

FILED

JUN 02 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

YAKIMA AIR TERMINAL-  
MCALLISTER FIELD, an agency  
of the City of Yakima and the  
County of Yakima, Washington,

Respondent,

v.

M.A. WEST ROCKIES  
CORPORATION, a Nevada  
corporation,

Appellant.

Case No. 293068

REPLY BRIEF OF APPELLANT  
M.A. WEST ROCKIES  
CORPORATION

(Proof of Service attached)

Respectfully submitted this 31st day of May 2011.

Sternberg Thomson Okrent & Scher, PLLC

BY: 

Aaron S. Okrent, WSBA# 18138  
500 Union Street, Suite 500  
Seattle, WA 98101  
(206) 233-0633

Attorneys for Appellant  
M.A. West Rockies Corporation

## TABLE OF CONTENTS

<b>I.</b>	<b>Introduction.</b>	1
<b>II.</b>	<b>Factual Clarifications and Reply Arguments.</b>	1
	A. M.A West Tendered Payment at the Proper Location	2
	B. M.A. West Tendered Timely Payments to Cure under the Time Frames Under the Law and the Lease.	3
	C. Miscommunication of YAT regarding its simultaneous notices led to inaccurate and deceptive notices..	11
	D. Attorneys' Fees are Not Delinquent Rent.	14
	E. Accounting: M.A. West should have a Credit	15
	F. Accounting: YAT's Accounting Exhibits Support M.A. West's Position.	19
	G. Acceptance of the March 22, 2010 Payment as Rent Rather than as a Replenishment of the Additional Security Amounted to Waiver of the Alleged Default	21
<b>III.</b>	<b>Conclusion</b>	22
	Proof of Service	23

## TABLE OF AUTHORITIES

### Table of Cases

<u>Anderson v. Bessemer City</u> , 470 U.S. 564, 84 L.Ed.2d 518, 105 S.Ct. 1504 (1985).	7
<u>Carlstrom v. Hanline</u> , 98 Wn. App. 780, 990 P.2d 986, 989 (2000).	13
<u>Codd v. Westchester Fire Ins. Co.</u> , 14 Wn. 2d 600, 605, 128 P.2d 968 (1942).	12
<u>Daniels v. Ward</u> , 35 Wash. App. 697, 669 P.2d 495 (1983).	14,15
<u>First Union Management v. Slack</u> , 36 Wn. App. 849, 855 (1984).	17
<u>Heriot v. Lewis</u> , 35 Wn. App. 496, 668 P.2d 589 (1983).	8
<u>Kane v. Klos</u> , 50 Wn.2d 778, 314 P.2d 672 (1957).	8
<u>Local Union 1296, Int'l Ass'n of Firefighters v. City of Kennewick</u> , 86 Wn.2d 156, 542 P.2d 1252 (1975).	8
<u>Mayes v. Emery</u> , 3 Wn. App. 315, 475 P.2d 124 (1970).	8
<u>Peoples Bank v. Birneys Enters.</u> , 54 Wn. App. 668, 775 P.2d 466 (1989).	10,18
<u>Provident Mutual Life Insurance Co. of Philadelphia v. Thrower</u> , 155 Wash. 613, 285 P. 654 (1930).	12,17
<u>Rickards v. Canine Eye Registration Found.</u> , 704 F.2d 1449, (9th Cir. 1983), cert. denied, 464 U.S. 994 (1983).	7
<u>Schmechel v. Ron Mitchell Corp.</u> , 67 Wn.2d 194, 197, 406 P.2d 962 (1965).	8

<u>Signal Oil Co. v. Stebick</u> , 40 Wn.2d 599, 245 P.2d 217 (1952)	21
<u>Voicelink Data v. Datapulse</u> , 86 Wn. App. 613, 937 P.2d 1158 (1997).	6
<u>Wold v. Wold</u> , 7 Wn. App. 872, 503 P.2d 118 (1972)	9

**Table of Statutes**

RCW 59.04.040. . . . . 5,7,9

**Court Rules**

CR 52 . . . . . 8,10

## I. INTRODUCTION

This Reply Brief focuses on three main aspects of the Respondent's Brief.

