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No. 69798-6-1
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION 1

LINCOLN WARREN LEE II and CARLENE TUDOR
LEE,
Appellants,

v.

DOHENY HOMES, LLC, et al.,
Respondents.

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APPELLANTS' REPLY TO RESPONDENTS' BRIEF

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I. REPLY TO RESPONDENTS' BRIEF

The Lee's object to Doheny's restatement of the case to the extent that it mischaracterizes the trial court's findings of facts or attempts to characterize a fact as undisputed where the record reveals that it was. For instance, Doheny states they agreed to allow the Lees to move out of the property if they found a subtenant. This position was disputed at trial,¹ and is not included in the trial court's findings of fact.

Doheny also states that the Lees signed a lease agreement involving another property, but that lease agreement was not accepted by the landlord until after the Lees had terminated the Doheny lease.² This other property was also one that Mrs. Lee had looked into a week before the heating system failed as a potential place she could share with her children who were moving to Washington in early 2011.³ At trial, this other landlord testified that he did not consider the lease binding until the Lees moved into the property, which occurred after the Lees terminated the Doheny lease.

As for the Doheny's arguments in response to the Lees' appellate brief, these must fail for the reasons that follow.

A. The Trial Court's Ruling is Not Supported by Substantial Evidence or Washington State Law.

The trial court's finding that the Doheny's made a good faith effort to inspect and repair the property is not substantially supported by the

¹ See FOF ¶ 14,

² RP 296-299, Exh.2.

³ RP 248, RP 310-314.

record or Washington State law. Even if there is substantial evidence to find that a good faith effort was made to gain entry into the property, Mr. Doheny was not qualified to inspect or repair the defective heating system, and therefore his inspection did not constitute the “remedial action” contemplated by RCW 59.18.070. . **Error! Bookmark not defined.**

The Dohenys had an obligation of good faith in performing the duties imposed by Washington’s Landlord Tenant Act (the “Act”). RCW 59.18.020. The Lees had an obligation of good faith in performing their duties imposed by the Act. *Id.* The Lees fully performed each and every duty required of a tenant under the Act, including payment of rent. The issue on appeal is whether the Dohenys performed their duties in good faith and whether the trial court’s findings and conclusions against the Lees were reversible error. The duty of good faith imposed upon the Lees by the trial court had no connection to any duty imposed by the Act, or any act which must be performed as a condition precedent to the exercise of a tenant’s right to terminate a lease under RCW 59.18.090. There is no duty or obligation imposed upon a tenant by the Act that requires the additional duties imposed upon the Lees by the trial court.

1. A Landlord’s Personal Inspection of the Property Does Not Constitute “Remedial Action” When the Landlord Does Not Have the Experience or Expertise Necessary to Diagnose or Repair the Defect.

In order for the Dohenys conduct to be deemed a good faith effort to commence remedial action, the Dohenys had to show that they had done everything possible to have the heating system inspected and

repaired within 24 hours of receiving notice from the Lees of the need for repair. RCW 59.18.070. . Remedial action as used in the Act infers an act that is designed to remedy the situation as quickly as possible, and this act must take place within 24 hours after notice of a defective heating system is received. *Id.* A layperson with no technical expertise who lacks the ability to diagnose or repair a heating system is not sufficient to trigger the remedial action imposed upon a landlord by the Act.

When Mr. Doheny went to the property, he was not qualified to diagnose or repair the heating system. This is supported by Mr. Doheny's testimony. He admits that he was not qualified to diagnose or repair the heating system.⁴ He admits that he went to the property to confirm that the heating system was not working and to see if it was something he could fix even though he was not qualified to diagnose or repair the heating system.⁵

A proper inspection would have revealed the need to order parts, which did not occur until the qualified repair technician inspected the heating system on January 4, 2011.⁶ The Act requires a landlord to commence remedial action no later than 24 hours after receipt of written notice when the defective condition deprives the tenant of heat. RCW 59.18.070. . Secondary sources suggest that the Act requires heat to be

⁴ RP 147-149, RP 176.

⁵ RP 147, RP 186.

⁶ Exh. 20.

fully restored within 24 hours.⁷ This interpretation is supported by the legislative history.

