

FILED
COURT OF APPEALS
DIVISION ONE
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No. 70038-3-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION ONE

MICHAEL S. KENNARD and BETTY S. KENNARD,
husband and wife,
Appellant,

v.

CAPTAIN JACK JR.'S FAMILY ENTERTAINMENT CENTER INC.,
STACY STANG and MICHAEL STANG, husband and wife,
Respondents.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHATCOM COUNTY
THE HONORABLE DEBORRA GARRETT

BRIEF OF RESPONDENTS STANG, *ET AL.*

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I. INTRODUCTION

This case concerns an allegation of unlawful detainer of a commercial lease between the landlord, Appellants Michael S. and Betty Kennard (“Kennard”) and the tenants, Respondents Captain Jack’s Family Entertainment Center, Inc. and Stacy and Michael Stang (“Stang”).

II. RESTATEMENT OF THE CASE¹

Beginning in early 2012, Kennard and Stang began negotiating a lease for property that Kennard owned at 4176 Guide Meridian, Bellingham, Washington (“Property”).² Stang was looking for a location that would be suitable to open up a restaurant and child play area.³ The Property was vacant but was previously used for more commercial/warehouse type uses rather than a restaurant.⁴ During their negotiations, Stang communicated to Kennard their intended use and both parties agreed that significant modifications to the building would be necessary.⁵ These modifications included installing a kitchen, a heating, ventilation, and air conditioning (“HVAC”) unit, as well as obtaining an

¹ For unknown reasons, two separately paginated transcripts have been provided as the Verbatim Report of Proceedings. As a result, the VRP consists of two different pages which could be referred to as “RP at 1.” The following references are therefore used:

- “RP Trial at ___” references the two days of consecutively paginated trial transcript;

- “RP [date] at ___” references the hearing held on the date referenced in the citation.

² RP Trial at 80, lines 3-21.

³ RP Trial at 78, lines 15-19.

⁴ RP Trial at 166, lines 6-13.

⁵ RP Trial at 27, lines 3-17; RP Trial at 160, lines 9-13; and RP Trial at 33, lines 12-14.

occupancy permit from the City of Bellingham.⁶ Knowing that these modifications would be financially burdensome, Kennard agreed to waive the rent deposit as well as a security deposit in exchange for Stang installing the HVAC unit.⁷ A Letter of Intent was drafted and signed and then, through their respective real estate agents, the parties drafted and signed the lease agreement on or about February 17, 2012 (“Lease”).⁸ Upon signing the Lease, Kennard agreed to allow Stang early possession in order to begin the significant improvements required to get the business open.⁹ Contained within the Lease agreement was Exhibit “B” which listed improvements to be completed by the landlord (Kennard) as well as the tenant (Stang).¹⁰ Exhibit “B” required Kennard to complete the following:

1. Landlord to remove all debris and rubbish from the premises and present it to tenant in broom sweep condition.
2. Landlord will furnish and install a fire sprinkler system that meets requirements as set by local codes.
3. Landlord will repair rain gutters that are leaking.
4. Landlord to repair damaged siding and power wash the building in preparation of painting it.
5. Landlord to repair all entry doors to proper working condition, including repair of overhead roll-up doors.
6. Landlord to repair window glass that is broken, cracked, damaged.

⁶ *Id.* See also CP 35 and RP Trial at 83, lines 3-6; RP Trial at 159, lines 10-15.

⁷ CP 171, Defendants’ Exhibit 5.

⁸ CP 16-47; CP 171, Plaintiff’s Exhibit 1 and Defendants’ Exhibit 5; CP 228, Findings of Fact 1 *unchallenged*.

⁹ RP Trial at 29, lines 1-14; RP Trial at 163, lines 1-3; CP 229, Findings of Fact 2 and 3.

¹⁰ CP 35.

7. Landlord to bring building to code will install an access ramp to the lower portion of the building.¹¹

Shortly after Stang was allowed possession, they began working on the improvements that were their responsibility as per Exhibit "B".¹² This included installation of the HVAC system, installing a kitchen, upgrading plumbing, electrical, and flooring where necessary.¹³ Stang originally planned to open their business in May 2012.¹⁴ Unfortunately, as the months ticked by, it became clear to Stang that Kennard had no intention of completing any of the listed items in Exhibit "B" in time for the planned opening.¹⁵ As a result, Stang began inquiring as to whether and when Kennard intended on completing his list of items and offered to complete them instead.¹⁶ During these conversations, Kennard agreed Stang could complete his improvements and he would pay them back in some form later on, but at a minimum, rent would not be due.¹⁷ Kennard testified:

Q: You said to Mr. and/or Mrs. Stang that you agree that you owed some money but that the previous month's rent should more than cover it?

