Supreme Court No.
Court of Appeals No. 85901-3-I

SUPREME COURT OF THE STATE OF WASHINGTON

EIGHT IS ENOUGH,

Petitioner,

v.

CYNTHIA OHLIG,

Respondent.

PETITION FOR REVIEW

By:

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1. IDENTITY OF THE PETITIONER

Petitioner Eight is Enough ("Petitioner") asks this Court to review the decision of the Court of Appeals, Division One, referred to in Section Two.

2. COURT OF APPEALS DECISION

Lewis County Superior Court found that it was proper to order a writ of restitution where the landlord issued a 90 day termination notice based on selling the property where Respondent's, Cynthia Ohlig's ("Respondent"), sole defense was a counterclaim that the landlord did not respond to her request for a comfort animal and allegedly discriminated against her, somehow barring eviction based on the notice to sell the property.

Division One of the Court of Appeals, on March 4, 2024, ruled that this was an error, holding the trial court needed to make a specific finding regarding the discrimination counterclaim, and remanded the case back to the trial court. Respondent, desiring more relief, moved for reconsideration and that decision was

denied on April 5, 2024. *Eight Is Enough, LLC. v. Ohlig*, 85901-3-I, 2024 WL 913857 (Wash. Ct. App. Mar. 4, 2024).

3. ISSUES PRESENTED

3.1. Whether review should be granted under RAP 13.4(b)(1) and RAP 13.4(b)(2) where Division One's Decision expressly conflicts with this Court's Decision in *Terry*, holding discrimination counterclaims are improper in expedited unlawful detainer proceedings, and conflicts with Division One's own previous published and unpublished decisions on the issue of whether a tenant may bring a counterclaim based on discrimination where the claim is not related to the basis of termination as stated in the notice? Yes.

3.2. Whether review should be granted under RAP 13.4(b)(4) because there is a substantial public interest issue, that should be decided by this Court, in preventing the elimination of the limited nature of unlawful detainer proceedings by allowing essentially any discrimination type counterclaim regardless of whether it relates to the termination notice issued by the landlord? Yes.

3.3. Whether review should be granted under RAP 13.4(b)(4), as an issue of substantial public policy that should be decided by this Court, because the "whole principal of strict construction of statutes in derogation of the common law has no analytical or philosophical justification" yet is repeated as a boilerplate standard in caselaw as lawful standard for courts to follow? Yes.

4. STATEMENT OF THE CASE

4.1. Petitioner is a small business owned by several

elderly women. (CP 73). Each of these owners has declining health problems and can no longer manage this business. (CP 73, 162-63). They have sold off rentals during the last three years, incrementally to avoid large capital gains taxes that are not affordable. (CP 73, 162-63).

4.2. Petitioner rented to Respondent in 2015 (CP 73) a three-bedroom single family home at the below market rate of $895.00 per month and never increased rent; Respondents are generous and kind landlords. (CP 7). The rental agreement expressly prohibited pets. (CP 9).

4.3. Petitioner learned of a dog on the property in the winter of 2022 and requested Respondent fill out an application. (CP 74, 163). Respondent refused. (CP 74, 163). Petitioner accepted months of rent and in doing so accepted the pet on the property and waived the issue. (CP at 103, 162-63).

4.4. In April of 2022, Petitioner spoke with a surveying company for the purpose of subdividing the four rental homes, including Respondent's, on the single lot. (CP at 73-80). These

properties would be sold over time to effectuate the goal of getting out of the business while minimizing capital gain taxes. (CP at 73-80).

4.5. In May of 2022, the surveyor continued her work including obtaining permits. (CP 73-80). The city approved the subdivision. (CP at 162). However, the initial approval that created four lots was cost prohibitive. (CP 73-80). The County required far too much money invested into the properties and associated road front for such permitting. (CP 73-80). The county required such things as costly side walking. (CP 73-80).

4.6. As a cost saving alternative suggested by the surveyor, Respondents elected to subdivide the properties into two lots, one dwelling on one lot and three dwellings on the other lot. (CP 73-80, 147-59, 162-63). The dwelling Respondent resided in, rented many years prior, was in need of much repair. (CP 73-80, 147-59, 162-63). This property would not sell without substantial repairs and refurbishing (indeed, over $20,000.00 was spent to repair the unit after Respondent moved

out). (CP 73-80, 147-59, 162-63).

4.7. The three other homes had tenants with a strong history of paying rent timely (unlike Respondent who has failed to pay rent timely many times for long lengths of time), which could attract potential buyers. (CP 73-80, 147-59, 162-63). These properties did not need refurbishing and could theoretically be sold to another landlord as an investment with existing and paying tenants still residing in them. (CP 73-80, 147-59, 162-63).

4.8. Had the property Respondent rented been included in the lot with the other dwellings, there was no potential that a landlord would purchase that lot with three dwellings, at least not without Petitioner selling the lot for far below market value to compensate the buyer for needed repairs. (CP 73-80, 147-59, 162-63). Potential buyers of rentals with tenants in them request a review of such tenant's rent payment history before investing. (CP 73-80, 147-59, 162-63).

4.9. Petitioner gave Respondent over 120 days of notice that they were selling the property "so that she could stay through

the summer and into the fall." (CP 162, 162-63). The termination date of the notice was September 30, 2022. (CP 15-16).

4.10. Petitioner continued to accept rent from Respondent through June of 2022 (CP 4, 182). In doing so, with knowledge of the breach of the rental agreement, by performance Petitioner formally accepted the dog on property, waiving any possible future objection.

4.11. Respondent then stopped paying rent in July of 2022. (CP 4, 182). Respondent did not vacate on September 30, 2022. (CP 4, 182). Petitioner filed for eviction in October 17, 2022. (CP 4, 182). The basis of the complaint was the 90 day notice to sell the property. (CP 4, 16, 182).

4.12. On November 10, 2022, Respondent answered the complaint. (CP 64). She argued in pertinent part:

- "It would be impossible" for Petitioner to sell the property. (CP 33).
- Back owed rent was not at issue. (CP 33, 40-42).

- Petitioner was bringing a retaliatory eviction against Petitioner under RCW 59.19.250 and RCW 59.18.240. (CP 36-37).

- Petitioner "discriminated" against Respondent because "Neither Ms. Lebaron nor anybody else at Eight is Enough responded to [Respondent's] reasonable accommodation request" for a comfort animal. (CP 38).

4.13. Respondent's sole declaration and testimony in this case was filed the same day. (CP 49-52). It neglected to provide that the comfort animal had been residing on the property for several months without any objection from Petitioner, or that Petitioner had given Respondent an application for a pet or roommate, or that rent had been paid and any objection waived, and stated:

> "I would have been open to discussing my reasonable accommodation request to see what they could reasonably offer me."
>
> "[N]either Rose LeBaron nor anybody else from Eight is Enough contacted me to discuss my accommodation requests."
>
> "I received nothing in writing acknowledging my reasonable accommodation requests."

> "I received no offer of reasonable accommodation. I did not even receive a response offering to discuss, oral or written."

(CP 49-51).

4.14. In pertinent part as to this Petition, on appeal Petitioner responded:

- Petitioner did not deny Respondent's reasonable accommodation at all. Petitioner did respond to the request: Petitioner requested Respondent fill out an application for any additional persons or pets on the property. Respondent refused to do so and refused to speak with Petitioner again. Petitioner then accepted rent for months with knowledge of the dog being on the premises and waived the violation as a matter of law.

