

**FILED**

JUN 14 2012

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

Case No. 30244-0-III

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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SCHREINER FARMS, INC.,  
a Washington Corporation,

Plaintiff / Appellant,

v.

AMERICAN TOWER, INC., a Delaware Corporation; NEXTEL WEST CORPORATION, INC. d/b/a NEXTEL COMMUNICATIONS, a Delaware Corporation; TOWER ASSET SUB, INC., a Delaware Corporation; SPECTRASITE COMMUNICATIONS, INC., a Delaware Corporation; and WESTERN OREGON WIRELESS COMMUNICATIONS, INC., an Oregon Corporation; and WASHINGTON OREGON WIRELESS, a Washington Limited Liability Company,

Defendants / Respondents.

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RESPONDENTS' and CROSS-APPELLANTS' REPLY BRIEF IN  
SUPPORT OF CROSS APPEAL

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## I. INTRODUCTION

Plaintiff/Appellant/Cross-Respondent Schreiner Farms, Inc. (hereafter "Schreiner") did not provide authority distinguishing 100 year old precedent that, in order to impose a restraint on alienation in a lease, the restraint must be expressly stated and "by words which admit of no other meaning." *E.g., Burns v. Dufresne*, 67 Wash. 158, 161, 121 P. 46 (1912) (citation omitted). Restraints "are construed by courts of law with the utmost strictness, to prevent the restraint from going beyond the express stipulation." *Id.* (citation omitted). Any asserted restraint other than those expressly stated in the lease is immaterial, given the law on restraints. *See* 14A Karl B. Tegland, *Wash. Prac., Civil Procedure* § 25:19 (2011). The restraints Schreiner seeks to impose on assignment and use are not express.

Similarly, Schreiner did not provide case law negating its March 10, 2000 written consent to SpectraSite Communications (hereafter "SpectraSite") licensing tower and ground space and easements to Washington Oregon Wireless (hereafter "WOW"). CP 189. Schreiner,

being not only a person of ordinary understanding but one with more than ordinary experience in land transactions and instruments of conveyance and security, and with time and opportunity both to consult with an attorney and to inspect the instruments before signing, cannot now be heard in law to repudiate his signature. The whole panoply of contract

law rests on the principle that one is bound by the contract which he voluntarily and knowingly signs.

*National Bank of Washington v. Equity Investors*, 81 Wn.2d 886, 912-13, 506 P.2d 20 (1973).

Defendants' joint motion to dismiss the breach/default claims in Schreiner's *First Amended Complaint* should have been granted at the trial court level as a matter of law. Schreiner's offer of extrinsic evidence in this area of law does not prevent summary judgment.

The following points and authorities address the summary judgment standards that were applicable at the trial court level and here on review, and then address the six points that Schreiner's response brief submits support questions of fact. *Reply Brief of Appellant and Brief of Cross-Respondent*, 27-28 (hereafter "*Brief of Cross-Respondent*").

## II. REPLY

### A. CR 56; SUMMARY JUDGMENT RULES

Schreiner sought a declaratory judgment that Defendants are in default based on three specific claims and requests for relief (assignment, use, and consent), which are fully set out in Section II.B herein. CP 92-94.

Defendants moved for summary judgment and demonstrated that the lease lacks an express restraint on assignment (other than giving notice and the assignee assuming obligations under the lease). *E.g.*, CP 113-23,

485-86; *Brief of Respondents and Cross-Appellants*, 41-49 (hereafter “*Brief of Cross-Appellants*”). Defendants demonstrated that the use provision employs permissive language and allows use of the subject facility by Lessee Tower Asset Sub and licensee WOW. CP 113, 120-22, 485; *Brief of Cross-Appellants* 42-45. Defendants demonstrated that SpectraSite was the parent company, manager and a d/b/a for Tower Asset Sub. CP 187, 188, 189. Defendants also demonstrated that Schreiner consented to SpectraSite licensing space to WOW, by virtue of Schreiner’s March 10, 2000 written consent. CP 122-24, 189, 486; *Brief of Cross-Appellants* 50-51. Defendants also showed that Defendant American Tower, Inc. has never been a lessee or licensee and had no connection to the Premises or radio communications site. CP 453 (American Tower, Inc.’s Answer to Interrogatory No. 3).