¹¹ Id.

¹² RP Trial at 87, lines 8-23.

¹³ CP 35; RP Trial at 89, lines 3-25.

¹⁴ RP Trial at 88, lines 23-25.

¹⁵ RP Trial at 95, lines 5-24; CP 229, Findings of Fact 4, 5.

¹⁶ Id.; CP 232, Conclusion of Law 3.

¹⁷ RP Trial at 93, lines 24-25; RP Trial at 122, lines 1-3; RP Trial at 125, lines 2-5; RP Trial at 164, lines 6-8; CP 229, Findings of Fact 4, 5; CP 232, Conclusions of Law 3, 5, 6.

A: That's correct.¹⁸

Stang immediately began completing the list of improvements that Kennard was responsible for in the hopes of opening on time.¹⁹ However, both Kennard and Stang acknowledged that without a sprinkler system installed on the property, it would be impossible to obtain an occupancy permit.²⁰ Without an occupancy permit, Stang could not open their business.²¹ Kennard agreed that the sprinkler system was his responsibility and acknowledged it was important to Stang to get it installed.²² Kennard's recognition of the importance of the occupancy permit also came in the form of an email he sent to Stang stating: "you, the tenant needing it to meet your needs including everything from receiving an occupancy permit to not having something hideous or obstructive interfering with your décor."²³ Despite multiple requests to Kennard to install the sprinkler system, it was not properly installed until August 3, 2012.²⁴ Stang was granted an occupancy permit the same day.²⁵ Stang

¹⁸ RP Trial at 61, lines 10-13; CP 229, Findings of Fact 4, 5, 6; CP 232, Conclusions of Law 3, 5, 6.

¹⁹ RP Trial at 92, lines 18-24; CP 229, Findings of Fact 4, 5, 6.

²⁰ RP Trial at 159, lines 7-15; RP Trial at 159, lines 10-15.

²¹ RP Trial at 83, lines 3-6.

²² RP Trial at 27, lines 1-25; RP Trial at 28, lines 1-6.

²³ RP Trial at 50, lines 14-22; CP 21, Exhibit 6.

²⁴ RP Trial at 106, lines 5-6.

²⁵ Id.

opened their business the following day which was three months later than initially planned.²⁶

Shortly after opening, Kennard began demanding rent.²⁷ Up until that time, Kennard had not requested any rental payment and, based upon the conversations Stang had with Kennard, Stang believed the amount of money paid to complete the landlord improvements on the building more than covered the past and future rental payments and that the parties had agreed to that.²⁸ Stacy Stang testified:

He [Kennard] assured us we wouldn't have to pay rent until he got [his improvements] done, that we wouldn't worry about it and so we didn't feel there was anything needed in writing because we had a verbal agreement...²⁹

In an attempt to resolve the conflict between what was agreed to and Kennard's demand for rent, Stacey Stang met with Kennard on August 27, 2012.³⁰ During this meeting, Stacey Stang presented Kennard with several invoices memorializing the amount of money Stang had paid to date for the improvements Kennard stated he would be responsible

²⁶ RP Trial at 84, lines 21-22.

²⁷ RP Trial at 34, lines 19-25; CP 229-30, Findings of Fact 7, 8, 9, 17; CP 232, Conclusions of Law 5, 6.

²⁸ RP Trial at 35, lines 2-4; CP 229-31, Findings of Fact 7, 8, 9, 17; CP 232, Conclusions of Law 3, 6.

²⁹ RP Trial at 147, lines 21- at 147, line 1. CP 229-31, Findings of Fact 8, 9, 17; CP 232, Conclusions of Law 3, 6.

