IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Supreme Court No. 100835-0

(Court of Appeals No. 55455-1-II)

Amie McKean,

Respondent,

v.

Josh Thomas,

Petitioner.

AMENDED PETITION FOR REVIEW BY THE WASHINGTON STATE SUPREME COURT

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I. INTRODUCTION

In December 2016, Petitioner began renting Respondent's property in Port Orchard, Washington (the "Property") under a one-year lease agreement. In December 2017, Petitioner's tenancy was briefly extended by a written month-to-month lease until March 2018, when the Parties signed an 18-month lease for the Property. Then, in September 2019, the Parties again extended Petitioner's tenancy by signing a two-year lease for the Property.

In a subsequent unlawful detainer action, Respondent sought to invalidate the two-year lease signed in 2019 by invoking the statute of frauds, RCW 59.18.210, in order to circumvent Governor Jay Inslee's moratorium on evictions for non-payment of rent during the COVID-19 pandemic. Rather than proceeding with the eviction for non-payment of rent, Respondent changed the basis of the eviction to the "owner intent to occupy the premises" exception to the Washington moratorium on evictions for non-payment of rent.

In order for Respondent to take advantage of the "owner intent to occupy the premises" exception, Petitioner had to be a month-to-month tenant. Respondent, however, had signed a lease agreement with Petitioner through August 31, 2021, which

Respondent does not deny. Therefore, Respondent argued that the two-year lease signed in September 2019 was invalid under the statute of frauds, RCW 59.18.210, simply because the lease was not acknowledged.

However, in Miller v. McCamish, this Court stated:

> The purpose and intent of the statute of frauds is to prevent fraud, and not to aid in its perpetration, and courts, particularly the courts of equity, will, so far as possible, refuse to allow it to be used as a shield to protect fraud, or an instrument whereby to perpetrate a fraud. [T]he courts will endeavor in every proper way to prevent the use of the statute of frauds as an instrument of fraud or as a shield for a dishonest and unscrupulous person[.][1]

In this case, neither Respondent nor Petitioner disputes that the Parties signed the two-year lease. Neither Respondent nor Petitioner dispute any of the terms of the two-year lease. Indeed, it was Respondent who drafted the two-year lease agreement and insisted on the two-year term. Respondent has no basis for invoking the statute of frauds, other than to circumvent the eviction moratorium.

Despite clear evidence that Respondent's sole purpose for invoking the statute of frauds was to take advantage of an exception to the moratorium on evictions for non-payment of rent,

[1] Miller v. McCamish, 78 Wn.2d 821, 825, 479 P.2d 919 (1971) (citing 49 Am.Jur. Statute of Frauds § 578 (1943)).

the trial court found that the statute of frauds rendered the two-year lease invalid and that Petitioner had a month-to-month tenancy on the Property. Although the Court of Appeals overturned the eviction due to insufficient notice, the Court of Appeals erred in affirming the trial court's ruling on the statute of frauds issue.

II. IDENTITY OF PETITIONER

Petitioner is Josh Thomas, the appellant in the Court of Appeals.

III. THE COURT OF APPEALS DECISION

Petitioner seeks review of the decision of the Washington Court of Appeals – Division Two, filed March 15, 2022, affirming the Kitsap County Superior Court's ruling that the statute of frauds, RCW 59.18.210, applied to the two-year lease between Petitioner and Respondent and established a month-to-tenancy for Petitioner. A copy of the decision is attached as Appendix 1.

IV. ISSUES PRESENTED FOR REVIEW

1. Whether this Court should grant review because there is a split amongst the divisions of the Washington Court of Appeals regarding the appropriate test to apply in determining the applicability of the statute of frauds, RCW 59.18.210, to a signed, but unacknowledged, lease of more than one year, the terms of

which neither party have disputed.

2. Whether the Court of Appeals decision in this case raises issues of public interest because Washington law is unclear regarding the applicability of the statute of frauds, RCW 59.18.210, to a signed, but unacknowledged, lease of more than one year, the terms of which neither party disputes.

V. STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

In September 2019, Petitioner Josh Thomas and Respondent Amie McKean signed a two-year lease (the "Lease") on the property located at 7554 Long Lake Road SE in Port Orchard, Washington (the "Property").[2]

Petitioner had been renting the Rental Property from Respondent since December 2016. The initial lease was for a term of one year with rent of $2,100.00 per month. At the end of the initial lease term, Petitioner and Respondent briefly entered a month-to-month lease, before signing an 18-month lease extension beginning March 1, 2018 with rent of $2,800.00 per month.[3]

In September 2019, Petitioner agreed to sign another extension, with substantially increased rent, based on Respondent's promises to finally make certain repairs and

[2] CP 5-9 (Complaint).
[3] CP 49, 53-57 (Declaration of Josh Thomas, Thomas Exhibits 1 and 2).

improvements to the Rental Property, as well as Respondent's promise to work out the terms of a private sale of the Rental Property to Petitioner.[4] The two-year lease term was at the request of Respondent, as she stated in an email, "I put two years to make the bank happy for my re-fi".[5]

Despite Respondent's representations and Petitioner paying the substantially higher rent, Respondent failed to make the necessary and promised repairs and improvements or to take any steps towards starting them. In December 2019, Petitioner informed Respondent that he felt she was taking advantage of him and using the increases in rent to fund her other real estate ventures and that she had no intention of making any repairs or improvements at the Rental Property. Respondent responded by telling Petitioner to never contact her again.[6]

On January 8, 2020, Petitioner filed a lawsuit against Respondent for violations of her duties as a landlord, as well as other violations of Washington's Residential Landlord-Tenant Act (Kitsap County Superior Court Case No. 20-2-00070-18).[7]

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[4] CP 53-54 (Declaration of Josh Thomas, Thomas Exhibits 1 and 2 (highlighted portions)).
[5] CP 53-54 (Declaration of Josh Thomas, Thomas Exhibits 1 and 2 (highlighted portions)).
[6] CP 76 (Declaration of Chris Rosfjord, Rosfjord Exhibit 1, Page 10, ¶ 60(c) and Declaration of Josh Thomas, ¶ 4).
[7] CP 64-81, 47 (Declaration of Chris Rosfjord, Rosfjord Exhibit 1 and Declaration of Josh Thomas, ¶ 4).

On February 10, 2020, Respondent filed a retaliatory unlawful detainer action against Petitioner, asserting non-payment of rent under the two-year lease agreement (Kitsap County Superior Court Case No. 20-2-00325-18). Due to the COVID-19 pandemic, the prosecution of both actions was delayed.