RCW 59.18.070. was amended in 1989. It had previously read in relevant part:

For the purposes of this chapter, *a reasonable time* for the landlord to commence remedial action after receipt of such notice by the tenant shall be, except where circumstances are beyond the landlord's control;

(1) Not more than twenty-four hours, where the defective condition deprives the tenant of water or heat or is imminently hazardous to life;

(2) Not more than forty-eight hours, where the landlord fails to provide hot water or electricity;

(3) Subject to the provisions of subsections (1) and (2) of this section, not more than seven days in the case of a repair under RCW 59.18.100(3);

(4) Not more than thirty days in all other cases.

In each instance the burden shall be on the landlord to see that remedial work under this section is completed with *reasonable promptness*.

Where circumstances beyond the landlord's control, including the availability of financing, prevent him from complying with the time limitations set forth in this section, he shall endeavor to remedy the defective condition with all *reasonable speed*.

RCW 59.18.070 (1973) (emphasis added); Session Laws 1989 c 342 § 4.

The 1989 amendment modified the relevant language to read as it does to this day:

⁷ William B. Stoebuck and John W. Weaver, 17 Wash. Prac., Real Estate § 6.40 (2d ed. 2013) (“when the defect deprives the tenant of water or heat or is imminently hazardous to life, the landlord should repair it within 24 hours.”).

The landlord *shall commence remedial action* after receipt of such notice by the tenant *as soon as possible but not later than* the following time periods, except where circumstances are beyond the landlord's control:

- (1) Not more than twenty-four hours, where the defective condition deprives the tenant of hot or cold water, heat, or electricity, or is imminently hazardous to life;
- (2) Not more than seventy-two hours, where the defective condition deprives the tenant of the use of a refrigerator, range and oven, or a major plumbing fixture supplied by the landlord; and
- (3) Not more than ten days in all other cases.

In each instance the burden shall be on the landlord to see that remedial work under this section is *completed promptly*. If completion is delayed due to circumstances beyond the landlord's control, including the unavailability of financing, the landlord shall remedy the defective condition *as soon as possible*.

RCW 59.18.070 (1989)(emphasis added); Session Laws 1989 c 342 § 4.

Gender-based changes were made in 2010, but other than that the 1989 text cited above remains unchanged.

The trial court focused on a reasonableness test that was removed from the statute in 1989. The language of RCW 59.18.070 (no longer allows for just a reasonable amount of time or “reasonable speed” within which to repair a defective condition. Session Laws 1989 c 342 § 4. Instead, the statute now and during this case has a hard deadline within which a landlord must commence repairs with the only exception being a delay in the “completion” of the repairs for circumstances beyond the landlord’s control. RCW 59.18.070. The trial court held the Lees responsible for delaying repair, as discussed more fully below, but there is nothing in the record to show that the Dohenys were prevented from

having a qualified repair technician out to the property within 24 hours from their receipt of notice that the Lees were without heat or that they were unable to restore heat in other ways.

Even if RCW 59.18.070, as amended, only requires that the landlord start the repairs within 24 hours, surely this requires more than what the Dohenys did in this case. There is nothing in the record that shows that the Dohenys were unable to call multiple repair companies from the moment they received the written notice and schedule a proper inspection or repair within 24 hours. Instead, the Dohenys were unwilling to call any other company and used up the first 25 hours with only a visit to the property by Mr. Doheny that served no purpose other than to confirm what Mr. Doheny already knew from the Lees' written notice.

Even if Mr. Doheny had been qualified to inspect the heating system, the record offers substantial support that he did not attempt to inspect the property until at least 25 hours after receiving notice of the defect. Mrs. Lee and her son testified that they both remained inside the condo for a full 24 hours after the notice of defects was received by the Dohenys.⁸ They both testified that Mr. Doheny did not stop by the property during this 24 hour time period. *Id.* The evidence shows that the Dohenys did not call the Lees until 25.5 hours after receipt of the notice of repairs, and Mr. Doheny sent a text message shortly thereafter

⁸ RP 321-324, RP 372-374.

that only mentions going to the property at around the time that the Lees say he did on December 29, 2010.⁹

A reasonable interpretation of the remedial action requirement of RCW 59.18.070 would result in a conclusion that the Doheny's did not commence remedial action until the heating repair company arrived at the property to inspect the heating system on January 4, 2011, and Doheny's failure to schedule a repair technician before that date did not comply with the applicable 24-hour period of time or a reasonable attempt to remedy the defect "as soon as possible." RCW 59.18.070. . Because this date fell outside the 24 hour time period set under the Act, and did not constitute a prompt remedy, the Lees had a legal right to terminate the lease on December 30, 2010 pursuant to RCW 59.18.090.

