

No. 71318-3-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

PHILLIP D. BURGESS and LINDA L. BURGESS,

Respondents,

v.

MICHAEL CROSSAN and ROWENA CROSSAN d/b/a
LAKE WASHINGTON BOAT CENTER

Appellants.

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DIVISION I
STATE OF WASHINGTON
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RESPONDENTS' BRIEF

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ORIGINAL

TABLE OF AUTHORITIES

WASHINGTON CASES

Angelo Property Co. v. Hafiz,
167 Wn. App. 789, 274 P.3d 1075 (2012).....10, 15

Brubaker v. Hovde,
45 Wn. App. 44, 723 P.2d 1193 (1986).....6

Butler v. Craft Eng. Contr. Co.,
67 Wn. App. 684, 843 P.2d 1071 (1992).....4

City of Seattle v. McCoy,
101 Wn. App. 815, 4 P.3d 159 (2003).....8

Clallam County v. Folk,
130 Wn.3d 142, 922 P.2d 83 (1996)4

Curley Elec., Inc. v. Bills,
130 Wn. App. 114, 121 P.3d 106 (2005).....5

Falaschi v. Yowell,
24 Wn. App. 506, 601 P.2d 989 (1979).....4

Holohan v. Melville,
41 Wn.2d 380, 249 P.2d 777 (1952).....4

In re Mele,
488 Br. 448 (Bkrtcy. W. D. Wash. 2013).....7

In re Ross,
173 Br. 937 (Bkrtcy. E. D. Wash. 1994).....8

LaFramboise v. Schmidt,
42 Wn.2d 198, 254 P.2d 485 (1953).....6

Merritt v. Newkirk,
155 Wn. 517, 285 P. 442 (1930).....6

TABLE OF AUTHORITIES

Nationwide Papers Inc. v. Northwest Egg Sales, Inc.,
69 Wn.2d 72, 416 P.2d 687 (1966).....12

Owens v. Layton,
133 Wn. 346, 233 P. 645 (1925).....13, 14

Rouse v. Glascam Builders, Inc.,
101 Wn.2d 127, 677 P.2d 125 (1984).....4

Shepard v. Dye,
137 Wn. 180, 242 P. 381 (1926).....14

Tungsten Products, Inc. v. Kimmel,
5 Wn.2d 572, 105 P.2d 822 (1940).....9

Werker v. Knox,
197 Wn. 453, 85 P.2d 1041 (1938).....6

Western Union Telegraph Co. v. Hansen & Rowland Corp.,
166 F.2d 258 (1948).....12

Wilson v. Lund,
74 Wn.2d 945, 447 P.2d 718 (1968).....12

STATUTORY AUTHORITIES

RCW 1.12.020.....11

RCW 25.05.055(1).....5

RCW 26.16.030.....6

RCW Ch. 59.12 et seq.....10, 11, 12, 13, 14

RCW 64.28.020.....4

TABLE OF AUTHORITIES

SECONDARY SOURCES

Cross, The Community Property Law in Wash. (Revised 1985),
61 Wash. L. Rev. 13 (1986).....9

Unlawful Detainer under RCWA Ch. 59.12,
17 Wash. Prac., Real Estate § 6.80, (2d ed. 2013).....10

Statutory Construction, 2 Sutherland § 4704 (3d ed. Horack).....12

TABLE OF CONTENTS

STATEMENT OF THE CASE.....1

ARGUMENT.....3

1. There was just one tenant to evict –
Lake Washington Boat Center.....3

2. Rowena & Michael Crossan were not cotenants –
they were partners.....4

3. The marital community is presumed to be liable.....6

4. A writ of restitution restores possession to the landlord.....10

5. The relief sought would make Washington’s
unlawful detainer law a nullity.....15

6. Request for Attorney Fees and Expenses.....16

CONCLUSION.....17

STATEMENT OF THE CASE

On or about February 28, 2011, Michael Crossan and Rowena Crossan, a married couple, entered into a lease agreement with Philip and Linda Burgess. Appellant's Brief at 1; CP 10-21; 213-14. Mr. and Mrs. Crossan jointly executed the lease agreement as "Michael Crossan and Rowena Crossan, d/b/a Lake Washington Boat Center." *Id.* The lease was for commercial property space located at 423 Auburn Avenue North in Auburn, Washington, with approximately 10,000 square feet of warehouse space and 2000 square feet of showroom space. CP 2; CP 93; CP 205. Following execution of the lease and prior to the trial court's order issuing a writ of restitution, Michael and Rowena Crossan occupied the space and conducted business at the subject property as Lake Washington Boat Center. CP 2; CP 93.

