

FILED
COURT OF APPEALS
DIVISION II

2016 FEB 26 PM 1:57

STATE OF WASHINGTON

BY _____
DEPUTY

Court of Appeals No. 48083-2-II

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

MICHAEL L. ROESCH,
Appellant,

v.

CARL BOHM and CANDY BOHM,
Respondents.

BRIEF OF APPELLANT MICHAEL ROESCH

By:

Christopher M. Constantine, WSBA, No. 11650
Of Counsel, Inc., P. S.
Of Attorneys for Appellant Michael L. Roesch
P. O. Box 7125
Tacoma, WA 98417-0125
(253) 752-7850

Kenyon E. Luce, WSBA No. 3081
LUCE & ASSOCIATES, P.S.
Of Attorneys for Appellant, Michael L. Roesch
4505 Pacific Highway East, Suite A
Tacoma, WA 98424
(253) 922-8724

I. TABLE OF CONTENTS

| | | |
|------|---|----|
| I. | TABLE OF CONTENTS | i |
| II. | TABLE OF AUTHORITIES | ii |
| III. | ASSIGNMENTS OF ERROR..... | 1 |
| IV. | ISSUES PERTAINING TO ASSIGNMENTS OF ERROR | 3 |
| V. | STATEMENT OF THE CASE | 4 |
| | A. FACTS..... | 4 |
| | B. PROCEDURAL HISTORY | 5 |
| VI. | ARGUMENT..... | 22 |
| | A. The trial court exceeded its subject matter jurisdiction by admitting into evidence Respondents' exhibits. | 22 |
| | 1. Standard of review..... | 22 |
| | 2. The trial exceeded its jurisdiction by admitting documents from the real estate transactions. | 23 |
| | B. The trial court exceeded its jurisdiction by instructing the jury on Respondents' claim of title to 14712 60 th St. E. | 28 |
| | 1. Standard of Review..... | 28 |
| | 2. The trial court erred in giving Instructions 2 and 11. | 29 |
| | C. The trial court exceeded its subject matter jurisdiction by allowing Respondents to litigate a civil claim against Respondent and his brother in an unlawful detainer..... | 31 |
| | D. The court erred in denying Appellant's motion for judgment pursuant to CR 50 (a)..... | 32 |
| | 1. Standard of review..... | 32 |
| | 2. The court erred in denying Appellant's motion for judgment pursuant to CR 50 (a). | 32 |
| | E. The court erred in denying Appellant's motion for judgment pursuant to CR 50 (b). | 41 |
| | F. The trial court erred in denying Appellant's motion for new trial or reconsideration..... | 42 |
| | G. The court erred in dismissing Appellant's claims against Respondents..... | 43 |
| | H. The trial court erred in awarding attorney fees to Respondents. | 44 |
| | I. Appellant requests attorney fees on appeal. | 44 |
| VII. | CONCLUSION..... | 45 |

II. TABLE OF AUTHORITIES

Cases

| | |
|--|------------|
| <i>224 Westlake, LLC v. Engstom Properties, LLC</i> , 169 Wn. App. 700, 281 P. 3d 693 (2012)..... | 39, 42 |
| <i>Angelo Property Co., LP v. Hafiz</i> , 167 Wn. App. 789, 274 P. 3d 1075, <i>review denied</i> , 175 Wn. 2d 1012 (2012)..... | 22, 25, 26 |
| <i>Ashmore v. Estate of Duff</i> , 165 Wn. 2d 948, 205 P. 3d (2009)..... | 35 |
| <i>Blaney v. International Association of Machinists and Aerospace Workers</i> , <i>Dist. 160</i> , 151 Wn 2d 203, 87 P. 3d 757 (2004)..... | 28 |
| <i>CHG International, Inc. v. Robin Lee, Inc.</i> , 35 Wn. App. 512, 667 P. 2d 1127, <i>review denied</i> , 100 Wn. 2d 1029 (1983)..... | 38 |
| <i>Cooley v. Hollister</i> , 38 Wn. App. 447, 687 P. 2d 230 (1984)..... | 37 |
| <i>Dickerson v. Chadwell, Inc.</i> , 62 Wn. App. 426, 814 P. 2d 687 (1991)..... | 43 |
| <i>Duprey v. Donahoe</i> , 52 Wn. 2d 129, 323 P. 2d 903 (1958)..... | 34 |
| <i>Faust v. Anderson</i> , 167 Wn. 2d 531, 222 P. 3d 1208 (2009)..... | 32 |
| <i>Federal National Mortgage Association v. Ndiaye</i> , 188 Wn. App. 376, 353 P. 3d 644 (2015)..... | 27, 30 |
| <i>First Union Management, Inc., v. Slack</i> , 36 Wn. App. 849, 679 P. 2d 936 (1984)..... | 28 |
| <i>Foisy v. Wyman</i> , 83 Wash.2d 22, 515 P.2d 160 (1973) | 25 |
| <i>Geonerco v. Grand Ridge Properties IV, LLC</i> , 146 Wn. App. 459, 191 P. 3d 76 (2008)..... | 27, 28, 29 |
| <i>Guijosa v. Wal-Mart Stores, Inc.</i> , 144 Wash.2d 907, 32 P.3d 250 (2001) | 32, 33 |
| <i>Hawkins v. Diel</i> , 166 Wn. App. 1, 269 P. 3d 1049 (2011)..... | 44 |
| <i>Heaverlo v. Keico Industries, Inc.</i> , 80 Wn. App. 724, 911 P. 2d 406 (1996)..... | 26 |
| <i>Hue v. Farmboy Spray Co., Inc.</i> , 127 Wn. 2d 67, 896 P. 2d 682 (1995)..... | 28, 29 |