RCW 59.18.090 allows a tenant to terminate a tenancy if "after receipt of written notice, and expiration of the applicable period of time . . . the landlord fails to remedy the defective condition within a reasonable amount of time . . ." This statute can be interpreted at least two ways. The first is that a tenant must wait for the applicable period of time, which in this case is 24-hours, and if the landlord has not remedied the defect and does not have a legitimate reason for not fixing the problem, the tenant may terminate the tenancy. The second interpretation would be that the tenant must allow the 24-hour time period to pass, and if the landlord has

⁹ RP 231-236, RP 108-112, Exhs. 4, 20-22, 48 (Ex. C).

not remedied the defect within a reasonable amount of time thereafter, then the tenant can terminate the lease.

The second interpretation would render the time periods prescribed by RCW 59.18.070 superfluous. The statute would need only to have a reasonable time period requirement which our legislation did away with in 1989. The first interpretation coincides with the 1989 amendment to RCW 59.18.070, where a landlord “shall” take action to repair the defect “no later than” the time period prescribed. And if completion of the work is delayed for reasons beyond the landlord’s control, then the landlord must remedy the defect “as soon as possible”.

Here, there was nothing to prevent the Dohenys from getting a qualified repair technician out to the property within 24 hours of receipt of the Lees’ notice of defects. They simply did not try. When the Lees mailed their notice of termination 48 hours after Dohenys’ received notice of the lack of heat, the Dohenys had not sent out a qualified repair technician, had not informed the Lees of when the repair would be done, and instead had set up the repair work for a week later despite having the ability to pay for 24-hour emergency service.

2. The Commencement of Remedial Action and Completion of Repairs Was Not Delayed Due to Circumstances Beyond Doheny’s Control.

As mentioned above, the Doheny’s did not commence remedial action until the heating repair company arrived at the property to inspect the heating system on January 4, 2011. But, even if we accept that Mr.

Doheny's visit to the property to make sure the heating system had failed was sufficient to commence repairs, "the burden shall be on the landlord to see that remedial work under this section is completed promptly . . ." And if completion of the repair is delayed due to circumstances beyond the landlord's control "the landlord shall remedy the defective condition as soon as possible." RCW 59.18.070. There is substantial evidence to support that the Dohenys did not make a good faith effort to remedy the lack of heat promptly or as soon as possible.

It is undisputed that the Dohenys received written notice from the Lees that they were without heat on the afternoon of December 28, 2010. It is undisputed that Mr. Doheny entered the premises on the night of December 29, 2010 and confirmed to his satisfaction that the heating system had failed. The record shows that the Dohenys wanted to personally confirm that the heater was not working before spending the money on a professional repair company.¹⁰ The record shows that Mr. Doheny did not tell Mrs. Doheny to call a repair company until after his visit to the property on the night of December 29, 2010.¹¹ The record shows that Mrs. Doheny left a message with one repair company and then waited a day or two to call them back.¹² When she did finally call back, she did not request 24-hour emergency service. *Id.* She did not call any another service company to see if they could come out sooner. *Id.* Instead, she scheduled an appointment with her preferred provider for

¹⁰ RP 113-115.

¹¹ RP 160.

¹² RP 114-115.

January 4, 2011 – a full seven days after receiving written notice that her tenant was living without a heating system or even a fireplace they could use.¹³ The Lees did not find out about the scheduled inspection until Mr. Lee sent a text message to Mr. Doheny on December 30, 2010.¹⁴ The Lees’ justifiably and legally mailed their notice of termination to the Dohenys that same day¹⁵.

If the trial court is correct, and Mr. Doheny was delayed in entering the property through no fault of his own, and his unqualified inspection was enough to commence remedial action, this in and of itself is not sufficient to support the conclusion that the Dohenys were delayed from remedying the situation “as soon as possible” by circumstances beyond their control. RCW 59.18.070. There is nothing in the record to support the position that the Dohenys were unable to get the heating system inspected or repaired by a qualified repair technician within 24 hours or even 48 hours of receiving the Lees notice. What the record does show is that the Dohenys *did not even try* to schedule a qualified inspection sooner. They did not call any other repair company to see if they could come out sooner. They did not ask for emergency services from the one company they did call.

¹³ RP 161, CP Ex. 20, 38.

¹⁴ Exh. 20.

