

NO. 35556-6-II

---

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

---

WILLIAM HOLDNER; RANDAL HOLDNER;  
HOLDNER FARMS, a partnership;  
HOLDNER FARMS WASHINGTON, a partnership,

Appellants,

v.

PORT OF VANCOUVER, USA,  
a Washington municipal corporation,

Respondent.

---

PORT OF VANCOUVER, USA,  
a Washington municipal corporation,

Respondent,

v.

WILLIAM HOLDNER and RANDAL HOLDNER,  
d/b/a HOLDNER FARMS, a partnership,

Appellants.

---

REPLY BRIEF OF APPELLANTS

---

Philip A. Talmadge, WSBA #6973  
Sidney Tribe, WSBA #33160  
Talmadge Law Group PLLC  
18010 Southcenter Parkway  
Tukwila, Washington 98188-4630  
(206) 574-6661  
Attorneys for Appellants

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities .....	ii
A. REPLY TO PORT’S COUNTERSTATEMENT OF THE CASE .....	1
B. SUMMARY OF ARGUMENT IN REPLY .....	2
C. ARGUMENT IN REPLY .....	2
(1) <u>The Port Did Not Need to Terminate the Holdner Leasehold in Order to Sink Its Wells</u> .....	3
(2) <u>The Port Retaliated Against Holdner for Exercising His Rights Under the Lease</u> .....	5
(3) <u>The Lease Was Ambiguous Regarding the Time Frame for Eviction, and the Trial Court Should Have Applied Principles of Commercial Reasonability</u> .....	7
D. CONCLUSION.....	8

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases

<i>Hollis v. Garwall, Inc.</i> , 137 Wn.2d 683, 974 P.2d 836 (1999).....	4
<i>Motoda v. Donohoe</i> , 1 Wn. App. 174, 459 P.2d 654 (1969).....	6
<i>Port of Longview v. Int'l Raw Materials, Ltd.</i> , 96 Wn. App. 431, 979 P.2d 917 (1999).....	6
<i>Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.</i> , 134 Wn.2d 692, 952 P.2d 590 (1998).....	7-8

A. REPLY TO PORT'S COUNTERSTATEMENT OF THE CASE

The Port spends a great deal of time emphasizing the long history and potential financial benefits of development of the Columbia Gateway. Br. of Resp't at 7-12. The appellants (hereinafter "Holdners") do not take issue with the importance or complexity of the Columbia Gateway project; he does not dispute the Port's right to move forward with its planned development. He simply wants the Port to be held responsible for breaching the lease, and to compensate him for the damage caused to his farm by the Port's unreasonable actions that were contrary to the terms of the lease.

The Port acknowledges that the wells could have been placed without evicting Holdner Farms, in fact, it originally proposed such a plan to Holdner. Br. of Resp't at 11-12. But the Port's plan would have caused substantial damage and disruption to the farming operation. The Holdners recognized this, and refused to allow access until he was assured compensation for the damage the wells would cause, not only to his crop, but to his cattle, which were in a critical calving stage.<sup>1</sup> CP 376. The Holdners could have refused the wells outright, since the trial court ruled

---

<sup>1</sup> The Port suggests on page 13 of its brief that Holdner unequivocally refused the Port access to sink the wells. Apparently recognizing the inaccuracy of this statement, it clarifies in a footnote that Holdner only refused access "under the circumstances then existing," meaning the circumstances where his business would be harmed without adequate compensation. Br. of Resp't at 13 n.2.

in his favor as to whether the “inspection” clause of the lease permitted the Port to sink wells. CP 377. But this would have been unreasonable, so the Holdners simply asked the Port to compensate him adequately for any attendant loss. Instead of negotiating, the Port evicted the Holdners.

B. SUMMARY OF ARGUMENT IN REPLY

The issue in this case is not, as the Port argues and as the trial court concluded on summary judgment, whether the Port needed to sink the wells. The lease allowed the Port to evict the Holdners if it needed *the property*, not if it needed mere access. The lease did not speak to the issue of access, and the Port was required to negotiate in a commercially reasonable manner to resolve the access issue. Instead, the Port retaliated against Holdner by evicting him for protecting his legal rights under the lease.

C. ARGUMENT IN REPLY

As a threshold matter, it is important to note that there has never been a trial on the interpretation of the Holdner/Port lease, nor any other issue in this case. The trial court found on summary judgment that the Holdners had raised no genuine issue of material fact regarding the terms of the lease, and ruled for the Port *as a matter of law*. RP (10/16/06):75.