Michael and Rowena Crossan do not dispute the trial court's findings that Michael Crossan committed a nuisance on the property they were leasing from Philip and Linda Burgess, nor do they dispute the trial court's decision granting a writ of restitution in favor of Philip and Linda Burgess due the nuisance acts committed by Michael Crossan. Appellant's Brief at 1-5.

Rowena Crossan brings this appeal challenging the trial court's order finding that she was "in unlawful detainer of the subject property, terminating her tenancy and forfeiting her leasehold interest." Appellant's Brief at 13.

ARGUMENT

1. There was just one tenant to evict – Lake Washington Boat Center.

The commercial property at issue in this case was leased and occupied by Lake Washington Boat Center. At the time, Michael and Rowena Crossan were doing business as Lake Washington Boat Center and they executed the lease agreement solely in that capacity and not as individuals. In bringing the action to evict Lake Washington Boat Center, Philip and Linda Burgess brought suit against “Michael Crossan and Rowena Crossan d/b/a Lake Washington Boat Center.” CP 1-41. As such, this matter involves an action against these two individuals acting and operating as Lake Washington Boat Center. Rowena Crossan is now seeking relief that would, in essence, result in only one-half of Lake Washington Boat Center being evicted from the premises.

Quite simply, as explained below, a tenancy in common would require the presence of two tenants. In the case at hand, the tenant was Lake Washington Boat Center. Michael and Rowena Crossan were both spouses and business partners, doing business as a single entity – Lake Washington Boat Center, which was the sole tenant of the premises. Rowena and Michael did not have, nor could they have, a separate undivided interest in the lease.

2. Rowena & Michael Crossan were not cotenants; they were partners.

Despite her arguments to the contrary, Rowena and Michael Crossan were not mere cotenants. “The essential attribute of a tenancy in common is possession; each cotenant is the holder of an undivided interest in the whole of the property, with the right to possession and enjoyment of the whole property.” *Clallam County v. Folk*, 130 Wn.2d 142, 149, 922 P.2d 73 (1996), citing *Rouse v. Glascam Builders, Inc.*, 101 Wn.2d 127, 130, 677 P.2d 125 (1984). “However, each cotenant’s title is ‘separate and distinct, and each tenant holds a separate estate.’” *Id.*, quoting *Falaschi v. Yowell*, 24 Wn. App. 506, 509, 601 P.2d 989 (1979); citing *Holohan v. Melville*, 41 Wn.2d 380, 400, 249 P.2d 777 (1952). Furthermore, “[a] tenant-in-common has a separate undivided interest which is descendible and may be conveyed by deed or will.” *Id.*, citing *Butler v. Craft Eng. Constr. Co.*, 67 Wn. App. 684, 694, 843 P.2d 1071 (1992).

RCW 64.28.020 provides, in pertinent part:

- (1) Every interest created in favor of two or more persons in their own right is an interest in common, unless acquired by them in partnership, for partnership purposes, or unless declared in its creation to be a joint tenancy, as provided in RCW 64.28.010, or unless acquired by executors or trustees;
- (2) Interests in common held in the names of both spouses or both domestic partners, whether or not in conjunction with others, are presumed to be community property.

[...]

On the other hand, “the association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intended to form a partnership.” RCW 25.05.055(1). The Revised Uniform Partnership Act holds similarly and provides that a partnership is created whenever two or more persons agree to carry on a business and share in the profits and ownership control. *Curley Elec., Inc. v. Bills*, 130 Wn. App. 114, 121 P.3d 106 (2005), rev. denied, 158 Wn.2d 1007, 143 P.3d 829 (2006).

