

74623.5

74623-5

NO. 74623-5

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

PACIFIC MARKET INTERNATIONAL, LLC,

Respondent,

v.

TCAM CORE PROPERTY FUND OPERATING LP,

Appellant.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

This appeal is the result of Pacific Market International's ("PMI") decision to flout this Court's determination that PMI's lease with the landlord, TCAM, "obligates [PMI] to pay for a certain number of spaces each month whether or not the tenant actually needs them." CP 2482. Despite this Court's unambiguous holding, PMI refuses to pay for parking charges incurred prior to the superior court's entry of judgment on remand. Instead, it takes a brief phrase from this Court's prior Opinion out of context and spins a misleading narrative to both this Court and the superior court in an attempt to achieve the exact opposite result of what this Court intended: that it does not have to pay for all of its allotted parking spaces.

At the inception of the case, PMI paid for all of its parking spaces under protest and TCAM had no damages. Both parties sought a declaratory judgment regarding whether PMI was obligated to pay for all of its allotted parking spaces whether it used them or not. After discovery, they cross-moved for summary judgment seeking opposite interpretations of the lease. PMI prevailed and TCAM appealed. This Court reversed, adopting TCAM's proposed interpretation of the lease. In the meantime, PMI had stopped making payments. It was not until this Court had ruled in TCAM's favor that TCAM had an entitlement to a money judgment.

The superior court erred by cutting off every available avenue for relief that TCAM was entitled to under this Court's interpretation of the lease.

II. RESPONSE TO COUNTER STATEMENT OF THE CASE

TCAM did not omit facts relevant to this appeal. PMI simply rehashes irrelevant facts in an attempt to reargue the first appeal in this case. However, it raises a few factual issues that need clarification.

First, TCAM does not own the three-story garage with approximately 360 parking spaces beneath its building. CP 67; CP 951; CP 926-938. The garage is part of a larger parking complex owned by the Port of Seattle. CP 67; CP 951; CP 926-938; CP 552-53.

Second, Republic Parking is not TCAM's agent. Republic Parking operates the large parking complex, including the garage at issue, on behalf of the Port of Seattle. CP 552-53; CP 951. PMI's employees receive the parking passes to the garage directly from the Port of Seattle's agent, Republic Parking.¹ CP 1055; CP 951; CP 553.

Third, TCAM does not have any employees in the building and does not obtain or hold any parking passes, whether for its own use or the use of tenants. CP 950-51.

¹ PMI's counsel conceded at oral argument before this Court that if PMI asked Republic Parking for all of its parking passes, it would have received them.

Fourth, despite the language that use of the parking spaces is limited to “Tenant, its officers and employees only,” there is nothing in the lease that prohibits PMI from subleasing or assigning its parking spaces. CP 849. Indeed, PMI has leased between twelve and fourteen parking spaces per month to its subtenants since August 2014. CP 2510; CP 2666-67. In contrast, TCAM is not entitled under the lease to take control of or sublease PMI’s parking spaces.

Fifth, Keith Awad testified that “I would have been interested in referring a group [interested in re-leasing excess parking spaces] to a tenant,” and this was his standard practice. CP 1009. However, this third party did not end up leasing space and needing the parking spaces. CP 1003. In contrast, Brian Shea of PMI claimed to be aware of individuals interested in purchasing monthly parking passes but provides no evidence that he pursued them. CP 553. Moreover, PMI provided no evidence that it encouraged its employees, to whom PMI passes the cost of the parking spaces, to use the parking spaces.

III. ARGUMENT

A. TCAM’s Position Throughout this Case Has Been Consistent

PMI initiated this action immediately after paying nearly \$75,000 to TCAM in overdue parking charges. CP 1-54; CP 750-752; CP 2510. The sole relief PMI requested was a determination of the meaning of the

lease, namely that it does not require PMI to pay for all of its allotted parking spaces. CP 4-6. PMI did not assert a claim for breach of the lease to recover its recent payment, which was noted as “paid under protest.”