The trial court erred when it concluded that the terms of the lease required Holdner Farms to allow the Port unfettered access to his

leasehold without just compensation for any ensuing damages. The trial court also erred when it found that the Holdners' rightful demand for just compensation for any damage caused by the Port's proposed entry somehow created a "need" for the Port to evict him.

(1) The Port Did Not Need to Terminate the Holdner Leasehold in Order to Sink Its Wells

The Port drafted ¶ 15 of the lease to allow for termination "at any time the PORT needs said premises to carry on its industrial development or other PORT activities." CP 15. According to the Port, the Holdners argue that "needs" under ¶ 15 means "[having] no other alternative" or "[cannot] live without it," like a man in the desert dying of thirst who "needs" water. Br. of Resp't at 16-18. As characterized by the Port, the Holdners' reading of ¶ 15 sounds extreme indeed.

Fortunately, the Holdners are not making this argument. The Port fails to reply to the Holdners' true contention: that the trial court erred when it equated the Port's purported "need" to monitor groundwater with a "need" to evict Holdner Farms from its long-term leasehold and seriously disrupt a large agricultural operation. Simply put, the circumstances under which the Port evicted the Holdners were not covered by the language of ¶ 15: the Port did not "need" to retake the entire 500-acre property order to sink its wells.

Contrary to the Port's contention, ¶ 15 of the lease language contemplates more than an assertion that the Port "has some legitimate requirement or want" for the property in order to evict Holdner Farms. The lease on its face contradicts the Port's claim of such unilateral power. The Port, as drafter of the lease, could have easily written the termination clause more broadly if that were its desire.<sup>2</sup> The Port, having chosen "needs" as the operative term, cannot now argue that it actually intended "needs" as the operative term, cannot now argue that it actually intended to write the term "wants," just to suit its present legal position. *See Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695, 974 P.2d 836 (1999) (extrinsic evidence cannot be used to vary, contradict, or modify written term in contract).

The lease contemplated that the Port might someday need to retake Parcels 4 and 5 in order to develop them for the Columbia Gateway. Under the terms of the CRANE settlement, *that development will never take place*. Nevertheless, the Port sought to evict Holdner Farms, a rightful leaseholder with much at stake, not because it needed the property, but because it found eviction preferable to working out a fair resolution to a relatively minor dispute. The Holdners have raised a genuine issue of material fact that neither party contemplated eviction

---

<sup>2</sup> For example, a lease allowing for termination "at any time for any reason" would certainly support the Port's present position. The lease at issue does not. Such a

under these circumstances when the lease was signed. The trial court erred when granted summary judgment to the Port on the lease interpretation issue.

(2) The Port Retaliated Against Holdner for Exercising His Rights Under the Lease

The Port did not evict the Holdners because it needed Parcels 4 and 5 for development; it evicted the Holdners because they would not acquiesce to the Port's unreasonable demands on the leasehold.

The Port concedes that the Holdners raised the retaliation issue to the trial court, but argues they did not address the issue with acceptable precision to argue the point on appeal. Br. of Resp't at 24-25. the Holdners argued to the trial court that the Port acted in retaliation by terminating the lease when they asserted their legal rights to "quiet enjoyment" and compensation for damage to his property. RP (10/16/06):49. The trial court concluded that the court did not act in retaliation, that its actions were "consistent with the lease provisions." *Id.* at 75. The parties' arguments, and the trial court's decision, were not restricted to an analysis of whether the Port violated the Holdners' constitutional rights. The retaliation issue was raised below.

---

lease likely would be illusory, and few prudent farmers would enter into an agricultural lease fraught with such uncertainty.

*Motoda v. Donohoe*, 1 Wn. App. 174, 459 P.2d 654 (1969), cited by the Port, is inapposite. In that case, the residential month-to-month tenant asserted no substantive legal right to support her equitable claims, arguing only that the landlord had improper motives for evicting her. *Id.* at 175. Had the landlord in *Motoda* claimed the right to enter the tenant's leasehold and damage her property without just compensation, and then evict the tenant when she protested, this Court might have reached a different result. Here, Holdner claims substantive legal rights cognizable at law: contract and property rights.

Although the Holdners cited a free speech case, *Port of Longview v. Int'l Raw Materials, Ltd.*, 96 Wn. App. 431, 979 P.2d 917 (1999), as an example of prohibited retaliatory eviction, the reasoning of *Port of Longview* does not apply only when free speech rights are at stake:

An equitable defense [such as retaliatory eviction] arises only when there is “a substantive legal right, that is, a right that comes within the scope of judicial action, as distinguished from a mere moral right.”<sup>3</sup>

*Id.* at 437 (citing *Motoda*, 1 Wn. App. at 175). The lease did not allow the Port to enter the premises and damage the Holdners' property, at least not without compensating them for their losses. Holdner was evicted in

---

<sup>3</sup> Thus, the Port is less than precise when it claims, “There is certainly no language in the *Port of Longview* decision to indicate that its holding would reach situations where constitutional rights were not being exercised by the tenant . . . .” Br. of Resp't at 27.

retaliation for defending his contract and property rights. The trial court erred when it concluded that the Holdners raised no genuine issue of material fact on the issue of retaliation.

