

63343-1

63343-1

NO. 63343-1-I

---

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

---

2009 JUN 30 PM 4:58

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON

Housing Authority of the City of Seattle,

Plaintiff/Respondent,

v.

Shaunta Powell,

Defendant/Appellant.

---

**BRIEF OF APPELLANT**

---

Eric Dunn, WSBA #36622  
**NORTHWEST JUSTICE PROJECT**  
401 Second Avenue S, Suite 407  
Seattle, Washington 98104  
Tel. (206) 464-1519  
Defendant/Appellant Shaunta Powell

 **ORIGINAL**

<b>Table of Contents</b>	<b>Page</b>
Table of Authorities .....	ii
I. Introduction .....	1
II. Assignments of Error .....	3
III. Statement of the Case .....	4
IV. Argument .....	7
A. Seattle Housing Authority (SHA) did not introduce substantial evidence to establish that Powell permitted a “nuisance” on or about the premises .....	7
1. Nuisance Requires Substantial Interference with Another’s Use or Enjoyment of Premises .....	8
2. <i>Ridpath v. Spokane Stamp Works</i> .....	11
3. SHA failed to prove a nuisance because no evidence was admitted showing that Powell or Banks caused any substantial interference with another’s use or enjoyment of the premises .....	13
B. Mere potential for substantial and unreasonable interference with another’s use or enjoyment of property is not a nuisance .....	14
1. Any danger that Banks’ posed to Stewart Manor was not certain to result in a substantial interference with others’ use or enjoyment of the premises .....	15
2. Fear cases are inapposite because Banks never caused fear	19
3. SHA’s annoyance after the fact cannot amount to substantial interference with use or enjoyment of premises .....	25
C. This action was properly dismissed after the evidentiary hearing by the Superior Court Commissioner .....	30
1. Analysis by Commissioner .....	30
2. Analysis by the reviewing judge .....	32
D. Even if SHA did present substantial evidence that a nuisance occurred, it was cured well before SHA issued notice to vacate .....	35
1. Powell has a right to cure most nuisances under the Residential Landlord-Tenant Act .....	36
2. Powell’s right to cure was not compromised by any of the exceptions in RCW 59.18.180(2-4) .....	38
V. Conclusion .....	41

<b>Table of Authorities</b>	<b>Page</b>
<b>Statutes, Codes &amp; Regulations</b>	
RCW 2.24.050	6
RCW 7.48	8
RCW 7.48.010	9
RCW 7.48.120	10
RCW 7.48A	9
RCW 9.66	9
RCW 49.60.030	23
RCW 59.12 et seq. - Unlawful Detainer Act	6-9, 32, 37
RCW 59.12.030	7-8, 14, 31, 36
RCW 59.18 et seq. - Residential Landlord-Tenant Act (RLTA)	1, 3, 6, 8, 32, 36-39
RCW 59.18.030	8, 12, 39-40
RCW 59.18.130	14, 37-41
RCW 59.18.180	36-41
RCW 59.18.370	5, 7
<b>Court Rules</b>	
RAP 2.5(a).	36
King County LCR 7(b)(8)(B)(iii)	35
<b>Judicial Decisions</b>	
<i>Champa v. Washington Compressed Gas Co.</i> , 146 Wash. 190; 262 P. 228 (1927) .....	21-22
<i>City of Tacoma v. State</i> , 117 Wn.2d 348; 816 P.2d 7 (1991) ...	34
<i>Crawford v. Central Steam Laundry</i> , 78 Wash. 355; 139 P. 56 (1914) .....	11, 13, 16, 31, 33
<i>Davis v. Baugh Industrial Contractors, Inc.</i> , 159 Wn.2d 413; 150 P.3d 545 (2007) .....	9
<i>Everett v. Paschall</i> , 61 Wash. 47; 111 P. 879 (1910) .....	9-11, 15, 20-21, 25- 30, 35
<i>Everett Housing Authority v. Terry</i> , 114 Wn.2d 558; 789 P.2d 745 (1990) .....	18, 36
<i>Graetz v. McKenzie</i> , 9 Wash. 696; 35 P. 377 (1983) .....	20
<i>Goodrich v. Starrett</i> , 108 Wash. 437; 184 P. 220 (1919) .....	21, 28-29, 31
<i>Grundy v. Thurston County</i> , 155 Wn.2d 1; 117 P.3d 1089 (2005) .....	8, 11, 13- 14, 16, 20, 33

<i>Hite v. Cashmere Cemetary Ass'n</i> , 158 Wash. 421; 290 P. 1008 (1930) .....	26-27, 30
<i>Housing Authority v. Pleasant</i> , 126 Wn. App. 382; 109 P.3d 422 (Div. 3, 2005) .....	36
<i>Hughes v. McVay</i> , 113 Wash. 333; 194 P. 565 (1920) .....	15, 23-24, 26
<i>In Re Cross</i> , 99 Wn.2d 373; 662 P.2d 828 (1983) .....	36
<i>In Re Marriage of Moody</i> , 137 Wn.2d 979; 976 P.2d 1240 (1999) .....	35
<i>Mathewson v. Primeau</i> , 64 Wn.2d 929; 395 P.2d 183 (1964) ..	26
<i>Park v. Stolzheise</i> , 24 Wn.2d 781; 167 P.2d 412 (1946) .....	22-25, 27, 29, 35
<i>Pratt v. Pratt</i> , 99 Wn.2d 905; 665 P.2d 400 (1983) .....	34
<i>Rea v. Tacoma Mausoleum Ass'n</i> , 103 Wash. 429; 174 P. 961 (1918) .....	26-27, 30
<i>Ridpath v. Spokane Stamp Works</i> , 48 Wash. 320; 93 P. 416 (1908) .....	11-12, 14, 19, 31, 33
<i>Shepard v. City of Seattle</i> , 59 Wash. 363; 109 P. 1067 (1910) .	22-25
<i>Spokane Stamp Works v. Ridpath</i> , 48 Wash. 370; 93 P. 533 (1908) .....	12
<i>State v. Osman</i> , 147 Wn. App. 867; 197 P.3d 1198 (Div. 1, 2008) .....	8
<i>State v. Pacheco</i> , 125 Wn.2d 150; 882 P.2d 183 (1994)	8
<i>Steele v. Queen City Broadcasting Co.</i> , 54 Wn.2d 402; 341 P.2d 499 (1959) .....	20, 22
<i>Sunnyside Valley Irr. Dist. v. Dickie</i> , 149 Wn.2d 873; 73 P.3d 369 (2003) .....	34
<i>Thornton v. Dow</i> , 60 Wash. 622; 111 P. 899 (1910) .....	9-10
<i>Tinsley v. Monson &amp; Sons Cattle Co.</i> , 2 Wn. App. 685; 472 P.2d 546 (1970) .....	20
<i>Turner v. City of Spokane</i> , 39 Wn.2d 332; 235 P.2d 300 (1951) .....	15-20, 27- 31
<i>Turtle v. Fitchett</i> , 156 Wash. 328; 287 P. 7 (1930) .....	15, 17, 31, 35

## **I. Introduction**

This appeal arises from a residential unlawful detainer action based on a claim of nuisance. The landlord, Plaintiff/Respondent Seattle Housing Authority (SHA), claims its tenant, Defendant/Appellant Shaunta Powell, caused a "nuisance" by allowing Michael Banks to stay at her apartment. Testimony at the hearing established that Banks has a criminal record and was the suspect in a series of robberies far from the premises. However, no evidence suggested that Banks committed any crimes or violent acts at or near Powell's apartment. SHA learned Banks was staying with Powell when the Seattle Police came to the premises and arrested Banks for the robberies. SHA gave Powell three days' notice to vacate for "nuisance" and provided no opportunity to cure.