1. Respondent's inaccurate and unsubstantiated conclusions regarding the tender of payment which are based upon assertions absent from the record;

2. Respondent's deliberate dodging of addressing the consequences of its admitted misrepresentations made in the required unlawful detainer notices; and,

3. Respondent's accounting, which, when based upon the representations in the notices served, the testimony of the Respondent's Finance Administrator, and after deducting non-rent payment amounts from the equation, indicated that M.A. West was due a credit as early as March 24, 2010, and certainly one by March 26, 2010.<sup>1</sup>

## II. FACTURAL CLARIFICATIONS AND REPLY ARGUMENT

The assigned Lease (CP 10-26) (Lease) provides specific provisions regarding payment of rent and notices.

---

<sup>1</sup> After the filing of the Appellant's Opening Brief the rights of M.A. West in this litigation were assigned to the Langdon Family Revocable Trust. Under separate cover the Court will be receiving a motion to substitute parties. For ease of reference in this brief, the reference to the Appellant has not changed.

Payments are to be made to the Yakima International Airport-McAllister Field **in care of** the Airport Manager's office. (CP 11 section 4.A.) (emphasis added.)

**All notices** of default of any terms and conditions under the lease by Lessee, **except for the payment of rent**, shall have a **30 day** notice. (CP 20, section 24. A.)(emphasis added.)

Notices shall be deemed received **three days** after mailing to the Lessee. (CP 20, section 24. A.)(emphasis added.)

A. M.A West Tendered Payment at the Proper Location.

The Yakima Air Terminal-McAllister Field ("YAT") asserts that M.A. West's tender of payment at the Airport Manager's Office was not the proper place to tender; that the payment could only be made to the attorney signing the Notice. (See Respondent's Brief, pages 5 and 14.)

The Lease states that the rent is to be paid at the Yakima International Airport-McAllister Field in care of the Airport Manager's Office. CP 11, Lease, Part 4 A. The Notice to Pay Rent or Vacate directs that the rent is to be paid to the undersigned. The undersigned signature block is listed as the *Yakima Air Field-McAllister Field*. It is simply signed on behalf of the YAT by its attorney. The Notice, which was drafted by the Landlord's representative, directed that the payment can be made to the undersigned, which is YAT (which is based at the Airport Manager's Office), or its agent, below named, which is Russell H. Gilbert. CP 36.

The refusal to accept the payment because it was made at the Airport Manager's Office is disingenuous.<sup>2</sup>

B. M.A. West Tendered Timely Payments to Cure under the Time Frames Under the Law and the Lease.

The undisputed and acknowledged testimony in the record is that M.A. West tendered payment on March 26, 2010. The issue, as presented to the trial court by YAT, was that tender on March 26, 2010 was simply too late. Not only did YAT not challenge the fact of the March 26, 2010 payment at trial, but, as noted below, YAT's Finance Administrator testified as well to the March 26, 2010 payment. Mr. Goodspeed testified to making the payment on Friday afternoon on March 26, 2010 both in his declaration and in open court. YAT, as noted below, was not disputing that the payment was made on March 26, 2010. In fact, it was relying on the fact the money was paid on that date.

At the hearing, the Respondent always understood that the payment was tendered on March 26, 2010. Respondent's attorney argued to the trial court:

But anyway, in any event, the bottom line is, Your Honor, the rent was due, the rent was not paid, the notice --- the ten day notice was

---

<sup>2</sup> Further, Respondent's Brief ignores the undisputed fact of tender on March 26, 2010 when it states on page 14 of its brief that from March 15-30, 2010, "M.A. West failed to tender all amounts due and owing under the Notice of Default for (1) unpaid rent (2) delinquency charges, and (3) costs and expenses incurred by YAT in preparation and service of the Notice of Default. They admit mailing back the payments on March 29, 2010, which makes their assertion of no tender in that time frame a complete falsity.

issued on the 15th, Mr. Goodspeed did not tender payment of the --  
- of the --- of the rental amount due which was under the --- the  
notice provides that the amount due is \$6,250.82 as of March 15th.  
**He tendered \$6,251.00 on March 26th.**

RP 17 (emphasis added.) Respondent counsel again represents to the  
Court, "He submitted copies of the checks that he submitted to the airport  
on March 26th." RP 19. Also, the Court should review YAT's counsel's  
email clarification to the Court (CP 137) which recites to the Court the  
application of the wrong deadline to receive tender.