On March 18, 2020, Governor Jay Inslee issued Proclamation 20-19, which prohibited evictions for non-payment of rent during the COVID-19 pandemic.

Before and after Governor Inslee issued his initial Proclamation 20-19, Petitioner has been unable to find work. Petitioner is a software engineer, and, in his industry, the COVID-19 pandemic caused employers to drastically reduce the number of available positions. Many times, employers condensed multiple positions down into a single position. So, instead of having five openings, an employer might only have one – though that person would be required to perform the duties of five people. In January 2020 and March 2020, Petitioner was offered jobs that he was fully prepared to accept and in the process of accepting, when he received word from the potential employers that the positions had been eliminated due to the COVID-19 pandemic. Petitioner continued to look for work daily without success.[8]

[8] CP 48-49 (Declaration of Josh Thomas, ¶ 8).

In August 2020, after Governor Inslee had signed three additional extensions of the moratorium on evictions for non-payment of rent (Proclamations 20-19.1, 20-19.2, and 20-19.3) and had just extended the moratorium to October 15, 2020, Respondent voluntarily dismissed her original unlawful detainer action based on non-payment of rent.[9] Respondent then filed the case underlying the appeal, seeking eviction of Petitioner based on the exception to the eviction moratorium allowing for evictions when the owner intended to occupy the rented property. Respondent alleged for the first time that the two-year lease agreement with Petitioner was invalid under the statute of frauds, RCW 59.18.210, because the lease was not acknowledged. Respondent does not dispute signing the two-lease or any terms therein.

B. PROCEDURAL HISTORY

On August 29, 2020, the day after the dismissal was signed in Respondent's original unlawful detainer action for non-payment of rent, Respondent had the 60-day notice of intent to occupy and to vacate served on Petitioner.[10] The Notice did not contain an affidavit from Respondent, only the signature of her attorney stating

[9] See Dkt. for Kitsap County Superior Court Case No. 20-2-00325-18.
[10] CP 36 (Affidavit of Amie McKean).

that Respondent intended to occupy the Rental Property. Moreover, the Notice does not cite to the exemption in Governor Inslee's eviction moratorium or that Respondent is relying on any such exemption.[11]

On November 3, 2020, Respondent filed her unlawful detainer action against Petitioner seeking eviction of Petitioner. Respondent alleged in her complaint that the two-year term of the Lease was invalid under the statute of frauds, RCW 59.18.210. Respondent further alleged that under the statute of frauds, the Lease was a month-to-month lease and, therefore, Respondent could proceed with an eviction because she intended to occupy the premises. Neither the Complaint or Affidavit of Respondent cite to the specific Proclamation, or provision therein, that Respondent was relying on when serving the Notice to Vacate or the Complaint.[12]

On December 3, 2020, Petitioner filed his Answer to the Complaint for Unlawful Detainer and Opposition to the Motion for Writ of Restitution.[13] Petitioner argued that Respondent was estopped from asserting that the statute of frauds, RCW

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[11] Id.
[12] CP 1-13 (Summons and Complaint) and 14-36 (Affidavit of Amie McKean).
[13] CP 41-46 (Answer), CP 47-63 (Declaration of Josh Thomas), and CP 64-81 (Declaration of Chris Rosfjord).

59.18.210, invalidated the two-year lease term because Respondent did not dispute that she had agreed to and signed the two-lease year agreement and did not dispute that the parties had agreed to a two-year term. Petitioner further argued that Respondent's new unlawful detainer action was just a continuation of her previous unlawful detainer action for non-payment of rent and that she was abusing the "owner intent to occupy" exemption to evict Petitioner for non-payment of rent in violation of Governor Inslee's moratorium on evictions for non-payment.

On December 4, 2020, the parties appeared before Kitsap County Superior Court Judge Jennifer Forbes for the show cause hearing on Respondent's motion for writ of restitution. Following oral arguments of counsel, Judge Forbes granted Respondent's order on show cause and signed the writ of restitution in favor of Respondent and permitting the eviction of Petitioner.

On December 8, 2020, the Kitsap County Sheriff's Office delivered the eviction notice to Petitioner at the Rental Property. On December 14, 2020, Petitioner had completely vacated the Rental Property in compliance with the eviction notice.

On March 15, 2022, the Washington Court of Appeals –

Division Two issue its decision.[14] The Court of Appeals affirmed the trial court's ruling that the two-year lease was invalid under the statute of frauds, RCW 59.18.210, that Petitioner had a month-to-month tenancy, and, therefore, Respondent could proceed with an eviction under the "owner intent to occupy the premises" exception to Washington's moratorium on evictions for non-payment of rent. Although the Court of Appeals determined Respondent could proceed with an eviction under the exception, the Court of Appeals determined that the trial court erred in issuing a writ of restitution because Respondent's 60-day notice of intent to occupy did not comply with the requirements of Proclamation 20-19.4.

VI. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. This Court Should Accept Review to Clarify When a Landlord (or Tenant) May Invoke the Statute of Frauds, RCW 59.18.210, When Neither Party Disputes the Terms of a Signed, but Unacknowledged Lease Agreement of More Than One Year.

In its decision, the Courts of Appeals determined that the statute of frauds, RCW 59.18.210, applied to the two-year lease agreement between Petitioner and Respondent. The Court of Appeals relied upon the Division Three Court of Appeals' decision

[14] Appendix 1.

in Stevenson v. Parker[15], which relied in part upon this Court's determination in Miller v. McCamish[16], as well as the Division One Court of Appeals decision in Powers v. Hastings[17], that part performance in the case of an oral lease is sufficient to remove it from the statute of frauds.

There are significant distinctions between the facts in this case and the Stevenson case and the facts in the Miller and Powers cases, as well as significant factual distinctions between the case at hand and the Stevenson, Miller, and Powers cases. These factual distinctions are important to the determination of the sufficiency of part performance necessary to remove the Petitioner's two-year lease from the statute of frauds.

First, unlike the Miller and Powers cases, this case and the Stevenson case did not involve an oral lease agreement. Rather, both this case and the Stevenson case involved a signed, but unacknowledged, written lease agreement.

Second, unlike the Miller, Powers, and Stevenson cases, this case does not involve a lease with an option to buy the property.