³⁰ RP Trial at 59, lines 20-24. CP 229-31, Findings of Fact 7, 8, 9, 10, 11, 17.

for.³¹ At the meeting, Kennard refused to pay any of the invoices.³² At the end of the meeting, the parties agreed to meet at a later date to discuss their respective financial obligations.³³ That follow-up meeting did not occur and instead Kennard instituted an unlawful detainer action against Stang and requested that the Court issue a writ of restitution.³⁴ Stang answered the unlawful detainer complaint with affirmative defenses and counterclaims including an award of attorney fees pursuant to the terms of the Lease.³⁵

A. Procedural History. Kennard's motion for a writ of restitution was denied and the case was set for trial before the Honorable Deborra Garrett.³⁶ Testimony was taken and at the end of the trial, the Judge ruled in favor of Stang, finding that Kennard did not meet their burden of proof that a writ of restitution should be ordered.³⁷ The Judge found that there were oral modifications to the lease that materially affected the financial obligation of the parties regarding rent.³⁸ The Court did not make a specific determination regarding how much rent was owed

³¹ RP Trial at 59, lines 25- at 60, lines 2. CP 229-31, Finding of Fact 8, 9, 10, 11, 17; CP 232, Conclusions of Law 3, 5, 6.

³² RP Trial at 104, line 24 – RP Trial at 105, line 1; CP 232, Conclusions of Law 3, 5, 6.

³³ RP Trial at 124, lines 3-23; CP 232, Conclusions of Law 3, 5, 6.

³⁴ RP Trial at 124, lines 19-23; CP 8-54.

³⁵ CP 68-80.

³⁶ CP 112-113.

³⁷ CP 228-38; CP 230-31, Findings of Fact 10, 11; CP 232, Conclusions of Law 4, 5, 6.

³⁸ RP 2/8/13 at 17, lines 5-7; CP 229-31, Findings of Fact 4, 5, 8, 9, 10, 11; CP 232, Conclusions of Law 3, 5, 6.

because the Court found there were not sufficient facts to make that determination.³⁹

In addition, the Court found that Stang was the prevailing party and awarded attorney fees in the amount of \$16,300 but denied an award of costs.⁴⁰ This appeal followed and Kennard is arguing several assignments of error regarding the Court's findings of fact and conclusions of law.

III. STANDARD OF REVIEW

A. Findings of Fact. Unchallenged findings of fact are verities on appeal.⁴¹ A finding of fact erroneously described as a conclusion of law is reviewed as a finding.⁴² Individual findings of fact must be read in the context of other findings of fact and conclusions of law.⁴³ Findings of fact which are properly challenged are reviewed for substantial evidence in the record.⁴⁴

B. Conclusions of Law. An unchallenged conclusion of law becomes the law of the case.⁴⁵ Challenged conclusions of law are

³⁹ RP 2/18/13 at 20, lines 9-15; CP 229-31, Findings of Fact 6, 10, 11; CP 232, Conclusions of Law 5, 6.

⁴⁰ RP 2/18/13 at 37, lines 1-15; CP 232, Conclusions of Law 7; CP 234-37, Findings of Fact (attorney fees) 1-7; CP 237-38, Conclusions of Law (attorney fees) 1-4.

⁴¹ Robel v. Roundup Corp., 148 Wn.2d 35, 42-43, 59 P.3d 611 (2002).

⁴² Willener v. Sweeting, 107 Wn.2d 388, 393-4, 730 P.2d 45 (1986).

⁴³ In re Hews, 108 Wn.2d 579, 595, 741 P.2d 983 (1987).

⁴⁴ Burrill v. Burrill, 113 Wn. App. 863, 868, 56 P.3d 993 (2002), *rev. den.*, 149 Wn.2d 1007 (2003).

⁴⁵ King Aircraft v. Lane, 68 Wn. App. 706, 716, 846 P.2d 550 (1993).

reviewed *de novo*.⁴⁶ However, when an appellant challenges conclusions of law not based on the law itself, but in alleging insufficient evidence, *de novo* review is not appropriate. Instead, appellate review is limited to determining whether the findings are supported by substantial evidence and, if so, whether those findings support the conclusions.⁴⁷

C. Challenged Facts Supported by Substantial Evidence.

Appellants assign error to nine of the trial court's findings of fact regarding the unlawful detainer proceeding but they do not substantively argue all the findings in their brief.⁴⁸ Specifically, the Appellants failed to argue how the trial court erred in making findings of fact 5, 7, 10, and 11. Accordingly, they are verities on appeal.⁴⁹ In addition, the Appellants assigned error to six conclusions of law but failed to substantively argue conclusions of law 3, 7, and 8.⁵⁰

Regarding the award of attorney fees, Appellant assigns error to finding of fact 1 and conclusions of law 1 through 4 but again, does not substantively discuss how the trial court erred in making these findings

⁴⁶ Robel, *supra*, at 43.

