawest's claims, Respondents argued to the trial court that they were not liable for the approximate \$221,000.00 then owed in unpaid rent, interest and late fees, because the written Lease was somehow converted to a month-to-month rental agreement when Seawest allegedly did not sign by the deadline.<sup>2</sup> Respondents did not cite relevant authority to support this

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<sup>2</sup> CP 439. This was the total amount due in December of 2011. The total unpaid rent, interest and late fees has continued to increase. Respondents did not vacate the premises until after Seawest sent a Notice of Termination of Tenancy on September 10, 2012. CP 1011.

argument. Further, even if the Lease somehow was transformed into an oral month-to-month tenancy, there are genuine issues of material fact as to the terms of that agreement and the identity of the tenant(s) responsible.<sup>3</sup>

Summary judgment and dismissal of all of Seawest's claims against Respondents was also improper because there is a genuine issue of material fact regarding whether Seawest waived its right to receive additional rents. Respondents often paid Seawest less than the full amount of rent due each month. In their motion for summary judgment, Respondents argued that by accepting less than the full rent amount each month, Seawest waived its right to collect the outstanding rent due. The Lease, however, expressly provided that Seawest did not waive its right to claim additional rents by accepting less than the full amount of rent due.

There is other evidence creating issues of fact regarding the questions of waiver and estoppel. An amendment to the Lease ("Amendment") is further evidence that Seawest did not waive any rights. In 2009, when Respondents requested rent relief from Seawest, Seawest agreed and the parties entered the Amendment. CP 433. The Amendment, executed almost two years after the Lease, specifically references and incorporates the terms of the Lease. Further, correspondence between Respondents and Seawest indicates that both

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<sup>3</sup> Prior to Respondents filing the summary judgment motion at issue in this appeal, for more than a year and a half, the identity of the tenant under the Lease was the key issue in this case. This dispute was the subject of several summary judgment motions.

parties acknowledged that Respondents would be liable for the rent deficiency.

Seawest pointed out these issues of material fact to the trial court. CP 871-885. While the trial court did not address these issues at oral argument or in its order, by granting summary judgment and dismissing all of Seawest's claims against all Respondents, the trial court effectively ruled that Seawest waived its right to additional rents that Respondents had agreed to pay.

The trial court also erred in granting summary judgment to Respondent NWREA, LLC. While Respondents Charles, DiBello and Rowe all filed or joined in the motion for summary judgment, Respondent NWREA, LLC neither moved for summary judgment, nor provided any argument or briefing. Further, Respondents Charles, DiBello and Rowe all argued that NWREA, LLC was the proper tenant under the Lease. Summary judgment dismissing NWREA, LLC was improper.

Respondents failed to show there were no genuine issues of material fact and that they were entitled to summary judgment as a matter of law. As such, the trial court's award of summary judgment and the order dismissing Seawest's claims against all Respondents was improper. Seawest respectfully requests that this Court reverse and remand this matter for trial.

## **II. ASSIGNMENTS OF ERROR**

(1) The trial court erred in granting summary judgment to Respondents Charles, DiBello, Rowe and NWREA, LLC.

(2) The trial court erred in entering final judgment in favor of Respondents Charles, DiBello and Rowe.

(3) The trial court erred in denying Seawest's Motion for Reconsideration and Motion to Vacate.

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

(1) Did the trial court err in granting summary judgment because it applied the incorrect burden of proof in deciding Respondents' Motion for Summary Judgment? (Assignments of Error 1 through 3).

(2) Did the trial court err in granting summary judgment to Respondents because there is a genuine issue of material fact as to when the Lease was signed? (Assignments of Error 1 through 3).

(3) Did the trial court err in granting summary judgment to Respondents because the Amendment incorporated the original Lease and bound Respondents? (Assignments of Error 1 through 3).

(4) Did the trial court err in granting summary judgment to Respondents because Respondents waived their right to object to the timing of signatures on the Lease and are estopped from denying the existence of the Lease? (Assignments of Error 1 through 3).

(5) Did the trial court err in granting summary judgment to Respondents because Respondents are estopped from denying the existence of the Lease? (Assignments of Error 1 through 3).

(6) Did the trial court err in granting summary judgment to Respondents because Respondents relied on enforcement of a provision in

the Lease, while at the same time claiming the Lease is void? (Assignments of Error 1 through 3).

(7) Did the trial court err in granting summary judgment to Respondents because there is no authority for the trial court to have converted the valid, acknowledged written Lease into an oral month-to-month tenancy? (Assignments of Error 1 through 3).

(8) Did the trial court err in granting summary judgment to Respondents because even if the written Lease is void, there are genuine issues of material fact as to the terms of any alleged oral lease and the identity of the tenant(s) under the oral lease? (Assignments of Error 1 through 3).

(9) Did the trial court err in granting summary judgment to Respondents because there is a genuine issue of material fact as to whether Seawest waived its right to receive additional rent? (Assignments of Error 1 through 3).