(3) The Lease Was Ambiguous Regarding the Time Frame for Eviction, and the Trial Court Should Have Applied Principles of Commercial Reasonability

The Port gave the Holdners the minimum permissible amount of notice under the lease, without taking into account that after 10 years of a substantial farming operation, minimum notice would cause maximum damage to Holdner Farms.

The Port claims that the Holdners did not raise commercial unreasonableness regarding the Port's refusal to negotiate and the swift eviction to the trial court. Br. of Resp't at 28. The Holdners argued to the trial court that the Port failed to give adequate notice of its plan (which was in the works as early as 2003) approached them when their farming operation was at its most critical stage, refused to negotiate when the Holdners explained their position, and then evicted them precipitously, causing substantial damage. RP (10/16/2006):50-51. The issue was raised.

The Port agrees with the Holdners' assessment, that an ambiguous commercial lease must be interpreted in a commercially reasonable fashion. Br. of Resp't at 28; *Wilson Court Ltd. P'ship v. Tony Maroni's*,

*Inc.*, 134 Wn.2d 692, 705, 952 P.2d 590 (1998). However, the Port contends that the 90-day provision is not ambiguous, so the concept of commercial reasonability is inapplicable. *Id.* The Port does not address the Holdners' argument regarding the ambiguity of the phrase "at least ninety (90) days" in ¶ 15. Instead, the Port tries to avoid the ambiguity by rewriting ¶ 15 to remove the term "at least."

The Holdners raised a genuine issue of material fact as to the parties' intentions in drafting ¶ 15 to say "at least" 90 days. The lease itself hints at the reason, that the parties recognized the potential disruption and damage that a hasty eviction would cause. CP 15 (lease ¶ 15 acknowledges early termination could cause loss of crops). Testimony from a Port employee confirms the Holdners' assertion that the termination clause was designed to allow maximum notice and minimal damage to Holdner Farms in the event that eviction became necessary. Summary judgment on this issue was improper.

#### D. CONCLUSION

The trial court erred in granting summary judgment to the Port. The trial court erroneously concluded that a need to sink monitoring wells equated with a need to evict Holdner Farms under the terms of the lease.

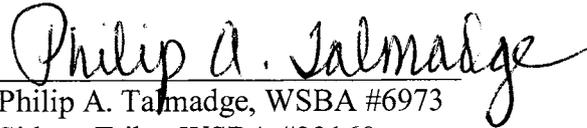
The Port's conduct in terminating a long-term lease for a cattle operation with a crop in the ground with the minimum possible notice was

retaliatory and breached its duty to perform under the lease in a commercially reasonable manner.

This Court should reverse the trial court's judgment, and vacate the writ of restitution. In the alternative, this court should remand for an award of damages for Holdner Farms' economic losses incurred by the hasty demand to vacate. Costs on appeal should be awarded to Holdner Farms.

Dated this 26th day of July, 2007.

Respectfully submitted,

  
Philip A. Talmadge, WSBA #6973  
Sidney Tribe, WSBA #33160  
Talmadge Law Group PLLC  
18010 Southcenter Parkway  
Tukwila, WA 98188-4630  
(206) 574-6661  
Attorneys for Appellants

DECLARATION OF SERVICE

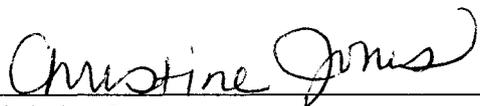
On said day set forth below, I deposited with the U. S. Postal Service a true and accurate copy of: Reply Brief of Appellants in Cause No. 35556-6-II to the following parties:

Bradley W. Andersen  
Kelly W. Walsh  
Schwabe, Williamson & Wyatt, P.C.  
700 Washington Street, Suite 701  
Vancouver, WA 98660

Original sent by Messenger:  
Court of Appeals  
Division II  
Clerk's Office

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

DATED: July 26, 2007, at Tukwila, Washington.

  
\_\_\_\_\_  
Christine Jones  
Legal Assistant  
Talmadge Law Group PLLC

RECEIVED  
BY: [Handwritten Initials]  
DATE: 7/27/07  
TIME: 10:10 AM  
COURT OF APPEALS  
DIVISION II  
CLERK'S OFFICE