

FILED
COURT OF APPEALS
DIVISION II

2012 DEC -3 PM 3:40

STATE OF WASHINGTON

BY _____
DEPUTY

Cause No. 43810-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

OLD CITY HALL, LLC

Appellant,

v.

PIERCE COUNTY AIDS FOUNDATION and
PEGGY FREYCHINEAUD GROSS

Respondents.

BRIEF OF RESPONDENT PEGGY FREYCHINEAUD GROSS

RICHARD H. WOOSTER, WSBA 13752
Kram & Wooster
Attorney for Respondent
1901 South I Street
Tacoma, WA 98405
(253) 572-4161

ORIGINAL

TABLE OF CONTENTS

	Page(s)
Table of Contents.....	i-iv
Table of Cases.....	v-vii
I. Introduction.....	1-3
II. Issues Pertaining to Assignments of Error and Answer to Issues Pertaining to Assignment of Error.....	3-5
1. Landlord's Assignment of Error.....	3-5
a. The trial court erred in denying OCH's motion for a continuance under CR 56(f) and denying OCH the opportunity to] Depose [former Non-profit tenant, Director] Rep. Darnielle.....	3
i. Attorney Tenant's Issue Related to This Assignment of Error.....	3
1. Is this issue irrelevant regarding the Attorney Tenant?.....	3
2. Did the Landlord fail to demonstrate any evidence expected to be developed from Rep. Darnielle which would rebut the undisputed material facts supporting Landlord's constructive eviction of the Attorney Tenant?.....	3
b. The trial court erred in granting summary judgment when disputes of material fact exist regarding whether OCH constructively evicted Respondents.....	4
i. Attorney Tenant's Issue Related to This	

	Assignment of Error.....	4
	1. Does any evidence rebut the facts that Landlord allowed the building to deteriorate into a derelict building constructively evicting Attorney Tenant?.....	4
c.	The trial Court erred in granting summary judgment when disputes of material fact exist regarding when OCH constructively evicted Respondents.....	4
	i. Attorney Tenant’s Issue Related to This Assignment of Error.....	4
	1. Did the Court act appropriately in using the date property was vacated by Attorney Tenant as the date of constructive eviction?.....	4
d.	The trial court erred in granting summary judgment when disputes of material fact exist regarding whether Respondents waived their ability to assert the affirmative defense of constructive eviction.....	4-5
	i. Attorney Tenant’s Issues Related to This Assignment of Error.....	4
	1. Does the Respondent Landlord bear the burden of establishing waiver?.....	4
	2. Does a tenant in a building that becomes a “derelict building” waive their right to assert constructive eviction by exercising their rights under their lease and continuing requests to the landlord to correct	

	the conditions constructively evicting the tenant from the building.....	4-5
3.	Does the absence of any evidence in support of their claim that the time required by attorney Tennant to obtain suitable office space was unreasonable preclude any claim of waiver on her constructive eviction?.....	5
e.	The trial court erred in granting summary judgment when disputes of material fact exist regarding when Respondents waived their ability to assert the affirmative defense of constructive eviction.....	5
i.	Attorney Tenant’s Issue Related to This Assignment of Error.....	5
1.	Does the absence of evidence establishing a waiver render this assignment of error moot?.....	5
2.	Is abandonment of the premises by the Attorney Tenant a proper point in time for determining constructive eviction, notwithstanding acts which diminished the value of the leasehold before the Attorney Tenant abandoned the premises?.....	5
III.	Statement of the Case.....	5-18
IV.	Argument.....	18-38
A.	The Issue of Continuance for Additional Discovery Does Not Impact Ruling Regarding Respondent, Peggy Fraychineaud-Gross.....	18-20

1.	Summary Judgment Standard.....	19-20
B.	The Landlord Failed to Demonstrate That Material Relevant Evidence Would Be Gained From the Deposition of Ms. Darnielle, the Non-profit Tenant's Executive Director that impacts the Attorney Tenant.....	20-22
C.	Substantial Evidence Supports the Conclusion the Landlord Allowed Conditions in the Building to Deteriorate to the Point the Tenants Were Constructively Evicted.....	22-37
1.	Constructive Eviction Was Demonstrated by The Deplorable Conditions at the Property and the Landlord Allowing the Property to Become a Derelict Building.....	22-29
a.	The Landlord Breached Covenants Under the lease.....	23-24
b.	The Landlord Engaged in Acts that Court Have Found Deprive Tenants of Quiet Enjoyment.....	24-25
c.	The Landlord Permitted Physical Interference with Tenants' Quiet Enjoyment.....	25-26
d.	The Landlord's Conduct is Not Comparable to Cases Where No Constructive Eviction was Found.....	26-29
2.	The Landlord Has Not Shown A Waiver of the Right To Assert Constructive Eviction.....	30-37
D.	Attorney Tenant Fraychineaud Gross Should be Awarded Attorneys Fees on Appeal.....	37-38
V.	Conclusion.....	38

TABLE OF AUTHORITIES

<u>Table of Cases</u>	<u>Page</u>
<u><i>Albice v. Premier Mortg. Servs. of Wash., Inc.</i></u> , 174 Wash.2d 560, 569, 276 P.3d 1277 (2012).....	34
<u><i>Aro Glass & Upholstery Co., v. Munson-Smith Motors, Inc.</i></u> , 12 Wn.App. 6, 528 P.2d 502 (1974).....	23, 25, 28, 33, 36, 37
<u><i>Atherton Condo. Apartment–Owners Ass'n Bd. of Directors v. Blume Dev. Co.</i></u> , 115 Wn .2d 506, 516, 799 P.2d 250 (1990).....	20
<u><i>Automobile Supply Co. v. Scene-in-Action Corporation</i></u> , 340 Ill. 196, 202, 172 N.E. 35, 38) (1930).....	34
<u><i>Bainbridge Island Police Guild v. City of Puyallup</i></u> , 172 Wn.2d 398, 409–10, 259 P.3d 190 (2011).....	31, 36
<u><i>Balise v. Underwood</i></u> , 62 Wn.2d 195, 381 P.2d 966 (1963).....	19
<u><i>Bowman v. Webster</i></u> , 44 Wn.2d 667, 669, 269 P.2d 960 (1954).....	31
<u><i>Brewster Cigar Co. v. Atwood</i></u> , 107 Wash. 639, 182 P. 564 (1919).....	24, 29
<u><i>Buerkli v. Alderwood Farms</i></u> , 168 Wash. 330, 11 P.2d 958 (1932).....	23
<u><i>Cent. Wash. Bank v. Mendelson–Zeller, Inc.</i></u> , 113 Wn.2d 346, 353, 779 P.2d 697 (1989).....	31, 32
<u><i>Coulos v. Desimone</i></u> , 34 Wn.2d 87, 96, 208 P.2d 105 (Wash. 1949).....	23
<u><i>Draper Mach. Works, Inc. v. Hagberg</i></u> , 34 Wn.App. 483, 486, 663 P.2d 141 (1983).....	32
<u><i>Janda v. Brier Realty</i></u> , 97 Wn.App. 45, 54, 984 P.2d 412 (1999).....	21