1. The Stevenson Decision, thus the Court of Appeals Decision in This Case, Conflicts With this Court's

[15] Stevenson v. Parker, 25 Wn. App. 639, 608 P.2d 1263 (1980).
[16] Miller v. McCamish, 78 Wn.2d 821, 479 P.2d 919 (1971)
[17] Powers v. Hastings, 20 Wn. App. 837, 582 P.2d 897 (1978).

Precedent Concerning Unacknowledged Leases.

In Stevenson, the Division Three Court of Appeals relied on the three-part test set forth in Powers to determine whether on not there was sufficient part performance to remove an unacknowledged lease of more than one year from the statute of frauds. The Court of Appeals applied this same three-part test in the case at hand and looked at the following factors:

> (1) delivery and assumption of actual and exclusive possession of the land, (2) payment or tender of the consideration, whether in money or property or services, and (3) the making of permanent, substantial and valuable improvements, referable to the contract.[18]

In discussing the first factor of possession, the Stevenson case specifically recognized this Court's prior decisions in Gattavara v. Cascade Petroleum Co. and Metropolitan Bldg. Co. v. Curtis Studio of Seattle that possession of the property and treating the lease as a measure of the parties' right is "sufficient waiver of the right to avoid a lease for lack of an acknowledgment."[19] In Metropolitan Bldg., this Court found that "[w]hile other matters could

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[18] Appendix 1, page 8 (citing Stevenson v. Parker, 25 Wn. App. 639. 644, 608 P.2d 1263 (1980) (quoting Powers v. Hastings, 20 Wn. App. 837, 847, 582 P.2d 897 (1978)).

[19] Stevenson v. Parker, 25 Wn. App. 639. 644, 608 P.2d 1263 (1980) (citing Gattavara v. Cascade Petroleum Co., 27 Wash.2d 263, 265-66, 177 P.2d 894 (1947); Metropolitan Bldg. Co. v. Curtis Studio of Seattle, 138 Wash. 381, 386-87, 244 P. 680 (1926)).

be cited sufficient to work an estoppel, this long acquiescence in the terms of the lease is alone sufficient for that purpose."[20]

Even though this Court determined in Metropolitan Bldg. that possession and treating a written lease as a measure of rights is sufficient to overcome an unacknowledged lease, the court in Stevenson and the Court of Appeals in this case still applied the entire three-part test for part performance. However, as noted above, the three-part test for part performance was developed in cases where there was an oral lease agreement with an option to buy the property.[21]

In cases like the case at hand, where there is a signed, but unacknowledged, lease agreement of more than one year, in which the parties do not dispute that the agreement was signed and do not dispute any of the terms of the lease, there is no reason for courts to engage in the three-part test of part performance. This Court made that clear in the Metropolitan Bldg. case.[22]

Moreover, in this case, the lease agreement did not contain an option to buy. Thus, the third part of the test – the making of

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[20] Metropolitan Bldg. Co. v. Curtis Studio of Seattle, 138 Wash. 381, 387, 244 P. 680 (1926).
[21] See Miller v. McCamish, 78 Wn.2d 821, 825, 479 P.2d 919 (1971) and Powers v. Hastings, 20 Wn. App. 837, 847, 582 P.2d 897 (1978).
[22] Metropolitan Bldg. Co. v. Curtis Studio of Seattle, 138 Wash. 381, 387, 244 P. 680 (1926).

permanent, substantial and valuable improvements – is wholly unnecessary as no standard residential lease would contain provisions for making improvements to the property.

In Ben Holt Industries, Inc. v. Milne, the Division One Court of Appeals – in a decision that occurred after the decision in Stevenson – found that the existence of an unacknowledged lease of more than a year, which neither party denied they had signed, plus the lessee's possession of the property and payment of rent was sufficient to satisfy the "quantum of proof" requirements.[23] As in this case, Ben Holt Industries did not involve a lease with an option to buy, just an unacknowledged lease of more than one year. Thus, unlike in Stevenson, the court in Ben Holt Industries did not apply the same three-part test for part performance, but instead relied on a two-part test set forth in Miller.[24]

According to Ben Holt Industries, the party seeking enforcement of an unacknowledged lease of more than one year must prove 1) the existence of the agreement by clear and unequivocal evidence; and 2) the acts relied on show part

[23] Ben Holt Industries, Inc. v. Milne, 36 Wn.App. 468, 474-476, 675 P.2d 1256 (1984).
[24] Ben Holt Industries, Inc. v. Milne, 36 Wn.App. 468, 474-476, 675 P.2d 1256 (1984).

performance "point to the existence" of the agreement.[25] The signed, but unacknowledged, lease was sufficient to satisfy the first factor, and possession and payment of rent were sufficient to satisfy the second factor.[26]

The test relied upon in Ben Holt Industries is in line with the holding in Metropolitan Bldg. that possession and treatment of the lease as a measure of the parties' rights is sufficient to remove the lease from the statute of frauds. Indeed, the Ben Holt Industries case specifically points to the Metropolitan Bldg. as part of a separate line of case which do not require conduct by the tenant or landlord beyond possession and payment.[27]

As such, this Court should accept review of this matter to clarify the appropriate test in cases where the statute of frauds has been raised concerning a lease of more than one year that is signed, but unacknowledged.

2. Even If the Court Believes the Three-Part Test of Part Performance Is Appropriate in the Case of An Unacknowledged Lease of More Than One Year, the Lower Courts Need Guidance Concerning the Significance of Each Factor.

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[25] Ben Holt Industries, Inc. v. Milne, 36 Wn.App. 468, 475-476, 675 P.2d 1256 (1984).
[26] Id.
[27] Ben Holt Industries, Inc. v. Milne, 36 Wn.App. 468, 475-475, 675 P.2d 1256 (1984).

When the only argument against upholding an express lease agreement of more than one year is the lack of acknowledgment, the most significant factor, if not sole factor, for enforcement should be possession and treatment of the lease as a measure of the parties' rights.[28] The other two factors, on the other hand, were clearly meant to determine the actual terms the parties had agreed upon in the case of an oral lease.

In order to confirm that the parties had a meeting of the minds on the rental amount in an oral lease, courts look to amount payments or services actually tendered by the tenant. In the case of an express, but unacknowledged lease of more than one year, that amount is set forth in the lease and payment of that amount would be sufficient.

