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No. 100884-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

ROBERT BIEHL and MICHELLE BIEHL
Appellant
v.

JOSEPH L. OSTEHLLER
Respondent.

.

ON APPEAL FROM
THE SUPERIOR COURT FOR PIERCE COUNTY
STATE OF WASHINGTON

The Honorable Judge Stephanie Arend

PETITION FOR REVIEW OF THE COURT OF APPEALS MARCH 28, 2022 DECISION IN 83414-2-I

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I. IDENTITY OF THE PETITIONER

Petitioner, Dr. Joseph Ostheller, through his attorney, Erin C. Sperger, asks this court to accept review of the Court of Appeals decision designated in Part II of this Petition.

II. COURT OF APPEALS DECISION

Ostheller requests review of the Court of Appeals' March 28, 2022 decision, which is attached as Appendix A.

III. ISSUES PRESENTED FOR REVIEW

A. Does the doctrine of invited error preclude the Biehls from challenging the summary judgment order on appeal when the trial court expressly gave them an opportunity to request the order be disregarded or modified, but instead of doing so the Biehls stated they were not asking the court to "overrule that decision" and that the court should follow it?

B. When a month-to-month tenancy continues under an initial lease contract, but is then lawfully terminated by the landlord in accordance with RCW 59.18.200(a)(1), do a tenant's obligations under the lease terminate as a matter of law if they comply and vacate, regardless of whether his co-tenant vacates?

C. When a landlord lawfully terminates a joint lease contract and one tenant complies and vacates but the other does not, does the landlord have to establish he or she entered into a new contract with the complying tenant who does not hold over in order

to hold the complying tenant contractually liable for rent and damages incurred after compliance with the lawful termination notice?

IV. STATEMENT OF THE CASE

The facts relevant to this petition are set forth in Ostheller's response brief on appeal, which are incorporated by reference herein. In addition, the following facts are relevant:

A. Summary Judgment

Both parties moved for summary judgment submitting the following evidence:

In February 2015, Joseph Ostheller and Ruth Taylor signed a one year lease to rent a home from Robert and Michelle Biehl. CP 148. At the time the defendants signed the lease they were married. CP 46. Upon expiration, the lease converted to a month-to-month tenancy under the same terms. CP 148.

Ostheller and Taylor separated in August 2016 and Ostheller vacated the property. CP 48. They stopped acquiring community property and incurring community debt on August 21, 2016 when Taylor filed a petition for dissolution. CP 107.

It is undisputed the Biehls personally served Ostheller with a 20-day notice of termination of tenancy on December 10, 2016 while he was at the property. CP 47, 142. Likewise, the communications regarding the termination and holdover were undisputed because the parties communicated exclusively through text messages, which both parties submitted as evidence. Because the Biehls produced the text messages in discovery, the messages marked “sent” were initiated by the Biehls and the ones marked “received” were initiated by Taylor or Ostheller. CP 279-80. The following text messages were sent and received on December 31, 2016 the day the tenancy was terminated:

2016-12-31 18:50:59 Sent

> … **The month to month rental was also terminated with the 2nd set of documents that the attorney delivered** at the same time. I discussed it with Joe that same day. So the **rental terminates at midnight tonight**… CP 281 (emphasis added).

2016-12-31 18:57:15 Sent

> The attorney delivered the documents right to ur front door. Joe texted me to tell me he received them... CP 281.

2016-12-31 19:22:58 Received

> Joe is wandering around like a deer in the headlights. I had intended… To negotiate directly with you for a fair solution and

an extension of one year to be stable as my mom passed away... CP 283.

2016-12-31 19:26:51 Sent

If you want to prepay 3 months at a rate of $3500 per month ... I will extend it that far and see how it goes. CP 187

2016-12-31 19:29:48 Received

I cannot pay that and the plumbing is an issue you have had for years. **I can pay our agreed rent but we have to resolve** at some point **the plumbing**. I can pay Jan rent and agree to three months to sort all the other out. CP 283-84 (emphasis added).

2016-12-31 19:31:57 Received

I won't pay more than 2650. CP 284.

2016-12-31 19:34:53 Sent

Not gonna happen. I have it in writing from Joe that he received the documents at the house … We will not be renting it for 2650 again **I made u an offer and that's it. Lease is up at midnight**. CP 284 (emphasis added).

2016-12-31 19:41:46 Sent

They were delivered to your house and Joe received them in person. **We terminated the month to month**... CP 285 (emphasis added).

2016-12-31 20:00:55 Sent

It's not a two-way street Ruth **we delivered the documents to the house, as required by law**, and they **were received in person by one of the tenants**… it's time to find another tenant.

… **I made you an offer accept it or move, that's it**. And don't worry my attorney will have no problem getting the money from Joe's practices. CP 286 (emphasis added).

2016-12-31 20:02:36 Received

Well. **I don't accept it** so I'll move but it won't be tonight and I will have an attorney tomorrow. CP 286-87.

The issue was not resolved that day, and the following conversation took place between January 12, 2017 and May 5, 2017:

2017-01-12 19:24:39 Sent

Ruth and Joe. It has been a couple weeks since I last heard from u and I have not received confirmation that u have moved and I have not received January rent yet…

Our attorney is ready to file the unlawful detainer with the court system, but I wanted to give you one last chance to get the back rent paid and get us a concrete schedule for you to move out… CP 287.

2017-01-12 22:21:26 Received[1]

I just talked to Ruth on the phone. She sounds like she is getting a cold or flu, and she asked me to communicate with you about the rent. She would li… CP 186

2017-01-12 22:21:32 Received

ke to have me pay you for the rent for Jan, and then on the first for the first 15 days of Feb. She promises to be out by feb 15. CP 186.

2017-01-12 22:23:14 Sent

You'll need to wire it in the morning. CP 186.

2017-01-12 22:30:03 Sent

[1] The Court of Appeals relied on this text message as evidence Ostheller negotiated an extension on December 31, 2016 but this conversation took place 12 days later on January 12 after Taylor had been holding over for 12 days.

> And I told her if she got it paid ahead of time she could stay longer. I just do not want to have to wonder every month if the rent is going to come or not. CP 186.

2017-01-13 17:37:00 Received

Sorry, I already sent it via bill pay. CP 186.

2017-01-16 16:03:09 Received

The house she was posing to get by feb 15th went to someone else, so she is back to square one looking. I'll talk to her about where she is at in her se… CP 187.