<u>Jones v. Best</u> , 134 Wn.2d 232, 240-41, 950 P.2d 1 (1998).....	31
<u>Matzger v. Arcade Building & Realty Co.</u> , 102 Wash. 423, 173 P. 47 (1918).....	25, 29
<u>McLeod v. Russell</u> , 59 Wash. 676, 110 P. 626 (1910).....	32, 33
<u>Myers v. Western Farmers Ass'n</u> , 75 Wn.2d 133, 449 P.2d 104 (Wash. 1969).....	26
<u>Parry v. Windermere Real Estate/East, Inc.</u> , 102 Wn. App. 920. 924, 10 P.3d 506 (2000).....	19
<u>Pellino v. Brink's Inc.</u> , 164 Wash.App. 668, 696-697, 267 P.3d 383, 399 (2011).....	31
<u>Quadrant Corp. v. Am. States Ins. Co.</u> , 154 Wash.2d 165, 171, 110 P.3d 733 (2005).....	20
<u>Seven Gables Corp. v. MGM/UA Entm't Co.</u> , 106 Wn.2d 1, 13, 721 P.2d 1 (1986).....	19, 20
<u>Spradlin Rock Prods., Inc. v. Pub. Util. Dist. No. 1</u> , 164 Wn.App. 641, 654, 266 P.3d 229 (2011).....	19
<u>State v. Kirkman</u> , 159 Wash.2d 918, 926, 155 P.3d 125 (2007).....	21
<u>State ex rel. Carroll v. Junker</u> , 79 Wn.2d 12, 26, 482 P.2d 775 (1971).....	21
<u>Turner v. Kohler</u> , 54 Wn.App. 688, 693, 775 P.2d 474 (1989).....	22
<u>Wagner v. Wagner</u> , 95 Wn.2d 94, 102, 621 P.2d 1279 (1980).....	31
<u>Wusthoff v. Schwartz</u> , 32 Wash. 337, 73 P. 407 (1903).....	24
<u>Young v. Key Pharmaceuticals, Inc.</u> , 112 Wn.2d 216, 770 P.2d 182 (1989).....	19
<u>Zedrick v. Kosenski</u> , 62 Wn.2d 50, 380 P.2d 870 (1963).....	19

Court Rules and Regulations

CR 8(c).....30

CR 56.....19, 21

CR 56(c).....19

CR 56(f).....3

RAP 2.5(a).....21

RAP 18.1.....38

I. INTRODUCTION

Respondents, Peggy Fraychineaud Gross and the Pierce County Aids Foundation were constructively evicted from their leaseholds after the Appellant, Old City Hall, LLC deferred maintenance and security allowing the building to deteriorate to a point the City of Tacoma declared it to be a derelict building.

Respondent, Peggy Fraychineaud Gross, a family practice attorney, maintained an elegant office in Tacoma's landmark building, Old City Hall. Appellant, Old City Hall, LLC (the Landlord) acquired the property with a plan to persuade the existing commercial tenants to vacate their leaseholds and change the building into a residential condominium property.

When Respondent Fraychineaud Gross (Hereinafter "Attorney Tenant") and Pierce County Aids Foundation (hereinafter "PCAF" or "Non-profit Tenant") were unable to locate suitable replacement locations within the limited incentives offered by the Landlord they continued to enforce their rights under their existing leases. The Landlord ceased maintaining the building and breached its multiple promises to bring building up to standards.

Conditions contributing to the constructive eviction included deferring maintenance on the heating and air conditioning

system causing the building temperature to fall into the fifties during the winter and swelter in the summer heat; allowing the bulk of the building to become vacant with such poor security that transients took up residence in the unoccupied floors and hallways; allowing human excrement, obscene notes and transient belongings to litter the hallways; offices were broken into and the remaining tenants and their customers regularly had unsettling encounters with squatters in the building; letting broken windows go unrepaired and entry awnings to remain ripped and tattered; padlocking the building's signature address entry forcing tenants and their customers to negotiate a steep hill and enter the building on a lower street; improperly maintaining the building's elevators and frequently having only a fraction of lights working properly.

Despite repeated promises to repair these conditions, the Landlord ignored the tenants' complaints. The tenants moved out claiming constructive eviction and the City of Tacoma declared the building a derelict building. The Landlord continued to defer maintenance and water pipes froze and broke flooding the building and forcing the last remaining tenants from the building.

The trial court found that the conditions described by the tenants in their declarations accurately portrayed conditions

supporting their claims of constructive evictions. Such claims were not waived by remaining in possession, exercising renewal options and continuing to request the Landlord to abate such conditions without the Landlord taking action. The constructive eviction excused the tenant's of their obligations to pay rent to the landlord under the lease as of the date each tenant vacated their offices.

It is requested that the trial court's actions be affirmed and the judgment below stand.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR AND ANSWER TO ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Landlord's Assignment of Error.

a. The trial court erred in denying OCH's motion for a continuance under CR 56(f) and denying OCH the opportunity to] Depose [former Non-profit tenant, Director] Rep. Darnielle.

i. Attorney Tenant's Issue Related to This Assignment of Error.

- 1. Is this issue irrelevant regarding the Attorney Tenant?**
- 2. Did the Landlord fail to demonstrate any evidence expected to be developed from Rep. Darnielle which would rebut the undisputed material facts supporting Landlord's constructive eviction of the Attorney Tenant?**

- b. The trial court erred in granting summary judgment when disputes of material fact exist regarding *whether* OCH constructively evicted Respondents.**
 - i. Attorney Tenant's Issue Related to This Assignment of Error.**
 - 1. Does any evidence rebut the facts that Landlord allowed the building to deteriorate into a derelict building constructively evicting Attorney Tenant?**
- c. The trial Court erred in granting summary judgment when disputes of material fact exist regarding *when* OCH constructively evicted Respondents.**
 - i. Attorney Tenant's Issue Related to This Assignment of Error.**
 - 1. Did the Court act appropriately in using the date property was vacated by Attorney Tenant as the date of her constructive eviction?**
- d. The trial court erred in granting summary judgment when disputes of material fact exist regarding *whether* Respondents waived their ability to assert the affirmative defense of constructive eviction.**
 - i. Attorney Tenant's Issues Related to This Assignment of Error.**
 - 1. Does the Respondent Landlord bear the burden of establishing waiver?**
 - 2. Does a tenant in a building that becomes a "derelict building" waive their right to assert constructive eviction by exercising their rights under their lease and continuing requests to the landlord to correct the conditions**

constructively evicting the tenant from the building?