In the case at hand, Michael and Rowena Crossan jointly signed the lease agreement for purposes of operating Lake Washington Boat Center out of the subject premises. They did not sign separate instruments. They each signed a single lease agreement, as partners, for purposes of operating Lake Washington Boat Center. They were working together for the united purpose of jointly owning and operating a business. Therefore, they were not, nor could they be, cotenants; they were partners. As such, any case law cited by Rowena Crossan in support of her appeal based upon an argument of cotenancy is inapplicable and has no bearing on the issues now before this Court.

3. The marital community is presumed to be liable.

In 1972, Washington's community property laws were revised to permit either spouse to manage the community. See RCW 26.16.030. A legal action "against a married man is presumed to be against the [marital] community, and the wife need not be joined separately or independently, since she is represented in the action through the husband. *LaFramboise v. Schmidt*, 42 Wn.2d 198, 200, 254 P.2d 485 (1953), citing *Merritt v. Newkirk*, 155 Wn. 517, 285 P. 442 (1930). See also *Brubaker v. Hovde*, 45 Wn. App. 44, 47, 723 P.2d 1193 (1986) (Presumption is that an obligation incurred or an enterprise undertaken by either spouse during the marriage is for the benefit of the community). A wife will be liable for the torts of her husband if his act either "(1) results or is intended to result in a benefit to the [marital] community or (2) is committed in the prosecution of the business of the community." *LaFramboise*, 42 Wn.2d at 200. Since the 1930s, "the trend of the law has not been toward relieving the community from liability for the torts of its individual members, but has been quite definitely in the direction of finding ways and means of imposing such liabilities upon the community." *Werker v. Knox*, 197 Wn. 453, 456, 85 P.2d 1041 (1938).

In *LaFramboise v. Newkirk*, the husband and wife were foster parents who received payment for the care they provided the children. *Id.*

at 200-01. The action was against the husband for indecent liberties taken against a child in the couple's care. *Id.* Since the incident arose during the course of the foster care the couple provided, the marital community was held responsible because the community received a benefit (payment from the State) for fostering that child. *Id.* at 200.

In the present appeal, both Rowena and Michael Crossan signed and executed the lease agreement for the subject premises, which was by and between Mr. and Mrs. Burgess and "Michael Crossan and Rowena Crossan, d/b/a Lake Washington Boat Center." Appellant's Brief at 1; CP 10-21; 213-14. Rowena and Michael were, at all times material hereto, a married couple. Rowena Crossan was a named defendant in the trial court action and as such, the issues were resolved against both Michael and Rowena Crossan by the trial court. *See LaFramboise*, 42 Wn.2d at 200.

Lake Washington Boat Center was and is a marital community business and the lease agreement was entered into by the marital community. Under Washington's community property laws, the relationship between a husband and wife creates a special form of partnership, under which spouses not only owe each other the highest fiduciary duties, but also the statutory duty to manage and control the community assets for the benefit of the community. *In re Mele*, 488 Br. 448 (Bkrcty. W. D. Wash. 2013) (emphasis added). Furthermore, if

Michael Crossan's acts of nuisance were committed in the course of managing community property, the marital community will be liable for those acts. *See In re Ross*, 173 Br. 937, 938 (Bkrcty. E. D. Wash. 1994). Since Michael Crossan's acts giving rise to this action arose during the course and scope of operating Lake Washington Boat Center, those acts did occur while he was managing a marital community business. Therefore, the trial court committed no error in finding both Rowena and Michael Crossan were in unlawful detainer due to the nuisance created by Michael Crossan, which was created in the course and scope of the operating Lake Washington Boat Center.

Rowena Crossan relies upon *City of Seattle v. McCoy*, 101 Wn. App. 815, 4 P.3d 159 (2003), in support of her position; however, that case is distinguishable. In *McCoy*, the City of Seattle brought an action to close the McCoy's restaurant for illegal drug activity under the drug nuisance law pursuant to RCW 7.43 et seq. *Id.* at 819. Unlike the Crossans, who are a married couple and who jointly executed the lease "doing business as" Lake Washington Boat Center, the *McCoy* case involved nuisance activities by unrelated third parties frequenting the McCoy's restaurant and lounge as patrons. *Id.* at 820-23.