Powell's residential tenancy is governed by the Residential Landlord-Tenant Act (RLTA), codified at RCW 59.18. The RLTA specifically prohibits a residential tenant from permitting a "nuisance" on or about the rental premises. A residential tenant who does create a nuisance, which A Washington law defines as a substantial interference with another's use or enjoyment of property, must promptly correct the violation if she wishes to preserve the tenancy. For three distinct types of egregious nuisances (i.e., those involving drug-related activity, gang-related activity, or certain "imminently hazardous" activities), a landlord may terminate a tenancy

with no opportunity to cure. A residential tenant who fails to timely correct a nuisance, or who commits one of the “incurable” nuisances, must vacate the premises on three days notice or is guilty of unlawful detainer.

In the case below, the Superior Court commissioner dismissed the action following an evidentiary hearing in which SHA failed to admit prima facie evidence of a nuisance in the premises. This was the correct result. Despite Banks’ past (and allegedly ongoing) cross-town criminal activities, there was no evidence of any substantial interference with anyone’s use or enjoyment of the premises, such as robberies or other violent or dangerous or acts at or near the apartment. Also, there was no evidence suggesting that Powell—or anyone else at the building, for that matter—knew of Banks’ alleged crimes or of any safety risk he may have posed. The evidence definitely did not establish that Powell caused one of the “incurable” nuisances for which her tenancy could be terminated with no opportunity to cure.

Unfortunately, the commissioner’s order of dismissal was overturned on revision. The Order Granting SHA’s Motion for Revision established, in essence, that substantial evidence of a nuisance does exist in the record, even without proof of any actual interference with another’s use or enjoyment of property. If upheld, the Superior Court’s ruling would

drastically expand the circumstances in which landlords can terminate tenancies based on nuisance allegations.

Under the Superior Court's ruling, a tenant can now face summary eviction, with no right to cure, solely by reason of a visitor's past misconduct—even if that visitor is well-behaved on the premises, and regardless of whether the tenant was aware of the visitor's background. The decision rests on an overly-broad interpretation of "nuisance," and is fully at-odds with the increased security of tenure residential tenants enjoy under the RLTA. For these reasons, Appellant requests this Court reverse the Superior Court's order on revision, and reinstate the commissioner's order of dismissal.

## **II. Assignments of Error**

1. The trial judge committed error by finding Plaintiff/Respondent Seattle Housing Authority introduced prima facie evidence of "nuisance" within the meaning of RCW 59.18.130(5) and 59.12.030(5); and

2. Alternatively, even if Seattle Housing Authority accomplished a prima facie showing of "nuisance," the nuisance was not of an "incurable" variety that would authorize termination of Powell's tenancy without an opportunity to cure.

### III. Statement of the Case

On December 17, 2008, the Seattle Police identified Michael Banks as a suspect in certain grocery store robberies alleged to have taken place in Capitol Hill, a neighborhood in Seattle, Washington. RP at 10. According to Seattle Police Officer Bruce Wind, Banks “had given the address of 6339 – 34<sup>th</sup>, No. 210.” RP at 10. This led Wind to Defendant/Appellant Shaunta Powell’s rental apartment at Stewart Manor, a public housing facility about eight miles from Capitol Hill in the “West Seattle” neighborhood of Seattle.<sup>1</sup>

Wind arrived at Powell’s door that day with two other officers. RP at 10. Wind knocked on the door and Powell answered. RP at 10, 13. Wind asked Powell if Michael Banks was there, and she said “no.” RP at 10, 13. Wind asked if “anyone” was in the apartment, and Powell again replied “no.” RP at 10, 13. Wind then asked if he could enter the apartment, and Powell said “yes.” RP at 10, 13. Wind took one step into the apartment and immediately spotted Banks in an adjoining room. RP at 10, 13. Wind arrested Banks and removed him from the premises without incident. RP

---

<sup>1</sup> Distance, according to Google Maps, between Powell’s home address of “6339 - 34<sup>th</sup> Ave, SW, Seattle, Wash.” and “Capitol Hill, Seattle, Wash.” is 8.6 miles; see [http://maps.google.com/maps?q=seattle,+washington&oe=utf-8&rls=org.mozilla:en-US:official&client=firefox-a&um=1&ie=UTF8&split=0&gl=us&ei=aV0ISoWPA52MtgPc2MTdAQ&sa=X&oi=geocode\\_result&ct=title&resnum=1](http://maps.google.com/maps?q=seattle,+washington&oe=utf-8&rls=org.mozilla:en-US:official&client=firefox-a&um=1&ie=UTF8&split=0&gl=us&ei=aV0ISoWPA52MtgPc2MTdAQ&sa=X&oi=geocode_result&ct=title&resnum=1), last visit May 11, 2009

at 10. Powell herself was not arrested or otherwise cited or detained in connection with the incident. RP at 12.

An unidentified police officer later informed Powell's landlord, Plaintiff/Respondent Seattle Housing Authority (hereafter "SHA") that Banks had been arrested in Powell's apartment. RP at 7. On or about January 6, 2009, SHA delivered to Powell a "Three Day Notice to Quit the Premises for Maintaining a Nuisance, Permitting Illegal Activity (hereafter "3-Day Notice")." CP at 5-6; RP at 6. The 3-Day Notice demanded that Powell relinquish possession of her apartment "not later than midnight on January 9, 2009." CP at 5. When Powell did not vacate as demanded, SHA brought this action, asserting that Powell is guilty of unlawful detainer for having caused a "nuisance." CP at 3-5.

Upon filing the complaint, SHA applied for and obtained an order commanding Powell to appear for a hearing on February 27, 2009, and show cause why a writ of restitution should not be issued restoring SHA to possession of her apartment. See CP at 15-18; see also RCW 59.18.370. At that hearing, SHA argued that Powell had caused an incurable nuisance by allowing Banks onto the premises and failing to report his presence to the police. CP at 3-7, 22-29, 55-59; RP at 10-18. However, no evidence was presented establishing that Banks committed any crimes or violent acts at or near Powell's apartment. See RP at 27. Wind testified about his

investigation of the Capitol Hill robberies and his arrest of Banks. RP at 8-15. However, Wind denied having any knowledge of Banks committing any crimes or acts “that could be a danger to somebody else at the apartment complex.” RP at 12. Wind also testified that Banks “does have a fairly extensive felony record,” but the contents of that record were not further described and no documents or other exhibits concerning Banks’ “felony record” were admitted into evidence. See RP at 12.

When SHA rested, the commissioner concluded after argument that SHA failed to prove a nuisance due to a “lack of any evidence whatsoever as to injurious behavior on the premises.” RP at 25-27; see also CP at 65. Accordingly, the commissioner entered an order dismissing the action without taking any further testimony or evidence. See RP at 15-27; see CP at 19, 65. SHA moved for revision, pursuant to RCW 2.24.050, and the order of dismissal was overturned on April 3, 2009. CP at 63-64. The reviewing judge, deciding the motion without oral argument, ruled that:

“1) an actionable nuisance under RCW 59.12 and 59.18 can proceed without an actual harm or injury; 2) testimony at the show cause hearing established that there are material facts in controversy; and 3) this case was improperly dismissed prior to the defendant responding to the plaintiff’s case.”

CP at 63. Reversing the commissioner’s order of dismissal, the April 3, 2009, ruling also remanded the action to the commissioner “for a de novo

show cause hearing, pursuant to RCW 59.18.370[.]” CP at 64. Powell now appeals the order on revision to this court. CP at 62-64.