Rebecca Brown, YAT's Finance Administrator, after clarifying she  
received payments on March 24, 2010, was then asked about receiving  
payments on March 26, 2010.

GILBERT: Would you tell the Court what that letter is?

BROWN: That is the company letter that I sent with the three  
checks that I returned on March 29th on the advice of counsel.

**GILBERT: Okay and so you did not accept those checks that  
were delivered on March 26th?**

**BROWN: No.**

GILBERT: And you returned them with this letter on the 29th?

BROWN: Yes.

RP 38 (emphasis added.)

Further, Respondent did not doubt that the tender was made under  
the airport office door on March 26, 2010. Respondent's counsel told the

Court in arguing against the need for an evidentiary hearing that all the evidence he needed was in the Declaration of Mr. Goodspeed.

I'm using --- I'm using Mr. Goodspeed's own declaration. I'm using the process server's declaration. We're not offering testimony of the airport, with respect to the non-payment of rent. This is --- there's nothing here that we --- it's not contested unless Mr. Goodspeed's going to contest his own statement.

.....

Your Honor, the issue before the Court is whether or not he paid. Documentation has been submitted showing that he has not paid. Mrs. --- Ms. Brown is here to testify as to the amount of unpaid rent. The only documentation that Mr. Goodspeed has submitted, is --- he submitted payments, copies of checks from back in November or December, I should say, as part of his --- as part of attachments to his declaration. He submitted copies of the checks that he submitted to the airport on March 26th.

RP 18-19. Mr. Goodspeed's declaration recites that he made the payment n March 26, 2010 at the Airport Manager's Office. (CP 82, lines 21-24.)

Pursuant to RCW 59.12.040's addition of one extra day if the notice is mailed, the March 26, 2010 payment was a timely cure payment. (Ten day notice which is mailed on March 15, 2010 would expire the end of the day on March 26, 2010.) More importantly, when the Court applies the Lease provision of adding three days to any mailed notice, the March 26, 2010 payment was made two days before the expiration of the waiting period.

It was not until M.A. West referenced the Lease in its opening brief regarding the 13 day deadline to tender payment, that, for the first time and in contradiction to YAT's own admissions and sworn testimony, it argues that they did not receive tender until March 29, 2010.

There is no testimony in the record from the Respondent that the money was not tendered under the door on March 26, 2010, as testified by Mr. Goodspeed. Further the assertions coming from Respondent's counsel in Respondent's Brief, and not by a witness with personal knowledge under oath, is not evidence. Counsel's assertions are not evidence. See, fn 2, Voicelink Data v. Datapulse, 86 Wn. App. 613, 619, 937 P.2d 1158 (1997) where the Court noted that it does not consider allegations of fact not supported in the record.<sup>3</sup> Additionally, the Trial Court made its ruling based upon the ten day deadline as presented to it by YAT without considering the one day mailing extension under statute or the three day extension under the Lease. Those are ultimate/material facts that were not addressed in the Court's findings prepared by Respondent.

---

<sup>3</sup> Fn 2 to Voicelink, supra: *Northlake Marine Works, Inc. v. City of Seattle*, 70 Wn. App. 491, 513, 857 P.2d 283 (1993); *Lewis v. City of Mercer Island*, 63 Wn. App. 29, 32, 817 P.2d 408, review denied, 117 Wn.2d 1024 (1991). **Assertions by counsel are not evidence.** See *Bravo v. Dolsen Cos.*, 71 Wn. App. 769, 777, 862 P.2d 623 (1993) (unsworn allegation of fact in appellate brief falls outside materials that court can consider), reversed on other grounds, 125 Wn.2d 745, 888 P.2d 147 (1995).

Nowhere in the entered Findings of Fact and Conclusions of Law, which were prepared and later amended by YAT's counsel, does the Court find that the payments were not tendered on March 26, 2010. YAT convinced the court that, in spite of the provisions in RCW 59.12.040 and the Lease, the March 26, 2010 tender was after the waiting period, when in fact, it was not. The Court never addressed in its conclusions of law the time periods under the Lease or enter a conclusion on the one day extension under the mailing rule of RCW 59.12.040.