⁴⁷ American Nursery Prods., Inc. v. Indian Wells Orchards, 115 Wn.2d 217, 797 P.2d 477 (1990), *citing*, Willener v. Sweeting, *supra*.

⁴⁸ See Brief of App. at 4 to 5.

⁴⁹ Keever & Associates, Inc. v. Randall, 129 Wn. App. 733, 741, 119 P.3d 926 (2005), *rev. denied*, 157 Wn.2d 1009 (2006) (regardless of an assignment of error, if the issue is not argued or briefed by citation to authority or to the record, the argument is deemed waived).

⁵⁰ See Brief of App. at 4 to 5.

and conclusions. Therefore, for the reasons cited above, they are verities on appeal.

To the extent Appellants sufficiently raised challenges to any of the Findings of Fact, they are supported by substantial evidence. These facts and the supporting citations to the record are outlined below in the Argument.

IV. ARGUMENT

A. Kennard failed to meet their burden to establish facts sufficient for the Court to find Stang in unlawful detainer.

In an unlawful detainer action, the court sits in limited capacity to summarily decide the issues authorized by statute and not as a court of general jurisdiction.⁵¹ Pursuant to the unlawful detainer statute, a landlord may seek a writ of restitution, returning possession of the premises to the landlord, as well as a judgment.⁵² The trial court, based upon its limited statutory authority, is bound to those two issues: a writ of restitution and the amount of rent due (if any). The burden is on the plaintiff/landlord to prove that the defendant/tenant is “guilty” of unlawful detainer.⁵³ The plaintiff must prove their right to possession of the premises by a

⁵¹ Angelo Property Co., LP v. Hafiz, 167 Wn.App. 789, 808-09, 274 P.3d 1075 (2012).

⁵² RCW 59.12.030 and RCW 59.12.170.

⁵³ RCW 59.12.030.

preponderance of the evidence.⁵⁴ In this case, Kennard requested a writ of restitution and judgment alleging Stang committed unlawful detainer by not paying rent pursuant to the terms of the Lease.⁵⁵ Kennard was unable to meet their burden of proof because Stang was successful in proving oral modifications to the Lease and Kennard breached the implied warranty of habitability of the premises.

1. The Court found oral modifications to the Lease changed the financial obligations of the parties. Although there was a written Lease signed by the parties, the terms of the Lease were modified orally afterward. Oral modifications to a written contract have long been held an acceptable method of altering an existing written contract.⁵⁶ Despite “no oral modification” clauses in contracts, the parties may still alter their agreement by oral modification.⁵⁷ These oral modifications must meet the minimum requirements of a valid contract: 1) subject matter; 2) parties involved; 3) promise; 4) terms and conditions; and 5) consideration.⁵⁸ For a valid contract, there must be an “objective manifestation of mutual assent of both parties.”⁵⁹ Mutual assent “generally

⁵⁴ Hous. Auth. Of City of Pasco & Franklin County v. Pleaseant, 126 Wn.App. 382, 392, 109 P.3d 422 (2005).

⁵⁵ CP 9-11.

⁵⁶ Haley v. Brady, 17 Wn.2d 775, 137 P.2d 505 (1943).

⁵⁷ Pacific Northwest Group A v. Pizza Blends, Inc., 90 Wn.App. 273, 277-78, 951 P.2d 826 (1998).

⁵⁸ Trotzer v. Vig, 149 Wn.App. 594, 605, 203 P.3d 1056 (2009).

⁵⁹ P.E. Systems, LLC v. CPI Corp., 176 Wn.2d 198, 207, 289 P.3d 638 (2012).

requires a valid offer and acceptance.”⁶⁰

Here, there is a wealth of evidence supporting the trial court’s finding that there was an oral modification to the Lease. Both Stacy and Michael Stang testified they had multiple conversations with Kennard where he agreed rent would not be due, at a minimum, until the sprinkler system was installed. He also promised he would pay them back for the improvements they were making that were his responsibility. These admissions by Kennard demonstrate there were oral modifications to the written Lease.