| | |
|---|--------|
| <i>Income Properties Inv. Corp. v. Trefethen,</i> 155 Wash. 493, 284 P. 782 (1930) | 25 |
| <i>Local 112, I.B.E.W Building Association v. Tomlinson Dairy Mart,</i> 30 Wn. App. 139, 632 P. 2d 911 review denied, 96 Wn. 2d 1017 (1991) | 35 |
| <i>Mid-Town Limited Partnership v. Preston,</i> 69 Wn. App. 227, 848 P. 2d 1268 (1993)..... | 35 |
| <i>Munden v. Hazelrigg,</i> 105 Wn. 2d 39, 711 P. 2d 295 (1985)..... | 25 |
| <i>Nadeau v. Beers,</i> 73 Wn. 2d 608, 440 P. 2d 164 (1968)..... | 35 |
| <i>Olpinski v. Clement,</i> 73 Wn. 2d 944, 442 P. 2d 260 (1968)..... | 43 |
| <i>Paetsch v. Spokane Dermatology Clinic,</i> 182 Wn. 2d 842, 348 P. 3d 389 (2015)..... | 32 |
| <i>Partlow v. Mathews,</i> 43 Wn. 2d 398, 261 P. 2d 394 (1953)..... | 37 |
| <i>Pham v. Corbett,</i> 187 Wn. App. 816, 351 P. 3d 214 (2015)..... | 25 |
| <i>Phillips v. Hardwick,</i> 29 Wn. App. 382, 628 P. 2d 506 (1981)..... | 24, 27 |
| <i>Port of Longview v. International Raw Materials, Ltd.,</i> 96 Wn. App. 431, 979 P. 2d 917 (1999)..... | 25 |
| <i>Proctor v. Forsythe,</i> 4 Wn. App. 238, 480 P. 2d 511 (1971)..... | 27, 30 |
| <i>Puget Sound Inv. Grp. v. Bridges,</i> 92 Wn. App. 523, 963 P. 2d 944 (1998)..... | 27, 30 |
| <i>Ross v. Harding,</i> 64 Wn. 2d 231, 391 P. 2d 526 (1964)..... | 38 |
| <i>Savings Bank of Puget Sound v. Mink,</i> 49 Wn. App. 204, 741 P. 2d 1043 (1987)..... | 26 |
| <i>Silverdale Hotel Assocs. v. Lomas & Nettleton Co.,</i> 36 Wash.App. 762, 677 P.2d 773 (1984) | 37 |
| <i>Singleton v. Frost,</i> 108 Wn. 2d 723, 742 P. 2d 1224 (1987) | 44 |
| <i>Skagit State Bank v. Rasmussen,</i> 109 Wn. 2d , 745 P.2d 37 (1987)..... | 36 |
| <i>Skarperud v. Long,</i> 40 Wn. App. 548, 699 P. 2d 786 (1985)..... | 25 |
| <i>Snuffin v. Mayo,</i> 6 Wn. App. 525, 494 P. 2d 497 (1972)..... | 27, 30 |

| | |
|--|--------|
| <i>Spake v. Elder</i> , 1 Wn. App. 116, 459 P. 2d 820 (1969)..... | 34 |
| <i>Sprincin King Street Partners v. Sound Conditioning Club, Inc.</i> , 84 Wn. App. 56, 925 P. 2d 217 (1996)..... | 26 |
| <i>State v. Brown</i> , 98 Wn. App. 586, 965 P. 2d 1102 (1998)..... | 34 |
| <i>Vacova v. Farrell</i> , 62 Wn. App. 386, 814 P. 2d 255 (1991)..... | 35 |
| <i>Willener v. Sweeting</i> , 107 Wn. 2d 388, 730 P. 2d 45 (1986)..... | 39 |
| Statutes | |
| RCW 19.36.010 (2)..... | 49 |
| RCW 4.84.330 | 53, 54 |
| RCW 59.18.380 | 25 |

III. ASSIGNMENTS OF ERROR

1. In a residential unlawful detainer, after dismissing Respondents' counterclaims for lack of subject matter jurisdiction, the trial court exceeded its jurisdiction by admitting at trial evidence Respondents had proposed for their dismissed counterclaims.
2. The trial court, by admitting evidence Respondents had proposed for their dismissed counterclaims, exceeded its subject matter jurisdiction by allowing Respondents to litigate at trial a general civil claim against Appellant's brother in a residential unlawful detainer.
3. The trial court exceeded its subject matter jurisdiction in a residential unlawful detainer by allowing Respondents to litigate at trial their claim of title to the property at issue in this case.
4. The trial court exceeded its subject matter jurisdiction in a residential unlawful detainer by admitting into evidence at trial failed, time-barred purchase and sale agreements and addenda between Respondents and Appellant's brother and between Respondents' parents and Appellant's brother involving parcels of real property other than the property at issue in this case.
5. The trial court erred in denying in part Appellant's motion in limine.

6. The trial court exceeded its jurisdiction by instructing the jury on Respondents' claim of title to 14712 60th St. E.
7. The trial court erred in denying Appellant's motion for judgment pursuant to CR 50 (a).
8. The trial court erred in denying Appellant's motion for judgment pursuant to CR 50 (b).
9. The trial court erred in denying Appellant's motion for new trial or reconsideration.
10. The trial court erred in awarding attorney fees to Respondents.
11. In the event he prevails on appeal in this case, Appellant is entitled to an award of attorney fees incurred on appeal.

IV. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The trial court exceeded its subject matter jurisdiction by admitting at trial evidence Respondents had proposed for their dismissed counterclaims. (Pertains to Assignments of Error Nos. 1-10).
2. The trial court exceeded its subject matter jurisdiction by allowing Respondents to litigate at trial a general civil claim against Appellant's brother in a residential unlawful detainer. (Pertains to Assignments of Error Nos. 1-10).
3. The trial court exceeded its subject matter jurisdiction by allowing Respondents to litigate at trial their claim of title to the property at issue in this case. (Pertains to Assignments of Error Nos. 1-10).
4. The trial court exceeded its subject matter jurisdiction in a residential unlawful detainer by admitting into evidence at trial failed, time-barred purchase and sale agreements and addenda between Respondents and Appellant's brother and between Respondents' parents and Appellant's brother involving parcels of real property other than the property at issue in this case. (Pertains to Assignments of Error Nos. 1-10).
5. The trial court erred in awarding attorney fees to Respondents
6. Appellant is entitled to an award of attorney fees on appeal in the event he prevails. (Pertains to Assignment of Error No. 11).

V. STATEMENT OF THE CASE

A. FACTS

Appellant Michael L. Roesch is the owner of the real property located at 14712 72nd Street East, Sumner, Washington.¹

In October, 2008, Appellant and Respondents executed a lease of Appellant's real property.² The lease term commenced November 1, 2008 and terminated on October 15, 2010.³ In paragraph 4 of the lease, Respondents agreed to pay Appellant monthly rent in the amount of \$802.75.⁴

Respondents entered into possession of Respondents' property in November, 2009.⁵ Respondents failed to pay the rent due under the lease, and on March 5, 2015, Appellant served Respondents with a three-day notice to terminate tenancy, alleging delinquent rent for the months of October 2012 to February, 2015, in the amount of \$22,447.00, late fees for that period totaling \$2,247.56, and attorney fees of \$5,381.10, for a total of \$30,105.66.⁶

¹ CP 1.

² CP 2, 6, 7, 8.

³ CP 6.

⁴ CP 6.

⁵ RP ____.

⁶ CP 2, 10, 11, 12.

Respondents did not thereafter either vacate the property or pay the sums set forth in the three-day notice.⁷

B. PROCEDURAL HISTORY

Appellant filed a complaint for unlawful detainer in this action on April 1, 2015.⁸ Appellant filed a summons on April 1, 2015 and an amended summons on April 15, 2015.⁹ Appellant served Respondent Candy Bohm with summons and complaint on April 13, 2015.¹⁰ Respondents filed an answer on April 17, 2015.¹¹ Appellant filed a motion for order to show cause why a writ of restitution should not issue on May 7, 2015.¹²

Respondents filed an amended answer, affirmative defenses and counterclaims on May 27, 2015.¹³ Respondents' counterclaims alleged Respondent Candy Bohm had been and continues to be the owner and occupant of Appellant's property at 14712 72nd St. East, Sumner, Washington.¹⁴ Respondents alleged claims against Appellant's brother, Fred Roesch, alleging that Fred Roesch had approached Respondents and the parents of Respondents Candy Bohm, Geraldine and Hillard Rudolph,

⁷ CP 2.