CR 56(e) obligated Schreiner to “... set forth specific facts evidencing a genuine issue of material fact for trial” in respect to each Defendant, assignment, use, and Schreiner’s March 10, 2000 consent to license. *Schaaf v. Highfield*, 127 Wn.2d 17, 21, 896 P.2d 665 (1995). “A material fact is one upon which the outcome of the litigation depends.” *Clements v. Travelers Indem., Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993). “A fact is an event, an occurrence, or something that exists in reality.” *Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355,

359, 753 P.2d 517 (1988). A factual dispute is immaterial if “the result in the case is compelled as a matter of law.” Tegland, *Wash. Prac., Civil Procedure* § 25:19. “More than mere possibility or speculation is required to successfully oppose summary judgment.” *Doe v. State Dept. of Transp.*, 85 Wn. App. 143, 147, 931 P.2d 196 (1997) (citation omitted). Schreiner did not meet its burden because the only material facts are the express restraints in the lease. Review of §§ 14, 2, and 6 shows that the lease did not restrain assignment, use, or licensing as alleged by Schreiner in its *First Amended Complaint*. And, having no connection to the Premises, American Tower, Inc. should have been dismissed.

#### **B. SCHREINER’S CLAIMS AND ASSERTED QUESTIONS OF FACT**

Respectfully, Schreiner's *First Amended Complaint* submitted three claims and requests for relief (hereafter collectively “Claim” or “Claims”) that should not have survived summary judgment, even in the absence of the statute of limitations. They are: (1) Defendant Nextel was not authorized to assign the Lease to Defendant Tower Asset Sub in January 2000 because Tower Asset Sub did not provide radio communications services (CP 92:15-21, 93:15-18) (the Assignment and Use Claims); (2) Defendant Tower Asset Sub's parent company and manager, SpectraSite, was not authorized to sublease/license to WOW in

March/April 2000 (CP 92:22-30, 93:19-27) (the License Authorization Claim); and (3) Schreiner did not consent to a sublease or license to WOW (*Id.*) (Consent Claim).<sup>1</sup>

In response to this Cross-Appeal, Schreiner divided its three Claims into six bullet points, which it submits show questions of fact. *Brief of Cross-Respondent*, 27-28. The six bullet points are addressed in the next section, II.C.

### **C. REPLY TO SCHREINER'S ARGUMENTS: ASSIGNMENT; USE; CONSENT**

The overriding rule of law is that any restraint must be express. *Burns*, 67 Wash. at 161; William B. Stoebuck & Dale A. Whitman, *The Law of Property* § 6.24 (3d ed. 2000) (citing *Noon v. Mironski*, 58 Wash. 453, 454-56, 108 P. 1069 (1910)). The assignment and use restraints Schreiner seeks are not express. Even if the real property rule is set aside for analysis, the restraints cannot be added under a contract theory, as they would require the deletion, addition, or modification of terms, which is prohibited. *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005). The context rule is to be used to determine the meaning of specific words and terms used; not to show an intention

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<sup>1</sup> Schreiner had a fourth claim that was dismissed on summary judgment and not appealed. CP 93:5-11, 93:28-94:4.

independent of the instrument or vary, contradict or modify the written word. *Id.* Washington courts will not allow such evidence to emasculate the written expression. *Id.* Admissible evidence does not include evidence of a party's unilateral or subjective intent as to meaning. *Id.* See also *In re Marriage of Schweitzer*, 132 Wn.2d 318, 327, 937 P.2d 1062 (1997).

1. The Lease Does Not Expressly Restrain a Partial Assignment or Having More Than One Entity On the Premises

Schreiner's first bullet point asserts that the lease does not allow a partial assignment or more than one "wireless communication company" on the Premises, citing CP 298-303. *Brief of Cross-Respondent*, 27. This citation is to an August 6, 1998 interim lease memorandum and the negotiations noted therein. Schreiner is non-specific about what aspect of this pre-lease negotiation it is relying on in respect to its first bullet point. Partial assignment, assignment of all rights, and provision for more than one radio communications company are separately addressed below.