Kennard conceded during his testimony at trial that he:

- would install the sprinkler system, he knew it was important to the tenants and he intended on installing it “as soon as possible;”⁶¹
- admitted that he was advised of “problems” with the building;⁶²
- did not ask for rent until August;⁶³
- felt that the building was perfect for the Stangs’ use;⁶⁴
- knew that an occupancy permit was necessary for Stang to open

⁶⁰ Dragt v. Dragt.DeTray, LLC, 139 Wn.App. 560, 571, 161 P.3d 473 (2007).

⁶¹ RP Trial at 27, 28 lines 13-6; RP Trial at 49, lines 7-10; CP 229-30, Findings of Fact 4, 5, 8, 9; CP 232, Conclusion of Law 3.

⁶² RP Trial 33, lines 12-14; CP 229-31, Findings of Fact 4, 5, 9, 17; CP 232, Conclusions of Law 3, 4, 5.

⁶³ RP Trial at 34 line 19- 35, line 4; CP 229-31, Findings of Fact 7, 8, 9, 10, 11, 17; CP 232, Conclusions of Law 3, 4, 5, 6.

⁶⁴ RP Trial at 47 line 23, 48, line 1.

for business as evidenced by the email he sent to Stang;⁶⁵

- had Stang complete items numbered 4, 6, and 7 as stated in Exhibit “B” of the Lease that were listed as his responsibility;⁶⁶
- owes Stang, at a minimum, \$2,300 for the improvements;⁶⁷
- owed Stang money but that “the previous month’s rent should more than cover it”;⁶⁸
- agreed to pay for the work that Stang completed on Kennard’s behalf:

Q: You had an agreement with Mr. Stang, either explicit or implicit, that you would pay him for the work that was completed on your behalf; is that correct?

A: Correct.⁶⁹

All of the above facts were not disputed and came directly from Kennard’s testimony. The trial court also heard testimony from Michael and Stacy Stang as to these oral modifications to the Lease. Clearly, the elements of a valid oral modification to the Lease have been met: 1) the subject matter was the parties’ financial obligations under the Lease; 2) the parties are the same as the ones in the Lease; 3) the promise was for

⁶⁵ RP Trial at 50, lines 2-22. CP 171, Defendant’s exhibit # 6; CP 229-31, Findings of Fact 4, 5, 6, 8, 9, 17; CP 232, Conclusions of Law 3, 5.

⁶⁶ RP Trial at 56, lines 13-21; CP 229-31, Findings of Fact 4, 5, 8, 9, 17; CP 232, Conclusions of Law 3, 5, 6.

⁶⁷ RP Trial at 59, lines 9-11; CP 229-31, Findings of Fact 4, 5, 6, 8, 9, 10, 11, 17; CP 232, Conclusions of Law 3, 5, 6.

⁶⁸ RP Trial at 61, lines 10-13; CP 229-31, Findings of Fact 4, 5, 6, 8, 9, 10, 11, 17; CP 232, Conclusions of Law 3, 5, 6.

⁶⁹ RP Trial at 58, line 23- 59, line 1; CP 229-31, Findings of Fact 4, 5, 6, 8, 9, 10, 11, 17; CP 232, Conclusions of Law 3, 5, 6.

Stang to complete Kennard's improvements; 4) the terms and conditions were Kennard agreed to pay Stang for the work; and 5) the consideration was that rent would not be due, at a minimum until the parties resolved their specific obligations to one another. After hearing all the testimony, the trial court found that there was sufficient evidence to find an oral modification to the Lease that altered "their respective financial obligations."⁷⁰

If there is substantial evidence justifying the trial court's findings, they should be upheld. Substantial evidence has also been defined as "evidence sufficient to persuade a rational fair-minded person that the premise is true."⁷¹ The trial court had ample evidence to support each and every finding of fact regarding the oral modifications to the Lease. The conclusions of law naturally flowed from those findings.

2. Failure to install the sprinkler system and bring the building up to code prevented an occupancy permit from being issued and thereby deprived Stang of the beneficial use of the Property. Due to the summary nature of unlawful detainers, the defendant may not assert a

⁷⁰ CP 229, Finding of Fact 5. As an aside, this is one of the findings that the Appellant assigned error to but did not substantively argue in their brief.