⁸ CP 1-12.

⁹ CP 13-14, 16-17.

¹⁰ CP 81.

¹¹ CP 21-24.

¹² CP 29-31.

¹³ CP 35-44.

¹⁴ CP 37.

for the purpose of entering into a complex real estate transaction involving the Rudolphs' property at 16224 60th St. East, Sumner, Washington, Respondents Bohms' property at 16220 60th St. East, and Appellant's property at 14712 72nd St. East in Sumner.¹⁵ Respondents alleged agreements where Fred Roesch would purchase Respondents' property at 16220 60th St. E., satisfying Respondents mortgage thereon that Fred would purchase the Rudolphs' property at 16224 60th St. E., and he would make substantial repairs and remodels to Appellant's property at 14712 72nd St. E., Sumner.¹⁶

Respondents' counterclaim described a proposal by Fred Roesch that Respondents and the Rudolphs would cooperate in a boundary line adjustment which would enlarge the size of the Rudolphs' property and diminish the size of Respondents' property.¹⁷ Respondents alleged that upon receipt of a December 26, 2007 purchase and sale agreement from Fred Roesch for the purchase of the Rudolphs' property and a January 8, 2008 purchase and sale agreement from Appellant for the sale of his property to them, Respondents and the Rudolphs contacted counsel to draft addenda to those agreements to address their concerns.¹⁸

¹⁵ CP 38.

¹⁶ CP 38.

¹⁷ CP 38.

¹⁸ CP 39.

Respondents described the progression of subsequent purchase and sale agreements for the three properties.¹⁹ Respondents alleged Appellant and Fred Roesch assured that all of the financing was to be taken care of so the Respondents and the Rudolphs would be living at the 14712 72nd St. E. property with a repairs and remodels completed and that property would be “free and clear” of outstanding mortgages or other financial encumbrances.²⁰

Respondents alleged claim a claim for breach of contract against Appellant for failing to complete the sale of 14712 72nd St. E. and to provide Respondents and the Rudolphs with a “free and clear” residence, and for failing to ensure the obligations against the 16224 and 16220 properties had been satisfied.²¹ Respondents also alleged a claim for breach of contract against Fred Roesch for failing to satisfy the obligations against Respondents’ and the Rudolphs’ properties and for allegedly failing to complete all of the promised remodeling and repair work on 14712 72nd St. E.²² Respondents also alleged a claim against Respondent and Fred Roesch for equity skimming.²³

¹⁹ CP 39-40.

²⁰ CP 40.

²¹ CP 41.

²² CP 41.

²³ CP 41, 42.

On May 27, 2015, Respondent Candy Bohm filed a motion in opposition to Appellant's motion for order to show cause.²⁴ On May 28, 2015, Respondents' counsel filed a declaration that attached excerpts of several of the purchase and sale agreements and addenda mentioned in Respondents' counterclaim.²⁵ Subsequently, on June 23, 2015, Respondent Candy Bohm filed a supplemental declaration that attached the purchase and sale agreements and related addenda mentioned in Respondents' counterclaim.²⁶ Also on June 23, 2015, Geraldine Rudolph filed a declaration in opposition to Appellant's motion for writ of restitution.²⁷ Mrs. Rudolph's declaration also attached documents referenced in Respondent's counterclaim.²⁸

Appellant's motion for order to show cause was heard on June 24, 2015.²⁹ The commissioner found credibility issues were present.³⁰ The commissioner ruled that he did not have jurisdiction to consider Respondents' counterclaims and therefore denied Appellant's motion.³¹ The commissioner also found possession was undetermined at that point.³²

²⁴ CP 45-48.

²⁵ CP 49-76.

²⁶ CP 110-179.

²⁷ CP 180-211.

²⁸ *Ibid.*

²⁹ VRP 062415, p. 1-14.

³⁰ *Ibid.*, p. 8.

³¹ *Id.*, p. 11.

³² *Id.*, p. 12; CP 273.

The commissioner ordered the parties to proceed to trial on the issue of possession.³³ Respondents filed a jury demand.³⁴

On July 7, 2015, Appellant filed a motion for partial summary judgment to dismiss Respondents' counterclaims for lack of subject matter jurisdiction and because third party claims are not permitted in a residential unlawful detainer.³⁵

On July 9, 2015, Respondents filed a motion to intervene and for joinder of parties and claims.³⁶ Therein, Respondents sought an order allowing Respondent Candy Bohm's mother, Geraldine Rudolph, to intervene as a party defendant and third party plaintiff, and to add Fred Roesch as a third party defendant.³⁷ On July 17, 2015, the trial court denied Respondent's motion to intervene and ordered the hearing on Appellant's motion for partial summary judgment to be heard on the first day of trial, August 17, 2015.³⁸

On July 20, 2015, Appellant filed his ER 904 disclosures which consisted of the following four documents: the declaration of Respondent Candy Bohm in support of motion and declaration for temporary orders in Pierce County Cause No. 13-3-00880-6, the strict reply declaration of

³³ CP 273.

³⁴ CP 275-76

³⁵ CP 280-92.

³⁶ CP 320-23.

³⁷ *Ibid.*

³⁸ CP 411-12.

Candy Bohm in Pierce County Cause No. 13-3-00880-6, the November 1, 2008 rental agreement for the property at 14712 72nd St. E., in Sumner between Appellant and Respondents, and the letter to Fred Roesch from Candy Bohm re improvement as subject rental property.³⁹

Respondents filed their ER 904 disclosures on July 22, 2015.⁴⁰ Respondents listed 29 documents.⁴¹ Included therein were expired purchase and sale agreements and addenda for 14712 72nd St. E., Sumner, expired purchase and sale agreements and addenda for 16220 and 16224 E. 60th E., Sumner, HUD settlement statements for the close of sale of 16224 60th E. in April 2009, a copy of a cashier's check for \$258,389.43, dated April 22, 2009, from Hillard Rudolph to Fred Roesch, a draft of a real estate contract for the property at 16224 E. 60th St. E. from Respondents to Fred Roesch, a reverse mortgage statement to the Rudolphs for 16224 E, copies of checks from Respondent Candy Bohm to Fred Roesch, and a commission disbursement form dated April 10, 2009 for Appellant's realtor, John Troupe.⁴²

On August 3, 2015, Appellant filed objections to Respondents' ER 904 disclosures.⁴³ Appellant objected to 28 of 29 of Respondents'

³⁹ *Ibid.*

⁴⁰ CP 421-25.