2017-01-16 16:03:19 Received

…arch and pay you for February by the first. Is that agreeable? CP 187.

2017-01-19 16:03:09 Received

Still haven't received January rent check CP 187.

2017-02-04 16:36:55 Sent

Still don't have rent? Did she move CP 187.

2017-05-05 13:24:08 Sent

> I understand your wife is still in the house haven't seen any rent yet for May what are we doing CP 187.

2017-05-05 13:24:23 Sent

Her attorney told me she was going to be gone by the end of April but I don't think that has happened (CP 187)

After a hearing on December 7, 2018, Judge Spier granted partial summary judgment in favor of Ostheller, concluding he was not liable for rent that accrued after December 31, 2016. CP 288-89.

B. Trial

Judge Arend presided over the subsequent bench trial. After trial, she asked the parties for supplemental briefing on whether the court was bound by Judge Speir's summary judgment ruling and what impact that ruling had on Judge Arend. RP 400. In their supplemental briefing, the Biehls stated, "Plaintiffs concede that Judge Spier's ruling is the law of the case at this level and do not request the current Court to overrule that decision." CP 349. Based on the Plaintiff's concession, Ostheller argued Judge Arend should apply Judge Speir's ruling because "the parties agree." CP 357.

In the trial court's letter ruling it, sua sponte, determined that it was not bound by the previous ruling, but because neither party requested it be modified, the court would "let it inform this Court as to the issues before it such that the ruling are consistent with one another. CP 375. The trial court further found the "only logical conclusion that can be drawn from Judge Speir's Order of December 7, 2018" was that "Because the tenancy [as to Dr. Ostheller] terminated, it follows that the obligations of Dr. Ostheller under the lease were also terminated on December 31, 2016. In other words, as of that date Dr. Ostheller was no longer a 'tenant.'" CP 376.

The trial court subsequently found "[n]o tenancy or contractual agreement existed between Dr. Ostheller and the Biehls after [December 31, 2016], so Ostheller had no obligation to pay rent after that date. CP 678-79. Based on the absence of a valid contract between Ostheller and the Biehls after December 31, 2016, the trial court also found Ostheller was not liable for damages to the landscaping, pond, or waterfall, lost rent, or personal labor performed to restore the property. CP 679-80. However, the Court awarded the Biehls $6,593.78 in damages incurred on or before December 31, 2016. CP 677, 679, 682.

Both parties petitioned for attorney's fees. CP 380-487, 488-583. The trial court awarded Ostheller $55,196.73 in attorney's fees and costs as the prevailing party on timber trespass, waste and six of the eight breach of contract claims. CP 664, 667. It awarded the Biehls $29,928.36 in attorney's fees and costs as the prevailing party on two of the eight breach of contract claims. CP 664, 667. Because Ostheller's attorney's fees were more than the Biehls' fees plus their awarded damages, the trial court entered a judgment against the Biehls for the difference of $18,674.59. The Biehls appealed.

On appeal, the Court of Appeals found the trial court erred by granting summary judgment because “there is evidence in the record of words and conduct manifesting an intent to continue Ostheller’s joint tenancy after December 31, 2016.” Biehl v. Ostheller, No. 834114-2-I, slip opinion at 14 (Mar. 28, 2022) (Herinafter “Opinion”). It further found that “because the trial court’s findings and conclusions flowed from the summary judgment ruling that “[n]o tenancy or contractual agreement existed” between Ostheller and the Landlords after that date, we reverse and vacate the findings and conclusions as far as they relate to the erroneous ruling on summary judgment. We remand for trial on the issue of when Ostheller’s tenancy ended, as well as the issues that flow therefrom. The trial court may then revisit its decision on attorney fees.” Opinion at 14.

The Court of Appeals did not address whether the Biehls invited the error or whether the trial court abused its discretion in relying on the summary judgment order when the court gave the Biehls the opportunity to request the court revise the order but failed to do so and instead told the court they were not asking to “overrule that decision.” CP 349.

Ostheller now timely petitions this Court for review.

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V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Court of Appeals' decision finding the summary judgment order was erroneous and then reversing and vacating the trial court's findings and conclusion that flow from that order is in conflict with this Court's precedent regarding the invited error doctrine and is an issue of substantial public concern which this Court should address under RAP 13.4(b)(1) and (4).

1. <u>The Invited Error doctrine precludes the Biehls from challenging the summary judgment order on appeal</u>.

Under the doctrine of invited error, "[t]his court will deem an error waived if the party asserting such error materially contributed thereto." *In re Dependency of K.R.*, 128 Wn.2d 129, 147, 904 P.2d 1132 (1995) (citing *State v. Pam*, 101 Wn.2d 507, 511, 680 P.2d 762 (1984)).

This Court has applied the doctrine even where there was no negligence or bad faith. *City of Seattle v. Patu*, 147 Wn.2d 717, 58 P.3d 273 (2002)(citing *State v. Studd*, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999).

In *Studd*, six defendants proposed instructions that erroneously stated the law of self-defense. *Studd*, 137 Wn.2d at 545.

While some proposed an instruction that effectively remedied the error others did not. This Court held the defendants who proposed the erroneous instruction without attempting to add a remedial instruction had invited the error and could not therefore complain on appeal. *Studd*, 137 Wn.2d at 546-47.

Likewise, in *Dependency of K.R.*, this Court held that because the mother's counsel materially contributed to the erroneous application of the law during a hearing, she could not complain on appeal. *Dependency of K.R.*, 128 Wn.2d at 147. There, defense counsel motioned the court to admit testimony from both the state's and the defense's polygraph examiner. After the court granted the motion, defense counsel objected to the state's examiner's testimony because there was no written stipulation as required under *State v. Renfro*, 96 Wn.2d 902, 639 P.2d 737, cert. denied, 459 U.S. 842, 103 S.Ct. 94, 74 L.Ed.2d 86 (1982). *Dependency of K.R.*, 128 Wn.2d at 147. This Court held the defendant waived her right to object on appeal to the state's polygraph examiner's testimony because defense counsel materially contributed to the error by initially moving to admit polygraph testimony for both sides. *Dependency of K.R.*, 128 Wn.2d at 147.