⁷¹ Dragt, 139 Wn. App. at 569.

counterclaim or a setoff unless it excuses the tenant's breach.⁷² One allowable counterclaim is a landlord's breach of the implied warranty of habitability.⁷³ The Foisy case is dispositive regarding this issue. In Foisy, the tenant entered into a 6-month lease for a house owned by the landlord.⁷⁴ At the end of the term specified in the lease, the landlord served a 3-day notice to pay rent or vacate upon the tenant.⁷⁵ When the tenant did not comply with the 3-day notice, the landlord filed an unlawful detainer action requesting a writ of restitution restoring the property back to the landlord.⁷⁶ The trial court issued the writ of restitution and the tenant appealed arguing that the trial court erred in excluding testimony from the tenant regarding his affirmative defense of implied warranty of habitability.⁷⁷ The Supreme Court of Washington agreed with the tenant holding that "in all contracts for the renting of premises, oral or written, there is an implied warranty of habitability and breach of this warranty constitutes a defense in an unlawful detainer action."⁷⁸

Similarly, in this case, there was a breach of the implied warranty of habitability that delayed the duty to pay rent. Although the trial court

⁷² Skarperud v. Long, 40 Wn.App. 548, 552, 699 P.2d 786 (1985); *See also* Esmieu v. Hsieh, 92 Wn. 2d 530, 598 P.2d 1369 (1979) (holding that the duty to cooperate in obtaining permits was not independent of the duty to pay rent).

⁷³ Foisy v. Wyman, 83 Wn.2d 22, 515 P.2d 160 (1973).

⁷⁴ Id. at 23.

⁷⁵ Id.

⁷⁶ Id. at 24.

⁷⁷ Id.

⁷⁸ Id. at 28.

did not make specific findings regarding the implied warranty of habitability, it was not error for the trial court to hear and consider this evidence. On appeal, a “party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground.”⁷⁹

The Lease allowed for early occupancy so Stang could complete all the work necessary to open for business.⁸⁰ The Lease restricted the use of the premises to a “restaurant and fun center.”⁸¹ Kennard acknowledged that the sprinkler system was needed to obtain an occupancy permit and he was to install it “as soon as possible.”⁸² Pursuant to the terms of the Lease, rent was to begin in May which was the anticipated open date for the business.⁸³ Stang could not open in May because there was no occupancy permit issued and Kennard did not ask for rent in May.⁸⁴ It was not until August, after the sprinkler system was installed and Stang was open for business that Kennard began demanding rent.⁸⁵ This evidence proves Kennard agreed that the delay in opening the business due to his

⁷⁹ RAP 2.5(a).

⁸⁰ RP Trial at 29, lines 1-14; RP Trial at 163, lines 1-3; CP 229, Findings of Fact 2 and 3.

⁸¹ CP 16 and RP Trial at 47, lines 19-22.

⁸² RP Trial at 27, line 3 – RP Trial at 28, line 6; CP 232, Conclusions of Law 5.

⁸³ CP 16; RP Trial at 88, lines 23-25.

⁸⁴ RP Trial at 159, lines 7-15; RP Trial at 159, lines 10-15; RP Trial at 83, lines 3-6.

⁸⁵ RP Trial at 34, lines 19-25; CP 229-31, Findings of Fact 7, 8, 9, 17; CP 232, Conclusions of Law 5, 6.

actions would delay rent.⁸⁶ This is because the delay was a breach of his implied warranty of habitability. The restriction on use of the Property in the Lease prevented Stang from opening any other type of business.⁸⁷ In the intervening time between the signing of the Lease and the opening of the business, the parties orally modified the terms of the Lease regarding rent so that the improvements paid for by Stang would delay the payment of rent and that the parties would “settle up later.”⁸⁸

In addition to the sprinkler issue, Kennard agreed to be responsible for bringing “the building up to code [and] will install an access ramp to the lower portion of the building.”⁸⁹ Stacy and Michael Kennard testified this was completed by them because Kennard was “too busy to address it.”⁹⁰

3. Kennard failed to prove a writ of restitution should issue. In addition to the foregoing, Kennard failed to prove a writ of restitution should have been issued. Kennard testified at trial that he was “not interested in evicting them. I’m interested in getting them to pay the

⁸⁶ CP 229-30, Findings of Fact 4, 5, 6, 9; CP 232, Conclusions of Law 3, 5, 6.

⁸⁷ CP 16 ¶ 1.g. “The premises shall be used only for Restaurant and Fun Center.”