This set the procedural posture for the case, as well as, quite reasonably, TCAM’s expectations. TCAM filed a counterclaim for the opposite determination, that the lease required PMI to pay for all of its parking spaces. CP 55-62. TCAM had no basis for a claim against PMI for breach of contract for failure to pay for the parking spaces, as PMI made a large payment bringing its account current. CP 2510. And no basis arose anytime soon thereafter: PMI made additional payments under protest over the next year and a half. CP 2510-11.

TCAM reasonably expected that once the courts ruled on the meaning of the lease, the parties would honor that interpretation. The parties filed cross-summary judgment motions regarding the interpretation of the lease. CP 73-100; CP 527-551. When PMI prevailed on summary judgment, TCAM did not oppose the entry of a judgment in PMI’s favor for the full amount of the payments PMI had made under protest. CP 1096-1098. Indeed, in its own motion, TCAM had sought entry of a money judgment for the parking charges accrued since the last payment under protest in August 2013, a few months before the parties filed their

cross-motions.² CP 98. TCAM never claimed that it would not be injured if the court ruled that PMI was required to pay for all of its parking spaces and then PMI failed to do so.

Once PMI prevailed on summary judgment, the only logical recourse for TCAM was to appeal. CP 1096-1098. Seeking to amend its counterclaim would have been futile as there was no breach of the lease under the superior court's interpretation of the lease. Furthermore, TCAM could not seek further relief under RCW 7.24.080 or CR 54(c) because it had lost its claim for declaratory relief regarding interpretation of the lease. TCAM viewed the declaratory judgment as determinative of the then-existing dispute between the parties, and appealed nine days after the judgment was entered. CP 1099-1103.

Accordingly, TCAM's opening brief was dedicated to principles of contract interpretation. App. Br. (No. 71707-3). TCAM reasonably expected that if it prevailed, PMI would abide by the ultimate judgment of the courts, as TCAM had done when PMI prevailed on summary judgment. So, while TCAM for good reason had not pled a claim for breach of contract, it never conceded, much less argued, that it had not or

² It is understandable why PMI did not make the payments under protest after prevailing on summary judgment. But PMI has provided no explanation for why it ceased to make payments under protest, after it had done so for the previous year and a half. CP 2510-11. Further, based upon PMI's prior conduct, TCAM had good reason to believe that PMI would continue to make payments prior to the summary judgment hearing. *Id.*

would not suffer injury if PMI refused to pay for all of its allotted parking spaces.

After this Court held that the lease requires PMI to pay for all of its parking spaces, PMI should have paid the accrued parking charges and begun paying for all of its parking spaces on an ongoing, monthly basis. CP 2482. However, it became apparent that PMI had no intention of abiding by this Court's interpretation when it failed to do so in the months after the Opinion and then mandate were issued. CP 2667. TCAM would have been ill-advised to seek reconsideration of this Court's Opinion in its favor. Moreover, PMI filed a motion for reconsideration on precisely this point.³ Mot. Rec. (No. 71707-3). PMI asked the Court to "confirm. . . TCAM should not be permitted to. . . seek money damages." *Id.* at 1. This Court denied the motion. 5/14/2015 Order (No. 71707-3). TCAM understood this to be an acknowledgement that it could enforce the lease and seek a money judgment if PMI failed to pay.

Thus, when TCAM presented a judgment declaring this Court's determination of the meaning of the lease, it also filed a motion seeking further relief under RCW 7.24.080 for the sums that PMI had failed to pay in defiance of this Court's Opinion. CP 2703-2708; CP 2492-2508.

³ TCAM was barred by RAP 12.4(d) from responding to PMI's motion for reconsideration without the Court requesting an answer.

At that point, PMI resurrected its “mitigation defense.” In the cross-summary judgment briefing, PMI raised the doctrine of mitigation in an effort to preclude a ruling in favor of TCAM, albeit while seeking a ruling in its favor, claiming that it created an issue of fact. CP 530 at lines 16-19. TCAM responded in its summary judgment reply brief as follows:

Both parties are seeking the Court’s interpretation of the lease, an executory contract that is still being performed, and a ruling on whether PMI is required to pay for its proportionate share of parking stalls. Neither party has brought a breach of contract claim. Mitigation is simply not an issue in this case. Even if it were, the duty to mitigate runs both ways and PMI has not passed the cost on to its employees or sought to sublease the parking stalls.