#### **IV. Argument**

The Superior Court Commissioner properly dismissed this action after the evidentiary hearing on February 27, 2009. See CP at 65. The Superior Court’s April 3, 2009, order on revision (which reinstated this action) was incorrect because the plaintiff failed to prove a nuisance and because the evidence demonstrated that any nuisance which did occur was timely cured. See CP at 63-64. The Superior Court’s April 3, 2009, order should therefore be reversed and the case dismissed.

##### **A. Seattle Housing Authority (SHA) did not introduce substantial evidence to establish that Powell permitted a “nuisance” on or about the premises.**

Seattle Housing Authority (SHA) claims Shaunta Powell permitted a nuisance on or about the premises of her rental apartment at Stewart Manor. See CP at 3-7. The Unlawful Detainer Act provides that a tenant who “erects, suffers, permits, or maintains on or about the premises any nuisance” is guilty of unlawful detainer if she remains more than three days after service of written notice to vacate. See RCW 59.12.030(5). There is no dispute that SHA served Powell the 3-Day Notice (to vacate the premises) and that she has remained in possession more than three

days afterward. See CP at 6-7; see RP at 8. However, the evidence in the record, even viewed in the light most favorable to SHA, could not have sustained a finding that Powell permitted “any nuisance” in the premises. The interpretation of the word “nuisance,” as used in the Unlawful Detainer Act as well as the RLTA, is a question of law for which the standard of review is de novo. See *State v. Osman*, 147 Wn. App. 867, 877; 197 P.3d 1198 (Div. 1, 2008).

**1. Nuisance Requires Substantial Interference with Another’s Use or Enjoyment of Premises.**

Neither the RLTA nor the Unlawful Detainer Act specifically defines the term “nuisance.” See RCW 59.18.030; see also RCW 59.12. Thus, common law is the first place to look for the correct definition. See *State v. Pacheco*, 125 Wn.2d 150, 185; 882 P.2d 183 (1994) (“As a general rule, we presume the Legislature intended undefined words to mean what they did at common law.”). Washington courts define nuisance generally as “a substantial and unreasonable interference with the use and enjoyment of land.” See *Grundy v. Thurston County*, 155 Wn.2d 1, 6; 117 P.3d 1089 (2005), quoting *Bodin v. City of Stanwood*, 79 Wn. App. 313, 318; 901 P.2d 1065 (1995).

It is worth noting that several Washington statutes also define “nuisance.” See, e.g., RCW 7.48 (concerning actions for damages or

abatement of public and private nuisances); RCW 7.48A (abatement of moral nuisances); RCW 9.66 (criminal penalties for causing nuisances). Many of these statutes predate the 1890 Unlawful Detainer Act; one dates all the way back to 1854—thirty-five years before Washington was admitted as the forty-second state into the Union. See RCW 7.48.010 (defining “actionable nuisance”). Though none is directly applicable to unlawful detainer cases, these statutes have profoundly informed the common law meaning of “nuisance” in Washington. See *Everett v. Paschall*, 61 Wash. 47, 50; 111 P. 879 (1910). Some review of the relationship between these statutes and the historical interpretation of “nuisance” by Washington courts is therefore useful.

At common law, a “nuisance” originally meant “anything that worketh hurt, inconvenience, or damage,” a definition the Washington Supreme Court quickly found impractically broad. See *Everett* at 49; see *Thornton v. Dow*, 60 Wash. 622, 633-34; 111 P. 899 (1910) (“The word ‘nuisance’ is so comprehensive that it has been applied to almost all wrongs which have interfered with the rights of the citizen, either in person, property, the enjoyment of his property, or his comfort”), abrogated on other grounds by *Davis v. Baugh Industrial Contractors, Inc.*, 159 Wn.2d 413; 150 P.3d 545 (2007). Hence, even in the earliest nuisance cases Washington courts were careful to limit this expansive definition in two key ways, the first of

which was by carefully interpreting “nuisance” within the specific context where the claim arose. See *Thornton* at 634 (“the term [nuisance] and the responsibility must be classified, or an investigation, however extensive it may be, results only in confusion”).

The context relevant to the present action—an unlawful detainer suit—is of course real property. At common law, nuisances concerning real property were recognized only in narrow circumstances involving some “physical inconvenience” such as an odor or other tangible invasion. See *Everett* at 49 (“Blackstone ... reduc[ed] the nuisances which affect a man's dwelling to three: (1) Overhanging it; (2) stopping ancient lights; and (3) corrupting the air with smells.”).

However, interference with use or enjoyment of real property was central to the “nuisances” recognized by Washington statutes. See, e.g., RCW 7.48.120 (unlawful act or omission that “in any way renders other persons insecure in life, or in the use of property” declared a nuisance). Over time, the Washington Supreme Court observed, the common law absorbed this core element of the statutory nuisances, at least in cases affecting real property. See *Everett* at 50 (“A new element in the law of nuisance has been developed, first, by judicial decisions, and, later, by declaratory statutes; that is, the comfortable enjoyment of one's property.”). Accordingly, by 1910 the common law definition of nuisance

in Washington reached injuries or interferences with use or enjoyment of land. See *Everett* at 49.

The second method by which Washington courts traditionally limited the unrestrained common law meaning of “nuisance” was by recognizing such claims—under both common law and the statutes—only in those instances where the degree of harm or interference is substantial. See *Crawford v. Central Steam Laundry*, 78 Wash. 355, 357; 139 P. 56 (1914) (nuisance exists where “enjoyment of one's premises is sensibly diminished, either by actual tangible injury to the property itself, or by the promotion of such physical discomforts as detract sensibly from the ordinary enjoyment of life . . . according to the notions and habits of people of ordinary sensibilities and simple tastes.”); see also *Everett* at 52 (nuisance requires “something appreciable. The cases generally say, ‘tangible, actual, measurable, or subsisting.’”). The modern definition of nuisance, “substantial and unreasonable interference with the use and enjoyment of land,” thus reflects the culmination of both these historical trends. See *Grundy* at 6.

## ***2. Ridpath v. Spokane Stamp Works***

Only one reported decision arises from an unlawful detainer action predicated on nuisance. See *Ridpath v. Spokane Stamp Works*, 48 Wash.

320; 93 P. 416 (1908). In *Ridpath*,<sup>2</sup> a hotel owner leased a room to a tenant who proceeded to install and operate loud, disruptive machinery in the premises. See *Ridpath* at 321. Several witnesses testified that the machinery “created an unnatural and unpleasant condition . . . sometimes ran for several hours in the day and . . . that it jarred the building and was so severe that the floors quivered[.]” See *Ridpath* at 324. Hotel staff testified that the racket from the machinery deterred guests from staying at the hotel and made it difficult or impossible to converse within other parts of the building. *Id.* at 323-24. One witness compared the effects of the machinery to that of an earthquake. *Id.* at 324.

After the trial court dismissed the action<sup>3</sup> for insufficient evidence of “nuisance,” the Supreme Court reversed, holding that “[i]f this testimony is true . . . operation of the machinery unquestionably under all authority constituted a nuisance[.]” *Id.* at 324. While the court’s citation to “all

---

<sup>2</sup> *Ridpath* should not be confused with *Spokane Stamp Works v. Ridpath*, 48 Wash. 370; 93 P. 533 (1908), a separate action arising out of the same facts, in which the tenant sued to enjoin the landowner from interfering with the tenant’s activities on the premises.

