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Supreme Court Case No. 1018321

(COA No. 84242-1-I)

SUPREME COURT
OF THE STATE OF WASHINGTON

FITNESS INTERNATIONAL, LLC,
a California limited liability company,

Appellant,

v.

NATIONAL RETAIL PROPERTIES, LP,
a Delaware limited partnership,

Respondent.

RESPONDENT'S ANSWER TO ETHNIC CHAMBER OF COMMERCE COALITION'S AMICUS CURIAE MEMORANDUM

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I. INTRODUCTION

If the Court wants to adopt the doctrine of temporary frustration to address the COVID-19 pandemic's impact on minority-owned businesses and communities of color, it should wait for a case in which application of the doctrine would discharge the rent obligations of a minority-owned business.

This is not that case.

First, the tenancy at issue is part of a "reverse build-to-suit transaction" between two large companies. These are specialized and site-specific transactions generally not repeated elsewhere, and neither party is a minority-owned business. There is no public interest at stake.

Second, a proper application of the doctrine of temporary frustration would not discharge Fitness International LLC's rent obligations. The doctrine merely suspends the duty to perform; it does not discharge the duty unless the frustrating event has made performance materially more burdensome relative to the contract's original allocation of risk. Here, Fitness International

repeatedly and unconditionally accepted the risk of paying rent—even if government orders restricted its ability to operate the facility. Further, it is undisputed that Fitness International in fact paid timely rent in five out of the seven months in which the government restricted its use and promptly paid for the other two months after the trial court entered judgment. On these facts, the temporary frustration doctrine would not have discharged Fitness International's duty to pay rent.

Finally, a discussion of the doctrine here would have little or no precedential value. The Court of Appeals rightly decided that frustration doctrines did not excuse Fitness International's duty to pay rent based on the terms of the lease and the parties' performance. A discussion of how the doctrine might apply to hypothetical facts would be unnecessary for a decision. It would not create the precedent the Coalition seeks.

This Court should decline review.

II. ARGUMENT

A. There is no "substantial public interest" in a private lease dispute between two large companies.

While the COVID-19 pandemic has greatly affected our society, not every dispute stemming from the pandemic is a matter of "substantial public interest" under RAP 13.4(b)(4). Courts considering review on this basis look to whether: (1) the dispute is public or private, (2) a decision would guide government officials, and (3) the dispute is likely to reoccur. *Randy Reynolds & Assocs., Inc. v. Harmon*, 193 Wn.2d 143, 152–53, 437 P.3d 677 (2019). Typically, matters of "substantial public interest" concern statutory interpretation or government action. *See*, *e.g.*, *id.* at 153 (proper interpretation of the Residential Landlord Tenant Act was a matter of substantial public interest because "[m]atters of statutory interpretation tend to be more public, more likely to arise again, and helpful to public officials."); *State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005) (accepting review because lower court's expansion of the definition of *ex parte* communication could

chill future policymaking). In contrast, contract and lease disputes are private controversies concerning only the rights of the contracting parties. *See Lightfoot v. MacDonald*, 86 Wn.2d 331, 334, 544 P.2d 88 (1976).

This case involves a long-term commercial lease between two large and sophisticated companies. CP 33, 67–68. The parties agree that this is not a "garden-variety lease." (Petition at 3). Rather, it concerns "a larger transaction, covering the acquisition, development, and use of" the leased property. *Id.* This is known in the industry as a "reverse build-to-suit" transaction; it is governed by specifically negotiated documents that are unlikely to reappear elsewhere. (*See* Petition at 3); CP 106. Unlike a typical commercial lease, the tenant here (*i.e.*, Fitness International) agreed to assume 100 percent of the risk of paying rent—even if the government ordered it to stop using the property as it wished and even if its facilities were completely destroyed. *See*, *e.g.*, CP 102–95 §§ 5.2, 15, 18.8, 21.2, 29.11. Any holding that would excuse Fitness

International's duty to pay rent notwithstanding the terms of the lease would apply only to transactions with this same allocation of risk. Accordingly, the Coalition's assertion that this affects "every business in Washington" is overstated. (Coalition Memo. at 4).

B. These are not the right facts on which to adopt the doctrine of temporary frustration.

Further, this is not the right case in which to adopt the doctrine of temporary frustration. The doctrine allows parties to: (i) delay performance during the frustrating event and (ii) discharge performance only if it "would be materially more burdensome than had there been no impracticability or frustration." RESTATEMENT (SECOND) OF CONTRACTS § 269 (Am. Law Inst. 1981). There are two reasons why this is not the right case in which to adopt doctrine.