CP 1024 at 5.

PMI also raised the doctrine on appeal, despite the fact that the summary judgment, and, therefore, TCAM’s appeal, related solely to the interpretation of the lease.⁴ Resp. Br. at 47-50 (No. 71707-3). TCAM explained again that the doctrine is not a defense: whether a party owes a duty of mitigation has no bearing on whether it is entitled to prevail on its claim for declaratory judgment. App. Reply at 22-23 (No. 71707-3). PMI cannot refute this. The superior court and this Court considered the interpretation of the lease, and declared its meaning.

⁴ TCAM’s appeal also challenged the award of damages to PMI, which followed logically from the superior court’s interpretation of the lease. However, PMI did not plead damages from a breach of the lease and the declaratory judgment claims were the crux of the cross-motions, the judgment, and the appeal.

After this Court reversed the superior court on its interpretation of the lease, and PMI failed to abide by that determination, TCAM sought further relief under RCW 7.24.080. CP 2481-2480; CP 2492-2508. At this time, PMI began its campaign of misinformation, representing repeatedly (and falsely) to the superior court that TCAM had argued to the Court of Appeals that it was not injured, and that the Court of Appeals accepted this position. CP 2748-2760. The superior court believed PMI and denied TCAM's motion for further relief. CP 2790-2794. It stated:

The Court of Appeals stated that "TCAM has not been injured. PMI has been paying under protest for the parking spaces it does not use. Because TCAM has not incurred a duty to mitigate there is no reason to remand this matter for trial..."

CP 2794 at lines 6-9. It also indicated that the proper recourse would have been a motion to amend TCAM's counterclaim:

While there arguably was a way in which TCAM could have asked for additional relief, it was not proper for it to ask for relief not requested in its Answer and Counterclaim...

Id. at lines 13-16. Accordingly, TCAM moved for reconsideration and, in the alternative, to amend. CP 2795-2815. When the superior court denied the motion for reconsideration, TCAM moved for reconsideration again. CP 2824; CP 2825-2838. In its last order, the superior court denied this motion and the previously filed request for leave to amend. CP 2865. TCAM timely appealed. CP 2866-2875.

It is PMI's argument that has shifted. Perhaps realizing that it went too far in misrepresenting TCAM's statements to the superior court, in its Brief of Respondent, PMI now argues that TCAM changed its position throughout the litigation. However, to the superior court it repeatedly beat the drum that, effectively "TCAM encouraged the Court of Appeals to find that it did not suffer an injury," which is absolutely false. CP 2748-2754; CP 2847-2857. Although PMI's new argument is less blatant, it is nevertheless misleading. TCAM never changed its position. It consistently argued that mitigation is not a defense to a declaratory judgment action. It also stated that, to the extent that PMI owed for parking, and assuming the courts ultimately adopted TCAM's proffered interpretation of the lease, TCAM would be entitled to recover from PMI the parking charges it would then owe.

B. TCAM's Appeal of All of the Decisions Was Timely Filed

As more fully explained in TCAM's Opposition to PMI's Motion to Dismiss, which TCAM incorporates herein, TCAM timely sought review of the superior court's judgment denying TCAM's request for further relief, and the orders denying it leave to amend its pleading and for reconsideration. TCAM filed its appeal 26 days after the superior court ruled on its motion to amend (filed with its first motion for reconsideration) and its second motion for reconsideration. PMI's

convoluted argument that this appeal was untimely is internally inconsistent and not supported by the rules or any other authority.

PMI concedes that there is no limit on the number of motions for reconsideration a party may file. Resp. Reply to Mot. to Dismiss at 2, 5, and 7. However, it claims that filing a second motion for reconsideration does not extend the time in which to appeal the underlying, substantive decision. *Id.* A second motion for reconsideration seeks relief from the same decision as the first motion did. According to PMI, if the superior court does not immediately rule on a motion for reconsideration, such that the moving party can obtain a ruling on its first motion for reconsideration and file a second motion within ten days of the initial decision, the moving party loses the opportunity to appeal that decision, which was the subject of both motions. *Id.* at 6. This virtually ensures that a party cannot file a second motion for reconsideration (even though the rules allow it), as its right to appeal could be cut off.