<sup>3</sup> Interestingly, the *Ridpath* decision does not actually reference RCW 59.12.030(5) or any other provision of the RCW, but refers only to “the unlawful detainer statute.” See *Ridpath* at 321-22. The text also indicates that the hotel owner had complained to the tenant about the noisy machinery prior to serving “the notice required by law” to terminate the tenancy. *Id.* at 322. Hence, it appears possible, that the action in *Ridpath* may have been predicated on a comply-or-vacate type notice as contemplated by subsection (4) of RCW 59.12.030, rather than a “nuisance” type notice per subsection (5). Even if a nuisance-type notice was given (per subsection (5)), in practical effect it does appear the tenant in *Ridpath*—unlike Powell—was actually provided an opportunity to preserve the tenancy by curing the claimed lease violation. See *Ridpath* at 322.

authority” perhaps did not lend an ideal level of clarity, overall *Ridpath* did presage the modern common law nuisance standard: “substantial and unreasonable interference with the use and enjoyment of land.” See *Grundy* at 6; see also *Crawford* at 357.

**3. SHA failed to prove a nuisance because no evidence was admitted showing that Powell or Banks caused any substantial interference with another’s use or enjoyment of the premises.**

Shaunta Powell, of course, is not accused of running loud machinery or creating any kind of disturbance through similar activities. Instead, SHA claims Powell permitted a nuisance by “harboring” a supposedly dangerous person, Michael Banks, in her apartment. RP at 11-12; CP at 6-7. According to the evidence SHA presented, a reasonable finder of fact could have concluded that Michael Banks is a felon who commits “strong-arm robberies,” that Powell allowed Banks into the premises and possibly to even live in her apartment, and that Powell lied to the police who came to her door looking for Banks. RP at 9-12. However, SHA presented no evidence suggesting that Banks interfered with any other person’s use or enjoyment of the rental premises (i.e., Stewart Manor). See RP at 27.

No evidence suggesting that Banks robbed, assaulted, or otherwise troubled other residents, employees, or other people at Stewart Manor was admitted. RP at 8-14, 27. SHA did assert in the 3-day notice that Banks had engaged in “theft against other persons at the building,” but offered no

evidence in support of this accusation at the hearing. See CP at 6-7; see RP at 27. Wind clearly testified that all of Banks' alleged robberies took place at "grocery stores in the Capitol Hill area." RP at 10-11. Wind had no knowledge of any illegal activities by Banks at Stewart Manor:

"Q. Were any crimes committed on the actual premises by this individual?

A. By Mr. Banks?

Q. Yes, Mr. Banks. Anything that occurred on the premises that could be a danger for somebody else in the apartment complex?

A. None that I know of that day."

RP at 12. Wind also testified that "we arrested Mr. Banks without incident." RP at 10.

Powell's conduct may warrant disapproval, and may have run afoul of some terms of the tenancy. But to establish that Powell caused a nuisance requires proof that she (or Banks) substantially interfered with others' use or enjoyment of the Stewart Manor premises. See *Ridpath* at 324; see also *Grundy* at 6. Since no evidence of any such interference was presented, SHA did not establish that Powell "permit[ted] on or about the premises any nuisance." RCW 59.12.030(5) see also RCW 59.18.130(5).

**B. Mere potential for substantial and unreasonable interference with another's use or enjoyment of property is not a nuisance.**

SHA claims Banks' mere presence was enough to establish a nuisance in light of his "extensive felony record" and violent propensities. See RP

at 11-12. However, Banks' felony record and violent propensities only suggests that he had the *potential* for causing a nuisance—Banks did not interfere with others' use or enjoyment of premises simply by possessing such characteristics. Washington has recognized only two situations in which a nuisance may be declared anticipatorily, that is, before any actual interference with use of enjoyment of premises occurs: (1) where an anticipated interference is certain to occur unless the condition or activity is restrained, or (2) where a condition or activity impairs others' use or enjoyment of premises through fear or (potentially) other kinds of mental discomfort. See *Turner v. City of Spokane*, 39 Wn.2d 332, 335; 235 P.2d 300 (1951); see also *Everett v. Paschall*, 61 Wash. at 52-53. Neither scenario is applicable to the present case.

**1. Any danger that Banks' posed to Stewart Manor was not certain to result in a substantial interference with others' use or enjoyment of the premises.**

A nuisance may be declared in advance where the dangerous condition or activity "would necessarily result" in the anticipated interference (with use or enjoyment of property). See *Turtle v. Fitchett*, 156 Wash. 328, 336; 287 P. 7 (1930) (construction of amusement park enjoined as a nuisance because noise and other interferences were certain to exist once park went into operation); see also *Hughes v. McVay*, 113 Wash. 333, 341; 194 P. 565 (1920) (construction of home for juvenile delinquents would not be

enjoined as a nuisance because “[c]ourts will not indulge in conjecture or uncertain apprehensions”). In the absence of certainty, exposing others to a danger does not constitute a nuisance unless and until a substantial interference actually occurs. See *Grundy* at 6; see *Crawford* at 357.

The clearest example of this rule may be the case of *Turner v. City of Spokane*, in which several property owners sued to enjoin dynamite blasting and rock-crushing activity set to take place very near their homes. See *Turner* at 334-35. The property owners argued that nearby blasting and quarrying would produce dust, noise, and shocks that would damage their wells and vegetation and cause “danger and annoyance to plaintiffs’ comfort, health, repose, and safety.” *Id.* at 334-35. Though the possibility of these interferences could not be dismissed, evidence also suggested that the rock-crushing dust might not reach the plaintiffs’ lands and that the blasting would be conducted in such a way as to avoid causing damage. *Id.* at 334-35. Satisfied the defendant had presented justifiable grounds to believe the anticipated injury might never actually occur, the *Turner* court found the dangers “not of sufficient imminence” to enjoin the blasting or rock-crushing. *Id.* at 335. Instead, the plaintiffs would have to wait until the risk matured into an actual interference with use or enjoyment of land: “appellants [could] apply[] for an injunction after, for example, the first

blast, if they show that they have been damaged, or are in real danger of suffering damage.” *Id.* at 337-38.

*Turner* is highly analogous to the present scenario. The apprehended injury was an assault, theft, or other criminal act by Banks (which would presumably have victimized a person at or near Stewart Manor). RP at 23 (“If a struggle had ensued or if guns are drawn . . . others could have been injured.”). Yet, as in *Turner*, SHA presented no evidence that any such act had actually occurred. See RP at 27. Thus, the question of whether the dangerous condition (i.e. Banks’ presence) constituted a “nuisance” depends on whether Banks was certain to inflict the apprehended injury upon another person at Stewart Manor. See RP at 27; see *Turner* at 335; see also *Turtle* at 336.

There was absolutely no evidence in the record from which the court could possibly have concluded that Banks *would necessarily* have robbed, assaulted, otherwise interfered with any person on or about the Stewart Manor premises. See RP at 27. In the *Turner* court’s view, the degree of certainty required to declare a condition a nuisance depends on whether “the injury apprehended is of a character to justify conflicting opinions as to whether it will in fact ever be realized.” *Turner* at 335, citing 7 ALR 49. Even before Banks was arrested and removed from the premises, a person could justifiably have held the opinion that he would not actually

inflict the apprehended injuries upon others at Stewart Manor. For instance, the evidence below suggested that Banks was committing robberies in Capitol Hill, but living in West Seattle. See RP at 10. A reasonable person could justifiably hold the opinion that Banks was unlikely to commit crimes in West Seattle because of the greater risk that he might be identified by a victim or witness, even if Banks may well have committed such offenses in other parts of town. On a broader level, to predict *with certainty* that any person would engage in some unspecified violent or criminal act would be a truly extraordinary conclusion to draw—undoubtedly a major reason why the Washington Supreme Court has expressed serious questions as to whether the nuisance provisions of the Unlawful Detainer Act even apply at all to tenant behavior. See *Everett Housing Authority v. Terry*, 114 Wn.2d 558, 569; 789 P.2d 745 (1990) (“none of the provisions of RCW 59.12.030 seem to address behavior of tenants”).