- Respondent's claim for retaliatory eviction under RCW 59.19.250 and RCW 59.18.240 failed to meet the requirements of those statutes. For example, Respondent "did not complain to any government authority regarding any safety issue. Therefore, RCW 59.18.240(1)'s requirements [were] not met." "Additionally, [Petitioner did] not requested any enforcement of tenant rights under Chapter 59.18, RCW. Thus, RCW 59.18.240(2)'s requirements [were] not met."

- Petitioner's sole reason for terminating the tenancy was because the company's owners were elderly, downsizing, had previously sold rentals, and were

> selling this rental as they could not keep up with the workload of being a landlord.

(CP 81-89).

4.15. A show cause hearing was set for November 18, 2022. (CP 29-30). Petitioner had been approved for one sub-division application but was seeking another that was less costly, and "it was just a matter of time" and work to get the property up for sale. (RP 5, 11-12).

4.16. Petitioner also explained that no one from the company "refused the therapy pet" let alone discriminated against anyone. (RP 6). "[The pet has] been allowed on the property ever since that reasonable accommodation was asked for. . . ." (RP 6).

4.17. As to the counterclaim of retaliatory eviction, Petitioner cited case law *Terry*, *Josephine*, and *SyHadley*, explaining that counterclaims are generally not allowed in expedited unlawful detainer actions. (RP 6-7). "[T]he Court must first look to the underlying basis of the landlord's unlawful

detainer action and the notice to vacate, and then ask whether the tenant's counterclaim is based on facts that may excuse the tenant's breach alleged by the landlord." (RP 8). "In this case, whether there's a therapy dog or pet . . . does not excuse the tenant [from] not vacating [after] having the tenancy properly terminated" by a notice to sell the property. (RP 7).

4.18. Petitioner pointed out that the allegation of retaliatory eviction by Respondent was not made regarding rights granted by Chapter 59.18, RCW, as RCW 59.18.240 required, but under law outside the unlawful detainer scheme. (RP 7-8). In other words, the statutory retaliation RCW required (1) failure to comply with "maintenance or operation of the premises" or (2) denial of rights granted by the Residential Landlord-Tenant Act. (RP 7-8, 12). The counterclaim of retaliatory eviction failed because it did not meet the requirements of RCW 59.18.240.

4.19. At this point during the show cause hearing, the trial court judge specifically asked Respondent's counsel "do you have a response to [Petitioner's counsel's] argument that

[Respondent's retaliatory eviction claim] doesn't meet the rights under this chapter in regard to the retaliation claim?" (RP 13). Respondent's answer was enlightening and if any error, he invited it: "no, I don't have a good response to it, to be honest." (RP 14).

4.20. The Court then granted the motion for a writ of restitution and found that "there's plenty of evidence to show an intent to sell": (1) Petitioner had "taken reasonable steps to sell the property or to show an intent that they plan to sell the property", (2) Petitioner has "several properties" and "have already sold and listed other properties for sale, showing their intent to sell these properties because they're aging and, also, the steps that they've taken to look into the subdivision [of this property] and having it divided." . (RP14-15).

4.21. The property was subsequently subdivided and sold as Petitioner stated would happen.

4.22. On appeal, Respondent argued the following in pertinent part:

- There was a substantial issue of fact regarding Respondent's counterclaim for discrimination that precluded an order for a writ of restitution at the show cause hearing.

5. WHY REVIEW SHOULD BE ACCEPTED

5.1. Review Should Be Granted Under RAP 13.4(b)(1) and RAP 13.4(b)(2) Because Division One's Decision is Contrary to Decisions of This Court, Including *Terry* that Expressly Held Counterclaims including Discrimination are Not Permitted in an Expedited Unlawful Detainer Proceeding, as well as and Published and Unpublished Decisions of the Court of Appeal, Including *Josephinium*.

"It is settled by an unbroken line of decisions that in [a unlawful detainer] proceeding the defendant may not assert a set-off or counterclaim." *Young v. Riley*, 59 Wn.2d 50, 52, 365 P.2d 769, 771 (1961) "It has long been settled that counterclaims may not be asserted in an unlawful detainer action." *Granat v. Keasler*, 99 Wn.2d 564, 570, 663 P.2d 830, 834 (1983). Counterclaims are not allowed during unlawful detainer proceedings. *Munden v. Hazelrigg*, 105 Wn.2d 39, 45, 711 P.2d 295 (1985). "In so holding, the courts have acknowledged the Legislature's intent to create a summary procedure and limit the

issue to the landlord's right of possession." *Granat*, 99 Wn.2d at 570–71.

Rather, "the court sits as a special statutory tribunal to summarily decide the issues authorized by statute and not as a court of general jurisdiction with the power to hear and determine other issues." *Id.* at 570–71. A trial "court has no jurisdiction to consider a counterclaim that is not necessary to determine the right to possession." *Seattle Univ. v. Kahssai*, 139 Wn. App. 1093 (2007).

In a case before this Court, En Banc, *Hous. Auth. of City of Everett v. Terry*, 114 Wn.2d 558, 789 P.2d 745 (1990), the tenant argued that an order for a writ of restitution should have been reversed because the landlord discriminated against the tenant by denying a reasonable accommodation of a handicap of the tenant. This Court—*citing the alleged violation of RCW 49.60.030*—expressly refused to consider the discrimination counterclaim, holding that "we have long held that counterclaims may not be asserted in an unlawful detainer action." *Id.* at 570.

Division One subsequently ruled in accord, citing *Terry*. *See e.g., Hous. Auth. of City of Seattle, Wash. v. Johnson*, 92 Wn. App. 1042 (1998) (holding "The holding in *Terry* precludes consideration of Johnson's handicap discrimination claim as a defense in the unlawful detainer action"); *Eastside Mental Health v. Vervynck*, 93 Wn. App. 1061 (1999) (holding "The *Terry* court characterized the argument made here—that a landlord discriminated against a disabled tenant by denying his request for a reasonable accommodation—as a counterclaim that may not be asserted in an unlawful detainer action").

As another example, *SyHadley* articulates the long accepted test used by the trial court in determining whether a counterclaim is allowable in an expedited unlawful detainer proceeding: "Because a landlord may have varying grounds for pursuing an unlawful detainer action, a court must (1) first look at the underlying basis for the landlord's unlawful detainer action as set out in the notice to vacate or the complaint; and (2) then ask whether a tenant's counterclaim is based on facts that may

'excuse' the tenant's breach alleged by the landlord." *SyHadley, LLC v. Smith*, 19 Wn. App. 2d 1017 (2021), *review denied*, 199 Wn.2d 1001, 504 P.3d 826 (2022). *Josephinium* is in accord. *Josephinium Associates v. Kahli*, 111 Wn. App. 617, 626, 45 P.3d 627, 632 (2002) (holding "tenant's defense" of discrimination "must constitute an excuse of [her] breach.").

"If the answer to the second inquiry is 'yes,' then the trial court may properly hear the counterclaim in an unlawful detainer proceeding." *Angelo Prop. Co., LP v. Hafiz*, 167 Wn. App. 789, 815, 274 P.3d 1075, 1088 (2012). "But if the answer to the second inquiry is 'no,' then the trial court may not address the counterclaim without first converting the unlawful detainer action into an ordinary civil action for damages." *Id.* at 815.