Subsequent motions for reconsideration should not be discouraged, as they promote judicial economy. The underlying purpose is reflected in the rule that a new “issue may be raised in a motion for reconsideration when the issue is closely related to an issue previously raised and no new evidence is required.” *August v. U.S. Bancorp*, 146 Wn. App. 328, 347, 190 P.3d 86, 95 (2008) (trial court properly considered an unpled claim for

fraudulent concealment on reconsideration). *See also River House Dev. Inc. v. Integrus Architecture, P.S.*, 167 Wn. App. 221, 231, 272 P.3d 289, 294 (2012) (“By bringing a motion for reconsideration under CR 59, a party may preserve an issue for appeal that is closely related to a position previously asserted and does not depend upon new facts.”).

The case relied upon by PMI, *Wilcox v. Lexington Eye Inst.*, is inapposite. 130 Wn. App. 234, 122 P.3d 729 (2005). Resp. Br. at 33. There, the “new legal theories” were based on “new and different citations to the record.” *Id.* at 241. Here, TCAM presented CR 54(c) as an alternate basis to the statutory mechanism in the Declaratory Judgment Act on which the superior court should enter a money judgment in its favor. CP 2825-38. The evidence to support the money judgment was exactly the same under either approach.

TCAM’s notice of appeal was not “untethered” from the judgment. RAP 2.4(f), which PMI relies on to justify this argument, does not go as far as PMI claims. It brings up for review a later-filed motion for reconsideration and similar motions, but it would not have brought up TCAM’s motion to amend, which was presented as an alternative once the superior court denied its motion for further relief. CP 2795-2815.

Finally, RAP 5.2(e) does not state that the notice of appeal must be filed within 30 days of the denial of a first motion for reconsideration. It

simply says “within 30 days after the entry of the order” “deciding timely motions,” such as a motion for reconsideration. TCAM’s second motion for reconsideration was indisputably timely with respect to the order denying its first motion. If an appeal of a denial of a motion for reconsideration reaches back to the original decision, why would an appeal of a denial of a second motion for reconsideration not do so as well?

The reason TCAM filed its notice of appeal when it did was to exhaust every possible avenue for the relief TCAM sought pursuant to this Court’s Opinion. *Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508, 527, 20 P.3d 447, 457 (2001) (rules meant “to afford the trial court an opportunity to correct errors, thereby avoiding unnecessary appeals”).

C. TCAM is Not Estopped From Seeking a Money Judgment

TCAM has consistently explained, correctly, that there is no mitigation defense to a declaratory judgment action, and that a party can seek declaratory judgment without disclaiming damages stemming from the outcome of that decision. It made this point in its appellate reply brief, after PMI raised its mitigation argument again. App. Reply at 22-23 (No. 71707-3). TCAM never claimed, either in its briefing, or at oral argument, that it had no injury. Indeed, under this Court’s holding, every month that

PMI did not pay the full parking charges TCAM was injured. This is not contradictory to TCAM's request for a money judgment.

Yet PMI insists that TCAM "claimed throughout these proceedings that it has no claim for damages against PMI..." Resp. Br. at 26. This is PMI's way of twisting two independent legal principles—declaratory judgment and the defense of mitigation to a claim for damages, into something they are not: directly contradictory positions. PMI's entire estoppel argument is its own invention as no such contradiction exists. The real contradiction is that PMI argues that the doctrine of mitigation is relevant to the interpretation of the lease at the same time as it argues that TCAM (claims it) has no injury.⁵ How can PMI claim that TCAM has no damages (based upon its interpretation of the lease) at the same time as it claims TCAM has a duty to mitigate those (nonexistent) damages?