When a court conducts a bench trial on contested issues, "canned" findings of fact and conclusions of law are inappropriate. Wholesale adoption of a prevailing party's finding may lead to more careful appellate scrutiny. *See, e.g., Rickards v. Canine Eye Registration Found.*, 704 F.2d 1449, 1453 (9th Cir. 1983), *cert. denied*, 464 U.S. 994 (1983). Substantial changes made by the trial court to the proposed findings prepared by a prevailing party ensure that the findings were those of the trial court for the purpose of applying the clearly erroneous standard of review. *Anderson v. Bessemer City*, 470 U.S. 564, 572-73, 84 L.Ed.2d 518, 105 S.Ct. 1504 (1985).

YAT is asking the Court of Appeals to hide behind these limited form findings of fact and conclusions of law and to disregard the undisputed testimony that payment was tendered on March 26, 2010. An

undisputed fact is "a fact disclosed in the record or pleadings that the party against whom the fact is to operate either has admitted or has conceded to be undisputed." Heriot v. Lewis, 35 Wn. App. 496, 668 P.2d 589 (1983).

The finding on the failure to cure is also a conclusion of law. Because "[a] conclusion of law is a conclusion of law wherever it appears," any conclusion of law erroneously denominated a finding of fact will be subject to de novo review. Kane v. Klos, 50 Wn.2d 778, 788, 314 P.2d 672 (1957); *see also* Local Union 1296, Int'l Ass'n of Firefighters v. City of Kennewick, 86 Wn.2d 156, 161-62, 542 P.2d 1252 (1975).

Conclusional findings reached on an erroneous basis, and not supported by substantial evidence, are not binding on appeal. See, Schmechel v. Ron Mitchell Corp., 67 Wn.2d 194, 197, 406 P.2d 962 (1965). In Mayes v. Emery, 3 Wn. App. 315, 475 P.2d 124 (1970) the Court noted:

Under CR 52, as construed by several decisions of the Supreme Court, it is necessary for the trial court to make ultimate findings of fact concerning *all* of the material issues. *See Bowman v. Webster*, 42 Wn.2d 129, 253 P.2d 934 (1953). *Gnash v. Saari*, 44 Wn.2d 312, 267 P.2d 674 (1954).

Mayes, *supra*, at 321-22.

Although a court is not required to make findings in regard to every item of evidence introduced in a case, it is necessary that it make findings of fact concerning all of the ultimate facts and material issues. See, Wold v. Wold, 7 Wn. App. 872 503 P.2d 118 (1972)(citations omitted.)

An ultimate or material fact is one which is important, carries influence or effect, is necessary, must be found, is essential to the conclusions, and upon which the outcome of litigation depends. See, Wold, supra, at 875 (citations omitted).

In the present case, the Court failed to address and make specific findings on the key issues of fact regarding timing of payments as required by RCW 59.12.040 and the three additional days under the Lease, the amounts of the payments and their application to the accounting. Those factual issues were not specifically ruled on by the Court except in finding of fact number 7 when the Court applied a summary judgment standard. Finding of fact number 7 states: "There are no substantial issues of material fact of the right of Plaintiff to be granted the other relief prayed for in the Complaint." CP 160. Therefore, absent the required specific findings on ultimate facts and the Trial Court's summary judgment approach, those specific factual issues are in front of the Court of Appeals on a *de novo* review. The only findings that are specific and are given the

"substantial evidence" test are number 1,2,3 and 5. The rest of the findings of fact, except number 7 as noted above, are conclusions of law disguised as findings of fact, which also require a de novo review.

In Peoples Bank v. Birneys Enters., 54 Wn. App. 668, 775 P.2d 466 (1989), the Court addressed the responsibility of the prevailing party to provide proper findings of fact and the consequences of any deficiencies.