Josephinium is another case that discusses how rare properly pled discrimination defenses are in unlawful detainer actions. The expedited proceeding prohibits counterclaims and in doing so requires defenses to be solely limited to be related to the termination notice at issue. Division One went so far as to

describe discrimination defenses as "extremely unlikely" in eviction cases because of the limited nature of the proceeding and the requirement for a discrimination allegation to somehow invalidate the eviction notice. *Josephinium*, 111 Wn. App. at 627. Only because of the "unusual circumstances" was a discrimination defense properly raised in *Josephinium* as it directly impacted whether the tenant did not comply with the failure to pay notice. *Id.* at 620.

The tenant in *Josephinum* was served a 14-day notice for failure to pay rent after she tendered a portion of her rent due. *Id.* at 621. She refused to pay the remaining rent due and also refused to vacate asserting that had the landlord moved her into a less expensive unit as part of a requested accommodation, she would not have been behind on rent and the landlord would not have had a basis for eviction for failure to pay. *Id.* at 627. Only because the discrimination counterclaim directly impacted the notice to vacate and reason given for terminating the tenancy could the trial court hear the generally impermissible counterclaim. *Id.*

In *SyHadley, LLC*, the tenant asserted that "she had suffered 'retaliation, harassment and discrimination based on race and sex' by . . . her landlord." *SyHadley*, 19 Wn. App. 2d 1017. The trial court found that the tenant was properly served with a notice to pay past due rent or to vacate the premises, that she owed rent in the sum of $11,088.29, and that she had not complied with the requirement to pay rent. *Id.* She was therefore unlawfully detaining the premises. *Id.* It also found that the tenant committed an assault against another tenant and that conduct justified the issuance of an order for a writ of restitution. The court of appeals affirmed the trial court issuance of a writ of restitution, at the show cause hearing, holding the tenant's discrimination counterclaim—even if proved—would not excuse the tenant's failure to vacate the premises based on the landlord's pay or vacate and nuisance termination notices issued. *Id.*

Here, this Court, En Banc in *Terry*, has already decided the issue of whether a discrimination claim may be raised in the limited special proceeding known as an unlawful detainer:

> Appellant Terry argued, "as an affirmative defense" in the unlawful detainer action, the counterclaim that a landlord has a duty to make a reasonable accommodation to the handicap of a tenant. A breach of this duty, he argues, constitutes discrimination by expelling a handicapped person from real property in violation of RCW 49.60.030(1)(c). The trial court disagreed.
>
> We do not consider the question raised by appellant's counterclaim because we have long held that counterclaims may not be asserted in an unlawful detainer action.
>
> ****
>
> [T]he counterclaim was not properly before the court. . . .

Terry, 114 Wn.2d at 569–70.

Subsequently, Division One, under the "unusual circumstances" of a case, later carved out a very narrow exception to the rule that a landlord's refusal to grant a reasonable accommodation is not a permissible counterclaim: Had the requested accommodation of the tenant paying lower rent been granted by the landlord—because the tenant had already tendered the proposed reduced amount of rent before the

unlawful detainer action was file—the tenant would not have been behind on rent at all as provided in the pay or vacate notice. *Josephinium,* 111 Wn. App. at 626. In such unusual circumstance, the tenant would not have been in violation of the notice, and the landlord would not have an unlawful detainer action at all. *Id.* Thus, the claim directly impacted whether the tenant complied with the notice or not and Division One held the "tenant's defense" of discrimination could be heard in the limited proceeding because it could "constitute an excuse of [her] breach." *Id.*

In other words, *Josephinium,* followed the test that a court must (1) first look at the underlying basis for the landlord's unlawful detainer action as set out in the notice to vacate or the complaint; and (2) then ask whether a tenant's counterclaim is based on facts that may 'excuse' the tenant's breach alleged by the landlord."

In the case at hand, Respondent alleged that she was Petitioner did not respond to her requested accommodation for a

comfort pet. Solely because of that allegation she believed she was excused for not vacating the unit because the owner was selling the property. Unlike *Josephinium*, where the granting or denying of the accommodation request directly determined the validity of the eviction notice, *i.e.*, whether enough rent was tendered or not given the prior accommodation request for a cheaper unit and whether the tenant complied with the eviction notice or not, this case presented no such issue. Respondent's claim was an impermissible counter claim. *See Terry*, 114 Wn.2d 558; *Granat*, 99 Wn.2d at 570–71; *Josephinium*, 111 Wn. App. at 626; *Johnson*, 92 Wn. App. 1042.

However, Division One has now ruled opposite as its previous decisions, contrary to this Court's decision is *Terry* and inapposite of *Josephinium*. The test applied above it did not cite and ignored. Moreover, Division One's decision ignored *Terry*'s explicit holding that it previously cited and relied on in other cases.

Accordingly, this Court is called upon under RAP 13.4(b)1) and (2) to reaffirm that counterclaims are not permissible under the limited statutory jurisdiction of unlawful detainer actions. While a narrow exception exists under *Josephinium*, the facts of this case and *Josephinium* are not similar. The requested accommodation in *Josephinium* could have possibly invalidated the eviction notice. In this case, the request for a comfort dog could not invalidate a notice based on selling the property.

5.2. Review Should Be Granted Under RAP 13.4(b)(4) Because the Substantial Public Interest Issue of Preventing the Elimination of the Limited Nature of Unlawful Detainer Proceedings Should Be Decided by this Court and Not By Some Unpublished Decision Contrary to All Previous Caselaw, and this Court's En Banc Ruling in *Terry*, on the Subject.

"An unlawful detainer action is a statutorily created proceeding that provides *an expedited method* of resolving the right to possession of property." *Christensen v. Ellsworth*, 162 Wn.2d 365, 370–71, 173 P.3d 228, 231 (2007) (emphasis added). Precisely what makes the hearing "expedited" is that

counterclaims are not allowed and only issues related to the possession as defined by the notice of termination are allowed. *Terry*, 114 Wn.2d 558. This is because these expedited hearings require a proper pre-suit termination notice to even establish statutory jurisdiction. *Id.*

Here, this Court should resolve this issue of whether unlawful detainer action remain expedited by prohibiting counterclaims. Division One's decision is not only contrary its prior decisions and to decisions of this Court, including En Banc, but it opens the flood gate to virtually every counterclaim or defense so long as it is couched as a "discrimination" counterclaim. That is not the law.

Tenants are free to sue landlords for discrimination in a regular civil action. They can even request preliminary injunctive relief in such regular civil action. *See e.g.*, RCW 7.40.020; CR 65. But what they cannot do is plead counterclaims that do not "excuse the tenant's breach by the landlord" as stated in the eviction notice. Both legislative intent and this Court's previous

decision have held that a trial court simply does not have statutory jurisdiction to hear such counterclaims in an expedited unlawful detainer action. The trial court only has the authority to rule on the basis for eviction as stated in the termination notice.

There is a reason Division One stated there was "scant . . . Washington caselaw" on this issue; Division One performed a prohibited legislative function by making up new law, by ruling directly contrary to *Terry*, and by not interpreting law as it is written. In the process it gutted the expedited nature of unlawful proceedings and thwarted legislative intent.

Moreover, Division One's reason for doing so,

> that the landlord's interpretation of *Josephinium* simply runs counter to the purposes of the WLAD. The landlord's reading would excuse landlords and courts from ever addressing superficially valid evictions which are motivated by blatant discrimination, making a mockery of the WLAD's aim of "elimination and prevention of discrimination" in housing. RCW 49.60.010[,]

is patently false and incorrect.