Unless the lease agreement contains an option to buy, the third factor - the making of permanent, substantial and valuable improvements – serves no purpose in determining whether or not there was part performance on the lease. In any case involving a standard lease without an option to buy, almost every tenant would fail to satisfy that third factor and lower courts will unnecessarily construe that factor against tenants. Indeed, the Court of Appeals

[28] Metropolitan Bldg. Co. v. Curtis Studio of Seattle, 138 Wash. 381, 387, 244 P. 680 (1926).

weighed that factor against Petitioner, even though there was no option to buy in the lease and, therefore, no reason for Petitioner to make improvements to the Property.[29]

The differences between enforcing an oral lease and enforcing a signed, but unacknowledged, written lease of more than one year are too substantial for courts to rely on the same three-part test for part performance in those cases without further guidance from this Court.

3. The Court of Appeals Erred in Its Application of the Three-Part Test for Part Performance.

Although Petitioner cited the Ben Holt Industries in his Reply Brief, the Court of Appeals still applied the three-part test for part performance used in the Stevenson case. The Court of Appeals determined that the only factor weighing in favor of Petitioner was the fact that Petitioner had taken possession of the Property.[30]

In finding against Petitioner on the second factor, the Court of Appeals noted that Petitioner had stopped paying rent in December 2019. First, this is incorrect, as Petitioner stopped paying rent in January 2020. Second, the Court of Appeals ignored the fact that Petitioner had withheld rent in January 2020 due to

[29] Appendix 1, Page 8.
[30] Appendix 1, Page 8.

Respondent's failure to perform her duties as a landlord and had filed a lawsuit against Respondent on January 8, 2020 to enforce his rights as a tenant – a reliance on the lease as a measure of his rights. In addition, the Court of Appeals decision fails to acknowledge that Petitioner had been residing and paying rent at the Property since December 2016. In fact, the September 2019 lease at issue was the fourth lease between Petitioner and Respondent on the Property.[31] Clearly Petitioner has satisfied the second factors of making payments.

In addition to the Court of Appeals error in applying the second factor, another issue is raised for this Court: What payment – or how many months of payments – is necessary to satisfy the second factor? For the Court of Appeals, three months[32] of payments was not enough. However, according to the Metropolitan Bldg. and Ben Holt Industries cases, as well as the Miller case, the commencement of rental payments would be enough, especially in a case like this one where Petitioner had been paying rent on the Property since December 2016.

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[31] Petitioner and Respondent signed a one-year lease commencing December 2016, a month-to-month lease for December 2017 to March 2018, an 18-month lease from March 2018 to August 2019, and the two-year lease for September 2019 through August 2021.

[32] Petitioner made four payments under the September 2019 lease before filing his lawsuit to enforce his rights as a tenant under RCW 59.18.

As noted above, the Court of Appeals also weighed the third factor - the making of permanent, substantial and valuable improvements to the Property – against Petitioner. At most, this factor should have been considered a wash, since the Petitioner's lease did not contain an option to buy and did not require Petitioner to make any improvements to the Property. However, the Court of Appeals specifically found that Petitioner did not make any improvements to the Property and, therefore, found the third factor did not support enforcement of the lease.

For these reasons, the Court of Appeals erred in finding the statute of frauds, RCW 59.18.210, applied and that Petitioner only had a month-to-month tenancy.[33]

4. The Public Interest Will Be Served by This Court's Review.

Not only is there a conflict of authority among the Court of Appeals, the issue of enforceability of a signed, but unacknowledged, lease of more than one year has substantial public importance. This Court has long held that the statute of frauds is not an absolute rule, even in the case of an oral lease.[34]

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[33] For further discussion on why Petitioner demonstrated that Respondent was estopped from asserting the statute of frauds, see Petitioner's Appellate Brief and Reply Brief filed in the Court of Appeals.

[34] See Metropolitan Bldg. Co. v. Curtis Studio of Seattle, 138 Wash. 381, 244 P. 680 (1926) and Miller v. McCamish, 78 Wn.2d 821, 825, 479 P.2d 919 (1971).

Rather, courts look to the actions of the parties to determine whether or not an agreement does in fact exist, what the terms of that agreement are, and if the parties performed on that agreement.[35] However, as noted above, there are different factual scenarios which require the party seeking to remove the lease from statute of frauds to prove different factors.

In the case of an oral lease, the party seeking to enforce that lease will obviously need to demonstrate there actually was an oral agreement and what the terms of that agreement were. In doing so, the actual performance of the parties is key to the court's understanding and determination of whether or not an actual agreement exists and what the terms of the agreement were.

On the other hand, in the case of a signed, but unacknowledged, lease, the agreement and terms thereof are clear and unequivocal. The only determination for the court is whether or not the parties acquiesced to the terms of the agreement. Arguably, all that must be shown is possession and treatment of the lease as a measure of rights, but the Division Two Court of Appeals, in this case, and Division Three, in Stevenson, have muddied the waters by adopting the three-part test for part performance that originated

[35] Id.

in the Powers case, which involved an oral lease with an option to buy.[36]

Under the three-part test for part performance, even though the tenant has taken possession of the property and begun paying rent, the landlord could still come back and challenge an unacknowledged lease of more than one year under the statute of frauds, even if the landlord admits that the parties did in fact sign the lease, the tenant took possession, and had begun paying rent. This goes directly against this Court's statement in Miller:

> The purpose and intent of the statute of frauds is to prevent fraud, and not to aid in its perpetration, and courts, particularly the courts of equity, will, so far as possible, refuse to allow it to be used as a shield to protect fraud, or an instrument whereby to perpetrate a fraud. [T]he courts will endeavor in every proper way to prevent the use of the statute of frauds as an instrument of fraud or as a shield for a dishonest and unscrupulous person[.][37]

The statute of frauds is to be used as a defense, not a weapon. Without further guidance from this Court regarding the applicability of the statute of frauds in cases involving signed, but unacknowledged, leases of more than one year, the terms of which are undisputed, then landlords, as well as tenants, will be

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[36] See Powers v. Hastings, 20 Wn. App. 837, 582 P.2d 897 (1978).
[37] Miller v. McCamish, 78 Wn.2d 821, 825, 479 P.2d 919 (1971) (citing 49 Am.Jur. Statute of Frauds § 578 (1943)).

potentially able to use the statute of frauds to get out of leases they in no way dispute they signed and agreed to, and which the tenant has taken possession and has been paying rent.

VII. CONCLUSION

There is currently a split within the divisions of the Court of Appeals on the appropriate test for courts to apply when determining the applicability of the statute of frauds, RCW 59.18.210, to leases of more than one year that have been signed by the parties, but the signatures were not acknowledged. It is in the best interests of the lower courts and the public that this Court accept review of this case and to clarify the appropriate test to be applied under those circumstances where the only issue regarding a signed, written lease agreement of more than one year, as it pertains to the statute of frauds, RCW 59.18.210, is the lack of acknowledgment of the parties' signatures.