Here, like the defendants in *Studd*, the Biehls erroneously stated the law. The summary judgment order was not final under CR 54(b), thus, it was “subject to revision at any time before the entry of judgment adjudicating all the claims.” CR 54(b). The Biehls could have asked the trial court to either disregard it altogether or to modify it in some way. The Biehls did neither. Instead, the Biehls’ counsel expressly stated the Biehls were not asking the court to “overrule that decision.” CP 349. Like defense counsel in *K.R.*, the Biehl’s counsel materially contributed to the error. But here, there is an even more compelling reason to apply the invited error doctrine because despite the Biehls’ erroneous application of the law, the trial court applied the right law. It applied CR 54(b) to determine it had authority to revise the summary judgment order but used its discretion not to revise it because the Biehls stated they were not requesting “the current Court to overrule that decision.” CP 349

The Court of Appeals ignored the invited error doctrine, which promotes judicial efficiency, fairness, and finality of decisions. If the Court of Appeals’ decision is allowed to stand it will undermine the public’s faith in the judicial system and allow one party to unfairly cause the other party to incur unnecessary attorney’s fees.

B. The Court of Appeals' decision reversing and remanding for trial the "issue of when Ostheller's tenancy ended…" conflicts with this Court's recent decision in *Spokane Airport Bd. v. Experimental Aircraft Ass'n*, _ Wn.2d _, 495 P.3d 800 (2021) because under *Spokane Airport*, Ostheller's tenancy ended on December 31, 2016 as a matter of law. It is also contrary to the plain and unambiguous language of RCW 59.18.200(a)(1) and RCW 59.12.030(2), which is an issue of substantial public concern that this Court should address under RAP 13.4(b)((1) and (4).

The Court of Appeals erred in reversing and remanding for trial the "issue of when Ostheller's tenancy ended…" because it directly contradicts the residential landlord tenant act (RLTA) and this Court's recent decision in *Spokane Airport Bd. v. Experimental Aircraft Ass'n*, __ Wn.2d __, 495 P.3d 800 (2021).

This Court reviews an order on summary judgment de novo. *Spokane Airport Bd.*, 495 P.3d at 804. It may affirm on any grounds established by the pleadings and supported by the record. *Lane v. Skamania County*,164 Wn. App. 490, 497, 265 P.3d 156 (2011).

In *Spokane Airport Bd.*, this Court held that "When a party properly exercises an option to terminate the lease, the lease terminates on the specified date and the leasehold ceases to exist."

Spokane Airport Bd., 495 P.3d at 807 (citing *State v. Sheets*, 48 Wn.2d 65, 68, 290 P.2d 974 (1955)).

A lease is a contract. *Seattle-First Nat'l Bank v. Westlake Park Assocs.*, 42 Wn. App. 269, 272, 711 P.2d 361 (1985). "A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." *Pope Res. LP v. Certain Underwriters at Lloyd's*, 494 P.3d 1076, 1092 fn. 150 (2021) (citing Restatement (Second) of Contracts § 1 (1971)).

Under the RLTA, a "tenant" is any person who is entitled to occupy a dwelling unit primarily for living or dwelling purposes *under a rental agreement*. RCW 59.18.030 (34) (emphasis added). Under RCW 59.18.200(1)(a) a landlord lawfully terminated a month-to-month tenancy by serving a written notice of termination upon the tenant at least 20 days before the end of the month. RCW 59.18.200 (1)(a). If the tenant does not comply with that 20-day notice then he or she is liable for unlawful detainer. RCW 59.12.030(2).

Here, it is undisputed that the initial lease contract expired on January 31, 2016 but continued under the same terms as a month-

to-month tenancy. It is also undisputed that the Biehls personally served Ostheller with a notice of termination of tenancy on December 10, 2016, which terminated the tenancy on December 31, 2016. CP 284-85. Robert reiterated this in his text messages to both Ostheller and Taylor stating:

- "the rental terminates at midnight tonight [December 31, 2016]." CP 281
- "I have it in writing from Joe that he received the documents [the notice of termination of tenancy] at the house" CP 284.
- "They were delivered to your house and Joe received them in person. We terminated the month to month." CP 285.
- "I made u an offer and that's it. Lease is up at midnight." CP 284.

None of the evidence the Biehls submitted on summary judgment show they rescinded the termination notice or that there was some legal defect in the notice. Thus, as of midnight on December 31, 2016, the set of promises that comprised the contract terminated, including Ostheller's promises to maintain the Property and to guarantee Taylor's payment of rent.

Ostheller was no longer a tenant after December 31, 2016 because he was no longer entitled to occupy the dwelling unit under any rental agreement. RCW 59.18.030(34), .200(1)(a). If Ostheller had continued to occupy the unit, he would have been liable for

unlawful detainer. *Spokane Airport Bd.*, 495 P.3d at 807; RCW 59.12.030(2).

There are no disputed facts material to the issue of when Ostheller's tenancy ended; under black letter law and this Court's recent decision in *Spokane Airport Bd.*, 495 P.3d at 807 Ostheller's tenancy ended on December 31, 2016 as a matter of law. By reversing and remanding to trial the "issue of when Ostheller's tenancy ended," the Court of Appeals ignored the RLTA and this Court.

This Court should accept review of this issue to once again clarify how and when a tenancy is terminated, and that termination releases all parties from any further obligations under the contract.

C. It appears to be an issue of first impression in Washington whether a tenant who holds over after a tenancy is lawfully terminated can bind a tenant who complied with the notice and vacated. This Court should accept review because this is an issue of substantial public concern that this Court should address to provide some guidance to the lower courts under RAP 13.4(b)(4).

This Court should accept review to clarify whether a landlord can hold a complying tenant contractually liable for damages incurred and rent accrued during another tenant's holdover period.

In 2020, Washington's population was 7,738,692. See United States Census Bureau 2020 Population and Housing State Data available at 2020 Population and Housing State Data (census.gov) (last visited 4/25/22). The owner-occupied housing unit rate from 2016-2020 is 63.3% meaning approximately 36.7% of the population, or 2,840,099 Washingtonians are tenants. U.S. Census Bureau QuickFacts Washington Available at U.S. Census Bureau QuickFacts: Washington (last visited 4/25/22). Thus, these issues relating to residential tenants are matters of substantial public concern because they will affect millions of Washington citizens.

Here, neither the summary judgment order, nor the trial court's findings and conclusions after trial were erroneous; Taylor's holdover did not contractually bind Ostheller, he did not contractually bind himself by entering into a new lease contract, and because he was no longer a tenant, and did not hold over, he owed no independent tort duty to the Biehls after Decembrer 31, 2016.