a. There is no express restraint on partial assignment

Neither the August 6, 1998 interim memorandum nor the final lease state that there cannot be partial assignment. Dispositively, review of § 14 shows that it is void of an express restraint on partial assignment. It provides: "Lessee may assign this Agreement to an entity upon written notification to Lessor by Lessee, subject to the assignee assuming all of

Lessee's obligations herein." CP 179. Even a covenant not to assign all parts of the premises will not prevent assignment of only one part. *E.g.*, *Burns*, 67 Wash. at 161. *See Coulos v. Desimone*, 34 Wn.2d 87, 94-95, 208 P.2d 105 (1949) (covenant against assignment without consent does not apply to original lessee, as lessor consented to original lessee when lease was entered). The interim memorandum's reference to only one monopole, one building, and one facility deals only with physical structures on the ground; it does not expressly restrain a Lessee's provision of radio communications services through its operations. The interim memorandum simply shows negotiation toward one monopole or tower, one shelter or building, and one facility. In sum, as a matter of law the lease language in § 14 does not expressly prohibit partial assignments; therefore a "partial assignment" restraint cannot be imposed.

b. The Lease does not expressly require assignment of all rights

Schreiner attempts to support its assignment theory with the assertion that the Lessee must receive all of the assignor's rights, in addition to assuming all obligations under the lease. As quoted above, the lease does not expressly impose this restraint. CP 179. The August 6, 1998 interim memorandum is also void of a requirement that the Lessee assign all rights. In turn, this argument also fails as a matter of law, as a restraint or obligation to assign all rights is not expressly stated in § 14 of the lease.

All that was expressly required was notice and assumption of obligations under the lease. This was done. CP 213, 225.

c. The Lease does not expressly restrain use of the Premises by more than one radio communications company

The second part of bullet point one contends that the lease does not allow more than one “wireless communication company.” *Brief of Cross-Respondent*, 27. Review of §§ 2 and 14 shows that there is no express restraint limiting the Premises to one “wireless communication company.” Section 2, the use provision, refers to a “radio communications facility” and “radio communications services,” not “wireless communication company.” CP 177. In his deposition, Joe Schreiner admitted that the lease does not state that only one company may operate from the Premises. CP 173 (Schreiner Dep. 94:22-95:15, 95:20-96:3).

Additionally, § 14 allows assignment with notice to Schreiner and licensing with consent from Schreiner. CP 179. On March 10, 2000, Schreiner consented in writing to SpectraSite (the manager/parent of the Lessee, Tower Asset Sub) licensing tower and ground space and easements to WOW. CP 189. While SpectraSite obtained written consent to license a portion of the Premises, the express terms of § 14 did not require **written** consent, they simply provide for consent. CP 179.

In summary, the lease does not expressly restrain partial assignment or use of the Premises by more than one radio communication or wireless communication company. It also does not require assumption of all rights by an assignee. Moreover, the August 6, 1998 interim memorandum only refers to one tower, one building and one facility. To this day, there is only one tower, one building and one facility. CP 131-32. As a matter of law, the extrinsic memorandum does not add any express restraints to the Lease.

2. Defendants Have Used the Premises in Accordance with the Lease

With its second bullet point, Schreiner asserts that Defendants other than Nextel were using the Premises in a manner not allowed by the lease, citing CP 327-337, 369-372. *Brief of Cross-Respondent*, 27. Respectfully, Schreiner's assertion is vague and appears to be a contention that a Defendant did not provide radio communications services.

The citations in Schreiner's second bullet point refer to the final lease (CP 327-37) and Nextel's Supplemental Answers to Interrogatories (CP 369-72). With Interrogatory No. 21, Nextel was asked to "provide any and all information Nextel has regarding the current lessee(s) and any sublessee(s), including the names of communication services providers,

the number of providers currently operating from the tower, and the nature of the operations being conducted.” CP 371. Nextel responded:

To Nextel’s knowledge, there are no sublessees. Paragraph 14 of the Lease Agreement dated August 28, 1999, discusses assignment, subletting, and licensing, as set forth therein. Exhibit B to the lease Agreement provides, “The type, number and mounting positions and locations of antennas and transmission lines are illustrative only. Actual types, numbers, mounting positions may vary from what is shown above.” On March 10, 2000, Mr. Schreiner approved licensing of tower and ground space to Washington Oregon Wireless, L.L.C. (WOW). Nextel and WOW both provide radio communication services for cellular phones. Nextel signals are picked up by the Nextel equipment. WOW (under the Sprint brand) signals are picked up by the WOW equipment.