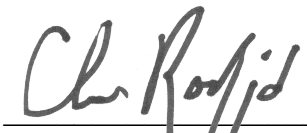
VIII. RAP 18.17 CERTIFICATE OF COMPLIANCE

Pursuant to RAP 18.17(b), the undersigned counsel hereby certifies that this Petition for Review contains 4671 words, exclusive of words contained in the appendices, the title sheet, the table of contents, the table of authorities, the certificate of compliance, the certificate of service, signature blocks, and pictorial images, and meets the length limitations for petitions for

review under RAP 18.17(c)(10).

DATED this 25th day of April, 2022,

ROSFJORD LAW PLLC



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Attorney for Petitioner Josh Thomas

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury according to the laws of the State of Washington that on this date she caused to be electronically filed the foregoing AMENDED PETITION FOR REVIEW with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record, including the following:

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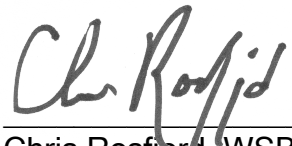

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Attorney for Petitioner Josh Thomas

APPENDIX 1

Filed
Washington State
Court of Appeals
Division Two

March 15, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

AMIE MCKEAN, Respondent, v. JOSH THOMAS, and any other residents of the premises, Appellant.	No. 55455-1-II UNPUBLISHED OPINION

ASHCRAFT, J.P.T.[1] – In this unlawful detainer action, the tenant, Josh Thomas, appeals the trial court's judgment in favor of his former landlord, Amie McKean, and the resulting writ of restitution.[2] Thomas challenges the trial court's conclusion that he was in unlawful detainer of the rental property, arguing that the trial court erred in concluding that the unacknowledged two-year lease violated RCW 59.18.210 and was therefore unenforceable under the statute of frauds. He also argues that the trial court erred when it failed to set an expedited trial to resolve issues of

[1] Judge Ashcraft is serving as a judge pro tempore of the court pursuant to RCW 2.06.150.

[2] We note that although Thomas has already vacated the premises and is not asserting that he had a right to possession of the property after the lease expired on September 1, 2021, this appeal is not moot because we can still offer relief in the form of reversing the attorney fees and costs the trial court awarded to McKean and allowing the trial court to consider whether to award attorney fees and costs to Thomas on remand. *Tedford v. Guy*, 13 Wn. App. 2d 1, 10 n.2, 462 P.3d 869 (2020) (appeal from unlawful detainer action is not moot when the tenant is no longer in possession of the property if the tenant continues to assert a right to possession or "has a monetary stake in the outcome of the proceedings.").

material fact and that the court failed to consider his responsive brief. Finally, he argues that the trial court erred when it issued the writ of restitution because McKean's unlawful detainer action failed to comply with the affidavit requirement in Proclamation 20-19.4.[3]

We affirm the trial court's unlawful detainer determination, but we reverse the writ of restitution and the judgment in favor of McKean for attorney fees and costs. We remand to the trial court for further action consistent with this opinion. And we deny both parties' requests for reasonable attorney fees and costs on appeal.

FACTS

I. SEPTEMBER 1, 2019 LEASE; TERMINATION OF RENT PAYMENTS

In December 2016, McKean began renting her property to Thomas. Thomas and McKean signed a lease renewal for a two-year term, running from September 1, 2019 to September 1, 2021.

The September 1, 2019 lease stated that the monthly rent was $3,500. According to Thomas, this was a significant increase in rent over the previous monthly rent of $2,800. Although the September 1, 2019 lease was for more than a year, it was not "acknowledg[ed], witness[ed,] or seal[ed]" as required under RCW 59.18.210.

Thomas ceased paying rent in December 2019. On January 8, 2020, Thomas filed a lawsuit against McKean for "breach of landlord duties and violations of [his] right to privacy." Clerk's Papers (CP) at 78.

[3] Proclamation of Governor Jay Inslee, No. 20-19.4 (Wash. Oct. 14, 2020), https://www.governor.wa.gov/sites/default/files/proclamations/proc_20-19.4.pdf [https://perma.cc/L2AS-CX23].

II. McKean's Unlawful Detainer Actions and Eviction Moratorium

In February 2020, McKean filed an unlawful detainer action against Thomas based on his non-payment of rent. But on March 18, due to the COVID-19 pandemic, Governor Jay Inslee issued Proclamation 20-19,[4] which prohibited evictions for non-payment of rent. Proclamation 20-19 was effective until April 17. The Governor subsequently extended the eviction moratorium several times. *See* Proclamations 20-19.1,[5] 20-19.2,[6] 20-19.3,[7] 20-19.4. As a result of the eviction moratorium, McKean voluntarily dismissed her original unlawful detainer action.

In addition to extending the eviction moratorium until October 15, Proclamation 20-19.3, issued on July 24, also created an exception to the eviction moratorium if the landlord provided "at least 60 days' written notice of intent to . . . personally occupy the premises as a primary residence." Proclamation 20-19.3 at 4.

On August 28, soon after voluntarily dismissing her original unlawful detainer action, McKean's attorney signed a 60-day notice to terminate tenancy, stating that McKean "intend[ed]

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[4] Proclamation of Governor Jay Inslee, No. 20-19 (Wash. Mar. 18, 2020), https://www.governor.wa.gov/sites/default/files/proclamations/20-19%20-%20COVID-19%20Moratorium%20on%20Evictions%20%28tmp%29.pdf [https://perma.cc/BBN9-QEM8].

[5] Proclamation of Governor Jay Inslee, No. 20-19.1 (Wash. Apr. 16, 2020), https://www.governor.wa.gov/sites/default/files/20-19.1%20-%20COVID-19%20Moratorium%20on%20Evictions%20Extension%20%28tmp%29.pdf [https://perma.cc/G9YP-7HYP].

[6] Proclamation of Governor Jay Inslee, No. 20-19.2, https://www.governor.wa.gov/sites/default/files/20-19.2%20Coronavirus%20Evictions%20%28tmp%29.pdf [https://perma.cc/8VTV-9HK9].