Summary judgment should be granted where "the pleadings . . . together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). A defendant meets this

burden by challenging the sufficiency of the plaintiff's evidence. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 770 P.2d 182 (1989). If the plaintiff's response "fails to make a showing sufficient to establish the existence of an element essential to her case, then the defendant's motion for summary judgment should be granted." *Atherton Condominium Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990); *Young*, 112 Wn.2d at 225.

Here, the trial court properly granted partial summary judgment to Ostheller, and the trial court properly relied on that ruling because the Biehls failed to establish any legal theory under which Ostheller could be liable for rent accrued or damages incurred the after December 31, 2016.

1. Ostheller did not hold over

"Hold over" means "To retain possession as tenant of property leased, after the end of the term. Black's Law Dictionary, Revised 4th Ed. p. 864 "Hold over." Available at Black'sLaw4th.pdf (heimatundrecht.de) (last visited 4/25/22).

When a landlord lawfully terminates a tenancy under RCW 59.18.200(1)(a), the tenant no longer has a legal right to possess the property after the termination date because the set of promises that constituted the contract is terminated; the landlord is not obligated to allow the tenant to continue in possession after the termination date. RCW 59.12.030(2). Therefore, the only way a tenant could remain in possession is by physically possessing the property with his person, property, or subtenant. This is consistent with this Court's decision in *Spokane Airport* that "a tenant becomes a holdover when they ***remain*** after the modified (or unmodified) term expires." *Spokane Airport Bd.*, 495 Wn.2d at 805.

Here, Ostheller testified in his declaration that he vacated in August 2016 and began living with his father in Paulsbo. CP 47-48. The Biehls did not present any evidence to contradict or rebut Ostheller's testimony. Further, Taylor was not Ostheller's subtenant. Because Ostheller was not in physical possession of the property after December 31, 2016, this Court should hold that he did not hold over as a matter of law.

This Court should accept review of this issue because the Court of Appeals has expanded the law in a way that will hold

unintended parties liable. For example, many parents assist their adult children with negotiating rental terms and even paying rent on their behalf. This does not make the parent a party to the contract and does not automatically make the parent a guarantor of the rent or condition of the property. Because this issue will affect a large portion of Washington's citizens this Court should accept review to clarify whether one can hold over when they are not in physical possession of the property by person, property, or subtenant.

2. Taylor's holdover did not bind Ostheller and did not make him contractually liable for rent accrued or damages incurred after December 31, 2016

There does not appear to be any authority in Washington to suggest that when a landlord terminates a joint tenancy, he can hold a complying tenant liable for rent accrued and damages caused by the complying tenant's former joint tenant who holds over. On December 31, 2016 Ostheller and Taylor were legally separated; they stopped incurring community debt on August 21, 2016 and Taylor could no longer bind their marital community. Even in the light most favorable to the Biehls there is no theory under which Ostheller can be liable for the Taylor's hold over.

When the Court of Appeals discussed Ostheller making rent payments, negotiating the terms of Taylor's continued occupany, and being present at the move out inspection, they confused the standard for holding over with the standard for a contract formation. If a tenant holds over (i.e. remains in possession) with the landlords agreement, generally a new month to month tenancy is formed under the terms of the initial agreement unless new terms are negotiated. *Marsh-McLennan Bldg., Inc. v. Clapp*, 96 Wn. App. 636, 980 P.2d 311, 316-17 (1999). However, if a tenant vacates and is not holding over, then he has not formed a new tenancy, has no contract with the landlord and, thus, no contractual duties. Similarly, there is nothing in the RLTA that requires a tenant notify the landlord that he intends to comply with the notice of termination. Ostheller was not required to tell the Biehls he vacated; he simply had to vacate.

This is an issue of substantial public concern that this Court should address because it affects millions of Washingtonians who enter into a lease agreement with a roommate who separates or divorce during a tenancy.

D. <u>The Biehls failed to establish the elements of a contract as a matter of law. This Court should accept review under RAP 13.4(b)(1) and (4) because the Court of Appeals decision</u>

conflict with this Court's precedent regarding mutual assent, which is an issue of substantial public concern.

To recover damages against Ostheller for breach of contract the Biehls had the burden at trial to prove by a preponderance of the evidence that (1) a valid contract existed between the Biehls and Ostheller; (2) Ostheller breached that contract; and (3). Ostheller's breach resulted in damages. *Northwest Independent Forest Mfrs. v. Department of Labor & Industries*, 78 Wn. App. 707, 712, 899 P.2d 6 (1995) (citing *Lehrer v. State, Dept. of Social and Health Services*, 101 Wn.App. 509, 5 P.3d 722, (Div. 3 2000)).

To form a contract, the parties must objectively manifest their mutual assent. *Yakima County Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 388, 858 P.2d 245 (1993). Mutual assent is expressed by an offer and acceptance of that offer. *FDIC v. Uribe, Inc.*, 171 Wn. App. 683, 689, 287 P.3d 694 (2012). "The acceptance of an offer must be identical to the offer, 'or there is no meeting of the minds and no contract.'" *Sea-Van Investments Associates v. Hamilton*, 125 Wn.2d 120, 126, 881 P.2d 1035, (1994) (quoting *Blue Mt. Constr. Co. v. Grant County Sch. Dist.*,150-204, 49 Wn.2d 685, 688, 306 P.2d 209 (1957)). And the "terms assented to must be

sufficiently definite." *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 178, 94 P.3d 945, 949 (2004).

Mutual assent is normally a question of fact but may be determined as a matter of law where reasonable minds could not differ. *Keystone*, 152 Wn.2d 171, 178, n. 10. The terms assented to must be sufficiently definite. *Keystone*, 94 P.3d at 949 (citing *Sandeman v. Sayres*, 50 Wn.2d 539, 541-42, 314 P.2d 428 (1957) (observing if a term is so "indefinite that a court cannot decide just what it means, and fix exactly the legal liability of the parties," there cannot be an enforceable agreement).

Here, there were no disputed facts regarding conversations about a new lease agreement because the entire conversation was done through text messages, which were submitted to the Court on summary judgment. Likewise, there were no competing inferences because contract formation is based on objective, not subject, intent. *Yakima County Fire Prot. Dist. No. 12*, 122 Wn.2d at 388.