CP 371.

The Nextel interrogatory response does not purport to state that Nextel’s and WOW’s services are the only radio communications services conducted at the facility. Additionally, the response does not purport to characterize Tower Asset Sub/SpectraSite’s operations. A summary of the use of the Premises by each Defendant, other than Nextel, follows.

a. American Tower, Inc. never operated on or from the Premises

American Tower, Inc. has never been shown to have been on or used the Premises. CP 443 (Tower Asset Sub’s Answer to Interrogatory No. 25), 453 (American Tower, Inc.’s Answer to Interrogatory No. 3). As a matter of law, there is no basis to assert a Use Claim, or any other claim

in the *First Amended Complaint*, against American Tower, Inc., as it held no interest in and had no connection to the Premises. Hence, it should have been dismissed.

b. The Lease did not expressly restrain Tower Asset Sub acting through its manager or doing business as SpectraSite

Tower Asset Sub is the only Defendant-assignee-Lessee. CP 90:10-12, 92:19-21, 187, 188. RCW 80.04.010 defines a radio communications service company. A “Radio communications service company’ includes every ... company ... making available facilities to provide radio communications service ... or cellular communications service ...” RCW 80.04.010 (effective until July 1, 2012). It also defines telecommunications company. A “Telecommunications company’ includes every ... company ... owning, operating or managing any facilities used to provide telecommunications ...” *Id.*

The assignment notices and interrogatory responses of all Defendants show that Tower Asset Sub is within the definition of a radio communications service company. The assignment notices include CP 187, 188, 189. These include a description that Tower Asset Sub did business as SpectraSite, notice that SpectraSite would act as Tower Asset Sub’s manager, and notice that SpectraSite was one of the largest providers of radio communications facilities for the wireless industry. *Id.*

Schreiner admits receiving the actual assignment documents for Tower Asset Sub, and likely reading them. CP 164 (Schreiner Dep. 59:13-17, 61:20-23), 165 (Schreiner Dep. 62:18-63:18).

Tower Asset Sub and SpectraSite each answered written discovery requests from Schreiner that showed their operations are to provide radio communications services, and that their services include the provision of a radio communications facility. CP 438-39 (Tower Asset Sub's Answers to Interrogatories No. 9 and 10), 531 (SpectraSite's Answers to Interrogatories No. 5 and 6). Tower Asset Sub responded "Yes" to the question "[Do] you provide radio communications services?" CP 439. SpectraSite gave the same answer. CP 531. Tower Asset Sub described its services as owning, maintaining and operating the communications tower and the Premises. CP 439. The only radio communications industry witnesses who provided testimony described Tower Asset Sub's operations as radio communications services; descriptions that match RCW 80.04.010. CP 130:31-32, 132:15-18, 137:18-24, 141:18-23.

The use provision (§ 2), which describes the Lessee's ability to provide radio communications services from a radio communications facility, is prefaced with permissive terms, i.e., the "Premises **may** be used by Lessee for **any** activity in connection with the provision of a radio communications facility from which Lessee can provide radio

communications services specific to Lessee's operations." CP 177 (emphasis added). Tower Asset Sub provided radio communications services by owning and operating a radio communications facility from which Nextel and WOW provide cellular services. CP 132, 137, 141. Tower Asset Sub's services were specific to its operations. CP 177, 438-39. Neither § 2 nor any other section of the lease expressly restrains this.

Additionally, Schreiner admitted that it did not investigate Nextel's operations in 1998 or 1999, and was not aware that Nextel collocated and had collocations on other towers or other sites. CP 172-73 (Schreiner Dep. 93:23-94:13). Hence, it did not attempt to restrain collocation. Moreover, it agreed to licensing a portion of the Premises (CP 179) and gave written consent (CP 189).

c. Schreiner consented to Washington Oregon Wireless

In respect to Washington Oregon Wireless, on March 10, 2000 Schreiner gave written consent to SpectraSite to license tower and ground space and easements to WOW. CP 161 (Schreiner Dep. 48:10-49:6), 162 (Schreiner Dep. 51:21-23), 189. In its *First Amended Complaint*, ¶ 23, Schreiner admits and pleads that it consented to WOW because Schreiner believed WOW was affiliated with Nextel. CP 92:10-12. It is. CP 132:11-14.