PMI cannot establish any of the three factors for its estoppel argument. The first factor relevant to the application of the doctrine of judicial estoppel, a clearly inconsistent position, cannot be established, as described above. *Skinner v. Holgate*, 141 Wn. App. 840, 848, 173 P.3d 300, 303 (2007). The case cited by PMI is distinguishable: the debtors in a bankruptcy proceeding maintained that a promissory note had no value

⁵ PMI is not so daring as to argue that TCAM does not have any injury, just that TCAM disclaimed it.

and was uncollectible but then sued in state court to recover the amount owed on the same note. *Harris v. Fortin*, 183 Wn. App. 522, 524, 333 P.3d 556, 557 (2014). Here, TCAM claimed the lease required PMI to pay for all of its parking spaces and then, when this Court agreed, and PMI failed to pay for those spaces, it sought further relief. It was not inconsistent for TCAM to argue (correctly) that mitigation was irrelevant to the lease interpretation issue.

Two of the other factors also are not present:

2) whether the party successfully persuaded a court to accept the party's earlier position but then creates the perception that the court was misled when it adopts a later, inconsistent position; and (3) whether the party would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Skinner, 141 Wn. App. at 848. Even if TCAM did, as PMI argues and TCAM vigorously contests, claim that it had no damages, this would not establish the second factor. TCAM “successfully persuaded” the Court to adopt its interpretation of the lease; the existence of damages was not relevant to the Court’s determination and thus was not an issue TCAM could have “persuaded” the Court to adopt.⁶ *New Hampshire v. Maine*, 532 U.S. 742, 750-51, 121 S. Ct. 1808, 1815, 149 L. Ed. 2d 968 (2001)

⁶ PMI did not file a cross-appeal. Of course PMI could not appeal the damages/mitigation issue because PMI won and TCAM did not contest PMI’s damages (based on the court’s ruling). TCAM appealed PMI’s damages only to the extent that PMI would not have damages under TCAM’s interpretation of the lease.

(“Absent success in a prior proceeding, a party’s later inconsistent position introduces no risk of inconsistent court determinations.”).

TCAM did not mislead the Court regarding its injury. PMI stopped making payments under protest in August 2013, and TCAM stated in its opening brief that there was a significant sum outstanding at the time of the summary judgment hearing. CP 2510; App. Br. at 24-25 (No. 71707-3). But the issue on appeal was whether PMI’s interpretation of the lease was correct. Once this Court held that it was not, PMI was required to make the payments. TCAM’s post-mandate motions were based solely on PMI’s failure to pay as required by the Court’s Opinion.

As explained in TCAM’s opening brief and below, the post-declaratory judgment relief that TCAM sought from the superior court provided an opportunity for PMI to present its arguments regarding mitigation, and TCAM would have had no unfair advantage in that respect. Indeed, PMI concedes that the mechanism provided by RCW 7.24.080 “would require additional factfinding, albeit in a summary procedure...” Resp. Br. at 28.

PMI’s lengthy argument that TCAM’s request for further relief was raised for the first time on appeal is nonsense. RCW 7.24.080 provides for “further relief based on a declaratory judgment...” TCAM sought further relief under this statute from the superior court

simultaneously with presenting the declaratory judgment for entry. This is neither a “novel application” nor was it raised “for the first time on this second appeal.” TCAM raised the argument in a motion to the superior court after remand. CP 2492-2508. It was the first instance in which TCAM was entitled to further relief. The prior judgment was entered in PMI’s favor, and TCAM’s request was based on the Court’s Opinion reversing that judgment and PMI’s failure to pay in defiance of that Opinion.

The case PMI relies on, *Schoenwald v. Diamond K Packing Co.*, is distinguishable. 192 Wash. 409, 421, 73 P.2d 748, 753 (1937). There, the plaintiff perfected his appeal with the Supreme Court of Washington and then filed with that same Court “an original petition praying for further relief under the Declaratory Judgment Act in the event we hold the decree of the lower court erroneous.” *Id.* at 421. The Court denied the petition for several reasons. One was that “it calls for the adjudication of questions not raised by the appeal and which are beyond the original jurisdiction of this court.” *Id.* See RCW 2.04.010 (jurisdiction of Supreme Court). Here, TCAM filed its motion for further relief with the superior court, which had jurisdiction to adjudicate such issues.

TCAM’s right, and need, to request a money judgment as further relief under the Declaratory Judgment Act and CR 54(c) only arose after

the Court remanded the case to the superior court. This Court reviews de novo the superior court's denial of TCAM's request for further relief.