Even in the light most favorable to the Biehls, there was no mutual assent. This is clearly evidenced in the text messages. On December 31, 2016 Robert Biehl stated to Taylor, “I made you an

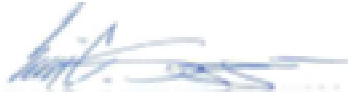
offer accept it or move, that's it." CP 286-87. Taylor responded, "I don't accept it." CP 286-87. Robert Biehl offered a new rental rate of $3,500 paid three months in advance and Taylor responded "I won't pay more than 2650" and she conditioned that payment on resolving the plumbing issue. CP 283-84. In the parties' written communications there was never an identical offer and acceptance. On January 12, 2017 there was still no agreement about rent or how long Taylor could occupy the unit. Robert Biehl believed Taylor was unlawfully detaining the Property because he stated, "Our attorney is ready to file the unlawful detainer." CP 287. This implies Taylor did not have the Biehls' consent to occupy the property, let alone under sufficiently definite terms. Although Ostheller reached out to Robert Biehl on January 12, again there was no identical offer and acceptance. And as argued above, Ostheller did not create a contract or become a holdover by virtue of Taylor holding over. Therefore, the summary judgment order was not erroneous, and the trial court did not err to the extent it relied on that order to make findings and conclusions.

This Court should accept review because the Court of Appeals' error will affect millions of renters in Washington who may face a similar situation.

D. **CONCLUSION**

For the foregoing reasons, Dr. Joseph Ostheller respectfully requests that this Court accept review under RAP 13.4(b)(1) and (4).

Respectfully submitted this 27th day of April 2022.



Erin C. Sperger, WSBA No. 45931
Attorney for Petitioner Joseph Ostheller

I certify that this petition has 4,985words in compliance with RAP 18.17(c)(10).

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on April 27, 2022, I deposited a copy of the foregoing Petition for Review along with Appendix A into the U.S. mail addressed to:

Robert and Michell Biehl
4810 Pt. Fosdick Drive #42
Gig Harbor, WA 98335

SIGNED this 27th day of April, 2022 at Burien, WA

APPENDIX A

FILED
3/28/2022
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ROBERT BIEHL and MICHELLE BIEHL, Appellants, v. JOSEPH L. OSTHELLER, individually and on behalf of his marital community, Respondent, RUTH JEAN OSTHELLER, n/k/a TAYLOR, individually and on behalf of her marital community, Defendant.	No. 83414-2-I DIVISION ONE UNPUBLISHED OPINION

BOWMAN, J. — Landlords of residential property appeal from an order on summary judgment, findings and conclusions after a subsequent bench trial, and findings in support of an award of attorney fees. We conclude that genuine issues of material fact precluded summary judgment. We reverse, vacate the findings and conclusions as far as they relate to the erroneous summary judgment ruling, and remand to the trial court for further proceedings.

FACTS

Robert and Michelle Biehl (Landlords) owned a residence in Gig Harbor. In February 2015, they executed an agreement with Joseph Ostheller and his then-

Citations and pin cites are based on the Westlaw online version of the cited material.

spouse Ruth Taylor[1] (Tenants) to lease the property.[2] The lease provided for a security deposit of $4,200, rental payments of $2,650 due the first of each month, and a late fee of $200.[3] The lease also included provisions requiring the Tenants to maintain the premises and its landscaping.

The original one-year lease expired on January 31, 2016. After that date, tenancy continued on a month-to-month basis. But, unbeknownst to the Landlords, the Tenants separated on August 21, 2016, and Ostheller moved out of the home that day. Still, he was often at the Gig Harbor residence visiting his children, discussing matters with Taylor, and removing personal property. Ostheller also continued to pay the rent[4] and communicate with the Landlords about the lease and maintenance issues.

That winter, Robert[5] "heard" that the Tenants were having marital trouble and, on December 3, 2016, asked Ostheller about his living arrangements. Ostheller responded, "I'm not sure if we will go through with the divorce. I'm here at the house a lot. But officially living with my dad in Poulsbo."

By this time, Tenants had repeatedly requested reimbursement for repairs they claimed to have paid for without the Landlords' permission. Because of these unauthorized repairs, the failure to produce receipts for those repairs, not paying

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[1] The 2015 lease refers to Taylor by her former name, Ruth Ostheller.

[2] According to the lease, the couple rented the property as a residence for themselves, their two teenaged children, and Taylor's mother.

[3] Tenants owed a late fee if the Landlords did not receive rent within five days of the due date.

[4] According to the Landlords, the Tenants regularly paid rent late but "never paid the late fees."

[5] We refer to Robert and Michelle Biehl by their first names when necessary for clarity and intend no disrespect by doing so.

late fees, and then failing to pay rent in December, the Landlords started eviction proceedings. On December 10, 2016, they arranged for service of a 20-day notice of termination of tenancy posted on the front door of the home, addressed to both Tenants.[6] Ostheller was at the house at the time of service and received the termination notice.

Ostheller texted Robert that he received the notice, and the two began a series of text messages over the next several days about appliance and water pressure issues. The Landlords repeatedly refused to waive the overdue December rent or reimburse the Tenants for alleged repair bills without receipts. Eventually, on December 13, 2016, Ostheller agreed to pay December rent and asked, "Would you like me to overnight the check or is it simply good enough that I send the payment from my bank system." Then, on New Year's Eve, Ostheller sent Robert the following message with a screenshot to show his bank had processed the December rent payment:

> My wife is anxious about a text received from you about someone picking up the keys[.] As though we didn't pay the rent this month. But, [I] did pay it, so, . . . [.] Please explain. I thought we were good. However, [I] [h]aven['']t sent the rent for Jan[uary] yet. Are you expecting us to move out right now?

Robert told him, "The lease is up as of Midnight. No rent has been received for January. The rate will be [$]3500 for holdover rent prepaid 3 months at a time."

Shortly after this exchange, in a group text message between the Tenants and Robert, Taylor explained that her mother was on hospice and that she could not move her or vacate the property "today, tomorrow[,] or next week." Ostheller

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[6] See RCW 59.18.200(1)(a) (landlord my terminate month-to-month tenancy by 20-day written notice).

asked if they could extend the lease for one month, or "[p]ossibly two," under these circumstances. Robert reiterated his offer to extend the lease if the Tenants prepaid three months' rent at an increased monthly rate of $3,500.

Taylor said she would not agree to a rent increase. Robert responded, "We will not be renting it for [$]2650 again." He also said they were not willing to lease the property solely to Taylor "[b]ecause [Ostheller] is who we leased to and [he] is who we will go after to collect from. We rented to a married couple not a single un[ ]employed woman."