⁴¹ *Ibid.*

⁴² *Id.*

⁴³ CP 426-435.

proposed exhibits on the ground of lack of subject matter jurisdiction. “*Irrelevant-ER 402. The court in an unlawful detainer lacks subject matter jurisdiction to consider any matter other than the primary issue of possession of the leased premises, plus incidental issues such as restitution and rent, or damages.*”⁴⁴

On August 10, 2015, Appellant filed his motion in limine.⁴⁵ Therein, Appellant again objected to Respondents proposed exhibits. Regarding Respondents’ proposed Exhibit 7, the January 30, 2008 real estate purchase and sale agreement (REPSA) from Appellant to Respondents regarding 14712 72nd St. E. Appellant objected to that exhibit on the ground that it was irrelevant, having expired as of September 27, 2008, after the extended date for closing passed.⁴⁶ Appellant also argued Respondents’ proposed Exhibit 7 was barred by the six-year statute of limitations.⁴⁷

Appellant objected to Respondents’ Exhibit 9, the October 15, 2008 REPSA from Appellant to Respondents regarding 14712 72nd St. E. as irrelevant, as it failed to close by the stated closing dates.⁴⁸ Appellant objected to Respondents’ proposed Exhibit 10, a purported addendum to

⁴⁴ *Ibid.*

⁴⁵ CP 463-484.

⁴⁶ CP 465.

⁴⁷ CP 466.

⁴⁸ CP 467.

Exhibit 9, as hearsay, as it was undated, unsigned, and unsworn.⁴⁹

Appellant also objected to Respondents' proposed Exhibit 10 as irrelevant, as the court lacked subject matter jurisdiction to consider any matter other than the primary issue of possession of the property, plus incidental issues such as restitution, rent or damages⁵⁰.

Appellant also objected to Respondents' proposed Exhibit 11, a purported addendum to Respondents' proposed Exhibit 7, as hearsay, as it was undated, unsigned and unsworn.

Appellant also objected to Respondents' proposed Exhibit 12, a REPSA dated January 30, 2008, from Fred Roesch to the Rudolchs regarding 16224 60th St. E.⁵¹ Appellant objected to that exhibit on the ground it was irrelevant, as the exhibit did not relate to possession of the property in question in this case, and the trial court lacked subject matter jurisdiction to consider it in a residential unlawful detainer.⁵²

Appellant also objected on the grounds of irrelevancy to Respondents' proposed Exhibit 13, a REPSA dated November 28, 2008 from Fred Roesch to the Rudolchs regarding 16224 60th St. E., as that

⁴⁹ CP 468.

⁵⁰ *Ibid.*

⁵¹ CP 469.

⁵² *Ibid.*

transaction merged into the deed conveying that property to Fred Roesch.⁵³

Appellant also objected to Respondents' proposed Exhibit 14, dated April 17, 2009, and proposed Exhibit 15, HUD-1 settlement statements for the Rudolphs' sale of 16224 60th St. E. to Fred Roesch. Appellant objected to those two proposed exhibits as lacking authentication, hearsay, and as they were not related to possession of the property in question in this case, the court lack subject matter to consider those two exhibits.⁵⁴

Appellant objected to Respondents proposed Exhibit No. 16, a copy of a cashier's check, dated April 22, 2009, from Hillard Rudolph to Fred Roesch in the amount of \$258,389.43, representing the net sale proceeds of 16224 60th St. E.⁵⁵ Appellant object to that exhibit as hearsay, and as it was not related to possession of the property in question in this case, the court lacked subject matter jurisdiction to consider it.⁵⁶

Appellant objected to Respondents' proposed Exhibit 17, a REPSA dated February 7, 2008 from Fred Roesch to Respondents for the purchase of 16220 60th St. E.⁵⁷ Appellant objected to that exhibit on the ground that

⁵³ CP 469.

⁵⁴ CP 470.

⁵⁵ CP 470-71.

⁵⁶ *Ibid.*

⁵⁷ CP 471.

by its terms, the sole remedy to Respondents as the sellers was forfeiture to them of the \$2,000 earnest money given by Fred Roesch in that transaction.⁵⁸ Appellant therefore argued the exhibit was irrelevant and the court lacked subject matter jurisdiction to consider it.⁵⁹

Appellant also attacked as hearsay and irrelevant Respondents' proposed Exhibit 18, an undated, unsigned, and unsworn copy of a real estate contract between Fred Roesch and Respondents for the purchase of 16220 60th St. E.⁶⁰ Appellant object to that exhibit as hearsay, and as the contract was not related to possession of the property in question in this case, the court lacked subject matter jurisdiction to consider it.⁶¹

Appellant objected to Respondents' proposed Exhibit 19, a reverse mortgage statement addressed to the Rudolphs, dated December 31, 2007, regarding their property at 16224 60th St. E.⁶² Appellant objected to the exhibit as hearsay, and as it was not related to possession of the real property in question in this case, the trial court lacked subject matter jurisdiction to consider it.⁶³

⁵⁸ *Ibid.*

⁵⁹ *Id.*

⁶⁰ CP 472.

⁶¹ *Ibid.*

⁶² *Id.*

⁶³ *Id.*

Appellant objected to Respondents' proposed Exhibit 20, a title commitment dated February 27, 2008, from Fidelity National Title addressed to John Troupe regarding 16224 60th St. E.⁶⁴ Appellant objected to that exhibit as hearsay and as it was not related to possession of the real property in question in this case, the trial court lacked subject matter jurisdiction to consider it.⁶⁵

Appellant objected to Respondents' proposed Exhibit 22, a letter dated February 4, 2008 from Respondent Candy Bohm to John Troupe.⁶⁶ Appellant objected to that exhibit as hearsay and as it was not related to possession of the real property in question in this case, the trial court lacked subject matter jurisdiction to consider it.⁶⁷

Appellant objected to Respondents' proposed Exhibits 23 and 24, undated, unsigned and unsworn drafts of an addendum to the REPSA dated January 8, 2008 (EX 7).⁶⁸ Appellant objected to those exhibits as hearsay and as they were not related to possession of the real property in question in this case, the trial court lacked subject matter jurisdiction to consider them.⁶⁹

⁶⁴ CP 473.

⁶⁵ *Ibid.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ CP 473-74.

⁶⁹ *Ibid.*

Appellant objected to Respondents' proposed Exhibits 25 and 26, undated, unsigned and unsworn drafts of an addendum to the REPSA dated December 26, 2007.⁷⁰ Appellant objected to those exhibits as hearsay and as they were not related to possession of the real property in question in this case, the trial court lacked subject matter jurisdiction to consider them.⁷¹

Appellant objected to Respondents' proposed Exhibit 27, a copy of an unsigned letter dated February 20, 2008, purportedly from John Troupe to Countrywide Home Loans regarding 16220 60th St. E.⁷² Appellant objected to that exhibit as hearsay and as it was not related to possession of the real property in question in this case, the trial court lacked subject matter jurisdiction to consider it.⁷³

Appellant objected to Respondents' proposed Exhibit 28, an uncertified copy of a separation agreement in Pierce County Cause No. 13-3-00880-6.⁷⁴ Appellant objected to that exhibit as hearsay.⁷⁵

Appellant objected to Respondents' proposed Exhibit 29, copies of checks written by Respondents to Fred Roesch in 2009, 2010 and 2011.⁷⁶ Appellant objected to that exhibit as irrelevant.⁷⁷

⁷⁰ CP 474.