D. The Opinion Does Not Bar the Relief Requested by TCAM

The Opinion does not preclude TCAM's right to seek enforcement of the declaratory judgment pursuant to RCW 7.24.080, Civil Rule 54(c), and Civil Rule 15. This Court held that PMI is obligated to pay for all of its parking spaces each month. CP 2482. PMI stopped paying for all of them in August 2013, thereby accruing approximately \$148,000 in parking charges. CP 2510-11; CP 2665-67. Yet, after the Opinion was issued, PMI continued paying for less than all of its parking spaces. CP 2667. Consequently, TCAM requested that the superior court enforce the lease and the Court's Opinion regarding PMI's obligations under the lease.

The superior court refused to do so, citing this Court's Opinion:

Defendant [TCAM] evidently represented to the Court of Appeals that at least as of the date of argument remand to determine any amounts due was not appropriate or necessary because it had been compensated (incurred no damages). Based on that, the Court of Appeals refused the Plaintiff's request for remand.

CP 2865. Faced with this Court's interpretation of the lease and the undisputed evidence that PMI had not fully compensated TCAM, the superior court erred.

PMI's attempt to shift the blame for this error to TCAM, by arguing that the superior court was relying on TCAM's briefing, is

unfounded. If this were the case, why would the superior court couch the statement with “evidently,” and use the time frame “as of the date of argument”? TCAM never affirmatively stated, in briefing or at oral argument, that it had been fully compensated by PMI or incurred no damages.

TCAM did not implicitly state this either. The issue on appeal was the meaning of the lease and TCAM briefed this issue. App. Br. (No. 71707-3). When PMI prevailed on summary judgment, TCAM did not object to the entry of a judgment awarding PMI the payments it made under protest. TCAM reasonably expected that PMI would do the same if TCAM prevailed on appeal. It is misleading to characterize this as TCAM stating it had been compensated, especially when PMI cannot claim that it paid all of the parking charges. The superior court’s faulty decision was not the result of anything said or done by TCAM.

In fact, whether or not PMI had fully compensated TCAM at the time of the appeal is beside the point. The undisputed evidence is that it had not done so. Yet, even if it had paid for all of the parking spaces, and then stopped making full payments after the issuance of the Opinion, TCAM would have been entitled to seek relief from the superior court. This Court’s conclusion that there is no reason to remand this matter for trial was premised on its belief that “TCAM has not been injured. PMI

has been paying under protest for the parking spaces it does not use.” CP 2491. In other words, the Court’s conclusion that the duty to mitigate was not triggered was based on the assumption that there was no injury to mitigate. This is logical: without an injury, what is there to mitigate? However, this does not foreclose the possibility that an injury arises in the future as the lease is an executory contract. Then, if there is an injury, the duty to mitigate might arise.

Furthermore, it is accurate to characterize the excerpts, “TCAM has not been injured,” and “PMI has been paying under protest for the parking spaces it does not use,” as dicta. *Pierson v. Hernandez*, 149 Wn. App. 297, 305, 202 P.3d 1014, 1018 (2009) (“Statements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute obiter dictum, and need not be followed.”). Appellate courts do not hear or weigh evidence or find facts. *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266, 270 (2009). Further, TCAM did not “urge disposition” of whether TCAM was injured. It argued that mitigation is not relevant to the interpretation of the lease.

However, it is inaccurate to characterize these excerpts as the law of the case. That doctrine applies to enunciations of a principle of law, not factual statements. *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844, 848 (2005). Even if the doctrine were applicable to these factual

statements or the conclusions drawn therefrom, it should not be applied as the statements are false, leading to an erroneous conclusion, and it would work a manifest injustice as TCAM is, in fact, injured. *Id.* at 42.