We pause here to issue a warning. Although formal written findings of fact were prepared and presented by the Bank's attorney,[fn1] conspicuously absent are any formal findings on the critical events.....CR 52 requires written findings. This means formal findings on all disputed facts. CR 52(a)(1); CR 52(a)(4). See *State v. Kingman*, 77 Wn.2d 551, 463 P.2d 638 (1970). Absence of findings undermines the conclusions of law. *Sandler v. United States Dev. Co.*, 44 Wn. App. 98, 721 P.2d 532 (1986); *State v. Poirier*, 34 Wn. App. 839, 664 P.2d 7 (1983). Also, absence of a finding will be taken as a negative finding on the issue. *Smith v. King*, 106 Wn.2d 443, 451, 722 P.2d 796 (1986); *Golberg v. Sanglier* 96 Wn.2d 874, 880, 639 P.2d 1347, 647 P.2d 489 (1982); *Pilling v. Eastern & Pac. Enters. Trust*, 41 Wn. App. 158, 165, 702 P.2d 1232, review denied, 104 Wn.2d 1014 (1985). We consider it the prevailing party's duty to procure formal written findings supporting its position. Prevailing parties must fulfill that duty or abide the consequences of their failure to do so.

Peoples' Bank, *supra*, at 669-70.<sup>4</sup>

---

<sup>4</sup> The trial court never indicated what evidence it was relying upon in his decision. How can YAT, in spite of all key evidence on payment and timing of payment to the contrary, assert the Court found substantial evidence when the judge never addressed the key issues in his findings and did not note the evidence he relied upon? At some point common sense has to rule the day.

All evidence points to timely payment being made both under RCW 59.12.040 and under the Lease.

C. Miscommunication of YAT regarding its simultaneous notices led to inaccurate and deceptive notices.

There was confusion between the YAT Finance Administrator and the YAT counsel in how monies were being applied before the two stapled and combined March 15, 2010 Notices were sent out to M.A. West. (CP 36 and CP 86.) YAT's counsel was under the impression, and his notice implied, that the previous replenishment of the additional security deposit was applied to the M.A. West's then outstanding rental balance. However, Ms. Brown did not apply the funds as represented in the YAT required notices.

SANDLIN: And then on March 15th you applied \$2716.29 from the trust account, didn't you?

BROWN: No, I didn't.

SANDLIN: You didn't? Okay, let's take a look at Exhibit "S". Now, this is a notice of application to deposit towards unpaid rent, do you see that?

BROWN: Yes.

SANDLIN: Now, that notice indicated that \$3,000.00 was taken, doesn't it?

BROWN: It does, but I didn't officiate it.

SANDLIN: So, you kept the \$3,000.00 inside the account?

BROWN: \$3,000.00 is in the account, yes.

SANDLIN: It's still there?

BROWN: Yes.

SANDLIN: Even though on March 15, 2010, your lawyer indicated that the \$3,000.00 was withdrawn?

BROWN: No, I think there was a failure of communication there.

(RP 44, lines 3-20)

Also, see:

BROWN: But at no time did I tell him I had withdrawn the --- I believe Mr. Russell misunderstood there --- we misunderstood each other. I thought I was doing as directed and not replacing it and using it.

(RP 47, lines 1-13)

Notices must also be sufficiently particular and certain so as not to deceive or mislead. See Provident Mutual Life Insurance Co. of Philadelphia v. Thrower, 155 Wash. 613, 285 P. 654 (1930) (substantial compliance suffices); Codd v. Westchester Fire Ins. Co., 14 Wn. 2d 600, 605, 128 P.2d 968 (1942) (notice must be particular).

Another confusing item in the Notice is the demand for a payment to replenish the deposit, when, as Ms. Brown testified, the deposit was full at the time the Notice went out and at the time of trial. M.A. West was served one document which included a stack of papers with two important

notices stapled and blended together; one Notice with a five day deadline and the other with a ten day deadline. One of the Notices included an overlapping demand for the same item.

Unlawful detainer law is strictly construed and it is not designed as a guessing game or to be applied to a moving target as to what is actually due to cure an alleged default.

Common sense dictates that a prerequisite to a proper unlawful detainer notice is to include a clear and accurate statement of what is allegedly due and to not take any action or send out other notices which would likely be confusing to the tenant. M.A. West, regardless of YAT's back-pedaling, is allowed to rely upon the Notice which indicates \$3,000.00 was applied from the deposit to the outstanding rent. The Court did not enter a finding of fact or conclusion of law on this issue. The two notices blended together with conflicting times and amounts were at best, ambiguous.