First, temporary frustration cases typically involve a duty to perform a specific task by a specific deadline. For example:

> On July 5, A charters his vessel to B for a voyage from New York to Liverpool, contracting that the vessel shall be ready for loading July 10. On

> July 8, the government requisitions the vessel . . . [and returns it] on July 15. A's duty to have the vessel ready is suspended until July 15 and he is then under a duty to perform with an appropriate extension of time . . . **However, if circumstances including his other contracts then make it materially more burdensome for A to perform, A's duty is discharged** . . .

Id. § 269 cmt. a (Illus. 2, citing RESTATEMENT (FIRST) OF CONTRACTS § 462 cmt. b (Am. Law Inst. 1932) (Illus. 4); *Borup v. W. Operating Corp.*, 130 F.2d 381 (2d Cir. 1942), *cert. denied*, 317 U.S. 672 (1942)). This case does not involve an event that delayed a party's ability to perform a specific task by a specific deadline. Rather, Fitness International's duty was to pay rent every month.

What is more, neither the pandemic nor government regulations in fact inhibited Fitness International from paying rent. It paid timely rent in five out of the seven months in which the government restricted commercial health-club activities, and it promptly paid for the other two months as soon as the trial court entered judgment. CP 230, 443, 449. On these facts, no one's performance was frustrated.

Second, the pandemic did not make paying rent "materially more burdensome." In deciding if post-frustration performance is materially more burdensome, courts consider the allocation of risk in the contract:

> In applying the standard of materiality, a court will consider whether the delay has seriously upset the allocation of risks under the agreement of the parties. The rule stated in this Section is, of course, subject to contrary agreement.

RESTATEMENT (SECOND) OF CONTRACTS § 269 cmt. a (Am. Law Inst. 1981). In other words, performance is not "materially more burdensome" unless the frustrated party bears a meaningfully greater burden than what the parties intended when they originally allocated risk. *Id.*

Here, Fitness International unconditionally assumed the risk of performance by agreeing to full payment of rent even in the face of government restrictions or a complete destruction of its gym. *See*, *e.g.*, CP 102–95 §§ 5.2, 15, 18.8, 21.2, 29.11. Fitness International's performance during the pandemic cannot be "materially more burdensome" than the original allocation of

risk it accepted. Whether or not this Court should formally adopt the temporary frustration doctrine, these are not the right facts to do so.

C. A discussion of the temporary frustration doctrine here would not benefit the Coalition's constituents.

Finally, review here would not create helpful precedent for the Coalition's constituents (or practically anyone else). To create precedent, "[a] principle of law must be **necessary** for the decision in the case." *In re Det. of Reyes*, 184 Wn.2d 340, 353–54, 358 P.3d 394 (2015) (J. McCloud, concurring) (emphasis in original). When a court hypothesizes about how the outcome might change if the facts were slightly different, the statement is not necessary for the holding. *Sw. Suburban Sewer Dist. v. Fish*, 17 Wn. App. 2d 833, 841, 488 P.3d 839 (2021) ("Dicta [is] . . . any statement of the law enunciated by the court merely by way of illustration, argument, [or] analogy."); *Swanson Hay Co. v. State Emp. Sec. Dep't*, 1 Wn. App. 2d 174, 208–09, 404 P.3d 517 (2017)

(distinguishing alternative bases for decision from hypotheticals not necessary for the holding).

Here, the Court of Appeals correctly decided this case on the specific terms of the lease and limited its discussion to the real—not hypothetical—facts. It addressed frustration defenses only because Fitness International raised them in the alternative. *See Fitness Int'l, LLC v. Nat'l Retail Props, LP*, 25 Wn. App. 2d 606, 524 P.3d 1057, 1063 (2023).

As discussed above, the temporary frustration doctrine requires courts to decide whether performance "would be substantially more burdensome" relative to their original allocation of risk. RESTATEMENT (SECOND) OF CONTRACTS § 269 (Am. Law Inst. 1981). Here, the governing lease allocated the risk of paying rent entirely on Fitness International, and Fitness International in fact paid the full measure of rent at issue. Any discussion of how the doctrine would have applied if the lease had allocated risk differently or if Fitness International had not performed, would be

hypothetical and unnecessary for the holding. It would not have precedential value for the Coalition's constituents or anyone else.

III. CONCLUSION

The public has no interest in this private commercial dispute between two large companies. The facts here are unique to the parties and unlikely to reoccur. Moreover, on these facts, the temporary frustration doctrine would not discharge Fitness International's duty to pay rent. A discussion of hypothetical facts has little to no precedential value.

Simply put, this is not the right case to address the Coalition's concerns. The Court should decline review.

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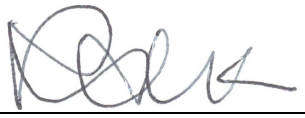
RESPECTFULLY SUBMITTED this 22nd day of June, 2023.

SNELL & WILMER L.L.P.

By 

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CERTIFICATE OF SERVICE

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

DATED this 22nd day of June, 2023, at Seattle, Washington.

Brenda Partridge

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SNELL & WILMER LLP

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