¹⁵ The notice was mailed to the business address of Doheny Homes listed on the Lees’ copy of the lease and registered with the WA Department of Revenue, which was also the same address Mr. Lee had delivered rent payments and where Trina Doheny works at her other company Extend Networks. See CP 1 (Ex. A), CP 15, Exhs. 10, 14. The termination letter was sent back on January 1, 2011 marked “unclaimed” even though Mrs. Doheny had accepted the certified notice of defects at the same address just days before. See CP 15 (Exhs. 9-10).

Rather than recognize such obvious disregard for the well-being of the Lees, the trial court instead blamed the Lees for delaying the repair by not contacting the Dohenys on the day the heat stopped working and for not telling the Dohenys in the written notice that being without heat required their immediate attention. The Lees were not required to call the Dohenys on the day they discovered they had no heat because the Act authorized them to instead send written notice. Mrs. Dohenys, who had a prior relationship with Mr. Lee, had also initiated two legal proceedings against Mr. Lee within the prior six months.¹⁶ This made written notice an appropriate and legal means of informing the Dohenys that the heating system had failed. Absent a waiver, as discussed below, a landlord is required to perform certain duties under the Act, and the tenant has no obligation to educate or inform a landlord of what the landlord's obligations are under the Act.

3. The Obligation of Good Faith Imposed by RCW 59.18.020 Was Violated by the Dohenys and Not the Lees.

The Landlord Tenant Act sets out specific timelines for repairing defects. RCW 59.18.070. When the defect involves the lack of heat, the repair work "shall commence" within 24 hours and must be completed "promptly". *Id.* Mr. Doheny went to the property by himself without a qualified repair technician. He admitted he was not qualified to inspect or repair the heating system.¹⁷ Despite being unqualified, he claimed he looked at the heating system. Mr. Lee, Mrs. Lee, and Mrs. Lee's son all

¹⁶ RP 196-199, RP 249.

¹⁷ RP 188-189, RP 238.

testified that Mr. Doheny did not even look at the heating system.¹⁸ Mrs. Doheny admits that she called only one service repair company, never made a request for 24-hour emergency service even though she could afford to pay for it, and scheduled the inspection on a date that would have left the Lees without heat in subfreezing temperatures for eight days.¹⁹ A good faith standard for purposes of RCW 59.18.070 surely required more than this, especially since the outside temperature was below freezing.

On the other hand, the Lees did not prevent Mr. Doheny from inspecting the heating system. The evidence shows no calls or text messages were placed to the Lees until Mr. Doheny's call on the afternoon of December 29, 2010.²⁰ The evidence shows that Mrs. Lee and her teenage son were home from the time the Dohenys received the notice of defects until the time Mr. Doheny first arrived 25 hours later.²¹ The evidence shows that Mr. Doheny stopped by the property at around 1:00pm on December 29, 2010.²² It was not unreasonable for Mrs. Lee's son, who was a minor at the time, to be uncomfortable with answering the door when Mr. Doheny appeared at the property by himself and Mrs. Lee had left to run a brief errand. When Mr. Doheny later contacted Mr. Lee to arrange for a specific time to gain entry, Mr. Lee did not deny him access. When Mr. Doheny showed up on the evening of December 29,

¹⁸ RP 236-239, RP 328, RP 374-375.

¹⁹ RP 114, Exhs. 15, 38. The Dohenys argument that it did not matter how long it took to repair the heat after the Lees moved out ignores the statutory requirement before they moved out to restore heat within 24 hours of receiving notice or as soon as possible thereafter.

²⁰ RP 231-235, Exhs. 21-22.

²¹ RP 321-324, 372-373

²² *Id.*, Ex. 20.

2010, again without a qualified technician, the Lee family did not deny him access.

The trial court ruled that the Lees' written notice of the defect was not sufficient despite the fact that the Landlord Tenant Act allowed it. The court ruled that because Mr. Lee had called the Dohenys in the past about a leaky pipe this had set up a course of conduct that disallowed written notice under the Act.²³ The trial court also found that the notice "did not indicate the lack of heat in the property was a threat to the health or safety of the occupants," that the notice "did not request additional heating devices or other accommodations", and the notice "did not indicate the heating issue was an emergency or request that the heating issue be fixed on an emergency basis."²⁴

There is no duty under the Act that requires a tenant to call the landlord when the property has no heat. There is no duty under the Act that a tenant forgo the right to provide the landlord with written notice of a defect or even when that written notice must be provided. There is no duty under the Act that requires a tenant to "indicate the lack of heat in the property was a threat to the health or safety of the occupants."²⁵ There is no duty under the Act that requires a tenant to "request additional heating devices or any other accommodations."²⁶ There is no duty under the Act that requires a tenant who informs their landlord that being without heat is

²³ FOF ¶ 21-23, RP 269.

