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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
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No. 37426-9-~~II~~

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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C & V HOSSMAN, JR., ET AL.  
Appellants,

v.

TNA FOOD SERVICE, dba JACKIE'S TERIYAKI, aka GERMAN  
ORTEGA & SERGIO TOSTADO PARTNERSHIP, aka T&A FOOD  
SERVICES CORPORATION,  
Respondents.

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APPELLANTS' REPLY BRIEF

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**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES**..... ii

**I. SUMMARY** ..... 1

**II. ARGUMENT** ..... 2

    A. The Court improperly concluded rent was not due under the lease until April 2006 ..... 2

    B. The evidence does not support the trial court’s finding that an agreement was reached on September 4, 2006..... 4

    C. Substantial evidence does not support the finding that the final rent check was for November or that there were sufficient funds in the account to cover the check ..... 5

    D. The Landlord had a good faith belief as to the amount owed on November 6, 2006 ..... 6

**III CONCLUSION** ..... 8

**TABLE OF AUTHORITIES**

**CASES**

*Foisy v. Wyman*  
83 Wn.2d 22, 515 P.2d 160 (1973) ..... 7

*Shelvog v. Skelvaag*  
169 Wash. 468, 14 P.2d 3 (1932) ..... 3

*Western Timber Co. v. Kalama River Lumber Co.*  
42 Wash. 620, 85 P. 338 (1906) ..... 3

**STATUTES**

RCW 19.36.010 ..... 3

RCW 59.12.030(3) ..... 6

## *I. SUMMARY*

The trial court erred when it concluded the Tenant was not guilty of unlawful detainer as of November 6, 2006. To reach that erroneous conclusion, the court relied on a number of unsupported factual findings and assumptions; and on an erroneous construction of the written lease.

The trial court erroneously found that the lease did not require payment of rent until April 2006. Had the court properly construed the lease, it necessarily would have concluded the Tenant was at least one month behind in rent payments.

The trial court compounded that error by finding there had been an agreement, as of September 4, 2006, that the Tenant's obligations (including October rent) had been paid and brought current. As a result, the court improperly concluded the Tenant's final rent check should be applied against November rent, when in fact the payment should have applied to the rent due for October. Had the trial court properly applied the Tenant's rent payments, it could have reached but one conclusion: the Tenant was behind by at least one month's rent as of November 6, 2006.

The trial court committed yet another error by assuming the final rent check would have cleared the Tenant's account had it been deposited in November. Thus, the court treated the final rent check as a valid payment – even though the Tenant failed to demonstrate there were funds available in its

bank account in November 2006 to make payment on the check. But for the unfounded assumption the check was good, the trial court could have reached only one conclusion: as of November 6, 2006, the Tenant had failed to pay rent due for October and November.

Because the only conclusion supported by the evidence is that the Tenant owed two months' rent as of November 6, 2006, as well as at least one month's "CAM" charges, the trial court erroneously concluded the Landlord did not have a good faith belief regarding the amount due and owing, as stated in the five-day notice to pay rent or vacate. When that erroneous conclusion is set aside, it is clear the unlawful detainer proceeding was validly brought. Because the court found the Tenant owed CAM payments under the lease as of November 6, 2006, and should have found that there was rent in arrears as well, the Tenant was guilty of unlawful detainer and judgment should have been entered in the Landlord's favor.

## **II. ARGUMENT**

### **A. The Court improperly concluded rent was not due under the lease until April 2006.**

The Court erroneously concluded a contract must be signed by both parties to be binding against one party. The codification of the statute of frauds specifically states the contract must be "signed by the party to be

charged therewith.”<sup>1</sup> With regard to the payment of rent, the Tenant is the “party to be charged therewith.” Thus, the lease was binding against the Tenant when the Tenant signed it on December 2, 2005. The fact that the Landlord had not signed the lease could not have been used as a defense by the Tenant against an action to enforce the lease at that time.<sup>2</sup> The Tenant’s assertion that it was not bound as of the date it signed the lease is simply wrong.