Just like where a tenant claims to own the property at question, and sues for quiet title, thereby preventing an unlawful detainer until the issue of ownership is decided—a tenant is free to sue a landlord for discrimination claims in a regular civil action. If the trial court in that ancillary, regular, civil proceeding believes there are merits to the discrimination claim and that the landlord is terminate the tenancy based on unlawful discrimination, injunctions may issue and stay the unlawful detainer action (if there is one filed) or enforceability of the termination notice (if no unlawful detainer has been filed).

But the point is that discrimination claims are to be addressed in regular civil actions. These counterclaims are not properly apart of an unlawful detainer action. What Division One has done in this case is turn the expedited unlawful detainer action into a regular civil action. This is against all previous caselaw, against legislative intent, against *Terry*, and against the sound public policy of creating a special unlawful detainer proceeding for deciding issues of possession in an expedited

way. Stated simply, any notion that unless Division One's decision stands, "discrimination would not be 'prevented'—it would only be compensated-for after the fact" (*Eight Is Enough*, 85901-3-I, 2024 WL 913857, at *6)—is completely false.

Discrimination claims are for discrimination cases. There, trial courts have general jurisdiction to not only grant damages but also to rule on issues of stays and injunctions, preliminary or otherwise. RCW 49.60.030(2) (stating, "Any person deeming himself or herself injured by any act in violation of this chapter shall have a civil action in a court of competent jurisdiction to *enjoin further violations, or to recover the actual damages* sustained by the person, or both.") (emphasis added).

It is incumbent on the tenant to properly file and plead such claims in a regular civil cause of action. As a practical matter, in a case involving a notice to sell the property, the tenant after the receiving the notice—has at least 90 days to file a discrimination claim. They are in no threat of being evicted before a trial court in the regular civil action can rule on, or

preliminarily provide relief as to, that discrimination claim. This has always been how impermissible counterclaims have been treated in the past. Impermissible counterclaims of ownership of the property and issue of quiet title are a prime example.

Another absurdity that arises under Division One's decision is suppose that in an unlawful detainer trial, the trial court finds discrimination. Does the trial court—sitting in limited statutory jurisdiction—have the authority to prohibit the landlord from selling the property? Forever? For just some limited amount of time? Or does the tenant remain there forever, regardless of whether they pay rent or not (which she did not in this case) at the property because the landlord didn't allow a comfort animal? For that crime, the trial court not sitting as court in general jurisdiction can forever bar the landlord from exercising their constitutional right of selling and alienating his or her property? Answers to these questions are why discrimination claims are properly heard before a court of general jurisdiction and not in limited unlawful detainer proceedings.

Accordingly, this Court is called upon to review Division One's decision. With unlawful detainer cases back-logging, taking many times longer than ever before, there is zero reason to allow counterclaims for discrimination in such expedited proceedings that have nothing to do with the termination notice at issue.

5.3. Review Should Be Granted Under RAP 13.4(b)(4), as an Issue of Substantial Public Policy that Should be Decided by this Court, Because the "whole principle of strict construction of statutes in derogation of the common law has no analytical or philosophical justification", Yet is Often Cited and Repeated in Caselaw for Courts to Follow.

Statutes are interpreted fairly without bias or favor to any party, including unlawful detainer statutes. *See Wickert v. Cardwell*, 117 Wn.2d 148, 155, 812 P.2d 858, 861 (1991) (Supreme Court of Washington stating, "whole principle of strict construction of statutes in derogation of the common law 'has been the object of a great deal of criticism in modern times'" and "the derogation of the common law doctrine 'has no analytical or philosophical justification'") and (citing 3 J. Sutherland,

Statutory Construction § 61.04 (4th ed. 1986) and citing 3 R. Pound, Jurisprudence 664 (1959)). The derogation of the common law doctrine appears to be "merely justification[] for decisions arrived at on other grounds, which may or may not be revealed in the opinion." *Id.* at 153. Not fairly interpreting a statute, and strictly interpreting a statute in favor of one party without legislative direction, is a violation of separation of powers doctrine. It stands in stark contrast to legislative intent. *See* RCW 1.12.010 (stating "The provisions of this code shall be liberally construed, and shall not be limited by any rule of strict construction.")

Here, the time is now to put a death nail in this meritless doctrine that is cited as an afterthought and that adds nothing to judicial opinions. Further, the optics of this Court previously citing authority that persuasively opines that the doctrine "has no analytical or philosophical justification", but this Court and other courts subsequently adding the standard as boilerplate to its judicial opinions—given what *Wickert* said about it—is terrible.

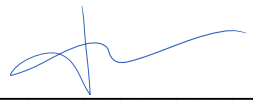
Even the casual reader of caselaw will believe any decision that refers to this doctrine as questionable. This Court should take review of this doctrine under RAP 13.4(b)(4).

6. CONCLUSION

Pursuant to RAP 13.4(b)(1), (2), and (4), Petitioner respectfully requests this Court grant review, for the reasons stated herein.

Respectfully submitted this ___ day of ____, 20____.

HARBOR APPEALS AND LAW, PLLC



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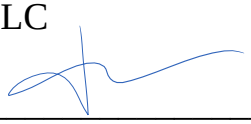

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

EIGHT IS ENOUGH, LLC. Respondent, v. CYNTHIA OHLIG, Appellant, and ALL OTHER RESIDENTS and OCCUPANTS, Defendants.[†]	No. 85901-3-I DIVISION ONE UNPUBLISHED OPINION

DÍAZ, J. — Cynthia Ohlig, a tenant, appeals an order for writ of restitution entered in favor of her landlord, Eight is Enough, LLC. Ohlig alleges the superior court committed three errors. First, she claims the court erred when it did not even *consider* her disability discrimination defense at the show cause hearing. Second, she claims the court erred by entering a judgment for unpaid rent even though the action was not based on a failure to pay. Finally, she claims the court erred by entering the landlord's proposed judgment before it was served on her or her

[†] Cynthia Ohlig is the only participating defendant in this appeal.

attorney. We agree with the first assignment of error and remand this matter for the court to hold a hearing to expressly consider Ohlig's discrimination defense, including whether there are any genuine issues of material fact which require the court to set the matter for trial. Otherwise, we affirm.

I. BACKGROUND

Appellant Cynthia Ohlig rented a house in Centralia, Washington. Ohlig's home was on a parcel with three other homes and respondent Eight is Enough, LLC ("landlord") owned all four parcels. Ohlig lived with a dog and a live-in caretaker, her adult grandson. Ohlig claims that, in January 2022, the landlord ordered her to remove both from the property and that she complied.

On May 20, 2022, Ohlig gave her landlord a written "reasonable accommodation request."[1] She requested that she be allowed to have an emotional support dog, a live-in caretaker, and help with cleaning and maintaining the apartment.

Ohlig attached to the request a signed note from her primary care provider, Dr. Gerald Lee, who had diagnosed Ohlig with anxiety, depression, and post-traumatic stress disorder. To alleviate those challenges, Dr. Lee had recommended that Ohlig have a "pet or emotional support animal/person," adding that "[t]he presence of this animal or person is necessary for the mental health" of Ohlig.

Ohlig alleges that the landlord responded to her request by claiming the

[1] Ohlig's written accommodation request is dated May 11, 2022. However, in a declaration, she claims she hand delivered the request to the landlord on May 20, 2022.

request was "nonsense" and stating that, if the request was granted, the landlord would charge "a pet deposit and substantially rais[e] the rent."