(10) Did the trial court err in dismissing Seawest's claims against Respondent NWREA, LLC because NWREA, LLC never moved for summary judgment and because Respondents Charles, DiBello and Rowe argued that Respondent NWREA, LLC was the tenant liable under the Lease? (Assignment of Error 1 through 3).

#### IV. STATEMENT OF THE CASE

**A. Seawest and Respondents enter a written Lease for office space.**

This lawsuit arises out of a commercial lease dispute. This appeal arises out of a remarkable series of rulings.

On September 26, 2007, Seawest and Respondents George and Wendy Charles, Sam and Renee DiBello, Jill Jensen, Jeremy Ames, and Emo and Cat Rowe signed the Lease for office space in a building owned by Seawest.<sup>4</sup> CP 412. Massoud M. Aatai, Seawest's principal and manager, signed the Lease on behalf of Seawest. *Id.* The office space was located at 13131 NE 85<sup>th</sup> Street in Kirkland, Washington (the "Property"), and leased by Respondents to operate a real estate brokerage firm they owned together, Keller Williams Realty.<sup>5</sup>

Until late in this case, the central issue was whether Respondents Charles, DiBello and Rowe signed the Lease in their individual capacities, or whether their undisclosed and unnamed limited liability company, NWREA, LLC, was the intended tenant. In fact, this issue was the subject of multiple summary judgment motions.<sup>6</sup> It was not until this most recent summary judgment motion that Respondents argued, for the first time, that the Lease was void due to the timing of signatures on the Lease. CP 707-712.

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<sup>4</sup> Jill Jensen and Jeremy Ames filed for bankruptcy and were not part of the proceedings before the trial court. CP 5-6.

<sup>5</sup> CP 381, 390, 391, 412.

<sup>6</sup> CP 84-88, 95-109, 216-217, 227-240, 347-348, 356-358, 579-580, 581-588, 598-599.

Article 1 of the Lease contained a “Lease and Rent Commencement” provision. CP 391. The provision stated, in part: “[t]his lease will become null and void unless it is executed by all parties by 5 p.m. September 26, 2007.” *Id.* Respondents claim that Seawest did not execute the Lease until the following day, which voided the Lease, *ab initio* and transformed the Lease into a month to month rental agreement.

The Lease signature page bearing all parties’ signatures is dated September 26, 2007. CP 412. On the next page, however, the notary’s signature acknowledging Mr. Aatai’s signature is dated September 27, 2007. CP 413. The notary block stated:

I certify that I know or have satisfactory evidence that Matt Aatai is the person who appeared before me, and said person acknowledged that he signed this instrument [...].  
*Id.*

Mr. Aatai testified that he did sign the Lease before 5:00 p.m. on September 26, 2007.<sup>7</sup> It was only the notary who signed the next day. CP 413. Thus, the evidence was that the Lease was mutually accepted by the parties on September 26, 2007, despite the fact that Mr. Aatai’s signature was not notarized until the following day.

Respondents Charles, DiBello and Rowe did not even suggest the Lease was void until more than four years after entering the Lease, after almost two years of litigation and after Respondents Charles, DiBello and Rowe all filed multiple summary judgment motions on a different issue.

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<sup>7</sup> Mr. Aatai submitted this declaration following the summary judgment hearing, at the trial court’s request for further briefing. CP 778-779. This declaration was not stricken from the record before the trial court.

**B. Respondents performed under the terms of the written Lease for approximately two years.**

Seawest and Respondents performed under the specific terms of the Lease until approximately two years into the Lease term. CP 757. Respondents' specific performance included payment of rent, payment of an agreed proportionate share of the utilities and real property taxes, and performance of the tenant improvement work, as specified in Exhibit C to the Lease. *Id.*

**C. Respondents sign an Amendment to original Lease.**

Approximately two years into the Lease term, Respondents approached Mr. Aatai and requested a rent reduction in the form of a deferral, with a later recapture of the deferred rent. *Id.* at 382. Mr. Aatai agreed, and on May 8, 2009, Seawest and Respondents executed the Amendment. *Id.*

The Amendment is titled, "Amendment to the Lease dated September 10, 2007 between Seawest Investment Associates, LLC, (Landlord) and Keller Williams Realty Kirkland (Tenant)." CP 433. The Amendment provided, in part:

[t]he Guarantors subject to the original lease will be subject to this amendment with their signatures provided below. Except to the extent that this amendment modifies the original lease, **all terms and conditions of the original lease shall remain in force.** *Id.* (Emphasis added).

**D. Respondents' further acknowledgement of the Lease as valid and in force.**

As further acknowledgement of the existence of the Lease, in an August 26, 2009 email from Jacky Elmore at Keller Williams Realty,

copying Respondent George Charles, Ms. Elmore wrote: “Hi Ed, We have been audited by the Department of Revenue. They need to see that the attached invoice included sales tax **as stated in the lease**. [...]” CP 736. (Emphasis added).

Despite the relief Seawest provided to the Respondents in the Amendment, in October 2010 Respondents still failed to pay approximately half of the rent due to Seawest under the Lease. *Id.* at 382.