WOW is also within RCW 80.04.010's definition of a telecommunications or radio communication service company. In response to written discovery, Nextel described itself and WOW as providing radio communications services for cellular phones. CP 371 (Nextel's Supplemental Answers to Interrogatories No. 20 and 21).

Moreover, Schreiner received and had the actual license between SpectraSite and WOW in its file. It showed WOW was using 345 square feet of the Premises and illustrated both Nextel's and WOW's antennas and equipment. CP 162 (Schreiner Dep. 51:1-53:9), 190-92 (Recitals, §§ 1, 2, 8, 11), 198-200. Schreiner not only consented to this in writing, but accepted the use for over seven years.

In sum, there is no express restraint preventing a Lessee radio communication service provider such as Tower Asset Sub from acting through SpectraSite to provide a radio communications facility. Similarly, there is no express restraint preventing WOW from using the Premises, in furtherance of Schreiner's March 10, 2000 written consent. Consequently, Schreiner's second bullet point, and its first and second Claims (Assignment and Use and License-Consent), should have been dismissed as a matter of law. CP 92:15-30, 93:15-22.

3. The Lease Allows More Than One Radio Communications Company to Operate From the Premises

With its third bullet point, Schreiner again contends that it did not intend to allow more than one “wireless communication company” to operate on the Premises, citing CP 298-303. *Brief of Cross-Respondent*, 27. Again, this is a citation to the August 6, 1998 interim memorandum and negotiations. Respectfully, this is duplicative of bullet point one and is addressed above.

4. The Assignees Were Authorized Users, as Schreiner Was Given Notice of Assignment, Accepted It, and the Assignees Provide Radio Communications Services

With its fourth bullet point, Schreiner asserts that the assignees were not authorized users of the Premises, as they were not “wireless communication service providers” as required by the lease, citing CP 369-372. *Brief of Cross-Respondent*, 28. This is another reference to Nextel’s Supplemental Answers to Interrogatories. Respectfully, this is duplicative of bullet point two, and is addressed above. Tower Asset Sub is the only Defendant-assignee-Lessee. As demonstrated, Schreiner was given notice of assignment, accepted it, and Tower Asset Sub provides radio communications services specific to its operations.

5. The Lease Expressly Allowed the Addition of Antennas and Equipment

With its fifth bullet point, Schreiner asserts that equipment and facilities for the Premises were installed in violation of the lease and without express written consent, citing CP 338-340 and 342-355. *Brief of Cross-Respondent*, 28. This citation refers to Schreiner's March 10, 2000 written consent; Schreiner's picture of the site with a pickup truck parked next to the facility; and a copy of the Tower Attachment License, which omits the Schreiner Farms Bates Stamp Numbers 67 through 79, used in Joe Schreiner's deposition. *Compare* CP 190-202, *with* CP 342-55. (The Bates Stamp shows the License was in Schreiner's file.) These three documents all conform to the express language of the lease and do not show an express restraint prohibiting Tower Asset Sub or its licensee, WOW, from adding antennas and equipment.

In fact, § 2 of the lease states that, "The Premises may be used by Lessee for any activity in connection with the provision of a radio communications facility ..." and Section 6(a) of the Lease provides:

6. Facilities; Utilities; Access.<sup>2</sup>

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<sup>2</sup> Curiously, Schreiner has consistently omitted the entire first sentence of § 6(a) each time it has referred to § 6, without noting that it was omitted. *Appellant's Brief*, 10; *Brief of Cross-Respondent*, 21.