[7] Proclamation of Governor Jay Inslee, No. 20-19.3 (Wash. July 24, 2020), https://www.governor.wa.gov/sites/default/files/proclamations/20-19.3%20Coronavirus%20Evictions%20%28tmp%29.pdf [https://perma.cc/7GB3-MJKT].

to personally occupy the premises . . . as her primary residence." CP at 13. The notice stated that Thomas's tenancy would be terminated on October 31, 2020, and that he was required to surrender possession of the premises on that day or McKean would start judicial eviction proceedings and seek attorney fees and litigation costs. Thomas was served with the notice on August 29. The August 28, 2020 notice did not include an affidavit from McKean regarding her intent to occupy the property.

On October 14, after McKean served the August 28, 2020 notice to of intent to occupy the premises, but before she sought to enforce it, the Governor issued Proclamation 20-19.4. In addition to extending the eviction moratorium until December 31, Proclamation 20.19-4 required, for the first time, that any 60-day notice of intent to occupy the premises as a primary residence "shall be in the form of an affidavit signed under penalty of perjury." Proclamation 20-19.4 at 5.

On November 3, McKean filed a second complaint for unlawful detainer and a motion for order to show cause seeking a writ of restitution. McKean argued that because the two-year lease was not "acknowledged," it did not comply with the statute of frauds, which converted the lease into a month-to-month tenancy, and that she now wished to occupy the property as her primary residence. CP at 5.

Also on November 3, McKean filed a notarized affidavit "pursuant to Proclamation by the Governor 20-19.4," in which she stated under penalty of perjury that she intended to occupy the property as her primary residence once Thomas vacated the property. *Id.* at 16 (capitalization omitted). McKean's complaint and motion for order to show cause with the attached affidavit were served on Thomas on November 6.

Two weeks later, Thomas filed an amended complaint for damages against McKean in his separate action. In his amended complaint, Thomas asserted claims for breach of landlord duties under RCW 59.18.060, violation of his right to privacy under RCW 59.18.150(8), and defamation.

On December 3, the day before the show cause hearing, Thomas filed an answer opposing McKean's complaint for unlawful detainer and request for a writ of restitution. In his answer, Thomas asserted, *inter alia*, that (1) McKean could not rely on the statute of frauds to invalidate the two-year lease term because she did not dispute that she had agreed to and signed the lease agreement, (2) the unlawful detainer action was just a continuation of McKean's original unlawful detainer action for non-payment of rent and that this new action was therefore in violation of the eviction moratorium, (3) McKean filed the unlawful detainer action in retaliation for the action he had filed against McKean, and (4) McKean had not satisfied the requirements of Proclamation 20-19.4 because her affidavit "provide[d] no proof of [her] assertions therein." *Id.* at 43.

III. SHOW CAUSE HEARING AND TRIAL COURT DECISION

At the start of the December 4, 2020 show cause hearing, the trial court commented that Thomas's December 3 filing was untimely. But the court stated that it had still reviewed the filing.

After hearing counsels' arguments, the trial court concluded that the statute of frauds applied, that Thomas's tenancy was month-to-month, and that the motion for a writ of restitution should be granted. In response to the trial court's oral ruling, Thomas argued that "the judgment [was] not appropriate at [that] time" and that issuing the writ of restitution was premature because the court needed to set the matter for trial on "the other affirmative defenses," namely his claim that this was a retaliatory eviction. Verbatim Report of Proceedings (VRP) at 20. The court disagreed, stating that there were no remaining issues to adjudicate.

In its written findings of fact and conclusions of law, the court again concluded that the statute of frauds applied and that Thomas's tenancy was month-to-month. The court also found that Thomas had received at least 60 days written notice of McKean's intent to personally occupy the premises as her primary residence and concluded that "[a]ll notices and procedures required by statute, Proclamation 20-19.3 and 20-19.4, and case law have been given and complied with in this case." CP at 85.

The court further concluded that Thomas was in unlawful detainer of the property and issued a writ of restitution. The trial court awarded McKean costs and reasonable attorney fees totaling $1,437. But the trial court made "no finding as to any issues of past due rent due to Gubernatorial Proclamation 20-19.4's prohibition," and stated that "any such claims may be adjudicated at a later date when the Gubernatorial Proclamations expire." *Id.* at 141.

Thomas moved for reconsideration, arguing that he "was prevented from having a fair hearing" because the trial court failed to review the materials that he had submitted the day before the show cause hearing. *Id.* at 103. The trial court denied the motion for reconsideration, stating that although Thomas's filings were late, the court had considered the materials before making its decision.

Thomas filed this appeal on December 11, but he did not move to stay the writ of restitution. According to Thomas, he vacated the property on December 14 "in compliance with the eviction notice." Br. of Appellant at 10.

ANALYSIS

I. UNLAWFUL DETAINER: APPLICATION OF THE STATUTE OF FRAUDS

Thomas challenges the trial court's conclusion that he was in unlawful detainer of the property. He asserts that the trial court erred when it concluded that the statute of frauds, RCW 59.18.210, applied and established a month-to-month tenancy. We disagree.

RCW 59.18.210 provides:

> Tenancies from year to year are hereby abolished except when the same are created by express written contract. Leases may be in writing or print, or partly in writing and partly in print, and shall be legal and valid for any term or period not exceeding one year, without acknowledgment, witnesses or seals.

Unacknowledged leases that exceed one year are effective only as oral leases and result in month-to-month tenancies. *Stevenson v. Parker*, 25 Wn. App. 639. 643, 608 P.2d 1263 (1980).

Thomas argues that McKean was "estopped from asserting that the two-year lease [was] unenforceable under the statute of frauds because she does not dispute that the parties signed a two year lease."[8] Br. of Appellant at 14 (emphasis omitted). He asserts that because McKean acknowledged the lease and its terms, she cannot use the statute of frauds to " 'take advantage of [her] own wrong.' " *Id.* at 15 (quoting *Miller v. McCamish*, 78 Wn.2d 821, 826, 479 P.2d 919 (1971)). We disagree.

As noted above, unacknowledged leases for terms that exceed one year are effective "only as an oral lease, and results in a tenancy from month to month." *Stevenson*, 25 Wn. App. at 643. This rule, however, is not absolute and can be modified when "there are equities sustaining the lease or estopping denial of its validity." *Id.*

[8] We review this legal question de novo. *Josephinium Assocs. v. Kahli*, 111 Wn. App. 617, 621, 45 P.3d 627 (2002).