On October 5, 2010, George Charles emailed Mr. Aatai:

I am writing regarding the **September 27, 2007 lease** between Seawest Investment Associates (“Seawest”) and NWREA, LLC, d/b/a Keller Williams Realty Kirkland (“NWREA”) (the “Lease”). On October 4, 2010, NWREA sent Seawest an **October lease payment** in the amounts of \$12,255 and \$2,600 for a total of \$14,855. While this amount is **less than the amount owed under the Lease**, it is all that NWREA can afford to pay at this time. NWREA hopes Seawest accepts this good faith payment.

NWREA wants to continue leasing the property. In order to do this, however, the **Lease terms must be renegotiated**. We look forward to the opportunity to discuss this with you. We are confident that Seawest would prefer to **renegotiate the terms** rather than search for a new tenant in this uncertain market.

Another option would be for NWREA to **assign its interest in the Lease**. **Section 21.1 of the Lease** requires Seawest’s consent to any assignment. Please let me know **whether Seawest would be amendable to an assignment** and, if so, on what terms. [...]. CP 436. (Emphasis added).

Seawest did not grant the Respondents further rent relief, and Respondents continued to fall behind in their rent obligation.

CP 382. However, at no point in time did any of the Respondents indicate they thought the Lease was void, nor did any of the Respondents voice any objection to the timing of Seawest's execution of the Lease. CP 757.

**E. Seawest files suit and a motion for summary judgment against Respondents Charles, DiBello and Rowe.**

Seawest initiated this action against Respondents Charles, DiBello and Rowe on November 12, 2010. CP 1-4. In May of 2011, Seawest moved for summary judgment. CP 21-24. Respondents Charles, DiBello and Rowe opposed this motion and filed their own cross motions for summary judgment, arguing that only NWREA, LLC was liable under the Lease.<sup>8</sup> The trial court denied Seawest's summary judgment motion on June 24, 2011. CP 225-226.

**F. The parties file additional summary judgment motions regarding whether the individual Respondents are liable under the Lease.**

Respondents then moved again for summary judgment, again arguing that NWREA, LLC, not Respondents Charles, DiBello and Rowe, was the proper tenant under the Lease.<sup>9</sup> Seawest opposed this motion and cross-moved for summary judgment.<sup>10</sup> The trial court denied Respondents' motions and granted Seawest's cross-motion for summary judgment. CP 639-642.

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<sup>8</sup> CP 84-88, 95-109, 216-217.

<sup>9</sup> CP 227-240, 347-348, 356-358.

<sup>10</sup> CP 364-371, 441-453.

Respondents Charles, DiBello and Rowes' moved for reconsideration, and the trial court reversed its ruling. Contrary to KCLR 59(b), the court failed to allow Seawest an opportunity to respond to the motion. CP 666-668. Thereafter, Respondent NWREA, LLC was joined as a defendant in the lawsuit in April of 2012. CP 678-681.

**G. Respondents made numerous admissions confirming the existence of the valid written Lease.**

Before filing the motion that lead to the judgment at issue in this appeal, Respondents Charles, DiBello and Rowe each filed multiple summary judgment motions and summary judgment oppositions.<sup>11</sup> Not once did they ever even suggest, much less argue, that the Lease was void due to the timing of Mr. Aatai's signature. *Id.* Instead, they argued that NWREA, L.L.C. was the only tenant.<sup>12</sup>

Further Respondents made numerous admissions in the course of these proceedings regarding the enforceability of the Lease. In Mr. Charles' June 13, 2011 Declaration, he stated that, "[b]elieving in good faith that the parties had completed negotiating the **lease terms**, the members each **signed the Lease**, and additionally, three-year personal guarantees **on September 27, 2007.**" CP 117. (Emphasis added). Further, in a motion for reconsideration, Respondent Charles admitted that the personal guarantees to the Lease were valid. CP 651.

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<sup>11</sup> CP 84-88, 95-109, 216-217, 227-240, 347-348, and 356-358.

<sup>12</sup> CP 84-88, 95-109, 216-217, 227-240, 347-348, 356-358, 579-580, 581-588, 598-599.

**H. Respondents Charles, DiBello and Rowe move for summary judgment, arguing for the first time in more than four years that the Lease is void.**

On May 22, 2012, Respondents Charles, DiBello and Rowe filed the motion at issue in this appeal.<sup>13</sup> Only Respondents Charles, DiBello and Rowe filed or joined in this motion. *Id.* Respondent NWREA, LLC did not file or join in the motion. *Id.*

In the motion, Respondents Charles, DiBello and Rowe argued, for the first time in over four years, that the Lease was void due to the timing of Mr. Aatai's signature. CP 707-712. This argument came after: (1) performing under the terms of the Lease for two years<sup>14</sup>; (2) negotiating relief from the Lease terms in the Amendment in May of 2009<sup>15</sup>; (3) requesting a second renegotiation or assignment of the Lease in October of 2010<sup>16</sup>; (4) making numerous admissions about the existence of the valid written Lease on many occasions in this proceeding<sup>17</sup>; and (5) arguing and defending summary judgment motions seeking confirmation that only Respondent NWREA, LLC was liable under the Lease.<sup>18</sup>

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<sup>13</sup> CP 707-712, 716-717, 721-723.