(a) Lessee has the right to erect, maintain and operate on the Premises **radio communications facilities including, without limitation**, a monopole and foundation, utility lines, transmission lines, air conditioned equipment shelter, **electronic equipment**, radio transmitting and receiving **antennas, supporting equipment**, possible future generator, and structures thereto (“Lessee Facilities”). No additional structures beyond those proposed and depicted in Exhibit B can be considered part of this Agreement unless previously approved by Lessor in writing, which approval shall not be unreasonably withheld, but may cause Rent to change. **In connection therewith, Lessee has the right to do all work necessary to prepare, maintain and alter the Premises for Lessee’s business operations ...**

CP 177 (emphasis added). At the same time, § 14 allows for assignment with notice and licensing a portion of the Premises with consent, which Schreiner gave. CP 189.

Exhibit B to the lease, which is referred to in the second sentence of § 6(a), contains a “Note” numbered “3.” Note 3 provides, “The type, number and mounting positions and locations of antennas and transmission lines are illustrative only. Actual types, numbers, mounting positions may vary from what is shown above.” CP 183. Section 18(i) states that the exhibits are part of the lease. CP 180.

Section 6(a) distinguishes “antennas” and “supporting equipment” from “structures.” As shown by the first sentence in § 6(a), the Lessee is authorized “to erect, maintain and operate on the Premises radio communications facilities **including, without limitation**, ... receiving

antennas, supporting equipment ... and structures ...” CP 177. Section 6(a) does not expressly say that the Lessee is restrained from adding antennas or equipment for a licensee who uses a portion of the premises, and it does not expressly thwart the § 14 right to license a part of the Premises.

Further, as shown earlier, Schreiner admits having the actual license that illustrates both Nextel’s equipment and WOW’s. CP 161-62 (Schreiner Dep. 49:22-53:9), 190-202. When consent was requested on March 3, 2000, Schreiner did not request more information or money; its president, Joe Schreiner, took seven days, signed the consent and sent it back to SpectraSite. “[A] party who signs an instrument manifests assent to it and may not later complain about not reading or not understanding.” *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 799, 64 P.3d 22 (2003) (citation omitted). *See also National Bank of Washington*, 81 Wn.2d at 913 (quoting *Lake Air, Inc. v. Duffy*, 42 Wn.2d 478, 480, 256 P.2d 301 (1953)). In sum, adding antennas and equipment was not restrained “by words which admit of no other meaning.” *Burns*, 67 Wash. at 161 (citation omitted).

6. Schreiner Admitted Giving Written Consent to Licensing Tower and Ground Space on March 10, 2000

With its sixth bullet point, Schreiner contends that licensing a portion of the Premises to WOW was not knowingly consented to, citing CP 338-340 and 342-355. *Brief of Cross-Respondent*, 28. This is again a reference to the March 10, 2000 consent (CP 189) and the Tower Attachment License (CP 190-202) that Schreiner was given and retained in its file. Schreiner offered no authority negating its written consent. As a matter of law, Schreiner is bound by it. *Michak*, 148 Wn.2d at 799; *National Bank of Washington*, 81 Wn.2d at 913. The third Claim relating to consent should have been dismissed as a matter of law. CP 92:22-30, 93:19-27.

**D. PERFORMANCE AND WAIVER**

Schreiner submits that the evidence before the trial court, and pointed out in the course of this appeal, does not support waiver because Schreiner did not have actual knowledge. *Brief of Cross-Respondent*, 30-31. Joe Schreiner was sophisticated, knowledgeable about leasing, and had utilized a real estate and business lawyer for leasing matters, as needed, for 25 plus years. CP 151-57. The Clerk's Papers and Deposition of Joe Schreiner show actual knowledge for more than seven years running; receipt of the actual assignment it now belatedly challenges; receipt of the

actual license of tower and ground space for antennas and equipment to WOW; the signed consent; as well as acceptance of rent. *See infra* p. 24, ¶ 14. Moreover, Schreiner admits knowing of the circumstances sometime prior to October 31, 2006 and consistently accepting rent through the date of its president's deposition. CP 149, 160 (Schreiner Dep. 43:3-18), 168 (Schreiner Dep. 75:15-76:1), 173-74 (Schreiner Dep. 96:9-99:16), 241-42, 261. Thus, there is actual knowledge and the cited waiver precedent supports dismissal of Schreiner's Claims. *E.g.*, *National Bank of Washington*, 81 Wn.2d at 913; *Field v. Copping, Agnew & Scales*, 65 Wash. 359, 362, 118 P. 329 (1911); *Douglas Northwest, Inc. v. Bill O'Brien & Sons Const., Inc.*, 64 Wn. App. 661, 675-76, 828 P.2d 565 (1992).