⁷¹ *Ibid.*

⁷² CP 474-75.

⁷³ *Ibid.*

⁷⁴ CP 475.

⁷⁵ *Ibid.*

Appellant's motion for summary judgment was heard on August 17, 2015, the morning of trial.⁷⁸ The court dismissed Respondents' counterclaims.⁷⁹

Regarding Appellant's motion in limine, the court inquired whether Respondents would be willing to decline to offer some of their exhibits.⁸⁰ In response thereto, Respondents identified Exhibits 6, 7, 9, 13, 14, 16, 17, 28, 29, 30, 36, 37, and 38 as those they intended to rely upon at trial.⁸¹ The court reserved ruling on Appellant's objection to Respondents' exhibits.⁸² The court announced it would allow some of Respondents' exhibits to "*allow for a framework to be established.*"⁸³ The court concluded that would require consideration of some RESPAs. "*I think that means you are going to be stuck with some Purchase and Sale Agreements....*"⁸⁴

Appellant argued that any consideration of the properties other than 14712 72nd St. E. would exceed the court's jurisdiction.⁸⁵ Appellant also argued consideration of the other transactions would contradict the

⁷⁶ CP 475.

⁷⁷ *Ibid.*

⁷⁸ VRP I, p. 23-84.

⁷⁹ VRP I, p. 82-84; CP 598-600.

⁸⁰ VRP

⁸¹ VRP I, p. 84-85.

⁸² VRP I, p. 86.

⁸³ VRP I, p. 92.

⁸⁴ VRP I, p. 93.

⁸⁵ VRP I, p. 76.

court's order on summary judgment and would present a real danger of confusing the jury.⁸⁶

The court voiced its opinion that the actions of Fred Roesch outside of the lease in question were irrelevant. “...*We are dealing with Michael Roesch and a lease agreement that he had with Bohm, and so whatever Fred Roesch did outside of that agreement it seems to me to be irrelevant....*”⁸⁷

At trial, the court admitted the following exhibits other than the lease in question:

| Exhibit # | Description | Signer | Report |
|-----------|--|-----------------------------|-----------------|
| 7 | REPSA 013008 Michael Roesch to Bohms 14712 72 nd St. E. | Michael Roesch | Vol. II, p. 186 |
| 8 | Candy Bohm letter to Fred Roesch 010708 re: work to be done on 14712 72 nd St. E. | Candy Bohm | Vol. III p. 379 |
| 9 | REPSA 101508 Michael Roesch to Bohms 14712 72 nd St. E. | Michael Roesch | Vol. II, p. 145 |
| 10 | Addendum to REPSA dated 101508 between Fred Roesch & Bohms re: 14712 72 nd St. E. & 16220 & 16224 60 th St. E. | Agent signed only | Vol. II, p. 223 |
| 12 | REPSA 013008 Rudolphs to Fred Roesch re 16224 60 th St. E. | Fred Roesch | Vol. II, p. 200 |
| 13 | REPSA 112908 Rudolphs to Fred Roesch re 16224 60 th St. E. | Fred Roesch | Vol. II, p. 201 |
| 14 | HUD-1 112908 Rudolphs to Fred Roesch re 16224 60 th St. E. \$258,389.43 | Hillard & Geraldine Rudolph | Vol. II, p. 204 |

⁸⁶ VRP I, p. 90.

⁸⁷ VRP I, p. 107.

| | | | |
|----|--|-------------------------------------|-----------------|
| 16 | Cashier's check for \$258,389.43 Hillard Rudolph to Fred Roesch | | Vol. II, p. 206 |
| 17 | REPSA /Addenda 020708 Bohms to Fred Roesch re 16220 60 th St. E | Fred Roesch | Vol. II, p. 207 |
| 22 | Candy Bohm letter to John Troupe 020408 w/Addenda prepared by K. Snyder | Candy Bohm | Vol. III p. 367 |
| 23 | Addendum No. 1 to 010808 REPSA Bohms, Rudolphs Michael Roesch & Fred Roesch (unsigned) | unsigned | Vol. III p. 368 |
| 24 | Addendum No. 1 to 010808 REPSA Bohms, Rudolphs Michael Roesch & Fred Roesch (unsigned) w/edits | unsigned | Vol. III p. 369 |
| 25 | Addendum No. 1 to 122607 REPSA Bohms, Rudolphs Michael Roesch & Fred Roesch (unsigned) | unsigned | Vol. III p. 368 |
| 26 | Addendum No. 1 to 122607 REPSA Bohms, Rudolphs Michael Roesch & Fred Roesch (unsigned) w/edits | unsigned | Vol. III p. 369 |
| 29 | Bohms' Chase checks to Fred Roesch November 2009 to February 2012 | Candy Bohm | Vol. III p. 403 |
| 37 | 082608 Addendum to REPSA 013008 Fred Roesch & Bohms re 14712 72 nd St., 16220 & 16224 60 th St. E. | Fred Roesch initialed; Agent signed | Vol. II, p. 215 |
| 38 | Amortization Schedule prepared by John Troupe for Bohms 6 percent interest, \$789.87/ month | | Vol. II, p. 218 |
| 53 | Septic System Invoices & Report (Flohawks) | | Vol. III p. 411 |
| 54 | Heating Systems Invoices & Service Contract Bohms and Dick's Heating & AC | | Vol. III p. 412 |
| 59 | Declaration of Carl J. Bohm 040313 Pierce Co. S. Ct. # 13-3- | Carl Bohm | |

| | | | |
|----|--|--|--------------------|
| | 00880-6 | | |
| 60 | First Choice Bank Statement for H. Rudolph and G. Rudolph, Statement Period 040809 to 050709 | | Vol. III p. 334-35 |

Trial in this action commenced on August 18, 2015.⁸⁸ Appellant renewed at trial his objections to Respondents' Exhibits 7, 10, 13, 14, 16, 17, 29, 37, 38, 53, 59, and 60.⁸⁹

Appellant objected to the inclusion in the court's instructions to the jury of any reference to the October 15, 2008 RESPA in Respondents' proposed Instruction 19, due to the limitations on the court's jurisdiction in unlawful detainers.⁹⁰ The court overruled Appellant's objection and included in the court's Instruction 2 paragraphs 2 and 3 of Respondents' proposed Instruction 19.⁹¹

The court agreed to give as its Instruction No. 11 Appellant's proposed Instruction 10 (cited).⁹² The court modified Appellant's proposed instruction by including language regarding Fred Roesch's alleged obligation to pay off the mortgage on the 14712 72nd St. E.

⁸⁸ VRP II, p. 137

⁸⁹ VRP II, p. 186 (EX7), VRP II, p. 223 (EX 10), VRP II, p. 201, (EX 13), VRP II p. 204 (EX 14), VRP II p. 206 (EX 16), VRP II p. 207 (EX 17), VRP III, p. 402-03 (EX 29), VRP II p. 215 (EX 37), VRP II p. 218 (EX 38), VRP III, p. 411 (EX 53), VRP II p. 290 (EX 59), VRP III, p. 334-35 (EX 60).