²⁴ FOF ¶ 24-26.

²⁵ FOF ¶ 24.

²⁶ FOF ¶ 25.

an emergency that needs to be fixed immediately. It is the landlord who has a duty to know what is required of him under the law, and to know that a failed heating system is an emergency because the Act says it is.

The Lees written notice of defects, despite being done in compliance with the lease and the Act, was deemed by the trial court as “likely to result in the Dohenys not being aware of the need for repairs, or so [*sic*] that repairs could be undertaken in for several days.”²⁷ These finding led the court to conclude in part that the Lees had acted in bad faith with respect to their method of notice. There is no case law to support such a severe interpretation of the Act that places such a heavy burden on a tenant and relieves a landlord of their duties under the Act. When the Lees mailed their notice of termination to the Dohenys on December 30, 2010, two days had passed since the Dohenys had received notice of that the Lees had no heat, and the Lees still had no idea of when and if the heat would be restored.²⁸ The trial court placed the burden of repair on the Lees even though the Act unambiguously provides that “the burden shall be on the landlord to see that remedial work under this section is completed promptly.” *Id.*

In addition to the findings and conclusions regarding the Lees’ written notice of defects, the trial court also concluded that the Lees had not engaged in good faith in terminating the lease. It appears that this

²⁷ FOF ¶ 23.

²⁸ Exh 20. The Dohenys did not tell the Lees that they had a repair company scheduled to inspect the furnace until Mr. Lee sent a text message to Mr. Doheny on December 30, 2010. The date of the inspection was January 4, 2011 or seven days after the Doheny’s received notice that the furnace and gas fireplace were not working.

conclusion was based in part on the method of notice regarding the defects, but also because the Lees had signed a lease agreement with another landlord before they terminated their lease with the Dohenys. The problem with the trial court's decision in this regard is that there is no case law or provision in the Act that prevents a tenant from leasing two properties at the same time or having a backup plan in the event the landlord fails to timely repair the defect. And, in this case, the parties had a pre-existing litigious relationship,²⁹ Mrs. Lee had been looking at other properties for herself and her children before the heat went out, and the other lease agreement was not even accepted by the landlord until after the Lees terminated the Doheny lease.³⁰

On December 30, 2010, the Lees were not legally obligation to move into the other property. They could have revoked their offer at any time up until they either took possession or the landlord executed the lease.³¹ Mr. Lee had a legal right under the Act to terminate his lease with the Dohenys and vacate the property the moment the Dohenys failed to commence remedial action within the statutory 24 hour time limit. RCW 59.18.090. Here, the Dohenys did not begin any remedial work until

²⁹ RP 196-199.

³⁰ RP 197-198, Exh. 2. The new landlord did not sign the lease agreement until after the Lees vacated the Dohenys property and testified that he did not consider it binding until he did.

³¹ An offer "may be revoked by the offeror at any time prior to the creation of a contract by acceptance." 1 Lord, Williston on *Contracts* § 5.8 at 666 (4th ed.1990); *Brown Bros. Lumber Co. v. Preston Mill Co.*, 83 Wash. 648, 655, 145 P. 964 (1915). An offeree's power of acceptance is terminated "when the offeree receives from the offeror a manifestation of an intention not to enter into the proposed contract." Restatement (Second) of *Contracts* § 42 (1979). *Cent. Puget Sound Reg'l Transit Auth. v. Heirs & Devises of Eastey*, 135 Wn. App. 446, 454, 144 P.3d 322, 325 (Div. 1 2006).

January 4, 2011, a full week after receipt of the Lees' written notice of needed repair.