- 3. Does the absence of any evidence in support of their claim that the time required by attorney Tennant to obtain suitable office space was unreasonable preclude any claim of waiver on her constructive eviction?**
- e. The trial court erred in granting summary judgment when disputes of material fact exist regarding *when* Respondents waived their ability to assert the affirmative defense of constructive eviction.**
 - i. Attorney Tenant's Issue Related to This Assignment of Error.**
 - 1. Does the absence of evidence establishing a waiver render this assignment of error moot?**
 - 2. Is abandonment of the premises by the Attorney Tenant a proper point in time for determining constructive eviction, notwithstanding acts which diminished the value of the leasehold before the Attorney Tenant abandoned the premises?**

III. STATEMENT OF THE CASE

Peggy Fraychineaud Gross (Attorney Tenant) established her practice in family law in 1989 within the secure ambiance of the classic Tacoma Old City Hall building. CP 566 She loved the building and invested considerably of her own time and resources to improve, decorate and otherwise personalize the appearance and comfort of her suite. She

opened up her suite by removing walls; she had a faux brick archway installed; she worked with designers for specific window coverings and furniture; she consigned various silk and dried arrangements to cover wires and pipes, and otherwise made the office her own. CP 566.

Attorney Tenant's lease was effective January 1, 2002, and had an initial term of 6 years ending on December 31, 2007. CP 34. According to the lease the Landlord reserved the exterior walls, roof, pipes, ducts, wires, fixtures, and common areas; including the obligation to maintain and repair. CP 34,37, 38. Landlord was responsible to provide water and electricity. CP 37. Landlord was responsible for providing heating, ventilation, and air conditioning from 7:30 a.m. until 5:30 p.m. Monday through Friday. CP 37. Landlord was responsible to provide janitorial services for the entire building five nights per week. CP 37. Landlord was required to maintain common areas in good order, condition and repair. CP 37.

The lease provided Attorney Tenant a warranty of quiet enjoyment of her space. CP 42. Finally the lease provided that Landlord indemnified Attorney Tenant for any negligence or wrongful act concerning Landlord's obligations under the lease. CP 17.

When the building was purchased by Old City Hall LLC, approximately May of 2005, the building conditions began to decline. CP 567; 294-95; 322-23. Old City Hall LLC members are one and the same as

The Stratford Company LLC, the property manager for Old City Hall LLC (hereinafter "Stratford"). Old City Hall LLC, had ambitions of converting Old City Hall into residential condominiums. CP 566, 322-23. To accomplish this ambition Old City Hall LLC needed to buy out the existing tenant's leases. CP 3.

In October of 2005 Ms. Gross received a letter from Lisa Skelton of Stratford advising her that the new owners wanted all tenants to move out of the building. Ms. Gross was offered \$5,000.00 as an incentive to assist in moving. She in fact looked for alternative space but found nothing that came close to the view and ambiance of the space she had personalized in the Old City Hall. CP 567-68.

Ms. Gross advised Stratford that it would cost her much more to move and re-create the personalized space she developed in her current suite. Stratford indicated they were willing to negotiate the payment for the cost of moving. Ms. Gross found a space that although did not have a comparable view, and although the offices were not aligned in the same suite, she thought it could be made workable. The parties verbally agreed to a lease buy-out value and Ms. Gross paid to have the new space held for her use. CP 568, 618. She did not formally enter into a new lease because she was unable to get formal written confirmation on the buy-out from Stratford. Overall she invested \$23,000 to hold the alternative space waiting for this confirmation. CP 569-70.

Mr. Webb, the principal owner of Old City Hall LLC requested Ms. Gross to consider the top floor of the Washington Building where he had an ownership interest, suggesting the space was comparable to her current suite. The floor was only accessible through a Fire Escape with a sign warning of asbestos. The space itself had no windows lower than 7 feet from the floor such that there was no view. It was inappropriate space for a law practice and not at all comparable. CP 568-69.

Two conditions prevented Old City Hall LLC, from their building redevelopment goal: 1) several of the tenants would not agree to suggested lease buy-out terms CP 567-569; 322-23; 294-95;367; (; and 2) the real estate crisis that began in 2008 and impaired development financing. CP 579; 653. Most of the tenants did in fact vacate, and Old City Hall LLC was left operating a building with far less rental income. CP 569, 576. When they were unable to come to terms on a buyout of the Attorney Tenant's lease and the long term lease of the Non-profit Tenant, Old City Hall LLC deliberately allowed the conditions and maintenance of the building to deteriorate having the effect of driving out the remaining tenants. CP 565-658, 363-407, 408-10;. The building became a risk to safety and health. CP 565-568; 410-11; 323-24; 297-98; Tenants were impaired from ingress and egress. CP 576, 298. By September 2008, after concluding the building was not habitable, Ms. Gross was constructively evicted, forced to abandon the premises and move her practice. CP 581.

The steady progression of deterioration and trouble began in 2005. In 2005 the presence of engineering staff on site noticeably diminished. CP 295 That is when heating problems began and at times the boiler would not be on at all. *Id.* By December 2005 the bathroom became persistently cold. CP 570; 585-86. The cold in the bathroom continued whenever the weather became cold. CP 569. The bathrooms were not being cleaned and there were broken toilets left unrepaired. Ms. Gross kept a log for January of 2006 of the numerous issues that confronted her and the complaints that resulted. CP 585-686.

Cooling during the warmer months was equally a problem in the building. CP 214-16. As early as 2005 Air Systems Engineering, the company retained by the building to maintain the HVAC systems, identified the need to replace both the heat pump and refrigerant compressor on part of the building servicing certain remaining tenants. CP 213 Both systems were over 30 years old and outside of warranty. CP 215. Old City Hall LLC would only consider transferring an equally old but better working system from another vacated part of the building. CP 215-16. Other tenants complained about the conditions. CP 364-65, 372-73.

In 2006 the decline in building conditions continued. Cold weather meant cold bathroom temperatures. CP 570-75; 585-86; 606; 598-99.. Deteriorating cleanliness was seen in dirty bathrooms including a

blood stain. CP 577; 569, 571 . Routine vacuuming was discontinued. CP 577-79. Disruptive construction noise increased as Old City Hall LLC began construction on the upper floors. CP 574-75; . The nauseating rank odor smelling like burnt rubber and leaking natural gas continued off and on apparently from the construction making it unfeasible to operate a law practice. CP 570. Replacing light bulbs in a darkened main hallway and fire escape exit took 20 days. CP 585-86. And minor thefts began within Defendant's office. CP 571-72, 595-96. Mr. Webb responded by saying the conditions should be short-lived. CP 578. But the conditions continued despite countless complaints. By 2008 tenants were experiencing daylight robberies in the building. CP 323-328.

In December of 2006, Stratford failed to secure the building's mail room resulting in confidential mail being stolen and the door vandalized. An employee of the Pierce County Aids Foundation opened the mail room door to find two men in the very small mailroom (approximately 6' by 4'), which terrified her. CP 572; 297..