<sup>14</sup> CP 757.

<sup>15</sup> CP 433.

<sup>16</sup> CP 436.

<sup>17</sup> See, e.g., CP 436, 736.

<sup>18</sup> CP 84-88, 95-109, 216-217, 227-240, 347-348, 356-358, 579-580, 581-588, 598-599.

**I. The trial court issues a series of rulings on Respondents Charles, DiBello and Rowe's motion for summary judgment.**

On June 29, 2012, the trial court heard oral argument on Respondents Charles, DiBello and Rowe's Motion for Summary Judgment. CP 935. Counsel for NWREA, LLC did not attend the hearing or provide any argument or briefing. CP 937.

Following oral argument, on July 5, 2012, the trial court issued its Order on Supplemental Briefing for Summary Judgment Motion. CP 764-766. In its Order, the court stated:

[t]he threshold issue is whether the lease was 'executed by all parties by 5 p.m. September 26, 2007.' If Seawest bears the burden of proof on this issue, arguably it has failed to do so. CP 765.

The trial court asked for supplemental briefing on:

[W]hether Seawest had made a showing sufficient to survive a summary judgment establishing that the lease was executed by all parties by 5 p.m. on September 26, 2007. *Id.*

The trial court's order gave the parties until July 13, 2012 to submit supplemental briefing. *Id.*

**J. The trial court enters orders granting summary judgment without waiting for any of the parties to file the requested supplemental briefing.**

One day after requesting supplemental briefing from the parties, and seven days *before* the deadline for the parties to submit their supplemental briefing, the trial court entered orders granting summary judgment to Respondents Charles, DiBello and Rowe. CP 767-773.

These orders each contained handwritten notes and interlineations from the trial court. *Id.*

**K. Seawest files the requested supplemental briefing and a motion for reconsideration.**

Despite the trial court's summary judgment orders entered on July 6, 2012, Seawest submitted the requested supplemental briefing, including a declaration from Mr. Aatai, on July 11, 2012. CP 774-779. Mr. Aatai's supplemental declaration explained that he did in fact sign the Lease on September 26, 2007. CP 778. His signature was notarized the next day. CP 413. On July 16, 2012, Seawest also filed a motion for reconsideration of the trial court's orders granting summary judgment. CP 871-885.

**L. The trial court enters orders vacating its prior orders granting summary judgment.**

Shortly after Seawest filed its motion for reconsideration, the trial court, "*sua sponte*," entered three orders vacating its three orders granting summary judgment. CP 900-902. (Emphasis in original). The trial court stated the orders granting summary judgment had been entered in error. *Id.* The trial court also extended the deadline for the parties to submit supplemental briefing to July 23, 2012. *Id.* On July 27, 2012, the trial court requested that Respondents file a response brief to Seawest's motion for reconsideration. CP 957.

**M. Trial court re-enters order granting summary judgment.**

On August 10, 2012, the trial court again entered an order granting Respondents Charles, DiBello and Rowe's motion for summary judgment

(the “Order”). CP 931-932. The Order stated, in part:

[...] and the court determining that there is no genuine issue of material fact which would preclude entry of judgment **in favor of the individual defendants** against plaintiff; it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

1. Defendants’ motion for summary judgment is granted, and plaintiff’s claims against defendants are hereby dismissed with prejudice;
2. Defendants DiBello, Charles and Rowe are entitled to entry of judgment against plaintiff for the attorney’s fees and costs incurred by defendants in this action;
3. Plaintiff’s Motion for Reconsideration is denied.  
*Id.* (Emphasis added).

**N. Seawest requests that the trial court clarify its order granting summary judgment**

Respondent NWREA, LLC never moved for summary judgment, nor did it join in Respondents Charles, DiBello and Rowe’s motion for summary judgment. CP 934. Further, Respondents consistently argued throughout the case that NWREA, LLC, not Respondents Charles, DiBello and Rowe, was the only tenant liable under the Lease.<sup>19</sup> However, the trial court ruled that *no one* was liable for rent at the premises that were still, at the time of the order, occupied by Respondents. CP 931-932.

Seawest requested that the trial court vacate its order and enter a new order to clarify that Seawest could still pursue its claims against Respondent NWREA, LLC. CP 933-937. Seawest pointed out that even the plain language of the trial court’s order granting summary judgment determined that there were no issues of fact that would preclude judgment

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<sup>19</sup> CP 84-88, 95-109, 216-217, 227-240, 347-348, 356-358.

in favor of only the “individual defendants,” not NWREA, LLC.<sup>20</sup>

To preserve its rights to an appeal, Seawest also filed its Notice of Appeal on September 10, 2012. CP 970-986. The trial court denied Seawest’s motion to vacate on September 21, 2012, which had the effect of holding that neither Respondent NWREA, LLC, nor Respondents Charles, DiBello and Rowe owed any obligation to Seawest with regard to the premises they had occupied since 2007. CP 1018-1019. The trial court awarded Respondents Charles, DiBello and Rowe attorneys’ fees totaling \$93,584.07 and entered final judgments on September 6, 2012. CP 961-969.