Even if the trial court had been correct when it concluded the lease was not valid until all parties had signed it in late December, by the lease’s express terms, the first month’s rent was due in March 2006. (PE at 1 [CP 41]) Moreover, there is no evidence in the record from which the trial court could have concluded the parties mutually agreed to modify that provision. Indeed, the Tenant acknowledges the Landlord “persisted throughout the length of the Tenant’s tenancy in treating the lease as having started at the beginning of December[.]”<sup>3</sup>

Because the first month’s rent was due in March 2006, the final rent check given to the Landlord had to be for October, as noted by the Tenant on

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<sup>1</sup> RCW 19.36.010.

<sup>2</sup> *Western Timber Co. v. Kalama River Lumber Co.*, 42 Wash. 620, 628, 85 P. 338 (1906) (“Want of mutuality arising from the failure of one party to sign cannot be successfully pleaded as a defense by the other party who did sign[.]”). See also *Shelvog v. Skjelvaag*, 169 Wash. 468, 472, 14 P.2d 3 (1932) (citing *Western Timber Co.*, 42 Wash. 620)).

<sup>3</sup> Respondent’s Brief at 4.

the check. (PE 35 at 17 [CP 220]) In addition, although the Tenant presented testimony the check would have cleared the account in October (VRP 222, ll. 11 – 17), there was no evidence in the record to refute the Landlord’s testimony that the check would not have cleared the account in November. (VRP 89, ll. 21 – 25) Thus, the October rent was never paid. Similarly, November rent was never paid. As a result, as of November 6, 2006, the Tenant owed two months’ rent and the Landlord properly served the five-day notice to pay rent or vacate premises at that time.

**B. The evidence does not support the trial court’s finding that an agreement was reached on September 4, 2006.**

It was undisputed at trial that the Tenant brought four checks to a meeting with the Landlord on September 4. The Tenant argues the fact that the Landlord cashed those checks shows the parties reached an agreement regarding all their outstanding disputes as of September 4.<sup>4</sup> However, the evidence is to the contrary. Mr. Tostado admitted at trial he knew Mr. Klakring had to obtain Mr. Hossman's assent to an agreement, and there is no evidence that occurred. (VRP 251, l. 16). The evidence negated any inference that cashing the checks was an acceptance of Mr. Tostado's attempt to satisfy his rent obligations by paying something less than the amounts due and owing under the existing written contract.

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<sup>4</sup> *Id.* at 7.

As of September 4, the Landlord contended the Tenant was in arrears on rent for July and part of August. In addition, the Tenant had a current rent obligation for September. The Tenant claims that, at the September 4, 2006 meeting, it indicated it wanted a credit for August's rent and another free month's rent based upon its theory that its rent obligation should not have begun until April 2006. Therefore, it claims the two rent checks it gave to the Landlord were for September and October, even though October rent was not due for almost a month. However, because no agreement was reached at the September 4 meeting, the two rent checks provided as of that date represented payment for July and September, as the Landlord had demanded.

The Tenant only gave the Landlord one more rent check, which would represent October rent. Therefore, even if that final check is considered a proper payment (which the Tenant failed to establish in any event), as of November 6, 2006, the Landlord properly concluded the Tenant owed rent for November and part of August.

C. **Substantial evidence does not support the finding that the final rent check was for November or that there were sufficient funds in the account to cover the check.**

The Tenant gave the Landlord the final rent check on October 10, 2006. (PE 32 [CP 117 – 119]) At trial, the Tenant claimed this check was for November rent. (VRP 220, l. 21 – 221, l. 3) However, the memo on the check states it was for October rent, which is consistent with the fact that the

two checks given to the Landlord at the September 4 meeting had to have been for July and September rent. Therefore, despite the Tenant's own contemporaneous written notation to the contrary, the trial court erroneously concluded that check was in payment of November rent.