Contrary to the trial court's ruling, a tenant is not obligated to inform a landlord of the landlord's responsibilities and duties imposed upon them by law. Other than what might be covered in a written lease, a tenant has a duty to do the following: (1) pay his rent; (2) keep the leased premises as clean and sanitary as their condition permits; (3) properly dispose of trash and garbage and pay for fumigation and extermination of infestation the tenant causes; (4) properly use fixtures and appliances the landlord supplies; (5) not personally or through family members or invitees intentionally or negligently damage the premises, facilities, or equipment; (6) not permit "a nuisance or common waste"; (7) not engage in drug-related activity; and (8) at the termination of the tenancy, restore the premises to the condition they were in at the beginning, except for reasonable wear and tear and conditions the landlord failed to repair in breach of his duties under the Act. RCW 59.18.130.

The Act allows a landlord to adopt, and to change from time to time, "reasonable obligations or restrictions ... concerning the use, occupation, and maintenance of his dwelling unit" RCW 59.18.140. However, it forbids the parties to waive many of the protections the statute gives tenants. RCW 59.18.230. As Professors William B. Stoebuck and John W. Weaver explain:

“... [the parties] are permitted under limited circumstances to vary their repair duties, meaning mainly the duties

contained in RCWA 59.18.060 (landlord's duties) and RCWA 59.18.130 (tenant's duties). The waiver may not appear in a standard-form lease; it must be approved by the county prosecutor, by the consumer protection division of the attorney general's office, or by an attorney for the tenant; there must be 'no substantial inequality in the bargaining position of the two parties'; and the waiver must not violate the 'public policy' in favor of 'safe and sanitary housing.'"

17 Wash. Prac., Real Estate § 6.40 (2d ed. 2013) (citing RCW 59.18.230 and .360). No such waiver is in the parties' lease agreement.³²

The Lees did not act in bad faith in the performance of their duties under the Act. Making arrangements to have another place to stay is not a violation of the Act nor was it a violation of the parties' lease agreement. A tenant has no duty to educate or inform a landlord of what the law expects from them. The trial court's ruling regarding bad faith on the part of the Lees, and its judicial waiver of the duties imposed upon the Dohenys, was a misapplication of the law and should be overturned.

B. The Lees Have Not Waived the Right to Challenge the Judgment.

The Lees did not waive their right to appeal the trial court's findings of fact or conclusions of law. An appeal is allowed from a final judgment. RAP 2.2(a)(1). A judgment is not appealable until it is formally entered in writing. RAP 5.2(c), RAP 5.2(a). The Rules of Appellate Procedure contain elaborate procedures for delaying the enforcement of a judgment while the appeal is pending. RAP 8.1. The

³² See CP 1 (Ex. A) and Exh. 14 (tenant's copy), Exh. 1 (landlord copy).

entry of judgment is also required to start the clock running for an appeal. RAP 5.2 (notice of appeal must be filed within 30 days after entry of judgment). And, a notice of appeal filed after the announcement of a decision, but before entry of the judgment, will be treated as filed on the day following the entry of the decision. RAP 5.2(g).

A waiver is the voluntary relinquishment of a known right. *Cornerstone Equip. Leasing, Inc. v. MacLeod*, 159 Wn. App. 899, 909, 247 P.3d 790, 796 (Div. 1 2011). A waiver can either be expressed or implied. *Verbeek Properties, LLC v. GreenCo Envtl., Inc.*, 159 Wn. App. 82, 87, 246 P.3d 205, 208 (Div. 1 2010). An express waiver is established by express declaration of the party. *Reynolds Metals Co. v. Elec. Smith Const. & Equip. Co.*, 4 Wn. App. 695, 700, 483 P.2d 880, 883 (Div. 1 1971). An implied waiver can be established by unequivocal acts or conduct that evidences an intention to waive. *Id.*

The Judgment entered in this case does not expressly waive the Lee's right to appeal the Judgment entered against them. The Rules of Appellate Procedure required entry of the Judgment in order for the Notice of Appeal to be treated as filed. Thus, Doheny's argument that the Lees waived their right to challenge entry of the Judgment is without merit.

C. The Award of Damages to the Dohenys was Improper.

The trial court's award to the Doheny's should be overturned because it was given despite the undisputed finding that the Doheny's had failed to properly mitigate their damages. The Doheny's claim that the Lee's

failed to properly object to or appeal the Doheny damages is not supported by the record or court rules.

1. The Lees Objected to Doheny's Claim for Damages in the Pleadings, at Trial, and on Appeal.

The Lees objected to Doheny's claim for damages in their Answer, Affirmative Defenses, and Counterclaims filed with the trial court. They included their objection to Doheny's damages claim in their trial brief. The trial itself dealt with the facts and circumstances surrounding the mitigation of damages issue, and the trial court found that the Dohenys did not make a reasonable effort to mitigate their damages.³³ The Lee's appeal is likewise an objection to the award of damages given to the Doheny's by the trial court.