Stratford ostensibly on behalf of Old City Hall LLC acknowledged in February of 2007 that it had not yet obtained financing for its project and this lack of financing left it with limited funds. CP 606 Old City Hall LLC's lack of investment in the maintenance of the building was entirely consistent with its lack of investment financing and provides one explanation for why the conditions deteriorated so badly.

In 2007 there were serious problems with heating and cooling; and serious roof leaks causing damage to personal property. CP 323. Construction noise continued. CP 574-75; 620-21.. Security deteriorated. A security guard unlocked and left open doors, leaving confidential attorney-client information at risk. CP 573; 609-16.. At this point Ms. Gross was compelled to forbid any cleaning or security staff from entering her office at all. Id. Three water leaks resulted in the failure of the office thermostat. CP 575; 623. Summer temperatures in the office that year were unbearably hot. CP 623. Another water leak ruined the phone system of another tenant. CP 323. . Winter temperatures in Attorney Tennant's office space were measured at 58 degrees. CP 572, 585 ; 604. And winter bathroom temperatures remained around 55 degrees Fahrenheit. CP 572-73.. On one occasion Ms. Gross's entire staff was forced to wear parkas for several days until any maintenance was provided. The staff all got sick. CP 572.

Throughout 2007 Air Systems Engineering made recommendations to the Landlord for replacing the aged and failing HVAC systems and equipment. CP 212-293. Stratford approved only transfer of comparably old systems from other unoccupied parts of the building, and maintenance on equipment that could be salvaged. Id. This was done as an ineffective cost savings measure rather than addressing the conditions needed to make the space appropriately heated and cooled.

In July of 2007 the Attorney Tennant was left metaphorically pinned between a rock and a hard place. Her lease was scheduled to expire in six months. Her lease required six months of notice to exercise an option to extend the term. CP 52. Attorney Tennant had not identified any suitable alternative space and she had no adequate resolution from Old City Hall LLC. CP 573. Old City Hall LLC representatives had promised conditions would improve. CP 573. Rather than allow herself to be forced to vacate without adequate accommodations she exercised her option. Thereafter the construction resumed, now on the third floor directly above her office. The noise at times prevented any productive communication or concentration in her office at all. Part of the floor of the third floor was removed giving the noise unencumbered access to her office. Through emails, phone calls, and direct pleas to the construction crew the noise persisted. Construction dust settled in the Attorney Tenant's office. CP 574-75.

Security was more often absent. Outside doors were left unlocked at night. One of the main entry doors to the building on Commerce Street was left broken for weeks and left unlocked on the weekends and in the evening allowing unimpaired access for anybody to the building. CP 576. Stratford's solution to the security problem was to chain and pad-lock the two entry doors, effectively barring entry or exit through the main building exterior doorway. By this reckless act a trap was created for anybody who

did not know the exit was locked, and no signage was posted to alert unwary people of the trap. Id.

The barred entrance also meant employees and clients were forced after leaving the main parking lot to climb up and down a hill to the entrance on the opposite side of the building. CP 298. This alternate entrance was not associated with the building address and left clients confused. CP 576,

Once entering the building clients were left with only one working elevator of the two in the building. CP 580. And that one elevator would at times fail. CP 576. The inside of the elevator was dark with only one of four lights working. CP 576-77.

By 2008 the decline in building conditions had become systemic including sanitation, maintenance, climate control, fire safety, and security. CP 565-658. The City of Tacoma declared the building a derelict building. CP 468-512.

Sanitation

- a. Feces were deposited in parts of the building. CP 577-78; 630-33; 372-73.
- b. Trash and alcohol containers were left strewn about. CP 633-45.
- c. Clothes and blankets were abandoned. CP 636-37.
- d. Bathroom not cleaned. CP 287-98; 569.

- e. Transients were living in the building. CP 297; 323; 577-79.

Maintenance

- a. Broken toilets left unrepaired, CP 569.
- b. Broken windows and windows covered with plywood CP 582; 468-512.
- c. Torn awnings CP 582; 468-512.
- d. Light bulbs went unreplaced leaving hallways and fire escape dark. CP 578-79.
- e. Common area plants were dead with dried leaves left unswept on the floor CP 570-80.

Climate Control

- a. Office and common area temperatures remained cold in the winter and hot in the summer. CP 579-80.

Fire Safety

- a. Cigarettes were extinguished in the carpet. CP 577-78; 633-36.
- b. Fire escape was dark without working lighting. CP 578-79.

Security

- a. Transients had taken up residence in the building CP 297; 323; 577-79; 447

- b. Transients would stay in the building during the day and beg from clients. CP 323.
- c. Attempted break-in resulting in destroyed office door knob. CP 323; 577-78.
- d. Unlocked main entrance during late evenings and weekends. CP-578; 647- 649
- e. Prostitution was taking place in the building. CP 577; 628-29; 323.
- f. One daylight robbery and two attempted break-ins with another tenant, South Bay Mortgage. CP 323

Stratford repeatedly assured Ms. Gross that it would deal with the situation and improve the conditions once they got financing. CP 581; 655-57. But conditions never improved. Id. Vendors for HVAC and janitorial services retained by Stratford went without pay and stopped working in the building. CP 296; 329-344; 409; 212-293; 287-98.

Rather than addressing the operating conditions of the building Old City Hall LLC through Stratford was publically blaming the remaining tenants for its inability to complete its condominium project. CP 653.

Contrary to the Landlord's assertion of waiver, the tenants that had remained in the building were uniform in their protest to Stratford regarding the untenable conditions and growing squalor. CP 294-321; 322-328; 303-407; 408-420.

Based upon these conditions and Old City Hall LLC's lack of good faith effort to improve them, South Bay Mortgage left the building in Spring of 2008. CP 323-24. Peggy Fraychineaud left in September of 2008. CP 581. Pierce County Aids Foundation left in December of 2009. CP 369. And after a frozen pipe and burst water line inside the building caused the condemnation of the building, Trina Jones Photography left in November of 2010. CP 408.

Attorney Tenant first reached out to Stratford in 2005 regarding the changing conditions of the building. CP 569. Communications were persistent throughout the remainder of her tenancy. CP 565-658. Although there was little to show as a result of the communications regarding building conditions, Stratford persistently attempted to negotiate terms for Ms. Gross to vacate the building. Id.

After recognizing in August of 2008 that the untenable conditions in the building were not going to improve Ms. Gross concluded that she had been constructively evicted. On August 4, 2008, the Attorney Tennant sent a letter to Stratford advising that she could no longer tolerate the conditions. CP 657 She got no response. She spent \$5,000.00 to move her furniture, thoroughly cleaned her suite and vacated on September 23, 2008. CP 581; 655-58.

The accuracy of the Attorney Tennant's assessment was separately validated when on December 21, 2009, after an exterior inspection the

City of Tacoma, Public Works Department found the building to be substandard. CP 468-513. Then on December 14, 2010, the same department found the building to be derelict and ordered it to be unoccupied. Id.