Five days after her request, the landlord gave Ohlig a 90-day termination notice. The notice indicated the landlord intended to sell Ohlig's home and that the lease would terminate on September 30, 2022. The month following, the landlord filed an unlawful detainer action for a writ of possession in Lewis County Superior Court. The landlord then moved the court to hold a show cause hearing to determine who had the right to possess the property.

In November 2022, at the conclusion of the show cause hearing, the court ruled in favor of the landlord. As will be discussed in more detail below, the court held that the landlord had sufficiently shown their intent to sell the property and met all the statutory requirements. However, the court did not address, either at the hearing or within its written findings, Ohlig's defense that the eviction was discriminatory. The court entered the landlord's proposed order which granted it possession of the home, $4,475.00 in past-due rent, as well as attorney fees and costs. Ohlig now appeals.

II. ANALYSIS

A. Procedural Background and Standard of Review

An unlawful detainer action is "a statutorily created proceeding that provides an expedited method of resolving the right to possession of property." Christensen v. Ellsworth, 162 Wn.2d 365, 370-371, 173 P.3d 228 (2007).

"The procedures set forth in the generalized unlawful detainer statutes, chapter 59.12 RCW, 'apply to the extent they are not supplanted by those found in

the Residential Landlord-Tenant Act [(RLTA)].'" Randy Reynolds & Assocs., Inc. v. Harmon, 193 Wn.2d 143, 156, 437 P.3d 677 (2019) (quoting Hous. Auth. of City of Pasco & Franklin County v. Pleasant, 126 Wn. App. 382, 390, 109 P.3d 422 (2005)). The RLTA applies to disputes, as here, involving a residential lease. Carlstrom v. Hanline, 98 Wn. App. 780, 786, 990 P.2d 986 (2000). Because "[c]hapters 59.12 and 59.18 RCW are statutes in derogation of the common law[,]" they "are strictly construed in favor of the tenant." Harmon, 193 Wn.2d at 156.

A landlord may evict a tenant if, among other grounds, "[t]he tenant continues in possession after the owner elects to sell a single-family residence and the landlord has provided at least 90 days' advance written notice of the date the tenant's possession is to end." RCW 59.18.650(2)(e); see also Klee v. Snow, 27 Wn. App. 2d 19, 22, 531 P.3d 788 (2023) (quoting RCW 59.18.650(2)(e)). Further, an owner "'elects to sell' when the owner makes reasonable attempts to sell the dwelling within 30 days after the tenant has vacated[.]" Id. The landlord may apply for a writ of restitution "at the same time as commencing the action or at any time thereafter." Harmon, 193 Wn.2d at 157 (citing RCW 59.18.370).

"To obtain a writ, a landlord must apply for an order for a show cause hearing . . . and serve that order on the tenant. A show cause hearing is a 'summary proceeding[ ] to determine the issue of possession pending a lawsuit' and is not the final determination of rights in an unlawful detainer action." Id. (alteration in original) (citation omitted) (quoting Hanline, 98 Wn. App. at 788; RCW 59.18.370). This opportunity for immediate temporary relief makes the show cause process similar to a preliminary injunction proceeding. Faciszewski v. Brown, 187

Wn.2d 308, 315 n. 4, 386 P.3d 711 (2016).

"At the show cause hearing, the court will determine if the landlord is entitled to a writ of restitution before a trial on the complaint and answer." Harmon, 193 Wn.2d at 157 (citing RCW 59.18.380). "The court shall examine the parties and witnesses orally to ascertain the merits of the complaint and answer[.]" RCW 59.18.380. "[I]f it shall appear that the [landlord] 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[.]" Id. And then, "the landlord can deliver the writ to the sheriff, who will serve it on the tenant." Harmon, 193 Wn.2d at 158 (citing RCW 59.18.390(1)). However, "[i]f there are genuine issues of material fact regarding possession or defenses raised by the tenant, the court sets the matter for trial." Tedford v. Guy, 13 Wn. App. 2d 1, 11, 462 P.3d 869 (2020) (citing RCW 59.18.380).

Thus, there are two separate events in an unlawful detainer action with two different standards of review: the factual determinations at the show cause hearing, and the decision to grant trial. As to the former, "[a] trial court's findings of fact will not be overturned on appeal if it is supported by substantial evidence." Leda v. Whisnand, 150 Wn. App. 69, 85 n. 6, 207 P.3d 468 (2009) (in an unlawful detainer action, considering whether the trial court's "finding of fact" on an element of a writ was erroneous); MH2 Co. v Hwang, 104 Wn. App 680, 685, 16 P.3d 1272 (2001) (in an unlawful detainer action, holding "[o]n appeal, the trial court's findings of fact must support its conclusions of law; the findings must be supported by substantial evidence"). "'Substantial evidence exists when there is a sufficient

quantity of evidence to persuade a fair-minded, rational person that a finding is true.'" Pham v. Corbett, 187 Wn. App. 816, 825, 351 P.3d 214 (2015) (quoting Hegwine v. Longview Fibre Co., Inc., 132 Wn. App. 546, 555-56, 132 P.3d 789 (2006)). Unchallenged findings of fact are verities on appeal. Id.

The court's factual findings are reviewed differently than the decision to order trial. Division Two of this court has held that "[w]e review a decision to strike a trial date in an unlawful detainer action for an abuse of discretion." Tedford, 13 Wn. App. 2d at 16. Division Three of this court disagreed, holding that Tedford did "not draw from the language of the applicable statute, nor [was] it based on Supreme Court precedent." Kiemle & Hagood Co. v. Daniels, 26 Wn. App. 2d 199, 218, 528 P.3d 834 (2023).

What is clear is that our Supreme Court has held that "[*w*]*hether or not the court issues a writ of restitution* at the show cause hearing, *if material factual issues exist*, the court is required to enter an order directing the parties to proceed to trial on the complaint and answer." Harmon, 193 Wn.2d at 157 (emphasis added). This language is "nearly the identical language that governs summary judgment." Daniels, 26 Wn. App. 2d at 218 (citing CR 56(c)). Summary judgment is reviewed de novo and, accordingly, "it appears something close to de novo review should apply, *at least when a tenant* denies the landlord's grounds for eviction or *raises an affirmative defense*." Id. at 218-219 (emphasis added).[2]

[2] This division recently issued an unpublished decision agreeing with Kiemle that a trial court's decision not to grant trial at a show cause hearing is reviewed de novo. Maggie Properties v. Nolan, No. 84549-7-I, slip op. at 14-15 (Wash. Ct. App. Dec. 4, 2023) (unpublished), https://www.courts.wa.gov/opinions/pdf/845497.pdf; GR 14.1(a) ("Unpublished opinions of the Court of Appeals have no precedential

B. Ohlig's Discrimination Defense

Ohlig first claims the superior court erred by failing to consider her discrimination defense at the show cause hearing. We agree.

1. Overview of Applicable Substantive Law

"Both federal and state law prohibit landlords from discriminating against disabled tenants[.]" Daniels, 26 Wn. App. 2d at 221 (citing 42 U.S.C. § 3604(f)(2), (3)(B), RCW 49.60.222(1)(f), (2)(b)). Specifically as to state law, the Washington Law Against Discrimination (WLAD) states that "[t]he right to be free from discrimination because of . . . the presence of any sensory, mental, or physical disability is . . . recognized as and declared to be a civil right." RCW 49.60.030(1). Further, "[i]t is an unfair practice for any person . . . because of . . . the presence of any sensory, mental, or physical disability . . . [t]o expel a person from occupancy of real property[.]" RCW 49.60.222(1)(i); see also RCW 49.60.222(2)(b) (refusing a reasonable accommodation can constitute discrimination). The provisions of the WLAD "shall be construed liberally[.]" RCW 49.60.020.