The Lees were not required to object to the proposed findings of fact and conclusions of law. Findings of fact and conclusions of law must reflect the findings and conclusions provided by the trial court, which in this case were recorded as part of the record in open court. A party does not get to re-write the findings and conclusions as presented by the court.

The did however object to the presentation of the Doheny's proposed findings of fact and conclusion of law because Doheny's legal counsel had failed to timely serve the Lees with the proposal prior to the hearing date requested for entry. The objection was also based on the proposal containing an e-signature from undersigned counsel that had been entered on the proposal without permission or consent. Despite

³³ FOF ¶ 25.

undersigned counsel's objection, the e-signature was not removed by the trial court prior to entry of the Findings of Fact and Conclusions of Law.

Ultimately, it is the trial court's decision as to whether findings of fact and conclusions of law as presented by the prevailing party conform to the court's decision. Entry of court-approved findings of fact and conclusions of law does not create a waiver of a right to appeal the trial court's findings or conclusions simply because a party does not object to the other parties' proposed findings and conclusions. The objection comes in the form of an appeal.

Finally, as discussed above, the agreed entry of the trial court judgment was needed to perfect the Lees' Notice of Appeal that had previously been filed with the court. The Lee's did not waive their right to appeal any portion of the trial court's findings of fact or conclusions of law simply because a judgment was entered in accordance with the trial court's decision and court rules.

3. The Trial Court Erred by Awarding Damages to the Dohenys After Finding They Had Failed to Mitigate Their Damages, and By Not Applying an Off-set for the Deposit

The Dohenys' provide no legal support to refute the Lees position on appeal. The undisputed fact remains that the trial court found that the Dohenys failed to properly mitigate their damages. The case law cited in the Lee's appellate brief supports overturning the trial court's decision that the Doheny's are entitled to damages despite their failure to mitigate these

same damages, and for failing to take into account the Lee's pre-paid deposit of \$1,900.

D. The Evidence Supports that the Doheny's Statement of Deposit Was Untimely Despite the Trial Court's Finding of Fact.

Under RCW 59.18.280, the fourteen day deadline to mail a statement of deposit begins when the lease is terminated and the premises vacated. Under RCW 59.18.090, the lease is terminated "upon written notice". The notice was mailed to Doheny Homes on December 30, 2010. The notice, which requested a walkthrough of the property on January 1, 2011, was delivered to the landlord Doheny Homes LLC via certified mail on December 31, 2010, but Doheny Homes refused to accept the letter and it was sent back on January 1, 2011 "unclaimed".³⁴ Had Mrs. Doheny not refused to accept delivery of the certified letter, she would have known that the Lees had terminated the lease and were vacating the property no later than January 1, 2011.³⁵ Dohenys should not be allowed to push out the date of termination based on a bad faith rejection of the notice which had been delivered to the Dohenys in the same manner as the notice of repairs and payment of the rent,³⁶ and the

³⁴ See Exh. 15 (Exs. 8-10)

³⁵ See Exh. 15 (Ex. 8)

³⁶ See *e.g.*, Exh. 3, Ex. 15, RP 202-209 (Mr. Lee refers to Mrs. Doheny's business Extend Network which she runs out of the same office as Doheny Homes LLC, but the record shows the notice and rent payments are made out to Doheny Homes' which shares the same address).

same address that the Dohenys used when they mailed the Lees a rental invoice for January 2011.³⁷

Mr. Lee should be awarded twice the amount of his deposit based on Dohenys' bad faith refusal to accept the letter from Mr. Lee, which amounts to an intentional refusal to provide a statement of deposit in a timely manner. If a landlord intentionally rejects a written notice from a tenant, especially when it conforms to prior course of conduct, they should not gain any benefit from doing so.

II. CONCLUSION

Based on the record and arguments presented, Appellants respectfully request this Court reverse the trial court's decision and Judgment based thereon, and award Appellants damages, costs and attorneys' fees pursuant to the parties' contract, RCW 4.84.330, RCW 59.18.280, RCW 4.84.010, and RAP 18.1.

DATED this 20th day of March, 2014.

Respectfully submitted,

SKYLINE LAW GROUP PLLC

By: 

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³⁷ See Exh. 31.