A few hours later, only Ostheller texted another proposal to Robert:

> I just talked to [Taylor] on the phone. She sounds like she is getting a cold or flu, and she asked me to communicate with you about the rent. She would like to have me pay you for the rent for Jan[uary], and then on the first for the first 15 days of Feb[ruary]. She promises to be out by [F]eb[ruary] 15.

Robert responded, "You'll need to wire it in the morning."

The Tenants' divorce became final on January 4, 2017.[7] On January 12, Robert texted both Tenants, stating that he had not heard from them since New Year's Eve, received January rent, or received confirmation that they had moved out. He offered them "one last chance" to pay the rent owed and provide a "concrete" date to move out before he would proceed with an unlawful detainer action. A few days later, Ostheller told Robert that the house Taylor planned to rent was no longer available and that she was "back to square one." He said he would pay February rent by the first of the month and asked, "Is that agreeable." Robert responded, "Still haven't received January rent check."

[7] Nothing in the record indicates that either Tenant informed the Landlords of the divorce.

Again, in February 2017, Robert texted Ostheller about the late rent and Taylor's plans. Ostheller told him that the rent payment was "scheduled to go out" in a couple of days. After what appears to be no communication for two months, Robert texted Ostheller again in May about the rent for that month. Ostheller explained that he mailed a check, but the post office returned it, and he promised to resend it promptly with the "address modification per [Robert's] instruction."

Taylor moved out of the home in July 2017. At that time, Ostheller sent Robert a message stating the property was nearly ready to turn over, but he still planned to "sweep out the garage and make another run to the dump." Ostheller told Robert that a moving truck was still parked in the driveway.

On July 20, Michelle and Ostheller[8] inspected the vacant house. She prepared a "Move Out Inspection Report" detailing the condition of the property. Ostheller signed the report, acknowledging that he was present, but wrote at the bottom of each page, "I don't agree with all findings." A few weeks later, the Landlords sent the Tenants a statement, providing the basis for retaining their damage deposit and an estimate of the additional damages owed. The Tenants did not respond.

The Landlords sued the Tenants in November 2017. They filed an amended complaint in September 2018, alleging breach of the lease, seeking unpaid rent, late fees, costs to restore the property to its prerental condition, and lost rent while they restored the property. They also alleged timber trespass and waste under chapter 64.12 RCW, seeking treble damages. Finally, the Landlords

[8] According to the Landlords, Taylor refused to be present.

alleged diminution in value, seeking damages plus prejudgment interest. They also requested attorney fees and costs as authorized by the lease.

Ostheller moved for partial summary judgment, arguing that his tenancy terminated on December 31, 2016—20 days after the Landlords served the termination notice—and that he did not enter into a new rental agreement. He argued he was not liable for any unpaid rent or damages that accrued after December 31, 2016. He also claimed there was no evidence to support the timber trespass claim.

The Landlords sought partial summary judgment as to Ostheller's liability. They argued that Ostheller remained a month-to-month tenant until July 2017 and was therefore jointly liable with Taylor for $11,444 in unpaid rent, late fees, and additional damages during the tenancy.

After a hearing on December 7, 2018, the court entered a written order, ruling:

> Defendant Joseph Ostheller's motion is granted in part. Dr.[9] Ostheller is not liable for rent that accrued after December 31, 2016. However, the issue of whether Dr. Ostheller is liable for damages or claims other than rent are reserved for trial.[10]

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[9] Ostheller is a dentist.

[10] The written order directly conflicts with the court's oral ruling immediately following the hearing. The court stated:

> I'm going to deny summary judgment for rent after December 31, 2016, because I think there are genuine issues of material fact regarding whether there was a contract between Ostheller and the [Landlords]. So that'll be something that will have to go to trial.
>
> With respect to damages and other claims, I am going to deny summary judgment because, again, I think there are issues of fact as to when things occurred, whether or not . . . Ostheller actually was a tenant. I think those will need to be fleshed out at trial.

Between the trial court's written order and its conflicting oral ruling, the written order controls. See Lang Pham v. Corbett, 187 Wn. App. 816, 830-31, 351 P.3d 214 (2015) ("A written order controls over any apparent inconsistency with the court's earlier oral ruling."). Neither party argues otherwise.

The court determined that Ostheller was liable for late fees of $750 incurred as of December 31, 2016 and denied his motion as to the timber trespass claim, reserving the issue for trial.[11] Finally, the court denied in part and granted in part the Landlords' motion "for the same reasons."

Taylor died in June 2019, and the case proceeded against only Ostheller.[12] A bench trial took place over two days in June 2020. The judge who presided over the bench trial was not the same judge who ruled on the summary judgment motions. The court heard testimony from the Landlords, Ostheller, Ostheller's current spouse, and a former tenant. The court considered more than 70 exhibits.

During closing argument, the Landlords claimed that Ostheller's tenancy was continuous through July 2017. But Ostheller, consistent with the order on summary judgment, argued that the Landlords terminated his tenancy on December 31, 2016 and that he did not enter into a new agreement with them.

The trial court pointed to the apparent "inconsistent" ruling on summary judgment and asked, "How is it that there is not a factual question with regard to rent, but there is a factual question with regard to ongoing obligation for damages." The court observed that before reaching the damages issue, it needed to resolve whether liability for damages would align with the prior court's legal ruling. The

[11] The court denied reconsideration of Ostheller's motion on the timber trespass claim, and a commissioner of Division Two of this court later denied discretionary review of the court's ruling.

[12] The Landlords served Taylor's estate with notice of a creditor's claim and their motion to substitute, and the court allowed substitution of Taylor's estate on the first day of trial. But it does not appear that any party joined the estate in the proceedings.

trial court considered supplemental briefing on that issue and the "impact" of the summary judgment ruling.[13]

In a letter ruling, the trial court stated that the summary judgment order was revisable under CR 54(b).[14] But because neither party requested modification, it would "respect" the summary judgment ruling and "let it inform" the court's resolution of the remaining issues. The court determined that "the only logical" interpretation of the summary judgment ruling was that Ostheller's month-to-month tenancy terminated on December 31, 2016 and that he was "no longer a 'tenant' " after that date.