⁹⁰ RP IV, p. 476.

⁹¹ RP IV, p. 477; CP 970.

⁹² RP IV, p. p. 486.

property and provide for Appellant to transfer title to that property to Respondents.⁹³

The trial court sent the case to the jury with a special verdict form.⁹⁴ On August 21, 2015, the jury returned the verdict with a “yes” answer to the following question: “*Are Defendants Carl and Candy Bohm excused from making rental payments on the Lease?*”⁹⁵

On August 24, 2015, Respondents filed a motion for award of attorney fees and costs.⁹⁶

On August 28, 2015, the court entered an Order on Jury Verdict.⁹⁷ Therein, the court dismissed Appellant’s claims in this case against Respondents.⁹⁸

On September 11, 2015, the court entered Findings of Fact, Conclusions of Law Re: Attorney Fees and a Judgment on Attorney Fees and Costs.⁹⁹ Therein, the court awarded Respondents attorney fees of \$41, 148.00, and costs of \$1,010.53.¹⁰⁰

⁹³ CP 979-80.

⁹⁴ RP IV, p. 546-47; CP 989-91.

⁹⁵ RP IV, p. 551; CP 989.

⁹⁶ CP 1000-05.

⁹⁷ CP 1055-56.

⁹⁸ CP 1056.

⁹⁹ CP 1093-97; CP 1098-99.

¹⁰⁰ CP 1098.

On September 14, 2015, Appellant filed his motion for reconsideration.¹⁰¹ Therein, Appellant argued the court had exceeded its subject matter jurisdiction in an unlawful detainer action to admit Respondents' exhibits, thereby turning what should have been a limited summary proceeding into a four-day ordeal of a jury trial.¹⁰² The court denied Appellant's motion.¹⁰³

On September 25, 2015, Appellant filed a Notice of Appeal from the Verdict, Order on Verdict, Judgment and Order Denying Plaintiff's Motions for New Trial or Reconsideration.¹⁰⁴

VI. ARGUMENT

A. The trial court exceeded its subject matter jurisdiction by admitting into evidence Respondents' exhibits.

1. Standard of review.

Whether a trial court had subject matter jurisdiction over a controversy is a question of law, which is reviewed de novo. *Angelo Property Co., LP v. Hafiz*, 167 Wn. App. 789, 808, 274 P. 3d 1075, review denied, 175 Wn. 2d 1012 (2012). Lack of subject matter jurisdiction renders the court powerless to hear the merits of the case. *Ibid.* A

¹⁰¹ CP 1139-1047.

¹⁰² CP 1142-45.

¹⁰³ CP 1219-20.

¹⁰⁴ CP 1217-1218.

judgment entered by a court lacking subject matter jurisdiction is void; and a party may challenge such judgment at any time. *Id.*

2. The trial exceeded its jurisdiction by admitting documents from the real estate transactions.

In this case, the trial court recognized it did not have jurisdiction to hear Respondents' counterclaims. "*I don't have any jurisdiction to deal with the counterclaims that they might bring.*"¹⁰⁵ The trial court therefore granted Appellant's motion for summary judgment dismissing Respondents' counterclaims.¹⁰⁶

Despite having dismissed Respondents' counterclaims for lack of subject matter jurisdiction, the court felt compelled to allow Respondents to introduce evidence, including documents from the real estate transactions between Fred Roesch and Respondents and Fred Roesch and the Rudolphs, to explain their Respondents failure to pay rent to Appellant as required by the lease in question:

I know that I ruled they are not going to be able to present counterclaims, and that's exactly what I intended to do. I don't intend to foreclose them from offering up some rationale for why they stopped making payments on the property And you know, I think that means you are going to be stuck with some Purchase and Sale Agreements that include your lease, in addition to

¹⁰⁵ VRP I, p. 82.

¹⁰⁶ VRP I p. 83; CP 598-600.

whatever is wrapped around the property on
60th.¹⁰⁷

The purchase and sale agreements referred to by the court were some of the same documents relied upon by Respondents in their response to Appellant's motion for summary judgment. In their response to summary judgment, Respondents relied upon the January 30, 2008 and October 15, 2008 RESPAs and their addenda between Appellant and Respondents for the sale of 14712 72nd St. E.¹⁰⁸ The trial court admitted January 30, 2008 and October 15, 2008 RESPAs at trial.¹⁰⁹ The court thereby undermined its own order on summary judgment.

RCW 59.18.380 allows Respondents to assert "*any legal or equitable defense or set-off arising out of the tenancy...*" The test for what is allowed under that statute is set forth in *Phillips v. Hardwick*, 29 Wn. App. 382, 385-86, 628 P. 2d 506 (1981):

Unlawful detainer actions under RCW 59.18 are special statutory proceedings with the limited purpose of hastening recovery of possession of rental property, and the superior court's jurisdiction in such action is limited to the primary issue of the right of possession, plus incidental issues such as restitution and rent, or damages. Any issue not incident to the right of possession within the specific terms of RCW 59.18 must be raised in an ordinary civil action.

¹⁰⁷ VRP I, p. 93.

¹⁰⁸ CP 445, 449; CP 146-154; CP 165-74; CP 175-77.

¹⁰⁹ EX 7, 9; VRP II, p. 186, 223

See also, Angelo Property Co., LP v. Hafiz, 167 Wn. App. 811 n. 38; *Munden v. Hazelrigg*, 105 Wn. 2d 39, 45, 711 P. 2d 295 (1985).

Washington courts have recognized only a very narrow range of matter that will excuse a tenant's failure to pay rent. As noted in *Munden*, defenses that excuse a tenant's breach include breach of warranty of habitability and breach of covenant of quiet enjoyment. 105 Wn. 2d 45 (citing *Foisy v. Wyman*, 83 Wash.2d 22, 515 P.2d 160 (1973), and *Income Properties Inv. Corp. v. Trefethen*, 155 Wash. 493, 284 P. 782 (1930)). *See also, Pham v. Corbett*, 187 Wn. App. 816, 826, 351 P. 3d 214 (2015); *Port of Longview v. International Raw Materials, Ltd.*, 96 Wn. App. 431, 444, 979 P. 2d 917 (1999) (Commercial tenant of a government landlord may, in some circumstances, assert its right to free speech as an equitable affirmative defense in an unlawful detainer action.).