## V. ARGUMENT

### A. **Summary judgment is appropriate only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.**

An appellate court reviews a trial court’s order granting summary judgment de novo. *Ranger Ins. Co. v. Pierce Cnty.*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to summary judgment as a matter of law. *Id.* A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation. *Id.* at 552. The court must construe all facts and inferences in favor of the non-moving party. *Id.* The moving party has the burden to show there is no genuine issue as to any material fact and

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<sup>20</sup> CP 932, 933-937.

that it is entitled to judgment as a matter of law. *Fitzpatrick v. Okanogan Cnty.*, 169 Wn.2d 598, 605, 238 P.3d 1129 (2010).

**B. The trial court erroneously placed the burden of proof on Seawest, the non-moving party.**

Respondents Charles, DiBello and Rowe moved for summary judgment.<sup>21</sup> As such, they had the burden to show there were no genuine issues of material fact. *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 162 Wn.2d 59, 70, 170 P.3d 10, 15 (2007). The trial court was required to construe all facts and inferences in favor of Seawest, the non-moving party. *Ranger Ins. Co. v. Pierce Cnty.*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008).

As evidenced by the trial court's order requesting supplemental briefing, the trial court failed to view the facts in the light most favorable to Seawest. Instead, the trial court questioned whether Seawest carried the burden of proof, and then incorrectly placed the burden on Seawest to show that the Individual Respondents *were not* entitled to summary judgment. CP 765.

In its order requesting supplemental briefing, the trial court asked for briefing on "whether Seawest has made a showing sufficient to survive a summary judgment establishing that the lease was executed by all parties by 5 p.m. on September 26, 2007." CP 765. The trial court mistakenly placed the burden on Seawest to show that the Lease *was* signed by all parties by September 26, 2007 at 5 p.m. Instead, the trial court should

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<sup>21</sup> CP 707-712, 716-717, 721-723.

have placed the burden on Respondents Charles, DiBello and Rowe, the moving parties, to show that the Lease *was not* signed by September 26, 2007 at 5 p.m.

Further, the fact that the trial court even had a question on this issue shows that Respondents did not meet their burden of proof. Respondents did not prove that Seawest's signature was untimely. As such, Respondents Charles, DiBello and Rowe's motion for summary judgment should have been denied.

**C. There are genuine issues of material fact regarding when the Lease was signed.**

Genuine issues of material fact regarding the timing of Mr. Aatai's execution of the Lease should have precluded summary judgment. The parties' Lease provided, "[t]his Lease will become null and void unless it is executed by all parties by 5:00 p.m. September 26, 2007." CP 391. The signature page of the Lease itself is dated September 26, 2007. CP 412. Further, in his supplemental declaration, Mr. Aatai explained that he did in fact sign the lease on September 26, 2007.<sup>22</sup>

The trial court was required to view these facts in the light most favorable to Seawest, the non-moving party. It cannot be said that reasonable minds could reach only one conclusion given these facts. There are genuine issues of material fact regarding when the Lease was signed. As such, the trial court should have denied Respondents Charles,

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<sup>22</sup> CP 778. Mr. Aatai's declaration was properly before the trial court on summary judgment, as the trial court requested supplemental briefing, and this supplemental declaration was never stricken.

DiBello and Rowe's motion for summary judgment on these grounds alone.

**D. The Amendment to the Lease incorporated all terms of the original written Lease and bound Respondents.**

Even if the trial court somehow found there were no issues of material fact as to when Mr. Aatai executed the Lease, there are numerous other genuine issues of material fact that should have precluded summary judgment.

There is a question whether the Amendment to the Lease incorporated and bound Respondents to all of the terms of the original written Lease. The parties signed the Amendment on May 8, 2009. CP 433. The Amendment is titled, "Amendment to the Lease dated September 10, 2007 between Seawest Investment Associates, LLC, (Landlord) and Keller Williams Realty Kirkland (Tenant)." *Id.* The Amendment provided, in part:

The Guarantors subject to the original lease will be subject to this amendment with their signatures provided below. Except to the extent this amendment modifies the original lease, **all terms and conditions of the original lease shall remain in force.** *Id.* (Emphasis added).

Therefore, even if the Lease was somehow found to be void, there is a genuine issue as to whether the May 2009 Amendment to the Lease expressly incorporated and bound the Respondents to the terms and conditions of the original Lease. There was not, and cannot be, any argument that the Amendment was not properly executed. The trial court never addressed the issue of the Amendment in any of its orders.