The court found that Ostheller admitted to incidents during his tenancy that supported some of the claimed damages, including pet damage to the carpets and water damage to the kitchen and laundry room. But as to others, the court concluded that "[e]vidence of damage seven months after termination of the tenancy does not support a finding that the damage was caused by Dr. Ostheller." The court also found that some claims failed for other reasons, including failing to establish certain conditions existed on the property when Ostheller took possession in 2015 and failing to establish damage beyond normal "wear and tear."

On August 19, 2020, the trial court entered findings of fact and conclusions of law consistent with its oral ruling. Based on the summary judgment rulings, it

[13] The trial court also asked for briefing on whether the independent duty doctrine affected the Landlords' ability to recover under both contract and tort theories.

[14] CR 54(b) provides that absent written findings, the trial court may revise a decision that adjudicates fewer than all claims or does not decide the rights and liabilities of all parties before entry of final judgment.

issued conclusions of law stating that no contract existed between Ostheller and the Landlords after December 31, 2016 and that Ostheller was not liable for unpaid rent or late fees accrued after that date.[15] The court also concluded that Ostheller was liable for damages of $8,693.78 to replace carpets and repair flooring but that he was not liable for damages related to walls, baseboards, landscaping, kitchen cabinets, the driveway, septic issues, or smoking. The court determined that Ostheller was entitled to an offset of half of the $4,200.00 security deposit. Finally, the court rejected the Landlords' claims for lost rent, timber trespass, waste, and recovery based on their personal labor to restore the property.

Both parties sought attorney fees under a provision of the lease which provides for "reasonable attorney fees and costs" to the "prevailing party" in any action arising out of the lease. Following a hearing, the court determined that Ostheller prevailed on most of the issues and entered an order on October 20, 2020 granting his petition.[16] The court also found that Ostheller's September 2019 offer of judgment for $60,000.00 was greater than the Landlords' damages, costs, and fees as of the date of the offer. So the court calculated the parties' awardable fees as of the date of the offer of judgment and awarded total judgment of $18,674.59 to Ostheller.

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[15] Consistent with the summary judgment ruling, the court found that Ostheller was liable for late fees accrued before 2017, and that he had satisfied that debt before trial.

[16] The record on appeal includes neither the transcript of this hearing nor the additional briefing and documents the parties submitted at the court's direction.

The Landlords appeal.[17]

ANALYSIS

The Landlords contend the court erred at summary judgment by concluding as a matter of law that they had no contractual relationship with Ostheller in 2017. They point to evidence in the record of "explicit and voluntary actions" showing that Ostheller remained a cotenant with Taylor after December 31, 2016. We agree.

Whether a court properly granted summary judgment is a question of law that we review de novo.[18] In re Kelly & Moesslang, 170 Wn. App. 722, 731, 287 P.3d 12 (2012). In considering summary judgment, a court must consider all facts submitted and all reasonable inferences from those facts in the light most favorable to the nonmoving party; here, the Landlords. Vasquez v. Hawthorne, 145 Wn.2d 103, 106, 33 P.3d 735 (2001). A court properly grants a summary judgment motion only if the evidence before it shows no genuine issues of material

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[17] Ostheller asks us to dismiss the Landlords' appeal because their briefing does not include proper assignments of error and issues pertaining to those assignments. See RAP 10.3(a)(4). But the Landlords' assignments of error along with the list of "issues raised" and the appendices to their brief, which include brackets to designate challenged findings and conclusions, are enough to apprise us of the substance of their claims. We are unpersuaded by Ostheller's assertion that it was "exceedingly difficult" to discern the Landlords' claims, and decline to resolve this appeal based on noncompliance with the rules or impose sanctions. See RAP 1.2(a) ("Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands."); RAP 18.9(a) (providing authority to impose sanctions on a party or counsel who violates the rules).

[18] Ostheller argues we should review the trial court's finding that his tenancy terminated in December 2016 for substantial evidence because the court weighed the evidence at trial and independently reached that conclusion. See Viking Bank v. Firgrove Commons 3, LLC, 183 Wn. App. 706, 712, 334 P.3d 116 (2014) (review of decision following a bench trial considers whether substantial evidence supports the trial court's findings of fact and whether those findings support the conclusions of law). But in its letter ruling, the trial court determined that "the only logical conclusion that can be drawn from [the summary judgment court]'s Order of December 7, 2018" is that Ostheller's tenancy terminated on December 31, 2016, and that it would "respect" that order. As a result, we review the summary judgment order that decided the issue as a matter of law, not the trial court's finding.

fact, the moving party is entitled to judgment as a matter of law, and "reasonable persons could reach but one conclusion." Vasquez, 145 Wn.2d at 106 (citing CR 56(c)). "[E]ven if the basic facts are not in dispute, if the facts are subject to reasonable conflicting inferences, summary judgment is improper." Southside Tabernacle v. Pentecostal Church of God, 32 Wn. App. 814, 821, 650 P.2d 231 (1982); Sanders v. Day, 2 Wn. App. 393, 398, 468 P.2d 452 (1970) (summary judgment not designed to resolve inferential disputes).

Paragraph 2B of the lease states the initial fixed-term lease expired January 31, 2016. That section also provides:

> Tenant shall vacate the Premises upon termination of the Agreement, unless: (i) Landlord and Tenant have extended this Agreement in writing or signed a new agreement; (ii) mandated by local rent control law; or (iii) Landlord accepts Rent from Tenant (other than past due Rent), in which case a month-to-month tenancy shall be created which either party may terminate as specified in paragraph 2A. Rent shall be at a rate agreed to by Landlord and Tenant, or as allowed by law. All other terms and conditions of this Agreement shall remain in full force and effect.[19]

It is undisputed that when the fixed-term lease expired on January 31, 2016, the Tenants continued to possess the property and the Landlords continued to accept rent, so the tenancy converted to month-to-month. And although the record on appeal does not include the notice itself, it is also undisputed that the Landlords properly served the notice to terminate the month-to-month tenancy on December 10, 2016 under RCW 59.18.200(1)(a), but did not proceed with eviction by filing an unlawful detainer action. The question before the court on summary judgment was whether the undisputed facts showed an agreement between the

[19] Emphasis added.

Landlords and Ostheller to extend month-to-month tenancy after December 31, 2016.