The WLAD also prohibits retaliation for "oppos[ing] any practices forbidden by this chapter[.]" RCW 49.60.210. There appears to be scant, if any, Washington caselaw considering a retaliatory eviction claim under the WLAD. However, our local federal district court held that "[t]aking an adverse action against a disabled employee because she requested or utilized a reasonable accommodation is a form of disability discrimination in violation of the WLAD's anti-discrimination

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value and are not binding on any court. However . . . [such cases] may be accorded such persuasive value as the court deems appropriate.").

provision." Hansen v. Boeing Co., 903 F. Supp. 2d 1215, 1218 (W.D. Wash. 2012) (citing RCW 49.60.180). In other words, "the decision to request a reasonable accommodation is a way to oppose the non-accommodated workplace status quo," meaning requesting accommodations is a form of "opposition" activity protected under RCW 49.60.210. Id. While this decision was in the context of employment, the court prefaced its holding on the fact that "[t]he need for reasonable accommodation is part and parcel of a disability" in any context. Id.

All of this said, our Supreme Court has "long held that counterclaims may not be asserted in an unlawful detainer action." Hous. Auth. of City of Everett v. Terry, 114 Wn.2d 558, 569-70, 789 P.2d 745 (1990). This constraint is proper because the scope of unlawful detainer actions is "limited to the question of possession and related issues such as restitution of the premises and rent." Munden v. Hazelrigg, 105 Wn.2d 39, 45, 711 P.2d 295 (1985). In turn, a "tenant may assert only those equitable defenses which affect the right of possession." Josephinium Assocs. v. Kahli, 111 Wn. App. 617, 619, 45 P.3d 627 (2002).

Despite the narrow scope of unlawful detainer actions, this court, however, has also held that "[t]he right to be free from discriminatory eviction is a substantive legal right, and ordinary civil remedies are unavailing in the face of a summary eviction proceeding." Id. at 625. Moreover, we have held that "[d]iscrimination may be a *defense* that *arises out of the tenancy*. When it does, the statute permits a tenant to assert the defense *and requires the court to consider it*." Id. at 626

(emphasis added).[3] After all, "[a] landlord cannot simply decide to evict all tenants of color." Id.

Generally, to show retaliation, there must be a causal link between the protected employment activity and the adverse action. Cornwell v. Microsoft Corp., 192 Wn.2d 403, 411-12, 430 P.3d 229 (2018). Because employers rarely reveal that their actions are motivated by retaliation, employees may point to circumstantial evidence to demonstrate the causal connection. Wilmot v. Kaiser Aluminum & Chem. Corp., 118 Wn.2d 46, 69, 821 P.2d 18 (1991). Circumstantial evidence may be the only evidence available and can be sufficient. Id. For example, "[t]hat an employer's actions were caused by an employee's engagement in protected activities may be *inferred from 'proximity in time* between the protected action and the allegedly retaliatory employment decision.'" Raad v. Fairbanks N. Star Borough Sch. Dist., 323 F.3d 1185, 1197 (9th Cir. 2003) (emphasis added) (quoting Ray v. Henderson, 217 F.3d 1234, 1244 (9th Cir. 2000)) (internal quotation marks omitted); see also Yartzoff v. Thomas, 809 F.2d 1371, 1376 (9th Cir. 1987).[4]

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[3] We further held, in Jospehinium, that "[i]f unlawful discrimination is *the* reason for an eviction, the defense certainly affects the tenant's right of possession." 111 Wn. App. at 625 (emphasis added). The usage of "*the* reason" instead of "*a* reason" does not appear to hold any analytical weight. That statement was made in passing and is not referenced or further discussed elsewhere in the opinion. While Ohlig urges us to follow Tafoya v. State Human Rights Com'n, 177 Wn. App. 216, 226, 311 P.3d 70 (2013), and adopt the "substantial factor" test present in employment discrimination cases such as Mackay v. Acorn Custom Cabinetry, Inc., 127 Wn.2d 302, 307, 898 P.2d 284 (1995), the parties did not fully or adequately brief this distinction when discussing Josephinium. As such, we do not reach this issue.

[4] These cases concern employment discrimination, not housing discrimination. Even so, "[w]here there is not an established standard for establishing

2. Discussion

Prior to the show cause hearing, Ohlig submitted competent evidence in support of her discrimination defense, including the following. First, Ohlig submitted Dr. Gerald Lee's diagnosis for anxiety, depression, and chronic pain. Second, Ohlig attached to her declaration her accommodation request, including Dr. Lee's signature and diagnosis. Third, Ohlig declared that none of the other tenants on the parcel received a termination notice. Fourth, in her answer, Ohlig argued that the timing of the termination notice–a mere five days after Ohlig claims she gave the landlord her accommodation request–supported her claim that the notice of termination was retaliatory. Finally, Ohlig claims the landlord already had shown animus towards her service animal and caregiver in January 2022. In short, Ohlig met her burden of presenting competent evidence in support of a prima facie case of discrimination, which was offered here as a defense to eviction.

At the show cause hearing, the landlord submitted evidence of its intent to sell the property, and it appears the court treated the landlord's certification and evidence of their intent to sell as dispositive. Specifically, the court granted the landlord's requested relief, finding that it had "met all requirements of the statute" and had "taken reasonable steps to sell the property or to show an intent that they plan to sell[.]" Most importantly for this issue, nowhere during the hearing, or within its written findings, did the court address or in any way indicate it considered Ohlig's discrimination defense.

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discrimination in a certain context, [courts] will often rely on the standards from employment discrimination cases." Tafoya, 177 Wn. App. at 226.

On appeal, Ohlig first argues that "Washington's Supreme Court has already held [in Faciszewski] that courts presiding over a show cause hearing must consider evidence presented by a tenant in support of a defense, even if the termination notice is facially valid." Ohlig also argues that "[d]isability discrimination is a defense to an unlawful detainer" under Josephinium, which the court was obligated to consider.

As to her first argument, Ohlig's interpretation of Faciszewski is somewhat overbroad. There, our Supreme Court analyzed the City of Seattle's Just Cause Eviction Ordinance (JCEO) and determined that a landlord's certification of just cause is not dispositive on the issue of possession. Faciszewski, 187 Wn.2d 323-24. As such, the court held that the lower court had erred by not considering the tenant's evidence disputing just cause. Id. However, our Supreme Court expressly stated that its holding was limited to Seattle's JCEO.[5] Id. at 317. As such, we do not rely on or interpret Faciszewski as standing for the sweeping proposition that a court must consider all defenses in all kinds of RTLA actions.

Ohlig's presentation of Josephinium however, is correct. We clearly held

[5] Faciszewski does reference the RLTA. Specifically, the court held that "[w]e believe the JCEO operates in harmony with the RLTA and unlawful detainer procedures when SMC 22.206.160(C)(4) is read not to make the landlord's certification determinative of 'just cause.'" Faciszewski, 187 Wn.2d at 317. The text of the JCEO also references how the RLTA governs the unlawful detainer process. Id. at 316. As such, the court concluded that "[t]he City that enacted the JCEO reads it this way, and such a reading retains the integrity of both the unlawful detainer process and the ordinance." Id. at 317. Even so, the vast majority of the court's holding referenced JCEO provisions that are distinct from the RLTA. The earlier references to the RLTA appear to be the court describing the contrasting provisions of the JCEO and RLTA within the broader eviction process. Thus, Faciszewski's relevance is limited.

there that the RLTA "permits a tenant to assert [a discrimination] defense *and requires the court to consider it*." 111 Wn. App. at 626 (emphasis added). We so held because, "[i]f unlawful discrimination is the reason for an eviction, the defense certainly affects the tenant's right of possession." Id. at 625.