The Landlord brought this action seeking damages for the tenants' abandonment of the premises and non-payment of rent. CP 1-67. Both Attorney Tenant and Non-profit Tenant counter-claimed that they had been constructively evicted. CP 69-78; 79-86. The Tenants moved for summary judgment. CP 94-117; 545-564.

The Landlord sought to continue the motion for summary to take the deposition of the Non-profit tenant's former Executive Director who had left the organization several years before the Non-profit tenant claimed constructive eviction. CP 661-663. In support of that motion, the Landlord claims the former director was a decision maker for the Non-profit tenant from 2005 to 2007. CP 662-663. The Landlord makes reference to negotiations for the Non-profit tenant to leave in 2005 and 2006, CP 677, but nothing reflecting an acceptance and waiver of the deplorable conditions by the Non-profit tenant or the Attorney Tenant. Nothing in the motion for continuance shows a basis that what happened in 2005 or 2006 have any bearing on the conditions in 2008 when the Attorney Tenant was forced to abandon the premises or in 2009 when the Non-profit Tenant reached the same conclusions. Ms. Darnielle was the

former executive director of PCAF, and had no authority to bind the Attorney Tenant. The Landlord did not seek a continuance of the Attorney Tenant's Motion for Summary Judgment. CP 702-710.

The Court after reviewing the pleadings and considering oral argument entered a letter ruling granting the motion of both tenants. CP 765-68. The Court rejected the Landlords claim of waiver noting: "In this case, however, the deficiencies are not in dispute. Standing alone, many of them would be sufficient as a matter of law for constructive eviction. Cumulatively, the evidence is overwhelming that there was a substantial breach of the lease agreement in that the premises ceased to be usable as a "law office" or for "office, counseling and activities related to Tenant's business" as described in paragraph 1(g) CP 9, 34 of each lease. CP 767.

The Court concluded the Tenants' obligation to notify the Landlord and afford the Landlord an opportunity to correct the deficiencies did not constitute a waiver. *Id.* The trial court entered orders of partial summary judgment finding both the Attorney Tenant CP 769-772; and the Non-profit Tenant were constructively evicted by the Landlord. CP 773-75.

IV. ARGUMENT

A. **The Issue of Continuance for Additional Discovery Does Not Impact Ruling Regarding Respondent, Peggy Fraychineaud-Gross**

1. Summary Judgment Standard

Summary judgment is required where the pleadings, depositions, answers to interrogatories, admissions on file, and any affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c); *Parry v. Windermere Real Estate/East, Inc.*, 102 Wn. App. 920, 924, 10 P.3d 506 (2000). A "material fact" is a fact upon which the outcome of the litigation depends, in whole or in part. CR 56; *Balise v. Underwood*, 62 Wn.2d 195, 381 P.2d 966 (1963); *Zedrick v. Kosenski*, 62 Wn.2d 50, 380 P.2d 870 (1963).

The burden is on the nonmoving party to make out a prima facie case concerning an essential element of the claim if the moving party first shows that there is an absence of evidence to support the nonmoving party's case. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 770 P.2d 182 (1989); On summary judgment, the moving party bears the initial burden of proving that there is no genuine issue of material fact. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If the moving party meets its initial burden, the nonmoving party must present evidence that material facts are in dispute. *Spradlin Rock Prods., Inc. v. Pub. Util. Dist. No. 1*, 164 Wn.App. 641, 654, 266 P.3d 229 (2011). It cannot rely on mere allegations, speculation, or argumentative assertions that unresolved factual issues remain. *Seven Gables Corp. v. MGM/UA*

Entm't Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986). If the nonmoving party fails to do so, then summary judgment is proper. *Atherton Condo.*

Apartment–Owners Ass'n Bd. of Directors v. Blume Dev. Co., 115 Wn .2d 506, 516, 799 P.2d 250 (1990).

Appellate courts review summary judgment ruling de novo, engaging in the same inquiry as the trial court. *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wash.2d 165, 171, 110 P.3d 733 (2005).

In this case the un rebutted evidence established that the Landlord permitted the conditions of the building to deteriorate to the point that it ceased to be adequate for occupancy and the tenants were constructively evicted the Landlord and provided no evidence to support their claim of waiver.

B. The Landlord Failed to Demonstrate That Material Relevant Evidence Would Be Gained From the Deposition of Ms. Darnielle, the Non-profit Tenant's Executive Director that impacts the Attorney Tenant.

The Landlord moved to continue the Non-profit's motion for summary judgment to take the deposition of the Non-profit Tenant's executive director who had left that position more than two years before the Non-profit Tenant claimed it was constructively evicted. CP 661-663. The Landlord did not seek a similar continuance of the Attorney Tenant's motion for summary judgment. CP 702-713. In their brief the Landlord

simply asserts “that the trial court erred in denying the Landlord’s motion for a continuance of the hearing date for PCAF’s motion for summary judgment.” Amended Appellant’s Opening Brief, pg. 11.

If Appellant asserts this issue applies to the Attorney Tenant it fails on two grounds. First, they did not seek this relief from the trial court. Secondly, it fails for the same reason it must fail against the non-profit tenant, the Landlord failed to show what expected evidence regarding building conditions or negotiations that occurred several years before the constructive eviction would have on the building conditions at the time of the constructive eviction or why a continuance was needed to obtain that evidence.

The general rule is that appellate courts will not consider issues raised for the first time on appeal. *State v. Kirkman*, 159 Wash.2d 918, 926, 155 P.3d 125 (2007) (citing RAP 2.5(a)). A trial court’s ruling on a motion for a continuance under CR 56 is reviewed for manifest abuse of discretion. *Janda v. Brier Realty*, 97 Wn.App. 45, 54, 984 P.2d 412 (1999). A trial court abuses its discretion when it exercises that discretion based on untenable grounds or reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A court does not abuse its discretion where “(1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party does not state

what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact.” *Turner v. Kohler*, 54 Wn.App. 688, 693, 775 P.2d 474 (1989).

Here the deposition was not taken because the Landlord failed to serve the deponent with a subpoena. CP 738. The Landlord did not demonstrate what evidence would be sought or how the evidence would create a material fact regarding the Attorney Tenant or even for the Non-profit Tenant. The Non-profit Tenant’s actions would not be binding on the Attorney Tenant. Even if the conditions were deplorable years before the constructive evictions were asserted, it would not impact the right to claim constructive eviction when the conditions continued unabated despite the Tenants’ ongoing complaints and Landlord’s false assurances the adverse conditions would be corrected.

C. Substantial Evidence Supports the Conclusion the Landlord Allowed Conditions in the Building to Deteriorate to the Point the Tenants Were Constructively Evicted.

1. Constructive Eviction Was Demonstrated by The Deplorable Conditions at the Property and the Landlord Allowing the Property to Become a Derelict Building.