Washington courts will construe ambiguities in a lease agreement against the one who drafts the agreement. Carlstrom v. Hanline, 98 Wn. App. 780, 785, 990 P.2d 986, 989 (2000). Additionally, when a lease is ambiguous, courts will adopt the interpretation that is "most favorable to the lessee." Id. at 785 (citing Allied Stores Corp. v. N.W. Bank, 2 Wn. App. 778, 784, 469 P.2d 993 (1970)).

Respondent suggests on page 16 of its Respondent's Brief that the Court rejected that YAT's Financial Administrator and YAT's counsel had a miscommunication which resulted in errors in calculating the amounts owed by M.A. West. The court could not reject the claim as it was an admission on the behalf of YAT. The Court simply was confused, as trying to follow the YAT accounting was difficult at best. Unfortunately, the Trial Court made a decision inapposite to the admission of YAT's own personnel. Respondent is mistaken when it attempts to lead this Court to believe that the record on appeal reflects that the Trial Court carefully considered YAT's own admission of an accounting mistake. That is absent from the findings and conclusions.

D. Attorneys' Fees are Not Delinquent Rent

Nowhere in the 2008 Agreement or the Lease, are attorneys' fees defined as rent. The 2008 Agreement only makes attorneys' fees part of the charges that can be applied from the additional security replenishment.

As noted in our opening brief, in Daniels v. Ward, 35 Wash. App. 697, 669 P.2d 495 (1983), the issue of whether attorneys' fees were rent was addressed:

We do not believe that the lease provision requires characterizing attorneys' fees as rent. The phrase in the lease "[a]ll sums to be paid by Tenant to Landlord under any of the provisions of this lease, in addition to the basic rent" applies to only payments from tenant to the landlord arising directly out of rental of the

premises, for example, the percentage rent. It does not apply to payments that effectively are payments from tenant to landlord's attorneys. Even DMN in its brief recognizes that the parties probably did not contemplate defining attorneys' fees as rent.

Daniels, supra, at 707.

CP 31, Paragraph 4 says, that YAT may also use the deposit **to pay** any attorney for the preparation of any notices hereunder and under the attached Lease. Any part of the deposit used for attorneys' fees shall be paid to YAT to return the total deposit to Three Thousand and no/100 Dollars (\$3,000.00) as is provided in section 3 above. This does not refer to or make attorneys' fees a part of rent. It is optional for YAT to apply the deposit towards fees by the use of the word "may." Nowhere does it say that YAT can apply the shorter notice period for a default in rent to other non-rent payment defaults. CP 30 and 31.

As noted above, both these agreements are drafted by the Landlord. Any ambiguities are to be construed against the drafter. If YAT wanted attorneys' fees to be included as rent, then it was for YAT to draft that into the agreements.

E. Accounting: M.A. West should have a Credit.

M.A. West, on March 22, 2010, cured any rental defaults as represented by the Notices as drafted and sent to them by YAT. When

M.A. West made timely tender on March 26, 2010, it had overpaid YAT and should have received a credit.

Yakima Air Terminal's Finance Administrator Rebecca Brown testified:

RP#	Description	Running Total
43	February 24, 2010 the balance due was \$5,687.85 (also CP 103)	\$5,687.85
43	March 1, 2010 invoice for March rent of \$2,718.29	\$8,406.14
43	March 4, 2010 applied the transfer from the deposit (\$3000.00)	\$5,406.14
43	March 8, 2010 received replenishment of \$3,000 from Goodspeed for deposit trust account	

Based upon the YAT's records, as of March 8, 2010, the deposit was fully replenished and the amount due would be \$5,406.14.

CP#	Description	Running Total
	March 4, 2010 Amount due (from above)	\$5,406.14
86	Notice of Application of Deposit Towards Unpaid Rent (\$3,000.00) March 15, 2010	\$2,406.14

YAT served a legal notice representing that it had applied the \$3,000.00 deposit towards unpaid rent, which, if it was a true statement, would have made the rent due of \$2,406.14. YAT hides behind the "may" provision of applying the deposit, but ignores the consequences of misrepresenting the application of funds to its tenant and then not correcting that information until after rejecting timely payments and not

until a full hearing.<sup>5</sup> Based upon YAT's representations in official and legal notices under the lease and the amendment, the alleged default in rent should have been \$2,406.14 and not the \$6,250.82 demanded in the notice. YAT demanded \$3,844.68 more than was due to bring the rent current.