To declare Banks’ mere presence a nuisance would thus be premature, because the essential level of certainty is absent. See *Turner* at 335. Not only could justifiable opinions conflict as to whether Banks would actually have interfered (substantially) with another’s use or enjoyment of property at Stewart Manor, but after Banks’ arrest the apprehended injury became virtually certain *not* to occur. This fact closes off any remaining argument

that Banks' mere presence at Stewart Manor could have been a hazard of "sufficient imminence" to constitute a nuisance. See *Turner* at 335.

A close reading of *Ridpath* lends further support to this conclusion. In *Ridpath*, as that court was careful to point out, the interference (with use or enjoyment of land) arose from "the operation of the machinery" and the consequent noise and vibrations—not the mere presence of the machinery alone. See *Ridpath* at 324. Had the *Ridpath* tenant merely brought the machinery into the hotel for storage or display purposes, and never activated it, there would have been no noise or vibrations and, hence, the basis upon which the court found a nuisance would not have existed. See *Ridpath* at 324. One hesitates to compare a live person to any kind of machinery, for in the case of a human being freewill must necessarily intervene for a potential danger to mature into an actual interference (with use or enjoyment of premises). But Banks was nonetheless like dormant machinery in relevant respects: he had only the potential to interfere with others' use or enjoyment of the premises at Stewart Manor, and he was removed without ever acting on that potential. As such, no nuisance arose. See *Turner* at 335; see also *Ridpath* at 324.

**2. Fear cases are inapposite because Banks never caused fear.**

As *Ridpath* clearly establishes, a tenant can cause a nuisance by setting in motion physical forces that cause actual, tangible interference with

another's use and enjoyment of land. See *Ridpath* at 324. Other (non-unlawful detainer) cases also recognize nuisances arising from tangible physical invasions: falling ice,<sup>4</sup> debris thrown by blasting,<sup>5</sup> flooding,<sup>6</sup> odors and flies.<sup>7</sup> Such a physical interference may be declared a nuisance before it ever happens, but only if the interference is certain to occur once the force is unleashed. See *Turner* at 335. Yet, as we have seen, this line of authority is not available to SHA because Banks never unleashed any physical force upon another person at Stewart Manor, and it cannot be determined *with certainty* that he would have. See *Turner* at 335. This does not complete our analysis, however, because an interference with use or enjoyment of property need not necessarily be physical in nature to sustain a claim of nuisance. See *Everett v. Paschall*, 61 Wash. at 52-53.

A condition that produces no tangible effects, but that nonetheless causes in others a substantial, reasonably-held fear, can support a claim of nuisance. See *Everett* at 50-51. That is because fear, like a foul odor or a disruptive noise, is a sensation capable of rendering others unable to enjoy

---

<sup>4</sup> See *Steele v. Queen City Broadcasting Co.*, 54 Wn.2d 402, 407; 341 P.2d 499 (1959).

<sup>5</sup> See *Graetz v. McKenzie*, 9 Wash. 696, 698; 35 P. 377 (1983).

<sup>6</sup> See *Grundy v. Thurston County*, 155 Wn.2d 1, 8-9; 117 P.3d 1089 (2005).

<sup>7</sup> See *Tinsley v. Monson & Sons Cattle Co.*, 2 Wn. App. 685, 678; 472 P.2d 546 (1970).

their homes or other lands. See *Id.* at 51 (“‘Comfortable enjoyment’ means mental quiet as well as physical comfort.”).

Washington first recognized fear as a type of interference with use or enjoyment of property in *Everett v. Paschall*, a case in which neighboring landowners sued to enjoin a tuberculosis sanitarium as a nuisance. See *Everett* at 47-48. The trial court found that while the sanitarium did not pose an actual danger to neighbors, its presence was nevertheless frightening, and depressed property values because of “general public dread of tuberculosis, and. . . contagion therefrom in the minds of persons ignorant of the true nature of the disease and the harmlessness of such sanitarium.” *Id.* at 48. Finding the neighbors’ fears unfounded, the trial court concluded that the sanitarium was not a nuisance. *Id.* at 49. The Supreme Court reversed, finding that the sanitarium interfered with the neighbors’ “comfortable enjoyment” of their homes by causing a genuine, reasonably-held fear of infection. *Id.* at 51.

Other cases followed *Everett* in holding that fear can sustain a claim of nuisance. In *Goodrich v. Starrett*, a court enjoined operation of a morgue in a residential neighborhood due to its neighbors’ fears of contagion. See *Goodrich v. Starrett*, 108 Wash. 437, 441; 184 P. 220 (1919). Fear of explosion was a sufficient basis for declaring a flammable gas facility to be a nuisance in *Champa v. Washington Compressed Gas Co.*, 146 Wash.

190, 195; 262 P. 228 (1927). And in *Steele v. Queen City Broadcasting Co.*, a television tower was a nuisance in part because it “engender[ed] fears, whether justified or not, that the tower will fall and that it may be struck by an airplane.” See *Steele v. Queen City Broadcasting Co.*, 54 Wn.2d 402, 407; 341 P.2d 499 (1959) (actual wind noise and falling ice also supported nuisance claim).

A couple decisions have even upheld nuisance claims based, wholly or in part, on the fear of fellow human beings. The Washington Supreme Court ruled in *Shepard v. City of Seattle* that “a private insane asylum, with its barred windows, and irresponsible inmates, would annoy, injure, and endanger the comfort, safety, and repose of any person of average sensibilities if located within 200 feet of his place of abode.” *Shepard v. City of Seattle*, 59 Wash. 363, 373; 109 P. 1067 (1910). A later decision established that a fear of the mentally ill could alone support a nuisance claim, even without barred windows. See *Park v. Stolzheise*, 24 Wn.2d 781, 800; 167 P.2d 412 (1946) (“to house a great number of mental patients [and] permit such patients to come and go as they pleased, would cause an immediate and profound alarm in the minds of the people in the neighborhood, would raise a fear for the safety of women and children,

and would deprive the property owners of that repose and comfortable enjoyment of their homes[.]”.<sup>8</sup>

An arguably more analogous case rejected a claim seeking to enjoin the construction of a home for juvenile delinquents as a nuisance. See *Hughes*, 113 Wash. at 343-44. The *Hughes* court left open the possibility that the home, once in operation, might then be “so negligently kept as to create a nuisance,” but “the presumption is against mismanagement[.]” See *Hughes* at 339. This analysis shares a key point of similarity with the present case, in that Powell’s mere admission of Banks to her apartment—like the introduction of juvenile delinquents into the neighborhood in *Hughes*—would not itself amount to a nuisance, though a nuisance might later arise if, for example, Powell failed to keep Banks under control while at Stewart Manor. See *Hughes* at 339.

Still, the facility in *Hughes* was a public necessity that the government had been statutorily obligated to build, and another relevant statute at the time provided “[n]othing which is done or maintained under the express authority of a statute can be deemed a nuisance.” See *Hughes* at 338, 340, quoting Rem. Code, Sec. 8311. The latter statute prevented the neighbors

---

<sup>8</sup> Whether and to what extent *Shepard* and *Parks* could be reconciled with modern equal opportunity requirements protecting the mentally infirm from public and private discrimination is unclear, but is nonetheless not at issue in this appeal. See, e.g., RCW 49.60.030.

from enjoining the facility based on fear alone. See *Hughes* at 339-40. As such, Appellant must concede that *Hughes* is considerably distinct from the present action and that, following *Park* and *Shepard*, the possibility remains that a tenant could theoretically permit a nuisance by hosting on the premises a person whose mere presence strikes fear into the hearts of neighbors or others in the immediate vicinity. See *Park* at 798.