"Leases are contracts, as well as conveyances." Seattle-First Nat'l Bank v. Westlake Park Assocs., 42 Wn. App. 269, 272, 711 P.2d 361 (1985). In the context of a lease, as with contracts in general, mutual assent is required for the formation of a valid agreement. Leda v. Whisnand, 150 Wn. App. 69, 78, 207 P.3d 468 (2009). To determine mutual assent, Washington follows the objective manifestation theory of contracts. Multicare Med. Ctr. v. Dep't of Soc. & Health Servs., 114 Wn.2d 572, 586, 790 P.2d 124 (1990).[20]

> [T]he unexpressed subjective intention of the parties is irrelevant; the mutual assent of the parties must be gleaned from their outward manifestations. To determine whether a party has manifested an intent to enter into a contract, we impute an intention corresponding to the reasonable meaning of a person's words and acts.

Multicare, 114 Wn.2d at 587.[21] The existence of mutual assent generally is a question of fact but may be determined as a matter of law if reasonable minds could not differ. Multicare, 114 Wn.2d at 586 n.24; P.E. Sys., LLC v. CPI Corp., 176 Wn.2d 198, 207, 289 P.3d 638 (2012).

The evidence before the court at the time of the summary judgment ruling showed the Landlords continued to accept month-to-month rent for the home between January and May 2017 and expected rent for June and July. While Taylor continued to live at the property in 2017, Ostheller negotiated and communicated with the Landlords about the rent, and he made most, if not all, of

[20] Overruled in part by statute on other grounds as stated in Neah Bay Chamber of Commerce v. Dep't of Fisheries, 119 Wn.2d 464, 832 P.2d 1310 (1992).

[21] Citations omitted.

the payments. And when Taylor moved out in July 2017, Ostheller prepared the property for turnover, he alone returned the property to the possession of the Landlords by accompanying Michelle during her inspection of the property, and he signed the Move Out Inspection Report. While Ostheller did not live at the residence between January and July 2017, this fact may not be dispositive since his tenancy undisputedly continued for several months after he moved out in August 2016. Because the evidence at summary judgment showed there were genuine issues of fact as to whether the Landlords had an agreement with Ostheller to continue his tenancy after December 31, 2016, the court erred by granting summary judgment on that issue.

Still, Ostheller suggests that he was entitled to summary judgment as a matter of law, regardless of any competing inferences, because his month-to-month tenancy could not continue once the Landlords served the termination notice. But Ostheller provides no authority to support his argument.[22] We are also unpersuaded by Ostheller's reliance on out-of-state authority and an unpublished decision of this court to argue that "one tenant cannot be involuntarily bound to a new tenancy by the acts of another." See Bockelmann v. Marynick, 788 S.W.2d 569, 572 (Tex. 1990) (presumption that one cotenant's holding over binds another cotenant is contrary to general principles of Texas law); Fin. Assistance, Inc. v. Slack, No. 72361-8-I, slip. op. at 9-10 (Wash. Ct. App. Nov. 10, 2014) (unpublished), http://www.courts.wa.gov/opinions/pdf/723618.pdf (cosigner of original fixed-term lease stopped being a tenant when the lease expired because

[22] We need not consider arguments unsupported by citation to authority. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); see RAP 10.3(a)(6).

he took no acts to bind himself as lessee in subsequent month-to-month tenancy, did not possess the premises or pay rent, and had no communication with the landlord or other tenants).

Construing the evidence and all reasonable inferences therefrom in the light most favorable to the Landlords, there is evidence in the record of words and conduct manifesting an intent to continue Ostheller's joint tenancy after December 31, 2016. As a result, the court erred by granting summary judgment on that issue as a matter of law. And because the trial court's findings and conclusions flowed from the summary judgment ruling that "[n]o tenancy or contractual agreement existed" between Ostheller and the Landlords after that date, we reverse and vacate the findings and conclusions as far as they relate to the erroneous ruling on summary judgment. We remand for trial on the issue of when Ostheller's tenancy ended, as well as the issues that flow therefrom.[23] The trial court may then revisit its decision on attorney fees.

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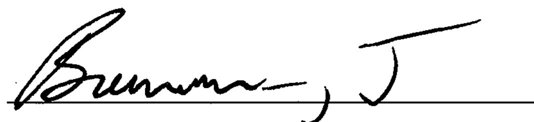
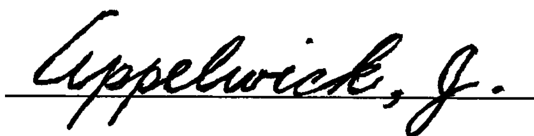
[23] Because we reverse and vacate the trial court's findings and conclusions implicated by the summary judgment order, we need not address the Landlords' challenges to specific findings and conclusions. But we address several issues the Landlords raised that may resurface on remand. Specifically, the Landlords contend (1) the court improperly placed the burden of proof on them to show that Ostheller caused damages during their contractual relationship; (2) the trial court erred by denying claims for some damages because the Landlords chose not make repairs; and (3) the trial court erred when, for purposes of attorney fees, it separated their breach of contract claim into eight distinct claims involving different aspects of the property.

The Landlords fail to establish reversible error with respect to any of these claims. First, as plaintiffs, the Landlords bore the burden to establish the elements of their claim, including a valid contractual relationship at the time of the alleged breach and damages. See Citoli v. City of Seattle, 115 Wn. App. 459, 476, 61 P.3d 1165 (2002) (a breach of contract cause of action requires plaintiff to prove a valid and enforceable contract, the rights of the plaintiff and obligations of the defendant under the contract, violation of the contract by the defendant, and damages to the plaintiff). Second, no authority supports the Landlords' position that they had a right to recover the estimated costs of unperformed repairs unless Ostheller could show that "the diminution in value was somehow less than the cost of remediation." And finally, because several different areas and aspects of the property needed separate repairs, ample evidence supported segregating the Landlords' claims.

Reversed, vacated in part, and remanded for further proceedings consistent with this opinion.[24]



WE CONCUR:



[24] Both parties request an award of attorney fees under RAP 18.1 and the attorney fee provision in the lease. RAP 18.1(a) authorizes an award of attorney fees and costs from appeal when authorized by law. We deny both requests as premature. The Landlords' partial success on appeal does not equate to actual relief because the claim that survived summary judgment is not yet resolved. But if the Landlords are ultimately entitled to additional relief on remand and the trial court concludes fees and costs are appropriate, the trial court may award reasonable fees and costs for this appeal. See RAP 18.1(i) (trial courts may determine amount of appellate fees on remand).

ERIN SPERGER PLLC

April 27, 2022 - 12:30 PM

Filing Petition for Review

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