⁸⁸ RP Trial at 95, lines 5-24; CP 229-31, Findings of Fact 4, 5, 10, 11; CP 232, Conclusions of Law 3, 4, 5, 6.

⁸⁹ CP 35.

⁹⁰ RP Trial at 85, lines 13-20; RP Trial at 98, lines 8-13; RP Trial at 100, line 24- RP Trial at 100, line 16; RP Trial at 173, line 20 – RP Trial at 174, line 17.

rent that the lease provides.”⁹¹ The sole purpose of a writ of restitution is to restore the premises to the one requesting the writ and determine damages (if any).⁹² Based upon this testimony alone, without anything further, the court could have used this as a proper basis to deny the writ of restitution.

i. Kennard failed to prove the actual amount of rent due. The plaintiff/landlord must prove the reason for issuing the writ of restitution. Here, Kennard requested that the trial court issue a writ of restitution based upon the default in rent.⁹³ Kennard also requested a judgment for the amount of rent due and owing. As stated previously, the burden is on Kennard to prove by a preponderance of the evidence that an amount certain is due. The 3-day notice to pay rent or vacate that was dated September 20, 2012 stated \$23,152.10 was due for the rental period of May 1, 2012 to September 30, 2012 plus late fees of \$1,157.60.⁹⁴ Then, Stang paid money into the registry of the court prior to trial and it was released to Kennard.⁹⁵ At trial, Kennard was unable to testify as to exactly how much he believed was owed to him. When asked how much, he

⁹¹ RP Trial at 46, lines 21-24; CP 229-31, Findings of Fact 6, 7, 8, 10, 11, 12, 14, 15; CP 232, Conclusions of Law 3, 4, 5, 6.

⁹² RCW 59.12.030 and RCW 59.12.170.

⁹³ CP 8-54.

⁹⁴ CP 54.

⁹⁵ CP 115-16; CP 126-27; RP Trial at 60, line 14- RP Trial at 61, line 2.

stated “[t]wenty thousand, twenty five thousand.”⁹⁶ This is different than what is on the 3-day notice to pay or vacate.

In closing arguments, counsel for Kennard attempted to admit, for the first time, substantive evidence of the amount of money owed. He stated “[t]he judgment that we are seeking is in the amount of \$16,594 which is the amount that Mr. Kennard stated in his declaration when we filed this case.”⁹⁷ However, Kennard’s declaration was filed on October 22, 2012.⁹⁸ After that date, there were two more releases of funds from Stang to the court registry and then to Kennard before the trial – on December 5, 2012 and January 9, 2013.⁹⁹ Therefore, the amount of money due to Kennard was never substantively supported by the evidence at trial.¹⁰⁰ There was no evidence presented at trial regarding where the December and January payments went and how that affected the past due amount (if any).¹⁰¹ Obviously, closing argument is merely that – argument. It is not the proper forum to attempt to introduce substantive evidence. The evidence at trial supported the Judge’s findings that the amount of rent due had not been proven by a preponderance of the

⁹⁶ RP Trial at 42, lines 19-23.

⁹⁷ RP Trial at 188, lines 1-3.

⁹⁸ CP 58.

⁹⁹ CP 115-16; CP 126-27.

¹⁰⁰ CP 229-31, Findings of Fact 6, 7, 8, 10, 11, 12, 14, 15, 17; CP 232, Conclusions of Law 4, 5, 6, 7, 8, 9.

¹⁰¹ *Id.*

evidence.¹⁰²

B. Trial Court properly awarded attorney fees.

The terms of the Lease provided:

[i]f either party is required to employ an attorney to enforce or declare its rights hereunder, including in any appeal, bankruptcy or insolvency proceeding involving Tenant or any Guarantor, the prevailing party in any such action shall be entitled to recover its attorneys' fees and costs.¹⁰³

The only issue before the trial court was a writ of restitution and the related follow-up of whether rent was due.¹⁰⁴ Stang prevailed on that issue and therefore they are the “prevailing party” for purposes of the attorney fee provision in the Lease. A “prevailing party,” for purposes of attorney fees collected based upon contract is one who receives a judgment in his or her favor.¹⁰⁵ Determination of who is a prevailing party is a question of law reviewed de novo on appeal.¹⁰⁶

Additionally, the trial court made specific findings that the amount and time spent for attorney fees were reasonable. The proper method for calculating reasonable attorney fees is the lodestar method.¹⁰⁷ This

¹⁰² CP 229-31, Findings of Fact 5, 6, 7, 8, 9, 10, 11, 12; CP 232, Conclusions of Law 3, 5, 6.