The general rule is that a constructive eviction occurs when any intentional or injurious interference by the landlord or those acting under this authority deprives the tenant of the means or the power of beneficial enjoyment of the demised premises or any part thereof, or materially

impairs such beneficial enjoyment. *Coulos v. Desimone*, 34 Wn.2d 87, 96, 208 P.2d 105 (Wash. 1949).

In cases where constructive eviction has been found lessors a) breached a covenant causing the property to have diminished fitness for the purpose intended; b) engaged in an act with the intent to deprive tenant of beneficial enjoyment of the property; or c) permitted a physical interference with tenant's quiet enjoyment of the property.

a. The Landlord Breached Covenants Under the Lease.

In *Aro Glass* a lease of a car lot expressly required low areas of pavement to be leveled so as to prevent pooling of water that would disrupt customers from examining cars. The lessor was found to have breached the covenant because it persistently failed to resolve the pooling of water and the tenant was found to have been constructively evicted. *Aro Glass & Upholstery Co., v. Munson-Smith Motors, Inc.*, 12 Wn.App. 6, 528 P.2d 502 (1974). Similarly in *Buerkli* the lease expressly required insurance proceeds to be spent toward rebuilding. When the lessor refused to apply insurance proceeds to rebuild after a fire the lessor was found to have violated its covenant and upon vacating the premises the tenant was found to have been constructively evicted. *Buerkli v. Alderwood Farms*, 168 Wash. 330, 11 P.2d 958 (1932).

Here the Landlord failed to maintain or heat the building, failed to maintain the elevators, padlocked the main entrance, allowed vagrants to

move into the building and allowed the once vibrant building to become like a “ghost town” with urine and feces stained hallways. CP 565-658.

b. The Landlord Engaged in Acts that Courts Have Found Deprive Tenants of Quiet Enjoyment

In *Brewster Cigar Co.* a transferee lessor reconstructed the entrance of the leasehold property and compelled a change in lease term to month-to-month without consent of the leasee. The act of the lessor deprived the tenant of beneficial enjoyment of the property and the tenant was found to have been constructively evicted. *Brewster Cigar Co. v. Atwood*, 107 Wash. 639, 182 P. 564 (1919). Similarly in *Wusthoff* the lessor began substantial renovations to the leasehold including work preventing use of the bathroom and substantial impairment of ingress and egress. Because the intentional act of the landlord substantially deprived the tenant of beneficial enjoyment of the property the tenant was found to have been constructively evicted. *Wusthoff v. Schwartz*, 32 Wash. 337, 73 P. 407 (1903).

Here the Landlord allowed construction to occur immediately above the Attorney Tenant’s space, stopped cleaning the bathrooms, and allowed the temperatures to soar with the summer heat and drop substantially below acceptable temperatures during the winter months. CP 565-658; 363-407; 294-321, 322-328. The Landlord refused investing in repairs to fix the problems with the HVAC system. CP 212-293. The

landlord padlocked the main entrance to the building and did not replace tenants that vacated the building and allowed transients to take up residence. CP 565-658, 363-407, 408-10

c. The Landlord Permitted Physical Interference with Tenants' Quiet Enjoyment

In *Matzger* the landlord sought to construct a skybridge across two adjoining buildings. Because the structure created a physical block to the sunlight and ventilation considered essential to the intent of the leasehold the tenant was found to have been constructively evicted. *Matzger v. Arcade Building & Realty Co.*, 102 Wash. 423, 173 P. 47 (1918).

Similarly in *Aro Glass* discussed *supra* uneven pavement causing pooling of water was considered a sufficient physical impairment to the intent of the leasehold that the vacating tenant was considered to have been constructively evicted. *Aro Glass & Upholstery Co., v. Munson-Smith Motors, Inc.* 12 Wn.App. 6, 528 P.2d 502 (1974).

Here the Landlord padlocked the building's main entrance across from the parking lot CP 576, forcing clients coming to visit the tenants to negotiate a steep hill and enter at a location that did not reflect the buildings address. CP 298-99. The Landlord engaged in noisy construction, failed to clean the restrooms, allowed transients to take up residence in the building and the hallways and vacant offices of the once prominent office building became littered with feces and other waste from

the transients who were allowed to live in the building. CP 565-658, 363-407, 408-10.

d. The Landlord's Conduct is Not Comparable to Cases Where No Constructive Eviction was Found.

In cases where a tenant was found not to have been constructively evicted the tenant was found to have been only nominally inconvenienced, or there was no significant impact on the fitness of the property for the intended use. For example in *Myers* the lessor changed the locks on the leasehold after the tenant abandoned the property. The tenant's nominal inconvenience of having to ask for new keys was insufficient to qualify for constructive eviction. *Myers v. Western Farmers Ass'n*, 75 Wn.2d 133, 449 P.2d 104 (Wash. 1969). In *Cline* the lessor came onto the premises of the leasehold to ask the tenant to collect rent overdue. While on the premises the lessor spoke with two sub-tenants about benign topics. The tenant alleged that the landlord demanded the rent to be paid or to get out, and further that the discussion with the two sub-tenants included a request not to pay sub-rent due to the tenant. Because the alleged acts of the lessor did not significantly impact the fitness of the property for its intended use tenant was not found to have been constructively evicted.

The facts of this case provide sufficient foundation to find constructive eviction as a matter of law. The lease expressly reserved for the Landlord the responsibility to repair and maintain exterior walls and the common areas. It expressly required the Landlord to provide heat,

ventilation, air conditioning, and janitorial service. And the lease expressly warranted the quiet enjoyment of the leasehold property. CP 34-62.

Old City Hall LLC through Stratford acknowledged that as of 2005 it wanted all tenants to vacate the building and commenced discussions in attempt to realize that effect. CP 567. Its behavior supported this motivation by fostering an environment of neglect, unfulfilled promises of correction and ultimate squalor to force out its tenants. CP 565-658, 363-407, 408-10.

Stratford did not attempt to replace departing tenants until there were only three tenants remaining. Aged HVAC equipment was not replaced and inadequately maintained despite repeated recommendations from the hired vendor for their replacement. Parts of the building went without heat or air conditioning while the remaining parts of the building had inadequate service or no service at all. Hallways and a fire-escape went without lighting. Construction noise became regular. Bathrooms were not cleaned and broken toilets were not repaired. Security diminished and was often absent with predictable results. Burglaries and vandalism occurred including damage to the main entrance. Stratford chain locked the main entrance rather than repair it. Vagrants took up residence in the building, leaving trash, clothing, cigarette stains, and

feces. And prostitution became apparent within the common area of the building. CP 565-568; 410-11; 323-24; 297-98.

Old City Hall LLC became constrained by the loss of rental income combined with its inability to obtain investment financing. Vendors went unpaid. Essential HVAC equipment went without repair or replacement. Building services such as security and general repair went unprovided. And Stratford discontinued discussions with Ms. Gross regarding compensation for relocating. As a result Ms. Gross and her staff suffered illness, discomfort, obstruction from their work and a general impairment from realizing the beneficial enjoyment of their property.