The landlord's primary argument in response, repeated in different ways throughout its briefs, is that Ohlig's discrimination defense is a mere counterclaim, which is separate from the right to possession, and thus the court did not need to consider it. However, this argument is simply a misstatement of the well-reasoned holding in Josephinium, and a mischaracterization of how Ohlig presents her claims. Ohlig is not seeking damages in this action, merely the right of continued possession, which a retaliatory eviction does not extinguish. In turn, we hold that it was error for the trial court to fail to consider the discrimination defense at the show cause hearing.

In its supplemental brief, the landlord acknowledges that Josephinium is good, applicable law, which permits a tenant to present some discrimination defenses at a show cause hearing. But, the landlord claims Josephinium is distinguishable, arguing that the court cabined its holding to the "'extremely unlikely'" and "'unusual circumstance'" of that matter. Suppl. Br. of Resp't at 3-4 (quoting Josephinium, 111 Wn. App. at 620, 627). That is, the landlord argues that Josephinium requires a discrimination defense be causally related to the reasons for the eviction. And, in Josephinium, the eviction was so related, according to the landlord, because there a disabled tenant requested an available unit that was less expensive. Id. at 4 (citing Josephinium, 111 Wn. App. at 627).

But for the landlord's failure to accommodate, the tenant would not have been behind on rent and thus subject to eviction. In contrast, the landlord avers Ohlig's discrimination claim has no such causal connection to its reasons for eviction, the purportedly long-planned sale of the property, and, thus, the trial court did not have to consider it.

We hold, first, that the landlord's interpretation of Josephinium simply runs counter to the purposes of the WLAD. The landlord's reading would excuse landlords and courts from ever addressing superficially valid evictions which are motivated by blatant discrimination, making a mockery of the WLAD's aim of "elimination and prevention of discrimination" in housing. RCW 49.60.010. As stated by Ohlig in her supplemental briefing, "discrimination would not be 'prevented' -it would only be compensated-for after the fact."[6]

Moreover, there is nothing in Josephinium which points to a distinction between discrimination causally related to the eviction and discrimination not so related. It is sufficient that a tenant raises a competent discrimination claim, which then the court must at least "consider." Josephinium, 111 Wn. App. at 626.

The landlord also makes four further arguments, none of which have merit. First, the landlord argues that the plain language of RCW 59.18.650(2)(e) only

[6] In her supplemental briefing, Ohlig presents a persuasive hypothetical based on the facts of Tafoya, 177 Wn. App. at 226, which admittedly did not involve eviction. Ohlig asks us to consider a situation where a "landlord sexually harassed the tenant by repeatedly propositioning her. What if, five days after she refused a sexual proposition, the landlord served her with a notice of intent to sell? Under the landlord's reading of the WLAD, she would have no defense, would be evicted, and would have to sue afterwards for damages." Such a defense would be incompatible with the WLAD's focus on prevention.

requires that a landlord "intend to sell" and take "reasonable attempts to sell" the property. However, the statute does not state or even suggest a landlord's election or attempts to sell the property are dispositive within an unlawful detainer action. RCW 59.18.650(2)(e). Rather, the statute simply enumerates various bases under which a landlord may seek eviction. Id. at (1)(a). In other words, RCW 59.18.650(2)(e) merely provides one way to lawfully begin the eviction process. It does not provide a way to decisively obtain possession against all defenses.

Second, the landlord argues Ohlig must be current on her rent and utilities before availing herself of any remedial provision of the RLTA. This claim relies on statutory language that "[t]he tenant shall be current in the payment of rent including all utilities which the tenant has agreed in the rental agreement to pay before exercising any of the remedies accorded him or her under the provisions of this chapter[.]" RCW 59.18.080. Indeed, this court has previously held that a commercial tenant could not bring a retaliatory eviction defense because they were in breach of their leases. Port of Kingston v. Brewster, No. 73668-0-I, slip op. at 7 (Wash. Ct. App. Dec. 7, 2015) (unpublished) https://www.courts.wa.gov/opinions/pdf/736680.pdf (citing Port of Longview v. Int'l Raw Materials, Ltd., 96 Wn. App. 431, 438, 979 P.2d 917 (1999)).[7]

Kingston and Longview (on which Kingston relies) are distinguishable from this matter. Longview concerned a First Amendment claim which was an "equitable affirmative defense," not a "substantive" statutory defense, where

[7] As an unpublished case, Kingston is not binding on this court and need not be accorded precedential value. GR 14.1.

"ordinary civil remedies are unavailing." 96 Wn. App. at 438; see also Josephinium, 111 Wn. App. at 626. Moreover, a substantive right, such as that in the WLAD, is not a "remedial provision" of the RLTA (such as those remedies the plaintiff sought to obtain in Longview and Kingston), but rather a right that "affects the tenant's right of possession," which is the appropriate sole subject of a show cause hearing. Josephinium, 111 Wn. App. at 625. In other words, the defense Ohlig is asserting goes to her right to retain possession under the WLAD, not her right to recover damages for a violation of the RLTA.

Stated otherwise, Ohlig's civil rights are not tethered to the RTLA. Ohlig is bringing her claim under the WLAD's anti-retaliation provision. RCW 49.60.222(1)(i), RCW 49.60.210. As stated in a slightly different context, the request for reasonable accommodations is a protected activity under the WLAD. Hansen, 903 F. Supp. 2d at 1218 (citing RCW 49.60.210). While Hansen was decided in the context of employment, the court observed that "[t]he need for reasonable accommodation is part and parcel of a disability" in a broader sense. Id. The right to be free from discriminatory retaliation is not limited to the employment context. Indeed, WLAD's mandate, while primarily focused on employers, still broadly includes actions by "any employer, employment agency, labor union, *or other person* . . . to expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by this chapter[.]" RCW 49.60.210(1) (emphasis added).

As such, even if Ohlig was somehow foreclosed from obtaining remedies under the RTLA because of her failure to pay rent, her distinct right to be free from

disability discrimination under the WLAD is untouched.

Third, the landlord argues that Ohlig improperly asserted her discrimination defense. Specifically, the landlord claims that RCW 59.18.240(2) required Ohlig to first complain to a government authority regarding compliance with maintenance or operation regulations before bringing a retaliation claim. The landlord offers no authority that such a requirement applies to all types of retaliation claims. "'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.'" City of Seattle v. Levesque, 12 Wn. App. 2d 687, 697, 460 P.3d 205 (2020) (quoting DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)).

Similar to the landlord's second argument, at most, this argument concerns a process for "reprisals or retaliatory actions" by the landlord *under the RLTA* and does not impact Ohlig's distinct right to be free from discrimination under the WLAD. RCW 59.18.240. Again, "[i]f unlawful discrimination is the reason for an eviction, the defense certainly affects the tenant's right of possession" and must be considered at a show cause hearing. Josephinium, 111 Wn. App. at 625-26.

Finally, the landlord argues the superior court found no issue of material fact on Ohlig's discrimination defense, meaning trial was unnecessary. This argument simply mischaracterizes the court's decision. The court's oral and written findings made no reference to Ohlig's discrimination defense or to whether there was an issue of material fact more generally.