The *McCoy* case had nothing to do with unlawful detainer or forfeiture of a lease but, rather, involved a constitutional challenge to a

governmental taking. *Id.* at 827. Furthermore, “[t]he McCoys did not know who was engaged in the illegal activity nor when it was occurring. *Id.* at 834. The McCoys had also taken steps to work with the police to curb illegal activity. *Id.* at 822. Unlike the *McCoy* case, here the nuisance was created by Rowena Crossan’s spouse, not random strangers frequenting the business.

Rowena Crossan also relies on *Tungsten Products, Inc. v. Kimmel*, 5 Wn.2d 572, 105 P.2d 822 (1940), but again, this case did not involve an unlawful detainer action or a marital community. Rather, in *Tungsten*, the defendants were tenants in common of mining leases or contracts and had entered into a contract with Tungsten for the sale of their interests. *Id.* These facts bear nothing in common with the facts of this case and the holding is inapplicable to the issues presently before this Court.

In cases involving a husband and wife, it is well established Washington law that “each spouse has the right and duty to manage the community property.” *In re Ross*, 173 B.R. at 938. Furthermore, the 1972 amendments to Washington’s community property laws made each spouse an equal manager of marital community property. *Id.* at 939, citing Cross, *The Community Property Law in Washington (Revised 1985)*, 61 Wash. L. Rev. 13, 141-2 (1986). Generally, “each spouse has an equal right to manage and conduct the community business. [A wife’s] failure to

exercise her management rights does not insulate her from the potential liabilities that may flow from a breach of her management duties.” *Id.* at 939.

For the foregoing reasons, Rowena Crossan may not insulate herself from liability for her husband’s wrongful acts. Thus, the trial court’s findings and decision should be upheld and Rowena Crossan’s appeal denied in its entirety.

4. A writ of restitution restores possession to the landlord.

Rowena Crossan does not challenge the trial court’s findings that her husband and business partner, Michael Crossan, committed nuisances on the property, nor does she challenge the trial court’s ruling granting a writ of restitution in favor of Phil and Linda Burgess as it relates to her husband. Instead, she challenges the writ only as it relates to her.

“The main purpose of unlawful detainer under RCWA Chapter 59.12...is to give the landlord a speedy, efficient action to evict a tenant for breach or for certain activities on the premises.” *Unlawful Detainer under RCWA Ch. 59.12*, 17 Wash. Prac., Real Estate § 6.80, (2d ed. 2013). An unlawful detainer action is a summary proceeding designed to facilitate the recovery of possession of the leased property and the primary issue for the trial court to resolve is limited to either: (1) entering a judgment in favor of the defendant (Lake Washington Boat Center) by dismissing the

action with prejudice or (2) rendering a judgment in favor of plaintiff (Philip and Linda Burgess). *Angelo Property Co. v. Hafiz*, 167 Wn. App. 789, 274 P.3d 1075 (2012), *rev. denied*, 175 Wn.2d 1012, 287 P.3d 394. Therefore, Rowena Crossan's requested relief, to have a writ of restitution against Michael Crossan but not her, is not a viable option under the law. Either Mr. and Mrs. Burgess must prevail or Lake Washington Boat Center must prevail. This is not a case amenable to splitting the baby.

The trial court's order granting a writ of restitution was based upon RCW 59.12.030(5), which provides:

A tenant of real property for a term less than life is guilty of unlawful detainer...when [a tenant] commits or permits waste upon the demised premises, or when [the tenant] sets up or carries on thereon any unlawful business, or when [the tenant] erects, suffers, permits, or maintains on or about the premises any nuisance, and remains in possession after the service...of three days' notice to quit.