" '[T]he purpose of the statute of frauds is to prevent a fraud, not to perpetuate one, and in this regard the courts of this state are empowered to disregard the statute when necessary to prevent a gross fraud from being practiced.' " *Id.* (quoting *Powers v. Hastings*, 20 Wn. App. 837, 842, 582 P.2d 897 (1978)). In this instance, there was an express written lease signed by each party and the parties do not dispute its basic terms. But this lease is unacknowledged. In this circumstance, the equitable doctrine of part performance can mitigate "the harsh results of a too-strict application of the statute of frauds." *Id.*

The equitable doctrine of part performance "prevents a party from asserting the invalidity of a contract where the other party has acted in conformity with the contract and thus placed himself in a position where it would be intolerable in equity to deny its enforcement." *Id.* at 643-44 (citing *Miller*, 78 Wn.2d at 827). To apply the doctrine of part performance, we look to three factors, " '(1) delivery and assumption of actual and exclusive possession of the land, (2) payment or tender of the consideration, whether in money or property or services, and (3) the making of permanent, substantial and valuable improvements, referable to the contract.' " *Id.* at 644 (quoting *Powers*, 20 Wn. App. at 847).

Here, the parties do not dispute the facts, and the only factor weighing in favor of sustaining the lease is that Thomas took possession of the property. Apart from paying three months of increased rent, Thomas failed to pay rent starting in December 2019 and, thus, he failed to comply with the terms of the lease. And there is no evidence that Thomas made substantial and valuable improvements to the property. Ultimately, Thomas fails to show that the statute of frauds should

not apply here. Although both parties agree that there was a written lease for a term of two years, there are no facts that suggest that it would be intolerable to deny the enforcement of the lease.[9]

Thomas further asserts that applying the statute of frauds to situations where there is a written lease and the parties do not dispute the terms of the lease would encourage fraud or other abuses of the statute of frauds. For instance, he suggests that it could allow landlords to knowingly sign 13-month unacknowledged leases for the express purpose of being able to convert the leases to month-to-month tenancies that could be more easily terminated "if they decid[ed] they do not like the tenant." Br. of Appellant at 20. But the equitable doctrine of past performance would still provide protection for such tenants because the court would be allowed to examine the circumstances of the situation to determine if there were reasons that would justify enforcing the lease despite the statute of frauds. Furthermore, if Thomas's assertion that the fact there was an undisputed written lease meant that the statute of frauds did not apply, then RCW 59.18.210's acknowledgement requirement would be rendered superfluous.

Thomas also contends that it would be inequitable to enforce the statute of frauds in this instance because McKean was using it to circumvent the moratorium on evictions for non-payment

[9] Though we conclude that the equitable doctrine of part performance is not applicable under the facts of this case, it is questionable whether this defense is even available to Thomas. Generally, when a defendant has stopped paying rent and is therefore in breach of the lease, equitable defenses are not available. *Hutchinson v. Wilson*, 54 Wash. 410, 412, 103 P. 474 (1909); *see also*, *Manufacturers' Fin. Co. v. McKey*, 294 U.S. 442, 449, 55 S. Ct. 444, 79 L. Ed. 982 (1935) (holding in the context of a breach of contract case that one must " 'do equity in order to get equity.' ") (quoting *Fosdick v. Schall*, 99 U.S. 235, 253, 25 L. Ed. 339 (1878)). We held in *Dzaman* that the Governor's proclamation at issue (20-19.4) precludes the enforcement of eviction orders, but does not preclude the finding of an unlawful detainer. *Dzaman v. Gowman*, 18 Wn. App. 2d 469, 480-82, 491 P.3d 1012 (2021). Thus, while 20-19.4 provides a defense against enforcement of an eviction order, it does not provide a defense to a breach of the lease when considering whether equitable defenses are available.

of rent. He asserts that the fact that McKean first sought to evict him based on non-payment of rent rather than to terminate a month-to-month tenancy and the fact she sought to invalidate the lease under the statute of frauds only after the eviction moratorium took effect shows her ill-intent. But it is pure conjecture that McKean chose to invalidate the two-year lease under the statute of frauds merely to be able to evict Thomas for failing to pay rent. Regardless of whether the lease was month-to-month or for two-years, McKean had a right to initially seek to evict Thomas for non-payment of rent. And she could have chosen to pursue a writ of restitution that did not challenge the terms of the lease for many reasons, such as wanting to avoid the extra expense of also needing prove that the lease did not comply with RCW 59.18.210. Additionally, there's nothing to suggest that at the time she filed the first unlawful detainer action, her circumstances placed her in a position where she wanted or needed to occupy the property as her primary residence.

Thomas fails to show that the trial court erred when it concluded that the statute of frauds, RCW 59.18.210, applied and established a month-to-month tenancy.

II. FAILURE TO SET FOR EXPEDITED TRIAL TO RESOLVE ISSUES OF MATERIAL FACT AND TO CONSIDER RESPONSIVE FILING

Thomas next argues that the trial court erred because it did not set the case for an expedited trial to determine the issue of possession and to evaluate Thomas's "affirmative defenses." Br. of

Appellant at 24. Thomas asserts that under RCW 59.18.380[10] the trial court was required to set a hearing because he raised issues of material fact.

Thomas contends that he raised an issue of material fact as to whether McKean was bringing this action in an attempt to circumvent the Governor's eviction moratorium. He argues that the trial court should have further considered McKean's sudden claim that the statute of frauds applied because she had not previously disputed the terms of the lease when she sought his eviction for non-payment of rent, and she suddenly dismissed that action when she could seek to evict him

[10] RCW 59.18.380 provides:

> At the time and place fixed for the hearing of plaintiff's motion for a writ of restitution, the defendant, or any person in possession or claiming possession of the property, may answer, orally or in writing, and assert any legal or equitable defense or set-off arising out of the tenancy. . . . The court shall examine the parties and witnesses orally to ascertain the merits of the complaint and answer, and if it shall appear that the plaintiff has the right to be restored to possession of the property, the court shall enter an order directing the issuance of a writ of restitution, returnable ten days after its date, restoring to the plaintiff possession of the property and if it shall appear to the court that there is no substantial issue of material fact of the right of the plaintiff to be granted other relief as prayed for in the complaint and provided for in this chapter, the court may enter an order and judgment granting so much of such relief as may be sustained by the proof, and the court may grant such other relief as may be prayed for in the plaintiff's complaint and provided for in this chapter, then the court shall enter an order denying any relief sought by the plaintiff for which the court has determined that the plaintiff has no right as a matter of law[.]
>
> . . . .
>
> If it appears to the court that the plaintiff should not be restored to possession of the property, the court shall deny plaintiff's motion for a writ of restitution and enter an order directing the parties to proceed to trial within thirty days on the complaint and answer. If it appears to the court that there is a substantial issue of material fact as to whether or not the plaintiff is entitled to other relief as is prayed for in plaintiff's complaint and provided for in this chapter, or that there is a genuine issue of a material fact pertaining to a legal or equitable defense or set-off raised in the defendant's answer, the court shall grant or deny so much of plaintiff's other relief sought and so much of defendant's defenses or set-off claimed, as may be proper.

on another basis. He also asserts that the trial court should have "question[ed] Ms. McKean on her intent or motivations" and whether her assertion that she was seeking to occupy the rental property for financial reasons was legitimate.[11] Br. of Appellant at 22.