Michael Banks could certainly be such a person, given the distressing information about him in the record. RP at 10-12. Yet even this theory is no help to SHA, because no evidence suggests that Powell's neighbors or others at the building even knew who Banks was, let alone that Banks caused them fear or other mental discomfort. No Stewart Manor residents testified in the case. SHA Property Manager Pamela Rorvik testified that she "suspicioneed {sic} that [Powell] had a boarder/lodger," but did not know who the suspected boarder was, let alone his criminal background, until after he was arrested and removed from the premises. RP at 7. Rorvik did not describe any fear of Banks or any belief that Powell's suspected boarder was dangerous. RP at 6-7. The only person who did know of Banks' "extensive felony record" prior to the arrest was Officer Wind. See RP at 12. Yet Wind does not appear to have been "using or enjoying the premises" at Stewart Manor in the manner relevant to this discussion, but even if he had been, nothing in the record suggests that

Wind's knowledge of Banks' criminal history interfered with Wind's use or enjoyment of the premises in any way.

Had Bank' past criminal acts or violent tendencies been known to Powell's neighbors, SHA staff, or others at Stewart Manor while he was still on the premises, an argument may have been possible under *Park* and *Shepard* that a nuisance existed by reason of fear (or possibly other forms of mental discomfort) that Banks might have inspired in others. See *Shepard* at 373; see also *Park* at 800. But because the information from which any such actionable fears might have sprung did not reach the relevant audience (i.e., SHA staff and residents) until after Banks was arrested and removed, Banks did not actually cause any such fear or otherwise interfere with others' comfortable enjoyment of the premises. See RP at 27; see *Everett* at 51.

**3. SHA's annoyance after the fact cannot amount to substantial interference with use or enjoyment of premises.**

As Banks is now gone, there is no further reason to fear that he may commit a robbery, assault, or other criminal act at Stewart Manor. See RP at 10. SHA may understandably be displeased that Banks was ever there in the first place, but SHA cannot now establish a nuisance claim based on present irritation over the location of Banks' arrest or ruminations about things Banks might have done. See RP at 22-23 ("If a struggle had ensued

or if guns are drawn ... others could have been injured.”); see *Hughes* at 343-44 (“an indulgence in conjecture, imaginary fear, and uncertain apprehensions [would] give countenance to a fastidiousness that finds no comfort in the law.”).

A series of cases arising out of cemeteries perhaps make this most clear. See *Rea v. Tacoma Mausoleum Ass’n*, 103 Wash. 429, 436-37; 174 P. 961 (1918); see also *Hite v. Cashmere Cemetery Ass’n*, 158 Wash. 421; 290 P. 1008 (1930). The plaintiffs in *Rea* claimed that living near a cemetery caused them mental discomfort, i.e., “unpleasant thoughts which [a cemetery’s] presence constantly suggests.” See *Rea* at 432. The court rejected their claim, finding such discomfort superstitious and “merely fanciful.” See *Id.* at 435 (“To become actionable . . . the inconvenience must be something more than fancy, delicacy, or fastidiousness.”); see also *Hite* at 424; see, accord, *Mathewson v. Primeau*, 64 Wn.2d 929, 938; 395 P.2d 183 (1964) (“That a thing is unsightly or offends the aesthetic sense of a neighbor, does not ordinarily make it a nuisance[.]”).

The *Rea* court distinguished *Everett* as having entailed more than just a “question of mere fear or mental unpleasantness apart from fear of physical infection of disease.” *Rea* at 436-37. Both *Rea* and *Hite*, a later

cemetery case, colorfully refuted<sup>9</sup> any plausible scientific grounds upon which a fear of cemeteries might be based. See *Hite* at 424; see *Rea* at 435. This, consistent with *Everett's* nod to the potential (if improbable) actual dangers of a tuberculosis sanitarium, and *Turner's* requirement of imminence, appears firmly to establish that fear will support a nuisance claim only if the fear relates to some actual physical danger to which the plaintiff is imminently exposed. See *Rea* at 435; see also *Everett* at 52-53; see also *Turner* at 335.

Indeed, only with extreme difficulty can the fear cases (*Everett, Park, et al.*) be reconciled with *Turner*. As in the fear cases, the plaintiffs in *Turner* introduced evidence that the rock-crushing and blasting activities they sought to enjoin would generate fear. See *Turner* at 334 (“Most of the plaintiffs have children and testified they were fearful that the blasting and operation of the crusher would be dangerous to the children.”). These fears would surely have fallen within the “ordinary sensibilities” standard of *Everett* and its progeny, notwithstanding the assurances of defense experts that the wind would blow the dust in the opposite direction or that

---

<sup>9</sup> See *Hite* at (“In order that a germ might leave one of the dead bodies in the cemetery, and finally reach the well of either of the appellants, it would be necessary for the germ to travel approximately 20 feet downward, through dry, sandy, or gravelly soil, until it reached the water table, and then be carried by the water table, which moves with extreme slowness, a distance of two or three hundred feet. . .”); see *Rea* at (“The human contents of these graves cannot, as they lie buried there, offend the senses in a legal point of view. The memorial stones alone affect the senses, and the same would result to the superstitious, though nothing human lay beneath them.”).

the dynamite blasts would be angled away from their houses. See *Turner* at 334-35; see also *Everett* at 52 (“The theories and dogmas of scientific men, though provable by scientific reference, cannot be held to be controlling unless shared by the people generally.”); see also *Goodrich* at 441-42. The *Turner* plaintiffs presented proof that the blasting and rock-crushing activity would lower their property values, the traditional method of proving a particular fear is widespread among the public. See *Turner* at 334 (“dust, noise, and shock from the blasting would interfere with their repose and well-being, and ... reduce the value of their property materially”); see also *Everett* at 51 (“we question our right to say that the fear is unfounded or unreasonable, when it is shared by the whole public to such an extent that property values are diminished”). *Turner* also closely resembled the fear cases in that public safety depended upon the strict observation of safety precautions. See *Turner* at 334-35; see *Everett* at 52-53 (“the security of the public depends upon proper precautions and sanitation, which may at any time be relaxed by incautious nurses or careless or ignorant patients”). By comparison, a negligently-prepared dynamite blast or even a shift in the wind could have sent harmful debris or shockwaves onto the *Turner* plaintiffs and their lands. See *Turner* at 334-35.

Why the *Turner* plaintiffs did not secure their injunction despite these formidable fear-based arguments is not immediately apparent, yet *Turner* does not appear to have overruled *Park, Everett*, or the other fear cases. See *Turner* at 337. Rather, a fine, yet significant point of distinction lies in the nature of the fear and the certainty with which it is realized. In *Everett* and *Goodrich*, for instance, the fear had actually led to marked, persistent disruptions in the daily lives and mental repose of the claimants. See *Everett* at 53 (“every house fly that might drone a summer afternoon in the drawing room or nursery is a constant reminder to plaintiffs of their neighbor, tending to disquiet the mind and render the enjoyment of their home uncomfortable”); see *Goodrich* at 439 (neighbors of morgue “lived in dread of acquiring some contagious disease” and were subjected or “a depressing effect” from “constant conveying of dead bodies in and out of the building” and “conducting of funeral services, accompanied as they are by the hysterical sobbing”). In *Goodrich*, for instance, these emotional effects produced physical manifestations such, as one witness testified, being “unable to relish [] meals or sleep properly.” *Goodrich* at 439.