**E. Respondents waived their right to object to the timing of Seawest's signature on the Lease.**

The facts show that Respondents unequivocally waived the right to object to the timing of Seawest's signature on the Lease. A waiver is the intentional relinquishment of a known right. *Jones v. Best*, 134 Wn.2d 232, 241, 950 P.2d 1 (1998). Waiver may be inferred from circumstances indicating an intent to waive. *Id.* Waiver can be express or implied. *Id.* Implied waiver can be shown by unequivocal acts or conduct evidencing an intent to waive. *Id.*

Under Washington law, where one party performs under a contract and the other party accepts that performance without objection, it is assumed that such performance was the performance contemplated by the contract. *Evans v. Laurin*, 70 Wn.2d 72, 76, 422 P.2d 319 (1966). If parties to a contract adopt by conduct a mode of performance that differs from the strict terms of the contract, neither party can assert a breach because the contract was not performed according to its letter. *Douglas Nw., Inc. v. Bill O'Brien & Sons Constr., Inc.*, 64 Wn. App. 661, 674-676, 828 P.2d 565 (1992)

In the *Douglas Nw., Inc.* case, the construction contract between a general contractor and a subcontractor required the subcontractor to obtain all necessary permits. *Id.* at 675-676. The general contractor, however, never sought to enforce that provision. *Id.* The general contractor instead indicated that it would obtain the permits, and in fact did obtain the permits. *Id.* Division One of the Court of Appeals held that where the

general contractor “never mentioned, relied upon, or sought to enforce” the contract provision, the general contractor was precluded from asserting a breach simply because that provision was not performed “according to its letter.” *Id.*

Similarly, in the present case, Respondents never mentioned, relied on or sought to enforce the provision requiring signatures by September 26, 2007. As such, they are precluded from now arguing the Lease is void due to Mr. Aatai’s alleged untimely execution.

If the Lease was not signed by September 26, 2007, by 5:00 p.m., either party had the right to declare the Lease void and decline to move forward with the tenancy. CP 391. Assuming, *arguendo*, that Seawest’s signature on the Lease was untimely, Respondents had the right to decline to move forward. Respondents did not exercise this right. Instead, Respondents moved forward, took full advantage of the Lease, moved into the office space and performed under the terms of the written Lease. For the next four years, Respondents gave Seawest every indication they thought the Lease was in full force and effect.

Respondents made numerous unequivocal acts indicating their intent to waive the signature deadline in the Lease, including the following:

- Respondents moved into the Property and began performing in accordance with their specific, written obligations under the Lease<sup>23</sup>;
- Respondents signed an Amendment to the Lease that explicitly incorporated all terms and conditions of the Lease<sup>24</sup>;
- Respondents requested renegotiation or assignment of the Lease<sup>25</sup>;
- Respondents admitted the existence of a valid Lease in correspondence with Seawest, and in fact requested renegotiation or assignment of the Lease<sup>26</sup>; and
- Respondents never questioned the validity of the written Lease in multiple summary judgment motions and oppositions.<sup>27</sup>

These acts clearly evidence Respondents' intent to waive the Lease provision at issue. Each of these acts alone is enough to create a genuine issue of material fact as to whether the Respondents admitted the Lease was valid. Together, these acts confirm that Respondents waived any right to challenge the validity of the Lease based on the timing of Mr. Aatai's signature. Respondents should not be permitted to now argue

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<sup>23</sup> CP 757.

<sup>24</sup> CP 433.

<sup>25</sup> CP 436.

<sup>26</sup> *See, e.g.*, CP 436, 736.

<sup>27</sup> CP 84-88, 95-109, 216-217, 227-240, 347-348, 356-358, 579-580, 581-588, 598-599.

that the Lease is void based on a provision they never mentioned, relied on or sought to enforce.

**F. Respondents are estopped from denying the existence of the Lease.**

Respondents not only waived any right they may have had to terminate the Lease, but they are also estopped from now denying the existence of the Lease. To prevail on a claim for equitable estoppel, a claimant must show: (1) a party's admission, statement or act inconsistent with its later claim; (2) action by the claimant in reliance on the first party's act, statement or admission; and (3) injury that would result to the claimant from allowing the first party to contradict or repudiate the prior act, statement or admission. *Kramarevcky v. Dep't of Soc. and Health Services*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993). Equitable estoppel is rooted in the principle that "a party should be held to a representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiable and in good faith relied thereon." *Id.* (Internal citations omitted).

In the present case, Respondents all signed the Lease, moved into the Property, and began performing in accordance with the specific terms of the Lease. These acts are all inconsistent with their recent claim that the Lease is void on its face. From the time the parties entered the Lease in September of 2007, until May of 2012, Respondents all acted in a manner indicating their agreement that the written Lease was valid and governed the terms of their tenancy.

Seawest acted in reliance on Respondents' conduct and allowed Respondents to occupy the Property. Seawest also made tenant improvements in reliance on Respondents' representations in the Lease, and in reliance on Respondents' conduct consistent with the specific terms of the Lease. CP 426. Seawest further acted in reliance on Respondent's agreements in the Lease and Amendment that Seawest would not waive any rights to collect additional rent in the event that Seawest accepted less than the full amount due. Seawest accepted less than the full amount of rent due from Respondents, but still allowed Respondents to remain at the Property. Should Respondents now be permitted to claim the Lease is void on its face, the harm to Seawest is clear. Respondents owe Seawest in excess of \$221,000 in past due rent, late fees and interest.