Moreover, the trial court erroneously concluded the Landlord failed to accept the October rent check because it did not attempt to deposit it until March 2007. The bank repeatedly advised the Landlord that there were insufficient funds in the account to pay the check. (VRP 89, ll. 21 – 25). The record does not contain substantial evidence to support the trial court's finding that the check would have been good in November. As a result, the trial court improperly concluded the Landlord did not accept the final rent check. Rather, the October rent payment represented by that check was never made by the Tenant. Therefore, as of November 6, 2006, the Tenant owed rent for October and November.

**D. The Landlord had a good faith belief as to the amount owed on November 6, 2006.**

A tenant is guilty of unlawful detainer when it continues in possession “after a default in the payment of rent, and after notice in writing requiring” payment or surrender of the premises.<sup>5</sup> After reaching various erroneous conclusions based upon erroneous findings, the trial court still concluded the

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<sup>5</sup> RCW 59.12.030(3).

Tenant owed the Landlord CAM charges for November. However, the court also concluded that such an amount was not sufficient to constitute unlawful detainer – in other words, the court concluded the unlawful detainer proceeding was invalid.

As our Supreme Court recognized in *Foisy v. Wyman*,<sup>6</sup> a discrepancy between the amount actually owed and the amount stated in an unlawful detainer notice does not invalidate the proceeding if the Landlord had a good faith belief regarding the amount due stated in the notice. The Tenant argues that *Foisy* is distinguishable because the judgment was ultimately in favor of the tenant. However, *Foisy* stands unequivocally for the proposition that, if the Landlord had a *good faith belief* regarding the amount stated in the notice of unlawful detainer, and the Tenant is found to have owed some amount of rent at the time the notice was served, the Tenant must be found guilty of unlawful detainer. A discrepancy between the amount stated in the notice and the actual amount due does not defeat the Landlord's cause of action. Thus, the real question here is whether the trial court erred in concluding the Landlord did not have a good faith belief as to the amount owed on November 6, 2006.

The trial court found the Landlord did not have the requisite “good faith belief” only because it first reached the erroneous conclusion that the

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<sup>6</sup> 83 Wn.2d 22, 32 – 33, 515 P.2d 160 (1973).

lease was not valid until the end of December and the first month's rent was not due until April 2006. In other words, if the trial court improperly rewrote the lease, then the trial court also improperly concluded the Landlord lacked a good faith belief that rent was in arrears on November 6, 2006.

In addition, nothing in the record refutes the Landlord's testimony that, as of November 6, it had good reason to believe there were insufficient funds to cover the October rent check. Thus, there was no evidence to support the conclusion that the Landlord lacked a good faith belief rent was owed and in arrears for October. The only conclusion supported by the record is that the stated amount due as of November 6 was based on a reasonable construction of the lease; a reasonable calculation of the rent and other charges due based on that construction of the lease; and reasonable inquiry into the Tenant's ability (or inability) to make further rent payments.

Because the Landlord had a good faith belief regarding the amount due stated in the five-day notice, the unlawful detainer proceeding was valid. Furthermore, the trial court concluded the Tenant owed November CAM charges as of November 6, 2008. Thus, the Tenant was guilty of unlawful detainer, but the trial court improperly held it was not.

### ***III. CONCLUSION***

For the reasons set forth in Appellant's Opening Brief and herein, the decision of the trial court should be REVERSED and judgment should be

entered in the Landlord's favor, finding that the Tenant was guilty of unlawful detainer as of November 6, 2008.

Respectfully submitted this 20<sup>th</sup> day of November, 2008.

WILSON SMITH COCHRAN DICKERSON

By 

David M. Jacobi, WSBA# 13524

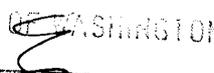
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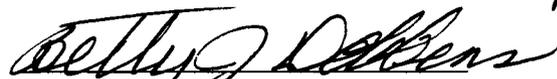
The undersigned certifies that under penalty of perjury under ~~the laws~~ of the State of Washington that on the below date I caused the attached document to be served and filed as follows:

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DATED at Seattle, Washington this 24<sup>th</sup> day of November, 2008.

  
Betty J. Dobbins