For the reasons above, we remand the case for the superior court to hold another hearing to expressly consider Ohlig's discrimination defense. "[I]f material factual issues exist, the court is required to enter an order directing the parties to proceed to trial on the complaint and answer" as to Ohlig's defense. Harmon, 193 Wn.2d at 157.

C. Judgment for Unpaid Rent

Ohlig next claims it was improper for the landlord to seek back-owed rent on appeal when the unlawful detainer action was based on the intent to sell, not a failure to pay. We disagree.

The RLTA does state that:

> The jury, or the court . . . shall also assess the damages arising out of the tenancy occasioned to the landlord by any . . . unlawful detainer . . . and, *if the alleged unlawful detainer is based on default in the payment of rent*, *find the amount of any rent due.*

RCW 59.18.410(1) (emphasis added). But, the statute also states:

> The court shall examine the parties . . . and if it shall appear that the plaintiff has the right to be restored to possession . . . shall enter an order directing the issuance of a writ of restitution . . . 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[.]

RCW 59.18.380 (emphasis added). And, this court has held that "[u]nlawful detainer actions under RCW 59.18 are special statutory proceedings with the limited purpose of hastening recovery of possession of rental property . . . *plus incidental issues such as restitution and rent, or damages.* Phillips v. Hardwick, 29 Wn. App. 382, 385-86, 628 P.2d 506 (1981) (emphasis added). Taken even further, we have held that "regardless of whether the landlord is successful in

obtaining the writ of restitution, the statute permits the landlord to seek 'other relief' as part of the unlawful detainer process, such as a final judgment for damages or termination of the tenant's lease." Webster v. Litz, 18 Wn. App. 2d 248, 253, 491 P.3d 171 (2021) (citing RCW 59.18.380). In other words, a landlord may seek owed rent under the RLTA not only in evictions based upon the tenant's failure to pay; actions based on a failure to pay rent are one of many instances where rent can be sought.

In response, Ohlig cites to Castellon v. Rodriguez, 4 Wn. App. 2d 8, 18, 418 P.3d 804 (2018), where we held that a trial court in an unlawful detainer action "lack[s] jurisdiction to enter a civil money judgment and issue the writ of garnishment." There, the lower court had entered a judgment which included $5,335.04 in damages in addition to "incidental issues" such as attorney fees, costs, and rent. Id. at 14. We reversed the trial court's judgment and held that the court should have "convert[ed] the Castellons' unlawful detainer action into a general action for damages prior to issuing judgment," rather than taking the further step of ordering garnishment. Id. at 19. Indeed, Castellon still stands for the proposition that the landlord has avenues to seek the unpaid rent within the narrow scope of unlawful detainer.

Importantly, Ohlig also does not contest the landlord's assertion that she stopped paying rent in July 2022 nor the amount of rent owed. Even after the landlord's appellate brief directly pointed this out, Ohlig's reply brief failed to address the matter in any depth. As such, there does not appear to be a genuine issue of material fact pertaining to Ohlig's failure to pay or the amount of rent she

owes, meaning a trial on this issue was unnecessary and the relief ordered appropriate. CR 56(c) (a grant of summary judgment requires there is "no genuine issue as to any material fact").

In short, should the landlord prevail after the court considers the discrimination defense, the landlord may obtain this back rent as appropriate "other relief." RCW 59.18.380.

D. Notice of Proposed Judgment

Under Washington's civil rules, "[n]o order or judgment shall be signed or entered until opposing counsel have been given 5 days' notice of presentation and served with a copy of the proposed order or judgment[.]" CR 54(f)(2). Generally, "[f]ailure to comply with the notice requirement in CR 54(f)(2) generally renders the trial court's entry of judgment void." Burton v. Ascol, 105 Wn.2d 344, 352, 715 P.2d 110 (1986). However, the judgment is not invalidated "where the complaining party shows no resulting prejudice." Id. For example, the Burton court found there was no prejudice where the complaining party was still able to present their theory of the case. Id. at 352-53.

Ohlig argues that the writ of restitution must be vacated as her "attorney never saw the proposed findings, conclusions and judgment, nor the landlord's cost bill and attorney fee declaration" before it was entered. At the show cause hearing, Ohlig's attorney had claimed he "was not served any of these declarations that [the landlord's attorney] has" and thus asked the court "set this over for two weeks so I can respond to those papers." The landlord's attorney asserted that he had served these papers.

In response to Ohlig's protests at the hearing, the court added language to the writ of restitution expressly giving Ohlig two weeks before the eviction order could be executed. As intended by the court, this provision gave Ohlig time to file a motion for reconsideration. Ohlig's motion argued at length that the case involved factual disputes requiring a jury trial, including Ohlig's discrimination defense. The motion was ultimately denied.

In short, the court granted Ohlig the two weeks her attorney requested and her counsel was able to review the missing documents and present arguments. As such, she was not prejudiced and a vacatur is unwarranted. Burton, 105 Wn.2d at 352.

E. Attorney Fees

This court in its discretion may grant reasonable attorney fees on appeal provided the party's briefing "request[ed] the fees or expenses" and the "applicable law grants to a party the right to recover." RAP 18.1(a). Under the RLTA, "[t]he prevailing party may recover the costs of suit or arbitration and reasonable attorneys' fees." RCW 59.18.290(1), (2). In the event of a default on rent, Ohlig's lease states that the landlord may seek "the entire balance as well as any damages, expenses, legal fees, and costs."

Both parties request fees on appeal. However, this court has held that it is premature to award fee when the matter has been remanded and no party has definitively prevailed on the merits, as here. Leda, 150 Wn. App. at 87 ("Although RCW 59.18.290(2) allows for an award of attorney fees to the prevailing party . . . no party has yet prevailed on the merits, any determination of the prevailing party

on appeal would likewise be premature"). Following that hearing or trial, the prevailing party may petition the trial court to award its fees, both for the proceedings below and their fees on appeal. See State v. Numrich, 197 Wn.2d 1, 31, 480 P.3d 376 (2021) ("Washington courts have routinely afforded deference to the trial court's own experience evaluating the reasonableness of attorney fees[.]"); see also Atkinson v. Estate of Hook, 193 Wn. App. 862, 874, 374 P.3d 215 (2016) ("The attorney fee statutes cited by the parties allow the court to exercise considerable discretion. The trial court, being more fully acquainted with the entire case and the parties, is in a better position than this court to exercise that discretion.").

III. CONCLUSION

We remand this matter for the superior court to expressly consider Ohlig's disability discrimination defense. If genuine issues of material fact exists, the court is required to enter an order directing the parties to proceed to trial as to Ohlig's defense. We otherwise affirm.

Díaz, J.

WE CONCUR:

Hazelrigg, ACJ

Mann, J.

FILED
4/5/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

EIGHT IS ENOUGH, LLC. Respondent, v. CYNTHIA OHLIG, Appellant, and ALL OTHER RESIDENTS and OCCUPANTS, Defendants.[†]	No. 85901-3-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, Cynthia Ohlig, filed a motion for reconsideration of the opinion filed on March 4, 2024 in the above case. A majority of the panel has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Díaz, J.

Judge

[†] Cynthia Ohlig is the only participating defendant in this appeal.

HARBOR APPEALS AND LAW, PLLC

April 22, 2024 - 4:33 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	85901-3
Appellate Court Case Title:	Eight Is Enough, LLC, Respondent v. Cynthia Ohlig, Appellant
Superior Court Case Number:	22-2-00853-7

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