In contrast, numerous Washington cases reveal how narrow the exception for facts which excuse a tenant's breach is. *See Munden*, 105 Wn. 2d 45 (Tenants' counterclaim based on damage to their automobile from a rockslide was not based on facts which excuse the tenants' breach.); *Income Properties Investment Corp. v. Trefethen*, 153 Wash. 493, 498, 284 P. 782 (1930) (A lessor's covenant to repair is independent of the lessee's covenant to pay rent.); *Skarperud v. Long*, 40 Wn. App. 548, 551, 699 P. 2d 786 (1985) ("[A] covenant to pay rent is independent

of any covenant to supply water to the leased or adjacent premises or any agreement to supply labor or materials....”); *Heaverlo v. Keico Industries, Inc.*, 80 Wn. App. 724, 733, 911 P. 2d 406 (1996) (In an unlawful detainer action, lessor’s alleged misrepresentation as to suitability of land for agricultural development does not excuse lessee’s nonpayment of rent on property already developed, occupied and farmed.); *Savings Bank of Puget Sound v. Mink*, 49 Wn. App. 204, 209, 741 P. 2d 1043 (1987) (“*Mink's affirmative defenses and counterclaims include allegations of breach of Regulation Z and the Truth in Lending Act, intentional infliction of emotional distress, defamation, slander of title, breach of contract, abuse of process, outrage, fraud, malicious prosecution, usury and unjust enrichment. These do not directly relate to the “question of possession” and may not be raised in an unlawful detainer action.*”); *Sprincin King Street Partners v. Sound Conditioning Club, Inc.*, 84 Wn. App. 56, 66-67, 925 P. 2d 217 (1996) (Commercial tenant’s counterclaim for lessor’s failure to keep hallways and common areas clean could not be asserted in an unlawful detainer.); (*Angelo Property Co., LP v. Hafiz*, 167 Wn. App. 815-16 (Trial court in unlawful detainer proceeding lacked jurisdiction over tenant’s counterclaims for constructive eviction and interference with quiet enjoyment where the tenant’s counterclaims did not excuse tenant’s

breaches of those lease covenants relied upon by lessor to support unlawful detainer).

The limited jurisdiction in an unlawful detainer does not permit litigation of questions of title. *Federal National Mortgage Association v. Ndiaye*, 188 Wn. App. 376, 353 P. 3d 644, 648 (2015); *Puget Sound Inv. Grp. v. Bridges*, 92 Wn. App. 523, 526, 963 P. 2d 944 (1998); *Snuffin v. Mayo*, 6 Wn. App. 525, 528, 494 P. 2d 497 (1972); *Proctor v. Forsythe*, 4 Wn. App. 238, 241, 480 P. 2d 511 (1971). The trial court admitted Exhibits 7, 9, 10, 12, 13, 17, 23, 24, 25, 26, and 37. Each of those exhibits was a REPSA or addenda. While purchase and sale agreements are not documents of title, they are promises to convey title in the future. *Geonerco v. Grand Ridge Properties IV, LLC*, 146 Wn. App. 459, 465, 191 P. 3d 76 (2008).

By admitting numerous title-related documents, the court allowed Respondents to litigate title to the property at 14712 60th St. E. In contrast, the court's jurisdiction in unlawful detainer is limited to issues of possession. *Phillips v. Hardwick*, *supra*. The court therefore exceeded its limited jurisdiction in an unlawful detainer by admitting Exhibits 7, 9, 10, 12, 13, 17, 23, 24, 25, 26, and 37.

The court's error in admitting the purchase and sale agreements and related addenda permeated the entire proceedings. Armed with those exhibits, Respondents proceeded to demonize Fred Roesch in front of the jury. In closing argument, Respondents' counsel argued "[i]t is Fred Roesch that's behind orchestrating this whole thing."¹¹⁰

The parties cannot waive lack of subject matter jurisdiction. *First Union Management, Inc., v. Slack*, 36 Wn. App. 849, 854, 679 P. 2d 936 (1984). Therefore, the Court lacked subject matter jurisdiction to admit Respondents' exhibits, regardless of whether or not Appellant objected to those exhibits. Appellant did, however, object to most of Respondents' exhibits, both in Appellant's motion in limine and at trial.

B. The trial court exceeded its jurisdiction by instructing the jury on Respondents' claim of title to 14712 60th St. E.

1. Standard of Review.

Legal errors in jury instructions are reviewed de novo. *Blaney v. International Association of Machinists and Aerospace Workers, Dist. 160*, 151 Wn 2d 203, 210, 87 P. 3d 757 (2004). An instruction's erroneous statement of the applicable law is reversible error where it prejudices a party. *Hue v. Farmboy Spray Co., Inc.*, 127 Wn. 2d 67, 92, 896 P. 2d 682 (1995).

¹¹⁰ VRP IV, p. 541.

2. The trial court erred in giving Instructions 2 and 11.

Error is assigned to excerpts of paragraphs 2 and 3 of Instruction 2:

(2) ...The Defendants also assert that the Plaintiff has failed to meet his obligations owing to them under the terms of a Real Estate Purchase and Sale Agreement of which the Rental Agreement was a part.

(3) The Defendant Cathy Bohm has also asserted that they entered into agreements with the Plaintiff's brother, Mr. Fred Roesch and that Fred Roesch has breached his obligations owing to the Defendant, Mrs. Bohm in failing to pay off the mortgage obligations owing against the subject property and then transferring to Candy Bohm title to the subject property, excusing her from making any further payments to either of them and entitling her to the continued right of possession of the property at 14712 72nd St. E., Sumner, WA....^{111 112}

Paragraphs 2 and 3 of Instruction 2 were incorporated by the court from Respondents' proposed Instruction 19.¹¹³ Appellant objected to paragraphs 2 and 3 of Respondents' proposed Instruction 19.¹¹⁴ Appellant objected to those paragraphs on the ground they exceeded the court's subject matter jurisdiction in unlawful detainer.¹¹⁵ The court stated it would give paragraph 2, but would delete paragraph 3.¹¹⁶ The court

¹¹¹ CP 970.

¹¹² The court's reading of the instructions to the jury was not reported. VRP IV, p. 514.

¹¹³ CP 921-22.

¹¹⁴ VRP IV, p. 476.

¹¹⁵ *Ibid.*

¹¹⁶ VRP IV, p. 476-77.

however, changed its mind and included both paragraphs 2 and 3 in Instruction 2.

The effect of including paragraphs 2 and 3 in Instruction 2 was to permit Respondents to argue to the jury title issues regarding the property at 14712 72nd St. E. The court therefore once again exceeded its subject matter jurisdiction in unlawful detainer, in violation of *Federal National Mortgage Association v. Ndiaye*, *Puget Sound Inv. Grp. v. Bridges*, *Snuffin v. Mayo*, and *Proctor v. Forsythe*.

Appellant also assigns error to the following paragraph in the court's Instruction 11:

(2) That the terms of the Agreements included an obligation on the part of Fred Roesch to pay off the mortgage obligations on the 14712 72nd St. E., Sumner property and provide for Michael Roesch to transfer title to this property to the Bohms.¹¹⁷

By allowing such language into Instruction 11, the court once again permitted Respondents to argue title questions to the jury, thereby exceeding its subject matter jurisdiction, in violation of *Federal National Mortgage Association v. Ndiaye*, *Puget Sound Inv. Grp. v. Bridges*, *Snuffin v. Mayo*, and *Proctor v. Forsythe*.

¹¹⁷ CP 980.