Respondents' conduct, and Seawest's indisputable reliance on that conduct, support a finding that Respondents are estopped from now denying the Leases' validity. The only conclusion one could reach from Respondents' conduct over the past four years is that the written Lease was in effect. Had the Respondents behaved or suggested otherwise, Seawest would not have continued to let Respondents occupy the space.

**G. Respondents cannot claim the Lease is void, while also relying on enforcement of a provision within that Lease.**

Respondents argued before the trial court that they could not waive their right to enforce the Lease provision requiring signature by a certain date, because the Lease never came into effect. CP 760. At the same time, however, Respondents rely on the validity and operation of the

provision requiring signature by September 26, 2007 by 5 p.m. The provision stated, in part: “This lease **will become** null and void unless it is executed by all parties by 5 p.m. September 26, 2007.” CP 391. (Emphasis added). Without the operation of that provision, Respondents would have no argument that the Lease failed due to an allegedly untimely signature. However, if that provision came into effect, then it follows that Respondents absolutely had the right to waive that provision.

Respondents’ arguments are tautological. Further, Respondents’ arguments ask that the Court hold Seawest to the Lease obligations, but not Respondents. Respondents cannot have it both ways. They cannot both argue they never had a right to waive the September 26, 2007 signature requirement because the Lease never came into effect, and also argue that the requirement that the Lease be signed by September 26, 2007 was in effect. The Lease had to come into effect for the provision on timing of the signatures to matter. Further, the provision at issue states the Lease “will become” void. CP 391. This language necessarily means that the Lease was valid and enforceable at some point. Assuming, *arguendo*, that Mr. Aatai did not sign by the deadline, or that the notarization of his signature was required on September 26, 2007 as well, Respondents retained the right to decline to move forward with the tenancy. Respondents waived this right by their unequivocal acts. Viewing the facts in the light most favorable to Seawest, the non-moving party, it cannot be said that any of the Respondents were entitled to summary judgment as a matter of law.

**H. There is no authority for conversion of a valid, acknowledged written Lease into an oral lease.**

Respondents argued before the trial court that when the written Lease “failed,” it became an “informal lease,” and the Respondents moved in under a month-to-month contract. CP 710. The only authority Respondents cited for this theory was a case involving a lease that failed because it was for a term longer than one year, but was not acknowledged. *Labor Hall Ass’n v. Danielson*, 24 Wn.2d 75, 94, 163 P.2d 167 (1945).

Respondents also cited to a Washington Practice section, and argued that it supported the idea that any time a written lease fails, an “informal lease” arises. CP 710-711. However, the Washington Practice does not support Respondent’s position at all. Instead, it states that “informal leases” are created when a lease does not comply with the requirements of the statute of frauds. 17 William B. Stoebuck, *Washington Practice: Real Estate* § 6.14 (2d ed. 2012).

The statute of frauds is not at issue in this case. As such, the authorities relied on by Respondents are irrelevant. The applicable authority provides that because Respondents accepted Seawest’s performance under the Lease without objection, it is assumed that such performance was the performance contemplated by the Lease. *Evans v. Laurin*, 70 Wn.2d 72, 76, 422 P.2d 319 (1966).

**I. Even if the Lease is void, there are genuine issues of material fact as to the identity of the tenant(s) and the terms of any alleged oral lease.**

Even assuming there were no issues of fact regarding the timing of Seawest's signature on the Lease, and assuming that Seawest's signature was untimely, and assuming that Respondents did not waive their right to object to the timing of Seawest's signature and are not estopped to deny its enforceability, and assuming that the written Lease somehow converted to an oral lease, there are genuine issues of material fact as to the identity of the tenant(s) and the terms of this alleged oral lease.

Respondents Charles, DiBello and Rowe argued that Respondent NWREA, LLC was the tenant under the oral lease. CP 710. However, Respondents Charles, DiBello and Rowe all signed the Lease individually. CP 412. Further, the individual Respondents, not NWREA, LLC, signed the Amendment to the Lease on May 8, 2009. CP 433. Assuming the written Lease did convert to an oral month-to-month lease, as Respondents assert, there is a genuine issue of material fact as to whether Respondent NWREA, LLC was the tenant under the oral lease, or Respondents Charles, DiBello and Rowe were the tenants.

The trial court never made any ruling as to the identity of the tenant(s), and instead dismissed, with prejudice, Seawest's claims against all potential tenants. In other words, the court ruled that no one was liable for paying rent at the premises Respondents occupied since 2007. The trial court's dismissal of Seawest's claims against all Respondents was in error.

**J. There are genuine issues of material fact as to whether Seawest waived its right to additional rents.**

The trial court erred in granting Respondents Charles, DiBello and Rowe's Motion for Summary Judgment, and in dismissing Seawest's claims against Respondent Charles, DiBello, Rowe and NWREA, LLC, without addressing whether Seawest waived its rights to additional rent from any of these Respondents.