By contrast, the fear at issue in *Turner* was a more generalized anxiety about the blasting and its possible effects. See *Turner* at 334. Since it could not be known whether or to what extent such fear would manifest itself once the blasting operations began, the evidence did not establish—

with certainty as the *Turner* court required—that *fear itself* would render the homeowners unable to eat, sleep, or enjoy their homes. See *Turner* at 335. The homeowners’ anticipated fear was, therefore, no different than any of the other anticipated injuries from the quarry: an insufficiently imminent threat that did not constitute a nuisance. See *Turner* at 335. Lacking imminence, the fear was comparable to the mental discomfort of the cemetery neighbors in *Rea* and *Hite*. See *Rea* at 435; see *Hite* at 424.

SHA has not introduced any evidence of fear, whether actual or anticipated. See RP at 27. Banks has been detected, arrested, and removed, and thus any fear based on his potential future actions would lack imminence. See *Turner* at 335. SHA may be justifiably displeased that Banks was in one of its apartment buildings, but such displeasure is a matter of “fancy, delicacy, or fastidiousness,” not a genuine fear of an actual physical danger to which SHA or its residents are imminently exposed. See *Rea* at 435; see also *Everett* at 52-53; see also *Turner* at 335. As such, SHA’s present displeasure does not constitute a substantial interference with use or enjoyment of the premises. See *Rea* at 435.

**C. This action was properly dismissed after the evidentiary hearing by the Superior Court Commissioner.**

**1. Analysis by Commissioner**

At the initial show cause hearing on February 27, 2009, the Superior Court Commissioner conducted a three-step analysis of SHA's nuisance claim. See RP at 27. First, the commissioner defined nuisance as "something that is immediately injurious or dangerous to the health, welfare, and safety. The potential for injurious behavior is not nuisance, by that definition." RP at 25. Next, the commissioner ruled "there has to be a nuisance on the premises." RP at 27. Finally, "that nuisance has to be injurious to the occupants or other people around there." RP at 27.

In articulating the standard of "immediately injurious" condition, the commissioner's approach was consistent with the rule set forth in *Turner*, that for an anticipated act or condition to constitute a nuisance, it must be certain to produce the anticipated injury. See *Turner* at 335; see also *Turtle*, 156 Wash. at 336-37. The commissioner's standard also correctly observed that a nuisance, for purposes of the Unlawful Detainer Act, must occur or exist "on or about the premises." See RP at 27; see RCW 59.12.030(5). And the commissioner's use of the phrase "injurious behavior" is easily reconciled with the correct legal standard, "substantial interference with use or enjoyment of property." See *Crawford* at 357. Certainly a person who experiences a substantial interference with the use or enjoyment of property thereby suffers an "injury," whether corporeal or cerebral in character. See *Ridpath* at 324; see also *Goodrich* at 441.

Using this legal framework, the commissioner turned to the record and observed:

“a complete void -- lack of any evidence whatsoever as to injurious behavior on the premises. And I believe that there has to be a nuisance on the premises, that that nuisance has to be injurious to the occupants or other people around there. And there was no indication of that.”

RP at 27. Finding no evidence of “injurious behavior on the premises,” the commissioner dismissed the case. RP at 27.

The written order of dismissal, however, stated that “a nuisance is not established where no actual injury has been alleged by plaintiff.” CP at 65. Reading the commissioner’s written order together with his oral ruling, the phrase “actual injury” appears to have meant “a nuisance on the premises,” which the commissioner had previously equated with “something that is immediately injurious or dangerous to the health, welfare, and safety.” See RP at 25-27, CP at 65. If so, then both the oral ruling and the written order are easily harmonized, and correct for the reasons discussed above.

## **2. Analysis by the reviewing judge.**

The reviewing judge reversed the commissioner’s order of dismissal on the ground that “an actionable nuisance under RCW 59.12 and RCW 59.18 can proceed without actual harm or injury[.]” CP at 63-64. Of course, the reviewing judge was correct insofar as the term “actual injury”

does not accurately describe the governing legal standard for nuisance, which is a substantial interference with the use and enjoyment of property. See *Grundy* at 6; see *Crawford* at 357; see also *Ridpath* at 324. Yet the reviewing judge should nevertheless have affirmed the order of dismissal, even if he may have clarified the written court's legal conclusions to conform to both the commissioner's oral ruling and the correct legal standard which it reflected.

As the reviewing judge did not grant oral argument, we have only the order itself from which to discern its reasoning. See CP at 63-64. Three plausible interpretations appear possible. The reviewing judge may have evaluated the nuisance question using a standard altogether different than "substantial interference with the use or enjoyment of property." The reviewing judge may have applied the correct standard, but found the evidence in the record was sufficient to establish a substantial interference with the use or enjoyment of property. Or, the reviewing judge may have interpreted the commissioner's phrase "actual injury" to mean something different than "substantial interference with the use or enjoyment of property," and thus questioned whether the commissioner applied the correct legal standard at all in the show cause hearing. See CP at 65.

In either of the first two situations, Appellant maintains, as discussed above, that the order on revision was incorrect because the definition of

nuisance is indeed “substantial interference with the use or enjoyment of property,” and SHA did not introduce substantial evidence to prove such an interference. See generally *City of Tacoma v. State*, 117 Wn.2d 348, 361; 816 P.2d 7 (1991) (conclusions of law must rest upon factual findings supported by substantial evidence); see also *Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wn.2d 873,880; 73 P.3d 369 (2003) (substantial evidence means “evidence sufficient to persuade a rational fair-minded person the premise is true”). Appellant suspects, however, that the reviewing judge’s order reflects the third scenario.

Courts speak through their written orders, not their oral opinions. See *Pratt v. Pratt*, 99 Wn.2d 905, 910; 665 P.2d 400 (1983). Regrettably, the commissioner’s written order (as is often the case) did not demonstrate the same level of clarity and thoroughness that his oral ruling contained. See CP at 65; see RP at 25-27. By declaring broadly that “a nuisance is not established where no actual injury has been alleged by plaintiff,” the written order was capable of multiple interpretations inconsistent with the proper legal standard. See CP at 65. The reviewing judge did not have access to a transcript of the show cause hearing, meaning a very close review of the audio recording would have been necessary to reconcile the commissioner’s written order with his spoken analysis. See CP at 19; see

also King County LCR 7(b)(8)(B)(iii) (revision motions decided based on electronic audio recording).

Furthermore, in the context of the present action, the phrase “actual injury” is highly suggestive of a physical, bodily injury—such as what a person would endure in an assault by Michael Banks—or at least a theft or other direct interference with property. See CP at 65. Of course, proof of a bodily injury or theft is certainly not necessary to have a nuisance. See, e.g., *Everett* at 51; see *Turtle* at 338; see *Park* at 800. Insofar as the reviewing judge understood the commissioner to have required SHA to prove more than just a substantial interference with use or enjoyment of property, his order on revision would have been correct. The problem, of course, is that the commissioner did apply the correct legal standard—and even if he had not, the reviewing judge, by applying the correct rule of law to the evidence in the record, should have reached the same result anyway: that there was not substantial evidence to conclude that Powell permitted a nuisance on or about the premises. See generally *In Re Marriage of Moody*, 137 Wn.2d 979, 993; 976 P.2d 1240 (1999) (discussing proper function of superior court judge on motion for revision of commissioner’s order).

**D. Even if SHA did present substantial evidence that a nuisance occurred, it was cured well before SHA issued notice to vacate.**

Even if Michael Banks' mere presence of in Powell's apartment could have constituted a nuisance under the governing legal standard, the condition was promptly cured. This provides a separate basis upon which SHA's action must fail. See RCW 59.18.180(1); see also *In Re Cross*, 99 Wn.2d 373, 378; 662 P.2d 828 (1983) (may affirm ruling on an alternative ground where record is adequately developed); accord see RAP 2.5(a).