As noted in Appellant's Opening Brief, notices must also be sufficiently particular and certain so as not to deceive or mislead. See Provident Mutual Life Insurance Co. of Philadelphia v. Thrower, *supra* and First Union Management v. Slack, 36 Wn. App. 849, 855 (1984)(Bank failing to advise tenant it was holding and cashing their checks for the purpose of collecting damages justifies tenant in assuming the bank accepted their payment as rent, and thereby waived any default as to prior unpaid rent.)

If YAT had not been deceptive and followed what it represented to its Tenant then the Notice to Pay or Vacate would have been for the \$2,406.14. YAT is under a misimpression that a replenishment of deposit is the same as a payment of rent. Nowhere is it defined as that in the Lease or the Amendment. (CP10 and 30).

---

<sup>5</sup> YAT's Ms. Brown testified the March 15, 2010 Notice indicating an application of the \$3,000 deposit funds was a miscommunication between YAT and its attorney that sent the notice; that she and Mr. Russell misunderstood each other. (RP 44, 47) She further testified that it was not until the hearing that M.A. West was advised of the mistake. (RP 68)

Respondent inaccurately asserts on page 18 of its brief that CP 159 recites that the court did not find a discrepancy in YAT's records and accounting and that the Notice of default accurately reflected the amount required to be paid by M.A. West to cure the default. That is not true. In fact, the Court in its Findings issued with CP 159 did not even enter an amount due or note what was not paid in compliance with the Lease. Nor did YAT prepare detailed Findings on those issues.

As noted above in Peoples' Bank, supra, at 669-70, the Appellant Court considers it the prevailing party's duty to procure formal written findings supporting its position. Prevailing parties must fulfill that duty or abide the consequences of their failure to do so.

YAT admits receiving and accepting payments on March 24, 2010 which totaled \$3,014.45. (RP 36 and 46). Based upon the March 24, 2010 payment by M.A. West and deducting the non rent attorneys' fees, M.A. West should have had a credit of \$608.31 and would then need to replenish the deposit. This is based upon representations made to M.A. West by the Landlord YAT and not M.A. West's accounting.

M.A. West tendered checks totaling \$2,920.56 on March 26, 2010. That payment plus the credit of \$608.31 equals a credit of \$3,528.87. Even under YAT's bizarre accounting practices, if we were to allow a

landlord to use a deceptive notice and not apply the prior deposit to the rent as represented, YAT still is in error on its underpayment argument.

The invoice representing the “legal fees” of \$799.50, which were made part of the amount due in the March 15, 2010 Notice of Default for Failure to Pay Rent, was not mailed until two days later on March 17, 2010. (CP 111-112) Under the Lease any amounts due that are not rent and are not timely paid require a 30 day notice to comply or pay. (CP 20) Instead, YAT ignored that provision.

F. Accounting: YAT's Accounting Exhibits Support M.A. West's Position.

YAT provided two accounting exhibits under CP 266 and 268 which supports M.A. West's position. It is important to note that the YAT exhibits, assume the March 26, 2010 payments were untimely. As noted above, the Trial Court was misinformed as to the RCW 59.12.040 one day extension under the mailing rule and the three day extension under the Lease. Under both YAT exhibits, CP 266 and CP 268, if the payments made on March 26, 2010 are deemed timely within the statute and/or the Lease, then the analysis is moot, as YAT cannot deny M.A. West would have a significant credit in the rent column.