Thus, if blame needs to be attributed for the incorrect premise that PMI fully compensated TCAM, it lies with PMI. It is improper for PMI to claim that this Court engaged in any fact finding. Resp. Br. 30 and 42 (“this Court determined that TCAM had not been injured” and “this Court found no damage”). PMI had the opportunity to correct the fallacy it introduced to this Court in its motion for reconsideration. Resp. Mot. to Recon. App. Br. (No. 71707-3). Instead, it perpetuated the misrepresentation, by stating that, “TCAM represented to this Court that it was not injured.” *Id.* 1. It repeated this argument to the superior court after remand, stating “[t]hroughout the trial court and appellate court proceedings, TCAM repeatedly urged the court to accept its ‘no injury’ premise.” CP 2753.

This Court’s denial of PMI’s motion for reconsideration sheds light on the issue of whether the Opinion foreclosed TCAM’s request for further relief. PMI squarely addressed this issue when it asked the Court to “confirm...TCAM should not be permitted to...seek money damages.” Mot. Recon. p. 1. The Court denied the request, effectively not “confirm[ing]” that TCAM cannot seek money damages. TCAM

understood this to be an acknowledgement that it could seek a money judgment if PMI failed to pay. 5/14/2015 Order (No. 71707-3).

The superior court would not have been operating with an unauthorized “blank check” if it had granted TCAM the money judgment or an opportunity to amend its pleading. Rather, it would have been enforcing this Court’s holding. The superior court would have had to acknowledge that PMI had not fully compensated TCAM, which does contradict the following two sentences of the Court’s Opinion: “TCAM has not been injured. PMI has been paying under protest for the parking spaces it does not use.” CP 2491. Yet, as explained above, these statements are not legal principles that become the law of the case, nor were they findings of fact. Whatever their origin, they were not the facts presented to the superior court after the mandate. The superior court had authority to enforce the Opinion based upon the undisputed facts before it.

E. PMI Would Not Have Been Prejudiced by the Requested Relief

PMI’s claim that it would have been prejudiced if the superior court allowed TCAM to seek further relief under RCW 7.24.080, entry of a judgment pursuant to Civil Rule 54(c), or leave to amend pursuant to Civil Rule 15, is contrived. PMI knew that it did not pay for all of its parking spaces and the lease obligated it to do so. As explained in

TCAM's opening brief, PMI would have had an opportunity to present its argument regarding mitigation.

PMI cannot complain that it is prejudiced by the procedural posture it created in this case. Damages and the duty of mitigation were not relevant to the lease interpretation, which was appropriately resolved on summary judgment. They only arose when PMI failed to pay after this Court reversed the superior court's summary judgment order. The cases cited by PMI are distinguishable because in each, the case proceeded through trial.⁷ Here, there was no trial because PMI prevailed on summary judgment. Contrary to PMI's insinuations, TCAM has no more unilaterally determined the scope of damages by retaining the payments under protest than PMI did by ceasing to make payments under protest after doing so for a year and a half. Now that TCAM has prevailed on the interpretation of the lease, and PMI failed to comply with that interpretation, TCAM has been injured.

At the show cause hearing on TCAM's motion for further relief under RCW 7.24.080 or CR 54(c), if the superior court had allowed one, PMI could have presented evidence to show that TCAM should have

⁷ *Beckmann v. Spokane Transit Auth.*, 107 Wn.2d 785, 733 P.2d 960 (1987); *State ex rel. A.N.C. v. Grenley*, 91 Wn. App. 919, 930, 959 P.2d 1130, 1136 (1998); *Allstot v. Edwards*, 114 Wn. App. 625, 629, 60 P.3d 601, 602 (2002); *Kelly v. Powell*, 55 Wn. App. 143, 151, 776 P.2d 996, 1000 (1989).

mitigated its damages during the period of August 2013 to April 2015.⁸ And, TCAM could have presented evidence that PMI should have mitigated its damages from February 2012 to January 2014, and April 2015 to October 2015.⁹ TCAM would also present evidence that PMI began paying for all of its parking spaces after the superior court entered judgment in October 2016 without any designation as “under protest.”