A partial chronology showing knowledge includes:

1. January 20, 2000: Nextel notified Schreiner that it had assigned the lease to Tower Asset Sub; Tower Asset Sub did business as SpectraSite; and Nextel was restructuring its tower assets. CP 159-60 (Schreiner Dep. 41:12-44:4), 187. Joe Schreiner testified that his impression of the notice was that Nextel had assigned to both Tower Asset Sub and SpectraSite. CP 160 (Schreiner Dep. 43:22-25). Joe Schreiner also testified that Schreiner received a copy of the actual Tower Asset Sub assignment documents. CP 164-65 (Schreiner Dep. 61:20-63:10), 204,

205-35. In part, the assignment states that it “contemplates, inter alia, the conveyance, assignment, transfer and delivery of Nextel’s tower assets, and the continuing lease by Nextel of certain ground and/or platform space on such tower assets ...” CP 224. Mr. Schreiner admits that the documents were likely read. CP 165 (Schreiner Dep. 63:5-10).

2. February 14, 2000: SpectraSite notified Schreiner of Nextel’s assignment to Tower Asset Sub, Inc., doing business as SpectraSite. SpectraSite was described as “a leading owner and operator of communications towers for the wireless telecommunications industry.” CP 160-61 (Schreiner Dep. 44:19-47:7), 188. Schreiner was requested to phone a toll-free number if it had any questions, including site administration or contract matters. CP 161 (Schreiner Dep. 46:11-15), 188.

3. March 3, 2000: SpectraSite requested Schreiner’s consent to license tower and ground space and easements to WOW. CP 161-63, 171 (Schreiner Dep. 87:15-22), 189. In his deposition, Joe Schreiner testified that the consent was a license for tower and ground space and easements. CP 161 (Schreiner Dep. 48:10-49:6), 162 (Schreiner Dep. 51:21-23).

4. March 10, 2000: Schreiner gave written consent to the WOW license. CP 161-63, 171 (Schreiner Dep. 87:15-22), 189. Joe Schreiner testified that he received a copy of the actual tower attachment license in

connection with a request for a memorandum of lease. CP 162 (Schreiner Dep. 51:1-53:9). The license, which was retained in Schreiner's file, described WOW's and Nextel's use and illustrated both entities' antennas and equipment on site and on the tower. CP 190-92 (Recitals, §§ 1, 2, 8, 11), 198-200. As a matter of law, Schreiner is deemed to have knowledge and understood its consent and acknowledgement of the use of the Premises. *Michak*, 148 Wn.2d at 799; *National Bank of Washington*, 81 Wn.2d at 913.

5. April 27, 2000: In a letter, 48 days after Schreiner consented to the WOW license, SpectraSite requested that Schreiner execute an enclosed memorandum of lease, confirming Schreiner's status as Lessor and Tower Asset Sub, Inc. as the Lessee. CP 203. Joe Schreiner made a handwritten notation on the letter that he had already signed one. CP 162-63 (Schreiner Dep. 53:21-57:21), 203.

6. May 23, 2001: SpectraSite again requested that Schreiner sign an enclosed memorandum of lease, which referenced and attached the January 2000 assignment documentation between Nextel and Tower Asset Sub. CP 164-65 (Schreiner Dep. 61:20-63:10), 204, 205-35. Mr. Schreiner again made a notation that one had already been signed. CP 164 (Schreiner Dep. 58:1-20), 204.

7. April 23, 2004 and April 29, 2005: SpectraSite contacted Schreiner about purchasing perpetual easements in lieu of existing leases. CP 165-66 (Schreiner Dep. 64:12-67:16), 236, 237.

8. September 2005: SpectraSite and American Tower notified Schreiner that they had merged, that the “combined company [was] poised to be the industry leader for wireless infrastructure solutions with the largest site portfolio in the industry,” and provided contact information in the event Schreiner “ever [had] questions about your lease agreement, rent payment, etc.” CP 238-39. Schreiner did not contact any of the Defendants nor raise a question about the way the communications site was being used. CP 166-67 (Schreiner Dep. 67:24-70:18).