¹⁰³ CP 38.

¹⁰⁴ CP 231, Finding of Fact 17.

¹⁰⁵ Hawkins v. Diel, 166 Wn. App. 1, 269 P.3d 1049 (2011) (trial court properly awarded attorney fees to tenants who prevailed on claim for failure to make timely repairs, even though landlord successfully defended against negligence claim).

¹⁰⁶ Id. at 10-11.

¹⁰⁷ 224 Westlake, LLC v. Engstrom Properties, LLC, 169 Wn. App. 700, 281 P.3d 693 (2012).

approach sets fees by multiplying a reasonable hourly rate by the number of hours reasonably expended on the lawsuit.¹⁰⁸ The supporting documentation need not be exhaustive or in minute detail but should simply inform the court of the number of hours worked, the type of the work performed, and the category of the attorney who performed the work.¹⁰⁹ The award of attorney fees will only be overturned for manifest abuse of discretion.¹¹⁰

Stang submitted detailed information regarding the time spent by each attorney.¹¹¹ Kennard fails to articulate what aspect of the attorney fees is unreasonable or why the award is an error of law. Kennard assigned error to finding of fact 1 and conclusions of law 1-4.¹¹² Kennard did not challenge findings of fact 2 through 7 which articulate the reasons why the court found the attorney fees reasonable. These unchallenged findings are verities on appeal and also provide substantial evidence to support the conclusions of law. Therefore, the award of attorney fees should be upheld.

¹⁰⁸ Crest Inc. v. Costco Wholesale Corp., 128 Wn. App. 760, 115 P.3d 349 (2005).

¹⁰⁹ 224 Westlake, LLC, 169 Wn. App. at 734.

¹¹⁰ Harmony at Madrona Park Owners Ass'n v. Madison Harmony Development, Inc., 160 Wn. App. 728, 253 P.3d 101 (2011).

¹¹¹ CP 172-94.

¹¹² See Brief of App. at 5; CP 234-38.

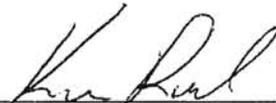
Finally, Stang respectfully requests this Court award attorney fees in favor of the Respondents on appeal pursuant to RAP 18.1 as well as the attorney fees provision contained in the Lease.

V. CONCLUSION

The trial court should be affirmed in all respects and Stang should be awarded attorney fees on appeal.

Respectfully submitted this 20th day of November, 2013.

BELCHER SWANSON LAW FIRM, P.L.L.C.

By 
KRISTEN C. REID, WSBA #38723
Attorney for Respondents Stang, *et al.*

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

MICHAEL S. KENNARD and
BETTY S. KENNARD, husband
and wife,

Appellants,

v.

CAPTAIN JACK JR.'S FAMILY
ENTERTAINMENT CENTER,
INC., STACY STANG and
MICHAEL STANG, husband and
wife,

Respondents.

Case No. 70038-3-I

Whatcom County Superior
Court Case No. 12-2-02806-7

DECLARATION OF
SERVICE

FILED
FEBRUARY 23 11:14 AM '09
CLERK OF SUPERIOR COURT
WHATCOM COUNTY, WASHINGTON

I, Veronica Vande Kamp, hereby certify as follows:

I am employed in the County of Whatcom, State of Washington. I am over the age of 18 and not a party to the within action. My business and place of employment is Belcher Swanson

Law Firm, PLLC, 900 Dupont Street, Bellingham, Washington 98225.

On the date set forth below, I served the following documents on the interested parties in this action in the manner described below and addressed as follows:

PARTY/COUNSEL	DELIVERY INSTRUCTIONS
Philip J. Buri Buri Funston Mumford, PLLC 1601 F Street Bellingham, WA 98225	<input checked="" type="checkbox"/> By U.S. Mail

1. ***Brief of Respondents Stang, ET AL.***
2. ***Declaration of Service.***

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

Dated this 20th day of November, 2013 at Bellingham, Washington.



Veronica Vande Kamp

11/20/2013 11:14:00 AM