Old City Hall LLC by and through Stratford, its property manager, had an express duty to protect the fitness of Ms. Gross's leasehold for the purpose of maintaining a law office. By allowing the disrepair, dereliction and insecurity of the building it violated that covenant. As in *Aro Glass & Upholstery Co.* 12 Wn.App. 6, 528 P.2d 502 (1974) where the lessor's breach of a covenant to repair areas of pooling water was found to have diminished the fitness of the leasehold for its intended purpose, Old City Hall LLC's breach of its covenant to maintain the integrity of the building diminished the fitness of Ms. Gross's leasehold and resulted in her constructive eviction.

Old City Hall LLC acted to create offensive noise, untenable building climate, security threats, uncleanliness, and an offensive environment for staff and clients, depriving Ms. Gross of the beneficial enjoyment of her leasehold. As in *Brewster Cigar* 107 Wash. 639, 182 P. 564 (1919) where the lessor's reconstruction of the leasehold's main entrance was an act depriving the tenant of the beneficial enjoyment of his leasehold and effecting a constructive eviction, Old City Hall LLC's acts created an offensive environment depriving Ms. Gross of beneficial enjoyment and effecting her constructive eviction.

Finally, Old City Hall LLC effected physical interference with the leasehold. Stratford chained the main entrance compelling an arduous trek to gain ingress or egress to the building and creating a physical trap for the those persons unaware the logical avenue for egress was chained shut. It left hallways and a fire escape unlit. It supported derelict common area conditions, and it created a building climate both uncomfortable and unhealthy. In *Matzger v. Arcade Building & Realty Co.*, 102 Wash. 423, 173 P. 47 (1918) the physical obstruction of natural light and ventilation for a tailor was sufficient to effect constructive eviction. In this case the Landlord physically compromised the building's habitable climate, cleanliness, and access, effecting a constructive eviction.

2. The Landlord Has Not Shown A Waiver of the Right To Assert Constructive Eviction.

The Landlord is asserting that by not immediately vacating the premises when conditions began to deteriorate after the Landlord purchased the building the tenants have waived thereafter their right to assert constructive eviction. That argument fails for several reasons.

First, there is no evidence to support the claim that the Tenants accepted the deplorable conditions and ceased their efforts to direct the Landlord to abide by its obligation under the lease or under the laws of Washington. The Landlord has not shown actions by the tenants inconsistent with any other intention than to waive their right to assert constructive eviction. Lastly, adopting policy of waiver of the right to assert constructive eviction would undermine the public policy behind the doctrine of constructive eviction that prohibits a landlord from interfering with the tenants' occupancy rights by providing recourse to the tenant to reject the tenancy obligations because of the landlords' failure to meet their responsibilities.

Waiver is an affirmative defense that the Landlord had the duty to assert in its answer to the counter claims. CR 8(c). The Landlord incorrectly asserts that the tenant has the burden of proof on the issue of waiver by remaining in possession. Appellant's Br. pg. 14. The burden of

proving waiver is on the party asserting the waiver. *Pellino v. Brink's Inc.* 164 Wash.App. 668, 696-697, 267 P.3d 383, 399 (2011).

Waiver is the voluntary and intentional relinquishment of a known right. *Jones v. Best*, 134 Wn.2d 232, 240-41, 950 P.2d 1 (1998). The person against whom a waiver is claimed must have intended to relinquish the right, advantage, or benefit, and his actions must be inconsistent with any other intention than to waive it. *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 409-10, 259 P.3d 190 (2011) (quoting *Bowman v. Webster*, 44 Wn.2d 667, 669, 269 P.2d 960 (1954)). Waiver will not be inferred from doubtful or ambiguous factors. *Wagner v. Wagner*, 95 Wn.2d 94, 102, 621 P.2d 1279 (1980).

The evidence in this case does not demonstrate an intent by the tenants to accept the conditions. The Attorney tenant repeatedly implored the Landlord to address the deficiencies in the building to allow her to continue to enjoy the benefits of her lease and the Landlord promised to correct the issue but the Landlord did not fulfill its promises. CP 569-76. The Non-profit Tenant also made similar complaints and again the Landlord claimed it would fix the problems and again the Landlord failed to live up to its promise. CP 294-321; 363-407; 408-420

Whether a waiver has occurred is generally a question of fact. *Cent. Wash. Bank v. Mendelson-Zeller, Inc.*, 113 Wn.2d 346, 353, 779

P.2d 697 (1989). However, when reasonable minds could reach but one conclusion from the evidence presented, the existence of a waiver may be determined as a matter of law, and summary judgment is appropriate. *Id.*

The Landlord cites *Draper Mach. Works, Inc. v. Hagberg*, 34 Wn.App. 483, 486, 663 P.2d 141 (1983) for the proposition that “Tenants waive their right to treat a landlord’s actions as constructive eviction if they decide to remain in possession of the leased premises. Amended Appellant’s Opening Brief, pg. 14. *Draper* does not so hold. In *Draper* some trucks belonging to the former tenant were left on the parking lot for a period of time from four days to almost a month after the lease began. The tenant failed to pay any rent and then asserted the trucks parked in the lot interfered with his quiet enjoyment at the outset of the lease for that period of time, either four days or almost a month. The Tenant claimed this interference entitled him to rescind the lease although the tenant remained in possession after the initial interference with their use of the property abated. The court disagreed and held that the continued occupancy of the premises after the problem abated demonstrated a waiver of the right to assert the breach permitted him to rescind the lease although the brief interference complained of had since abated and lasted only a short time. The internal *dicta* cited in *Draper* from *McLeod v. Russell*, 59 Wash. 676, 110 P. 626 (1910) does not support the Landlord’s position.

Although the facts are not fully developed, *McLeod* seemed to turn on the tenant's allegation that a third party's use of the demised premises which was permitted by both the tenant and the Landlord amounted to a constructive eviction. The court held that the tenant's consent to that third party's use of the premises prohibited the tenant from claiming an eviction arising from that use.

Aro Glass & Upholstery Co., v. Munson-Smith Motors, Inc., 12 Wn.App. 6, 528 P.2d 502 (1974) is instructive on the issue of waiver. There the condition of puddles of water in the parking lot continued for over two years, despite some attempts by the landlord to remedy the problem. That two year delay did not constitute waiver.

In *Aro Glass* the Court stated: "...the landlord had ample opportunity to correct the situation-and indeed, made several unsatisfactory attempts to correct the situation...Clearly, also, [the tenant] continually pursued its requests and demands that corrective action be taken. Under that state of the facts the lessee cannot be said to have waived the right to assert constructive eviction..." *Aro Glass & Upholstery Co. v. Munson-Smith Motors, Inc.*, 12 Wash.App. 6, 10-11, 528 P.2d 502, 506 (1974). *Aro Glass* further notes the tenant has an obligation to afford the landlord the opportunity to correct the defect giving rise to the constructive eviction claim. *Id.* at 10.