Rowena Crossan bases her challenge to the trial court's findings and order in part upon RCW 59.12.170, which provides for the issuance of a writ of restitution but goes on to state that judgment may also include forfeiture of the lease if the unlawful detainer proceeding was based upon "neglect or failure to perform any condition or covenant of [the] lease...or after default in the payment of rent." Rowena Crossan argues that because the trial court's ruling was based upon RCW 59.12.030(5), a forfeiture of the lease should not have been included in the judgment.

While these two code provisions seem to conflict, they must not be read in isolation. RCW 1.12.020 provides, “[t]he provisions of [the Revised Code of Washington] shall be liberally construed, and shall not be limited by any rule of strict construction.” The Supreme Court of Washington has held that the “[l]anguage within a statute must be read in context with the entire statute and construed in a manner consistent with the general purposes of the statute.” *Wilson v. Lund*, 74 Wn.2d 945, 947, 447 P.2d 718 (1968), quoting *Nationwide Papers Inc. v. Northwest Egg Sales, Inc.*, 69 Wn.2d 72, 76, 416 P.2d 687, 689 (1966). “[T]he general rule [is] that the cardinal purpose or intent of the whole act shall control, and that all parts be interpreted as subsidiary and harmonious. ‘A statute is to be construed with reference to its manifest object, and if the language is susceptible to two constructions, one which will carry out and the other defeat such manifest object, it should receive the former construction.’” *Wilson*, 74 Wn.2d at 948, quoting 2 Sutherland, *Statutory Construction* § 4704 (3d ed. Horack). Moreover, unlawful detainer statutes are strictly construed against the hold-over tenant. *Western Union Telegraph Co. v. Hansen & Rowland Corp.*, 166 F.2d 258 (1948).

The intent of RCW Ch. 59.12 is to provide the landlord with a means to retake the premises following various acts or failures to act by the tenant(s), as enumerated in the statutes. To grant a writ of restitution

restoring the premises to Mr. and Mrs. Burgess, yet allow the lease to remain in effect would violate the purpose of the law and lead to a result that could only be called bizarre.

In an unlawful detainer action pursuant to RCW Ch. 59.12, certain bases for an unlawful detainer action are curable by the tenant. This would explain the additional language of RCW 59.12.170, which permits the tenant to pay into the court amounts past-due to cure a breach for failure to pay rent. Then if the breach is not cured, the lease would be subject to forfeiture. Unlawful detainer actions based upon nuisance, however, are not subject to cure. Therefore, after a three-day notice, “rent” will be due no more than three days after the notice was served and not for any period of time after that, even if the tenant wrongfully remains in possession of the premises beyond that point. *Owens v. Layton*, 133 Wn. 346, 233 P. 645 (1925). The reason “rent” ends when the notice is effective is that the lease terminates at that point; after that, the tenant is wrongfully in possession as an unlawful detainer, but not as a tenant under the lease. *Id.* at 347. Said another way, “[r]ent is an incident of tenancy” and a tenancy is terminated following the landlord’s notice to quit the premises. *Id.* Therefore, following Mr. Burgess’ service of the notice to quit the premises, Lake Washington Boat Center was a trespasser and would be liable for

damages, but not for rent, because there was no longer a tenancy and thus no lease. *See Id.*

Even if this Court determines the lease had not yet been forfeited, the Washington Supreme Court has already addressed this issue in *Shepard v. Dye*, 137 Wn. 180, 242 P. 381 (1926), and has upheld the forfeiture of a lease under RCW 59.12.030(5). In *Shepard*, the property owners had leased premises to respondents Dye, who then subleased a portion of the premises to respondents Green. *Id.* at 181. The Greens began conducting an unlawful gambling business out of their portion of the premises. The property owners began an unlawful detainer action against the original lessees, the Dyes. The Dyes opposed the action, arguing, in part, that RCW 59.12.030(5) contained no reference to the holding of possession by a subtenant and therefore showed “a legislative intention not to permit summary disposition and forfeiture of the lease for any act of a subtenant.” *Id.* at 187. The Court, however, disagreed and found in favor of the lessors, holding that RCW 59.12.030(5) authorized termination of the head lease for violations by the sublessee. *Id.* at 188.