However this would be a pointless exercise, as the issue can be resolved as a matter of law based on the doctrine of equal opportunity. *Walker v. Transamerica Title Ins. Co.*, 65 Wn. App. 399, 405, 828 P.2d 621 (1992).¹⁰ Under this doctrine, where each party has an “equal opportunity to reduce the damages by the same act or expenditure,” and “it is equally reasonable to expect” each party to do so, there is no duty to mitigate. *Id.* Here, PMI had, at the least, an equal opportunity to lease any excess parking spaces to its employees or third parties, as TCAM did, and it was reasonable to expect PMI to do so:

⁸ PMI does not claim prejudice with respect to its ability to present evidence as it conducted discovery regarding mitigation. Br. of Respondent at 12 (No. 74623-5). From August 2013 to January 2014, PMI stopped making payments under protest despite no ruling from the superior court; from January 2014 to April 2015, the superior court’s interpretation that PMI was not required to pay for all of its parking spaces controlled.

⁹ From February 2012 to August 2013, PMI was paying under protest; from August 2013 to January 2014, PMI paid for only some of its allotted parking spaces despite no ruling from the superior court; and from April 2015 to October 2015, PMI continued to only pay for some of its allotted parking spaces despite this Court’s Opinion.

¹⁰ PMI fails to address this case, even though it was cited in TCAM’s opening brief. App. Br. at 39. PMI’s arguments regarding mitigation and reliance on *TransAlta Centralia Generation LLC v. Sicklesteel Cranes, Inc.*, 134 Wn. App. 819, 825, 142 P.3d 209, 212 (2006) (only one party was injured and had duty to mitigate) are misplaced.

- TCAM does not own the garage, the Port of Seattle does (CP 67);
- Republic Parking operates the garage on behalf of the Port of Seattle, and is not TCAM's agent (CP 68);
- Republic Parking provides the parking passes (CP 951; CP 553);
- PMI could have asked for all of its parking passes from Republic Parking;
- PMI, but not TCAM, knows how many parking spaces PMI needs each month (CP 951);
- PMI is located on site and TCAM is not (CP 950-51);
- TCAM would have arguably been in breach of the lease if it subleased PMI's parking spaces, whereas PMI would not have been in the same conundrum;
- There is nothing in the lease that prohibits PMI from subleasing or assigning the parking spaces;
- PMI subleased between twelve and fourteen parking spaces to its subtenants from August 2014 to October 2015 (CP 2510; CP 2666-67);
- TCAM's standard practice was to refer anyone interested in releasing excess parking spaces to tenants (CP 1009);
- PMI was aware of individuals interested in purchasing the parking passes but provides no evidence it pursued them (CP 553);
- PMI provides no evidence that it encouraged its employees, to whom PMI passes the cost of the parking spaces, to use them;
- PMI has not surrendered any parking passes to TCAM (CP 951).

TCAM requests that the Court apply this legal doctrine and hold that neither TCAM nor PMI had a duty to mitigate and judgment is to be entered based solely on the amounts owed under the lease.

IV. CONCLUSION

This Court held that PMI is obligated to pay for all of its parking spaces, and TCAM simply sought to collect for those parking charges that PMI refused to pay. TCAM presented to the superior court multiple methods for carrying out the intent of this Court. Yet the superior court

accepted PMI's false allegations that TCAM claimed it was not injured and denied each one in succession.

TCAM requests that this Court reverse the superior court's judgment and orders and order entry of a money judgment in TCAM's favor for the unpaid parking charges, interest, and late fees based upon the existing record. Alternatively, the Court should remand the case with instructions to hold a show cause hearing on TCAM's Motion for Further Relief under RCW 7.24.080 and/or CR 54(c) or, in the alternative, to allow TCAM to amend its pleading. TCAM also seeks an award of its attorneys' fees and costs incurred at the superior court level after the case was remanded and in this appeal pursuant to RAP 18.1 and the attorneys' fee provision of its lease. CP 136.

Respectfully submitted this 15th day of July, 2016.

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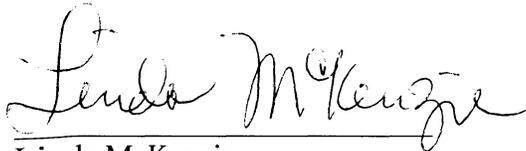
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V. CERTIFICATE OF SERVICE

I certify that on the 15th day of July 2016, I caused a true and correct copy of this Reply Brief of Appellant to be served on the following in the manner indicated below:

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Linda McKenzie

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