The Illinois common law relied upon by the Landlord is inconsistent with Washington law on the issue of who has the burden of proving waiver and what constitutes waiver. The court should disregard the Landlords attempt to invite a legal precedent where a landlord can promise to address a tenant's concerns and if the landlord successfully leads the tenant along for a sufficient period of time it can then ignore deplorable conditions without any recourse for the tenant. That would set a very poor precedent and encourage and reward poor conduct by landlords.

Waiver is an equitable principle that defeats someone's legal rights where the facts support an argument that a party relinquished its rights by delaying in asserting or failing to assert an otherwise available adequate remedy. *Albice v. Premier Mortg. Servs. of Wash., Inc.*, 174 Wash.2d 560, 569, 276 P.3d 1277 (2012). Even under Illinois law a tenant is not found to have engaged in a waiver of the right to assert constructive eviction when subsequent breaches by the landlord creating the conditions supporting constructive eviction are allowed by the landlord to continue or resume. The waiver of prior breaches did not waive subsequent breaches when the new breaches occurred. *Automobile Supply Co. v. Scene-in-Action Corporation* 340 Ill. 196, 202, 172 N.E. 35, 38 (1930). The Landlord in this case cobbled together remedies and assured the tenants the problems would be addressed, but failed to fulfill their obligations and

the tenants were justified in asserting the constructive eviction, notwithstanding the steady decline of the property.

The Landlord asserts that the Attorney Tenant's exercise of her option right to extend the lease amounts to a waiver. However, that extension continued the Landlord's obligations under the lease to properly maintain and heat the building and other conditions consistent with quiet enjoyment. The Attorney Tenant had diligently pursued other options for space but had not located suitable space. CP 567-69; 573. The record does not provide evidence to support an allegation that the time spent by the Attorney Tenant to find suitable replacement space was unreasonable.

The Landlord asserts that there "was no final straw immediately before [Attorney Tenant] departure that broke the camel's back." Amended Appellant's Opening Brief, pg. 18. That statement ignores the content of Ms. Fraychineaud Gross's declaration that points out in 2007 and 2008 after exercising her renewal option the Landlord allowed a number of new breaches to occur at the property . The Landlord began noisy construction immediately above her office; in the winter the heat was again not working and the building had become unsecured. CP 574-580. In 2008, in the months leading up to her abandonment of the premises her office was broken into and the lock went unrepaired by the landlord for an extended period of time. Id. The main entrance to the building was chained and padlocked. Transients had taken up residence in

the building and were scaring tenants and clients and the transients were defecating in the hallways and vacant offices. CP 574-685. Daylight robberies were occurring in the building. CP 323. Almost all other tenants had vacated and the building was like a ghost town. CP 576. In the summer of 2008 the air conditioning had failed so that her office felt like a sauna. It was evident that the Landlord was taking no steps to lease the building and the building which had been a vibrant commercial space had become a derelict building. CP 565-658.

As in *Aro Glass* the tenants' continued requests and demands that corrective action be taken on the problems in the building defeat the Landlord's claim of waiver. There is no indication that Attorney Tenant accepted the deplorable conditions or otherwise manifested that the Attorney Tenant, the person against whom a waiver is claimed, intended to relinquish the right, advantage, or benefit, and that her actions were inconsistent with any other intention than to waive her rights to a proper tenancy. *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 409–10, 259 P.3d 190 (2011) (discussing issue of waiver).

The Attorney Tenant consistently asserted her rights under the lease while seeking alternate space to relocate her office. No evidence supports that she waived her rights to object to the conditions or assert constructive eviction. When the conditions continued to deteriorate and her repeated requests to the Landlord to remedy the deficiencies went

unheeded, she asserted her right to claim constructive eviction and the court properly ruled that the effective date for the constructive eviction was the date she abandoned the premises.

The reasoning of *Aro Glass & Upholstery Co., v. Munson-Smith Motors, Inc.*, 12 Wn.App. 6, 528 P.2d 502 (1974) applies to this case, the Attorney Tenant had an obligation to afford the Landlord time to correct the deficiencies and when it proved unable or unwilling to do so, the tenant may claim constructive eviction and vacate the premises. The trial court should be affirmed. Any other holding would reward landlords who elect not to repair deplorable conditions providing the landlord can encourage tenants to accept the landlord's false promises to correct the deficiencies or where market conditions or a tenant's circumstance give rise to any delay in locating an alternate location to move the tenant's operation after the conditions giving rise to constructive eviction occur. .

The record is devoid of any facts to support the Landlord's allegation that the Attorney Tenant's or the Non-profit Tenant's effort to locate suitable replacement space were unreasonable or that the Tenants accepted the conditions and waived their right to assert they were constructively evicted by the Landlord's refusal to address the problems.

D. Attorney Tenant Fraychineaud Gross Should be Awarded Attorneys Fees on Appeal.

The parties' lease agreement provides for the award of attorney fees to the prevailing party where a party to the lease has to engage the services of an attorney to bring any action arising out of the lease, including fees on appeal. CP 41. Attorney Tenant should be awarded fees on appeal pursuant to RAP 18.1.

V. CONCLUSION

This Court should affirm the trial court's grant of summary judgment on the issue of constructive eviction and deny the Landlord the requested relief of putting the tenants through the expense of a trial regarding the deplorable conditions that caused the building to become a derelict building and constructively evict the tenants.

RESPECTFULLY SUBMITTED this 3rd day of December, 2012.



Richard H. Wooster, WSBA 13752
Attorney for Respondent Peggy Fraychineaud Gross

CERTIFICATE OF SERVICE

I, CONNIE DECHAUX, hereby certify that I am over the age of 18 years BY _____
DEPUTY

and not a party to the within action; my business address is and I am employed by Kram & Wooster, P.S., 1901 South I Street, Tacoma, Washington 98405. On the 3rd day of December, 2012, a true and correct copy of each of the following documents: Brief of Respondent Peggy Freychineaud Gross were delivered to:

Kathleen Pierce Morton McGoldrick PS 820 "A" Street #600 Tacoma WA 98401
Peggy Fraychineaud Gross 1702 Commercial St Steilacoom, WA 98388-1312
Michael R. Garner Theresa H. Wang Stokes Lawrence 800 Fifth Avenue Ste 4000 Seattle, WA 98104-3179

by the following method:

Electronic Mail.

Depositing same postage prepaid in the United States Mail

addressed to the person(s) identified above.

Delivering a copy to ABC-Legal Messenger Service, Inc., with appropriate instructions to deliver the same to the person(s) identified above.

Personally delivering copies to the person(s) identified above.

I hereby certify under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 3rd day of December, 2012.

KRAM & WOOSTER, P.S.

/s/Connie DeChaux
CONNIE DECHAUX