For the foregoing reasons, forfeiture of the lease and issuance of the writ of restitution not only gave full effect to the statutes and the intent of the legislature but was also consistent with Washington precedent.

5. The relief sought would make Washington's unlawful detainer law a nullity.

In an unlawful detainer action, Washington law requires the trial court to find in favor of either the landlord or the tenant; the court is not permitted to find partly in favor of one party and partly in favor of the other party. *Angelo Property Co.*, 167 Wn. App. 789. The parties in this case do not dispute that Mr. and Mrs. Burgess were, at a minimum, entitled to a writ of restitution as against Michael Crossan. Given Washington's law requiring a verdict in favor of solely one party or the other, along with Rowena Crossan's agreement that Michael Crossan was appropriately subject to eviction based upon nuisance, Ms. Crossan's present grounds for appeal should be denied.

Furthermore, as set forth above, Washington law clearly provides for Rowena Crossan's liability as a spouse, a partner and a signatory on the lease. To issue a writ of restitution against only Michael Crossan would take all force and effect out of the applicable unlawful detainer statutes which authorize the issuance of a writ of restitution in favor of Mr. and Mrs. Burgess, restoring their right of possession of the premises. That is, a writ of restitution that gives possession back to Mr. and Mrs. Burgess would become a nullity if Rowena Crossan was allowed to return to, and possess, the property.

6. Request for Attorney Fees and Expenses

Pursuant to RAP 18.1 and RAP 14 et seq., Respondents Philip and Linda Burgess hereby request the Court award them their reasonable attorney fees and costs associated with responding to Rowena Crossan's appeal.

CONCLUSION

Pursuant to Washington law, Michael and Rowena Crossan were partners. Aside from the fact that they were and are married, they each executed the lease agreement for purposes of obtaining a location to operate a joint enterprise – Lake Washington Boat Center. This fact alone is sufficient to establish the existence of a partnership. However, not only did they enter into the agreement jointly and for a joint purpose, they were also married.

As stated above, under Washington law, a marriage creates a special type of partnership, which includes fiduciary duties and obligations one would not otherwise find in a mere cotenancy. For these reasons, Rowena Crossan cannot escape liability for her husband's nuisance actions, which all took place in the course and scope of operating a joint business.

Additionally, the relief sought by Rowena Crossan would nullify the writ of restitution issued by the trial court. The writ granted Phil and Linda Burgess with the right to possess the property. That right would be extinguished if Rowena is allowed to prevail and resume occupying the premises as Lake Washington Boat Center.

It is undisputed that Michael Crossan committed various nuisances warranting the tenant's ejection from the property. It is undisputed that the

tenant in question was Lake Washington Boat Center. Therefore, to grant Rowena Crossan's appeal would effectively overturn the trial court's decision entirely and allow the Crossans to unjustly benefit from their bad acts.

For the foregoing reasons, Philip and Linda Burgess respectfully request the Court deny Rowena Crossan's appeal and award them their reasonable attorney fees and costs incurred in responding to this appeal.

RESPECTFULLY SUBMITTED this 17th day of June, 2014.

LUCE, KENNEY & ASSOCIATES, P.S.



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I, Liz Bostick, certify that at all times mentioned herein I was and now am a citizen of the U.S. and a resident of the State of Washington, over the age of 18 years, not a party to this proceeding or interested therein, and competent to be a witness therein.

On June 17, 2014, I caused a copy of Respondents' Brief to be served on the attorneys for Appellants at the address below:

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- By causing a full, true and correct copy thereof to be MAILED in a sealed, postage-paid envelope, addressed as shown above, which is the last known address for Appellants' attorneys, and deposited with the U.S. Postal Service on the date set forth below;
- By causing a true and correct copy thereof to be DELIVERED VIA GREYHOUND LEGAL to the Appellants' attorneys at the address listed above, on the date set forth below.
- By causing a full, true and correct copy thereof to be FAXED to the party at the facsimile number shown above, which is the last known facsimile number for the party, on the date set forth below.

DATED this 17th day of June, 2014.

LUCE KENNEY & ASSOCIATES P.S.



LIZ BOSTICK