Even so, assuming for argument sake that YAT is correct in its assertion that the one/three day extension under the statute and lease was

not met, YAT's exhibit CP 266 still supports M.A. West. If YAT had deducted the \$3,000.00 from the deposit, as its notice represented, the payments of March 24, 2010 would have made M.A. West short \$236.58. However, YAT included in that amount the \$799.50 for attorneys' fees which are non-rent items and require a longer notice. Therefore, after deducting the \$799.50 attorneys' fees collection, and *ignoring proper payment* on March 26, 2010 of an additional \$2,920.56, M.A. West would have a credit of \$562.92. (That does not even take into account the \$50.00 badge charge which was included in the rental accounting, which certainly is not rent. (CP 104))<sup>6</sup>

YAT's exhibit CP 268 uses an example where the \$3,000.00 deposit was not applied to rent contradicting what YAT had represented in its Notice. CP 268 indicates \$2,436.58 due before the March 26, 2010 tendered payment. However, that ignores the \$3,000.00 in the security deposit that YAT was holding which they represented had been applied to the rent. YAT should be held accountable to do as it states in a legal notice. The proper deduction for the \$3,000.00 applied from the deposit, before the March 26, 2010 payment, gave M.A. West a credit of \$563.42.

---

<sup>6</sup> The 2008 Agreement states that the \$3,000 is for *additional security for the payment of rent*. CP 30. Yet, in the Notice of Application of Deposit Towards Unpaid Rent dated March 4, 2010 (CP34), in addition to deducting for attorneys' fees, it includes a \$50.00 deduction for replacement of a lost badge.

(Again this all should be moot, as there is no dispute in the record before this Court of the payment of \$2,920.56 tendered on March 26, 2010.)

G. Acceptance of the March 22, 2010 Payment as Rent Rather than as a Replenishment of the Additional Security Amounted to Waiver of the Alleged Default.

YAT has waived any prior breach by M.A. West when its Financial Administrator, before the expiration of the Notice of Default for Failure to Pay Rent, admitted that YAT accepted the March 22, 2010 \$2,716.29 payment as rent and not as any replenishment to the additional security account. (RP 44-46)(YAT refers to this as the March 24, 2010 payment which also included two smaller checks for a total submitted of \$3,014.45 see CP 266) In Washington, by accepting rental payment after service of the notice, the landlord waives all past breaches. Signal Oil Co. v. Stebick, 40 Wn.2d 599, 245 P.2d 217 (1952).

YAT asserts that there is no waiver because the March 24, 2010 payment of \$3,014.45 was not payment in full of the alleged delinquencies. (Respondent's Brief, page 26). However, based upon what YAT was representing to M.A. West in the March 15, 2010 Notice of Application of Deposit Towards Unpaid Rent, \$3,000 had been paid from the deposit towards the rent. (RP 36 and 46). Based upon the March 24, 2010 payment by M.A. West and deducting out the non rent attorneys'

fees, M.A. West had a credit of \$608.31. The acceptance on March 24, 2010 was a not only a waiver, but M.A. West was then current on rent.

### III. CONCLUSION

M.A. West in this Reply Brief, its Opening Brief, and from the Court record, has provided the Court numerous examples of errors of law in the Trial Court and the absence of findings and conclusions in respect to ultimate facts from the trial. M.A. West has suffered from a gross injustice as YAT, as a governing agency, has mishandled this matter at multiple stages and proceeded as if it was wearing blinders to cover up its shortcomings to protect its ultimate purpose of getting rid of Mr. Goodspeed. Perhaps in YAT's haste they should have slowed down and applied more common sense in how to spend taxpayer money over at best, nominal accounting differences.

Unlawful detainer is not designed to apply to YAT's numerous mistakes and misrepresentations. The Court should reverse the trial court and enter relief as noted in our opening brief.

Dated this 31st day of May, 2011.

STERNBERG THOMSON OKRENT & SCHER, PLLC

  
\_\_\_\_\_  
Aaron S. Okrent, WSBA 18138  
Attorneys for M.A. West Rockies Corporation

CERTIFICATE OF SERVICE

I, Aaron S. Okrent, do hereby declare under penalty of perjury that I have served the attached pleading on the parties in interest by depositing them into first class mail, postage prepaid on May 31, 2011 as follows:

Mr. Russell H. Gilbert, Esq.  
Lyon Weigand & Gustafson, PS  
222 North Third Street  
P.O Box 1689  
Yakima, WA 98907

Dated May 31, 2011 at Seattle, Washington.



Aaron S. Okrent, WSBA#18138