Respondents Charles, DiBello and Rowe argued to the trial court that when the written Lease failed, Respondent NWREA, LLC moved into the office space under a month-to-month lease. CP 710. Respondents further argued that by accepting less than the full monthly rent, Seawest waived its right to collect any additional rent from NWREA, LLC. Even assuming Respondents' argument that NWREA, LLC is the tenant under an oral lease is correct, there is a genuine issue of material fact regarding whether Seawest waived its right to collect the full rent owed from NWREA, LLC.

The Lease, even if invalid, is evidence of the parties' agreement that Seawest would not waive its right to additional rent by accepting less than the full amount due. Section 33.7 of the Lease, which Respondents all signed and agreed to, provided:

[t]he acceptance at any time or times by Landlord of any sum less than that which is required to be paid by Tenant shall, unless Landlord specifically agrees otherwise in writing, be deemed to have been received only on account of the obligation for which it is paid, and shall not be deemed an accord and satisfaction notwithstanding any provisions to the contrary written on any check or contained in a letter of transmittal. CP 411.

Further, when Respondents failed to make their rent payments, Seawest agreed to a rent deferral, with a later recovery of the back rent owed. CP 382. Respondents Charles, DiBello and Rowe all signed the Amendment agreeing to this arrangement, and acknowledging they were liable for the full amount of rent due. CP 433. This Amendment is additional evidence that Seawest did not waive its right to collect the full amount of rent due. Viewing the facts in the light most favorable to Seawest, which the trial court was required to do on summary judgment, it cannot be said that there are no genuine issues of material fact and that Seawest waived its rights to additional rent.

**K. The trial court erred in dismissing Seawest's claims against Respondent NWREA, LLC.**

When the trial court granted Respondents Charles, DiBello and Rowe's Motion for Summary Judgment, the trial court also entered summary judgment in favor of Respondent NWREA, LLC. This order was in error for multiple reasons. First, NWREA, LLC never moved for summary judgment, nor did it join in the other Respondents' motion for summary judgment. Second, the order was in error because it effectively ruled that no one was liable for rent at the space Respondents were occupying at the time the order was entered. Respondents Charles, DiBello and Rowe's entire argument to the trial court was that when the written Lease allegedly failed, Respondent NWREA, LLC moved in as the tenant under an oral month-to-month lease. Assuming, *arguendo*, that this

was correct, then Seawest's claims against Respondent NWREA, LLC should not have been dismissed.

#### **VI. ATTORNEYS' FEES ON APPEAL**

Seawest respectfully requests an award of attorneys' fees and costs on appeal under RAP 18.1. Paragraph 26.13 of the Lease provides for an award of attorneys' fees "[i]f Landlord shall retain an attorney for the purpose of collecting any rental due from Tenant or for the purpose of enforcing any other term or provision of this Lease [...]." CP 407. Further, Article 32 of the Lease provides for an award of attorneys' fees and costs to the prevailing party. CP 410.

#### **VII. CONCLUSION**

The trial court erred in granting Respondents Charles, DiBello and Rowe's Motion for Summary Judgment, in dismissing Seawest's claims against *all* Respondents, in entering final judgments in favor of Respondents Charles, DiBello and Rowe, and in denying Seawest's Motion for Reconsideration and Motion to Vacate. There were numerous questions of material fact precluding summary judgment, and Respondents were not entitled to judgment as a matter of law.

As such, Seawest respectfully requests that this Court reverse the trial court's orders and remand this case for further proceedings.

RESPECTFULLY SUBMITTED this 23<sup>rd</sup> day of January, 2013.

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COURT OF APPEALS  
THE STATE OF WASHINGTON  
DIVISION I

SEAWEST INVESTMENT  
ASSOCIATES, L.L.C., a  
Washington limited liability  
company,

Plaintiff-Appellant,

v.

GEORGE CHARLES and WENDY  
CHARLES and the marital  
community composed thereof, SAM  
DIBELLO and RENEE DIBELLO  
and the marital community  
composed thereof, JILL JENSEN  
and JEREMY AMES and the marital  
community composed thereof, and  
EMO ROWE and CAT ROWE and  
the marital community composed  
thereof, and NWREA, LLC, a  
Washington limited liability  
company,

Defendants-Respondents.

No. 69305-1

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

CERTIFICATE OF SERVICE

ORIGINAL

On the date given below I caused to be served in the manner noted  
copies of the following upon designated counsel:

1. Plaintiff / Appellant's Opening Brief; and
2. Certificate of Service.

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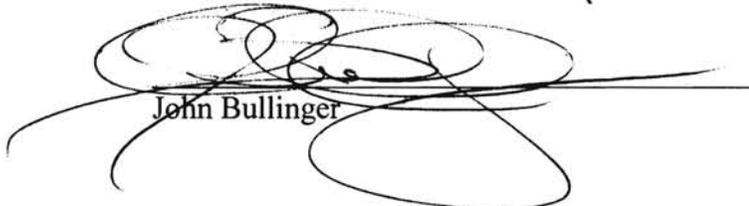
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I declare under penalty of perjury under the laws of the state of  
Washington that the foregoing is true and correct.

Executed at Seattle, Washington, this 23rd day of January, 2013.

  
John Bullinger