But Thomas cites no authority establishing that once a landlord has sought to evict a tenant for non-payment of rent under the terms of a lease that the landlord cannot choose to later assert that the lease did not comply with RCW 59.18.210. Nor does he cite any authority requiring the landlord to explain why they are seeking to move into the property or to prove that they are being forced to do so for financial reasons. Accordingly, Thomas has failed to demonstrate that these facts would be material to the trial court's decision and this argument is not persuasive. *See Johnson v. Lake Cushman Maint. Co.*, 5 Wn. App. 2d 765, 781, 425 P.3d 560 (2018) (" 'Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.' ") (quoting *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)).

Thomas further contends that it was apparent that the trial court had not reviewed his December 3 answer responding to McKean's complaint and motion for writ of restitution. But, the trial court expressly stated that it had reviewed Thomas's filings.

Thomas does not show that the trial court failed to comply with RCW 59.18.380 when it did not set an expedited trial to resolve material facts or that the trial court failed to consider his responsive brief.

[11] Thomas does not assert that there were questions of fact as to whether McKean actually intended to occupy the property as her primary residence; he questions only her motivations and justifications for doing so.

III. WRIT OF RESTITUTION: FAILURE TO COMPLY WITH PROCLAMATION 20-19.4'S AFFIDAVIT REQUIREMENT

Thomas also contends that McKean's unlawful detainer action failed to comply with the affidavit requirement in Proclamation 20-19.4. In light of recent case law, we agree that McKean failed to comply with Proclamation 20-19.4's affidavit requirement.

Regardless of whether the lease was enforceable under the statute of frauds, the trial court erred when it granted the writ of restitution because, under our recent decision in *Dzaman v. Gowman*, 18 Wn. App. 2d 469, 491 P.3d 1012 (2021), McKean's 60-day notice did not comply with the affidavit requirement of Proclamation 20-9.4.

In *Dzaman*, we held that Proclamation 20-19.4's requirement that the landlord's 60-day notice of intent to sell or occupy the property be "in the form of a sworn affidavit" applied to any attempt to *enforce* a judicial eviction order after its effective date of October 14, 2020. 18 Wn. App. 2d at 482. Thus, the trial court was prohibited from issuing a writ of restitution when the landlord's 60-day notice of intent to sell the property was not "in the form of a sworn affidavit," even though the landlord's notice fully complied with the proclamation in effect at the time the notice was issued. *Id.* at 482-83.

As in *Dzaman*, McKean's August 2020 60-day notice of intent to occupy the property did not comply with Proclamation 20-19.4 because was not in the form of sworn affidavit. Because Proclamation 20-19.4 applies to an attempt to enforce a judicial eviction order issued after the

effective date of the proclamation, October 14, 2020, the trial court erred in issuing the December 4, 2020 writ of restitution.[12] *Id.*

We recognize that McKean filed a sworn affidavit as an attachment to her November 3, 2020 complaint for unlawful detainer. But the filing of this affidavit did not provide Thomas with the full 60-days' notice prior to the trial court's December 4, 2021 decision.

As was the case in *Dzaman*, "[w]e conclude that Proclamation 20-19.4 prohibited [McKean] from obtaining [the] writ of restitution because that action constituted the enforcement of a judicial eviction order and [McKean] did not send a 60-day notice in the form of a sworn affidavit." *Id.* Accordingly, the trial court erred when it issued the writ of restitution.

IV. RELIEF

Thomas asks that this court "overturn the trial court's ruling that Ms. McKean had the right to possession of the Rental Property and instead determine that Ms. McKean had no right to possession." Br. of Appellant at 27. Alternatively, he asks us to set aside the trial court's ruling on the writ of restitution and remand "for an expedited trial on the issues of right to possession and all affirmative defenses raised by Mr. Thomas in his Answer." *Id.* Thomas does not, however, assert that he has a right to possession of the property after the end of the two-year lease term on September 1, 2021.

Because Thomas is no longer in possession of the property and he is not asserting that he had a right to possession of the property after September 1, 2021, the relief he requests is not

[12] We note that we did not hold in *Dzaman* that Proclamation 20-19.4 affected the trial court's finding that the tenant was guilty of unlawful detainer and judgment. 18 Wn. App. at 482. We stated that, "Proclamation 20-19.4 simply prevents [the landlord] from *enforcing* that judgment by obtaining a writ of restitution for a certain period of time." *Id.*

available. But we can remand to the trial court to vacate the attorney fees and the costs awarded to McKean that related to the writ of restitution and to exercise its discretion as to whether Thomas should be awarded costs and reasonable attorney fees under RCW 59.18.290(1) for that portion of the action.

V. REASONABLE ATTORNEY FEES AND COSTS ON APPEAL

In separate sections of their briefs, both parties request reasonable attorney fees and costs on appeal. McKean requests reasonable attorney fees and expenses under RCW 59.18.290(3) and under the rental agreement, as the prevailing party. Thomas requests reasonable attorney fees and expenses under RAP 18.1 and RCW 59.18.290. Because both parties have prevailed on major issues, we deny both parties' requests for reasonable attorney fees and costs on appeal. *See Am. Nursery Prods., Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 234-35, 797 P.2d 477 (1990) (when both parties prevail on major issues, "neither qualifies as the prevailing party).

CONCLUSION

We affirm the trial court's unlawful detainer determination, but we reverse the writ of restitution and the judgment in favor of McKean for attorney fees and costs. We remand to the trial court for further action consistent with this opinion. And we deny both parties' requests for reasonable attorney fees and costs on appeal.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

ASHCRAFT, J.P.T.

We concur:

LEE, C.J.

VELJACIC, J.

April 25, 2022 - 8:11 AM

Transmittal Information

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