9. September 11, 2006: In a letter, American Tower Corporation (a non-party) requested that Schreiner sign an enclosed document provided by its lender in connection with a mortgage that it was obtaining. CP 167-68 (Schreiner Dep. 70:21-74:20), 240.

10. October 18, 2006: American Tower Corporation again requested Schreiner's confirmation concerning the parties to the lease (Tower Asset Sub, LLC, was referred to as the Tenant and a subsidiary of American Tower Corporation or one of its affiliates) and the status of the lease. CP 168 (Schreiner Dep. 76:4-77:20), 243-45.

11. October 2006: Schreiner admits having actual knowledge of more than one company operating from the Premises, and WOW having a second set of antennas and equipment on the Premises. CP 173-74 (Schreiner Dep. 96:23-98:2), 261.

12. January 18, 2007: American Tower Corporation requested that Schreiner execute and return a memorandum of lease referring to Tower Asset Sub, LLC as the current Lessee. CP 246-52. Joe Schreiner made a handwritten note on the letter, stating that a copy of the original memorandum of agreement, dated August 28, 1999, was sent in response. CP 169 (Schreiner Dep. 78:7-22), 246, 253-58.

13. February 23, 2007: American Tower Corporation notified Schreiner that it was “reorganizing the companies that own this group of towers,” and as “part of this reorganization process, your Lease Agreement will be assigned to American Tower Asset Sub, LLC.” American Tower Asset Sub, LLC was described as a wholly-owned subsidiary of SpectraSite Communications, Inc. CP 169 (Schreiner Dep. 81:1-14), 259-60.

14. Schreiner admits regularly receiving and cashing the rent checks, without protest or reservation of rights, after its admitted actual knowledge of more than one company using the Premises some time

before October 31, 2006, and through at least July 10, 2010. CP 149, 160 (Schreiner Dep. 43:3-18), 168 (Schreiner Dep. 75:8-76:1), 241-42.

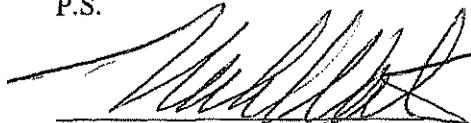
In summary, Schreiner had knowledge and the cited cases provide an alternative basis to affirm summary judgment.

### III. CONCLUSION

The statute of limitations is not the only ground supported by the trial court record that provides for summary judgment. The lack of an express restraint in the lease prohibiting assignment to and use by radio communications entities supports an alternative basis to affirm summary judgment, dismissing all Claims in the *First Amended Complaint*. Performance and waiver also provide an additional basis to affirm summary judgment. In turn, the court is respectfully requested to reverse the denial of summary judgment based on the lack of an express restraint and on waiver and affirm dismissal on alternate grounds.

DATED this 13 day of June, 2012.

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**FILED**

JUN 14 2012

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

Case No. 30244-0-III

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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SCHREINER FARMS, INC.,  
a Washington Corporation,

Plaintiff / Appellant,

v.

AMERICAN TOWER, INC., a Delaware Corporation; NEXTEL WEST  
CORPORATION, INC. d/b/a NEXTEL COMMUNICATIONS, a  
Delaware Corporation; TOWER ASSET SUB, INC., a Delaware  
Corporation; SPECTRASITE COMMUNICATIONS, INC., a Delaware  
Corporation; and WESTERN OREGON  
COMMUNICATIONS, INC., an Oregon  
WASHINGTON OREGON WIRELESS, a Washington  
Company,

**ORIGINAL**

Defendants / Respondents

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PROOF OF SERVICE OF RESPONDENTS' and CROSS-  
APPELLANTS' REPLY BRIEF IN SUPPORT OF CROSS APPEAL

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Communications, Inc.

**PROOF OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on the 14<sup>th</sup> of June, 2012, I caused a true and correct copy of the foregoing document to be served by the method indicated below, and addressed to the following:

Michael F. Cressey  
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Personal Service  
 U.S. Mail  
 Hand-Delivered  
 Overnight Mail  
 Facsimile (624-6441)

Dated this 14<sup>th</sup> day of June, 2012, signed at Spokane, Washington.