**1. Powell has a right to cure most nuisances under the Residential Landlord-Tenant Act.**

The Unlawful Detainer Act, which applies to all different types of tenancies, authorizes a landlord to terminate a tenancy on three days' notice, with no opportunity to cure, where the tenant causes a nuisance. See RCW 59.12.030(5). However, this rule is considerably narrower in residential tenancies. See RCW 59.18.180(1). The Unlawful Detainer Act applies to unlawful detainer actions against residential tenants only where not supplanted by the RLTA. See *Housing Authority v. Pleasant*, 126 Wn. App. 382, 390; 109 P.3d 422 (Div. 3, 2005). Under the RLTA, a tenant who causes a nuisance ordinarily has up to thirty days in which to cure the nuisance and thereby preserve the tenancy. See RCW 59.18.180(1); see also *Everett Housing Authority v. Terry*, 114 Wn.2d at 568-69 ("The Legislature has provided for a tenant to have at least one opportunity to

correct a breach before forfeiture of a lease under the accelerated restitution provisions of RCW 59.12.”).

The mechanics of the RLTA’s right-to-cure provision are only slightly more complicated. The RLTA imposes a duty upon residential tenants in section 130 not to “permit a nuisance or common waste.” See RCW 59.18.130(5). Section 180 of the RTLA then provides remedies for the landlord in the event of a tenant’s “fail[ure] to comply with any portion of RCW 59.18.130...” See RCW 59.18.180(1). Since a tenant who permits a nuisance violates subsection (5) of RCW 59.18.130, this entitles the landlord to the remedies in section 180. See RCW 59.18.130(5); see also RCW 59.18.180(1). Section 180, in turn, states that a landlord may issue the tenant a notice to correct the violation within thirty days (or less in case of emergency), and the tenant “shall have a defense to an unlawful detainer action filed solely on this ground if ... the tenant is in substantial compliance [or] remedies the noncomplying condition within the thirty day period[.]” See RCW 59.18.180(1).

As Wind testified at the show cause hearing, Banks was arrested and removed from the premises on December 17, 2008—several weeks before SHA issued Powell the 3-Day notice to vacate upon which this unlawful detainer action is predicated. See RP at 10; see CP at 6-7. No evidence suggests Banks has returned or otherwise continues to be a problem.

Thus, even assuming Powell permitted a nuisance in violation of RCW 59.18.130(5) by having Banks in her apartment, the record unequivocally showed that condition was cured and that Powell was in at least substantial compliance with her duties (under RCW 59.18.130 well before thirty days had elapsed and at the time of the unlawful detainer hearing. See RP at 10; see CP at 6-7; see also RCW 59.18.180(1).

**2. Powell's right to cure was not compromised by any of the exceptions in RCW 59.18.180(2-4).**

As mentioned above, the RLTA provides a residential tenant with an opportunity to preserve a tenancy by curing a nuisance—a right that may not exist in commercial or other types of tenancies (not governed by the RLTA). Compare RCW 59.18.180(1) with RCW 59.12.030(5). However, three specific instances remain in which the RLTA authorizes a landlord to evict even a residential tenant with no opportunity to cure. See RCW 59.18.180(2-4). Yet these exceptions pertain only to specific, narrowly-defined categories of very serious misconduct: “drug-related activity,” “gang-related activity,” or “imminently hazardous” activities that involve either physical assaults or deadly weapons, and for which the tenant is arrested. See RCW 59.18.180(2-4); see also RCW 59.18.130(6, 8-9). Under these exceptions “the compliance provisions of [the RLTA] do not

apply and the landlord may proceed directly to an unlawful detainer action.” RCW 59.18.180(2-4). None of these exceptions pertain.

SHA has not alleged or proven that Powell (or Banks) engaged in any “drug-related activity at the rental premises,” nor has any evidence to that effect surfaced. See RCW 59.18.180(6) (“If drug-related activity is alleged to be a basis for termination of tenancy ... the compliance provisions ... do not apply and the landlord may proceed directly to an unlawful detainer action.”). Drug-related activity, which the RLTA further defines as “activity which constitutes a violation of chapter 69.41, 69.50, or 69.52 RCW,” requires a nexus with “legend drugs” or “controlled substances” and there is no indication of any such activity in this case. See RCW 59.18.130(6).

The RLTA provision authorizing immediate eviction for “gang-related activity” is equally inapplicable. See RCW 59.18.180(4). “‘Gang-related activity’ means any activity that occurs within the gang or advances a gang purpose.” RCW 59.18.030(16). A “gang” is a group of “three or more persons [with an] identifiable leadership or an identifiable name, sign, or symbol” and that “on an ongoing basis, regularly conspires and acts in concert mainly for criminal purposes.” RCW 59.18.030(15). SHA has neither alleged nor offered evidence suggesting that Powell, Banks, or

any other relevant person belongs to a gang or engaged in any such “gang-related activity.”<sup>10</sup>”

The third exception concerns “imminently hazardous activity.” See RCW 59.18.180(3). This provision has two elements. First, there must be “activity on the premises that creates an imminent hazard to the physical safety of other persons on the premises as defined in RCW 59.18.130(8).” See RCW 59.18.180(3). Next, the tenant must be “arrested as a result of this activity[.]” See RCW 59.18.180(3). If, and only if, both elements are satisfied, “then the compliance provisions of [RCW 59.18.180] do not apply and the landlord may proceed directly to an unlawful detainer action against the tenant who was arrested for this activity.” RCW 59.18.180(3).

This exception does not entitle SHA to evict Powell notwithstanding the compliance provisions of RCW 59.18.180(1), most obviously because she was never arrested. RP at 12; see RCW 59.18.180(3). Not only is an arrest a critical element in establishing grounds for immediate eviction

---

<sup>10</sup> See RCW 59.18.130 (“Each tenant shall ... (9) Not engage in any gang-related activity at the premises, as defined in RCW 59.18.030, or allow another to engage in such activity at the premises, that renders people in at least two or more dwelling units or residences insecure in life or the use of property or that injures or endangers the safety or health of people in at least two or more dwelling units or residences. In determining whether a tenant is engaged in gang-related activity, a court should consider the totality of the circumstances, including factors such as whether there have been a significant number of complaints to the landlord about the tenant’s activities at the property, damages done by the tenant to the property, including the property of other tenants or neighbors, harassment or threats made by the tenant to other tenants or neighbors that have been reported to law enforcement agencies, any police incident reports involving the tenant, and the tenant’s criminal history[.]”).

under the exception, but—as the commissioner found—neither Powell nor Banks engaged in any activity “[i]mmminently hazardous to the physical safety of other persons on the premises.” See RP at 27; see RCW 59.18.130(8). Even if the exception did apply, it could only authorize SHA to evict Banks, not Powell. See RCW 59.18.180(3) (“landlord may proceed directly to an unlawful detainer action *against the tenant who was arrested for this activity.*”) (emphasis added).

Because none of these exceptions under RCW 59.18.180(2-4) pertain, the “compliance provision” of RCW 59.18.180(1) was in effect. See RCW 59.18.180(1). Hence, even if Powell did permit a nuisance, the fact that she cured the violation well before SHA took her to court supplied an alternative ground upon which the commissioner could have dismissed the action. See RCW 59.18.180(1).

#### **V. Conclusion**

For the foregoing reasons, this Court should REVERSE the Superior Court’s April 3, 2009, Order Granting Plaintiff’s Motion for Revision.

RESPECTFULLY SUBMITTED this 29 day of June, 2009.

**NORTHWEST JUSTICE PROJECT**

By   
Eric Dunn, WSBA #36622  
Attorneys for Defendant/Appellant  
Shaunta Powell