The prejudice to Appellant from Instructions 2 and 11 is apparent. By including the offending paragraphs in those instructions, the Court allowed the jury to consider issues over which the court had no jurisdiction. Appellant should not have been forced to defend against those paragraphs.

C. The trial court exceeded its subject matter jurisdiction by allowing Respondents to litigate a civil claim against Respondent and his brother in an unlawful detainer.

In *Angelo Property Co.*, this Court held that the trial court lacked subject matter jurisdiction to consider the tenant's constructive eviction counterclaim while exercising its limited-in-scope unlawful detainer jurisdiction, as the tenant's counterclaim for constructive eviction or interference with quiet enjoyment could not have excused the tenant's breaches of 13 covenants in the lease. 167 Wn. App. 815-16.

In much the same manner, the court exceeded its subject matter jurisdiction in this case by admitting Exhibits 7, 9, 10, 12, 13, 17, 23, 24, 25, 26, and 37 and by giving Instructions 2 and 11, thus permitting Respondents to pursue a civil claim against both Appellant and Fred Roesch. Therefore, as in *Angelo Property Co.*, the judgment against Appellant in this case must be vacated.

D. The court erred in denying Appellant’s motion for judgment pursuant to CR 50 (a).

1. Standard of review.

An order denying a motion for judgment as a matter of law is reviewed *de novo*. *Paetsch v. Spokane Dermatology Clinic*, 182 Wn. 2d 842, 848, 348 P. 3d 389 (2015); *Faust v. Anderson*, 167 Wn. 2d 531, 539 n. 2, 222 P. 3d 1208 (2009). Judgment as a matter of law is appropriate only when no competent and substantial evidence exists to support a verdict. *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wash.2d 907, 915, 32 P.3d 250 (2001).

2. The court erred in denying Appellant’s motion for judgment pursuant to CR 50 (a).

Error is assigned to the trial court’s order denying Appellant’s Motion for Judgment under CR 50 (a).¹¹⁸ The January 30, 2008 REPSA¹¹⁹, and all addenda thereto, and the unsigned addendum to the October 15, 2008 REPSA¹²⁰, were superseded by the October 15, 2008 RESPA¹²¹. Paragraph 18 of the October 15, 2008 REPSA recites that Northwest Multiple Listing Service Form 21 is an addenda thereto. Form 21 provides, in pertinent part, at paragraph N that “[t]his Agreement constitutes the entire understanding between the parties and supersedes

¹¹⁸ RP III, p. 464.

¹¹⁹ EX 7.

¹²⁰ EX 10.

¹²¹ EX 9.

all prior or contemporaneous understandings and representations...

(Emphasis added).”¹²² Thus, everything in the January 30, 2008 REPSA, including all addenda thereto, was superseded by the October 15, 2008 REPSA. That includes, specifically, the Form 34, dated August 4, 2008, attached to the January 30, 2008 REPSA.¹²³

Paragraph N of Form 21 supersedes not only prior understandings and representations, but also all contemporaneous understandings and representations. Further Paragraph N provides that “[n]o *modification of this Agreement shall be effective unless agreed in writing and signed by Buyer and Seller.*” Thus, Paragraph N supersedes the Form 34 signed by realtor John Troupe, but neither initialed nor signed by Appellant¹²⁴.

Paragraph N of form 21 removes all factual support for Respondents’ argument that Fred Roesch breached the October 15, 2008 addendum to the October 15, 2008 RESPA concerning the 16220 and 16224 properties by failing to make mortgage payments on the 16220 property.

The October 15, 2008 REPSA has terminated. Paragraph 12 of the October 15, 2008 REPSA provides a closing date of “*10/15/2010 ... Upon*

¹²² *Ibid.*

¹²³ EX 7.

¹²⁴ EX 10.

resale or refinance of 16224-60th St. East.”¹²⁵ When the closing date is not definitely fixed in the contract, a reasonable time after acceptance will be implied. *Spake v. Elder*, 1 Wn. App. 116, 123, 459 P. 2d 820 (1969); *Duprey v. Donahoe*, 52 Wn. 2d 129, 135, 323 P. 2d 903 (1958). By the time of trial in this case in August, 2015, a reasonable time for closing of that transaction had passed. *State v. Brown*, 98 Wn. App. 586, 603-04, 965 P. 2d 1102 (1998) (“*Clearly, a reasonable time for performance had passed when the Government sued for breach in 1996, five years after the parties entered the agreement in 1991.*”).

Respondents did not establish compliance with all conditions precedent to the October 15, 2008 REPSA. Respondents provided no evidence they complied with Form 22A of the October 15, 2008 REPSA, as Candy Bohm admitted that she never applied for the required loan.¹²⁶ Respondents’ obligation to apply for that loan is corroborated by paragraph 6 of the October 15, 2008 Addendum, which provided Respondents were to have a lien in the amount of \$317,431, the exact amount of the loan Respondents were required to obtain for 14712 72nd St. E.¹²⁷

¹²⁵ EX 9.

¹²⁶ EP III, p. 414.

¹²⁷ EX 10; RP III, p. 453.

Candy Bohm repeatedly asserted she was not required to apply for the loan, as payment for the mortgages on 14712 72nd St. E. was to come from Fred Roesch.¹²⁸ Candy Bohm's position on the loan was initially supported by Paragraph D of Addendum 1 to the January 30, 2008 REPSA.¹²⁹ Candy had taken that REPSA to her attorney to review and prepare addenda.¹³⁰ Closing of the January 30, 2008 REPSA was extended to September 26, 2008.¹³¹

The January 30, 2008 REPSA did not close by that date.¹³² The January 30, 2008 REPSA and all of its addenda expired on September 26, 2008. *Ashmore v. Estate of Duff*, 165 Wn. 2d 948, 952, 205 P. 3d 1111 (2009); *Mid-Town Limited Partnership v. Preston*, 69 Wn. App. 227, 235, 848 P. 2d 1268 (1993); *Vacova v. Farrell*, 62 Wn. App. 386, 407, 814 P. 2d 255 (1991); *Local 112, I.B.E.W Building Association v. Tomlinson Dairy Mart*, 30 Wn. App. 139, 142-43, 632 P. 2d 911, *review denied*, 96 Wn. 2d 1017 (1991); *Nadeau v. Beers*, 73 Wn. 2d 608, 610, 440 P. 2d 164 (1968).

¹²⁸ RP III, p. 441.

¹²⁹ EX 7.

¹³⁰ RP III, p. 366, 414-15.

¹³¹ EX 7.

¹³² RP III, p. 381-82.

The October 15, 2008 REPSA differed substantially from the January 30, 2008 REPSA, most notably in the requirement of Paragraph 1 of Form 22A that Respondents apply for a loan in the amount of \$317,431.¹³³ Respondents did not take the October 15, 2008 REPSA back to their attorney to review it.¹³⁴ Candy Bohm testified “*We were thinking we were signing the same documents.*”¹³⁵ Respondents are bound by their signatures on the October 15, 2008 REPSA. *Skagit State Bank v. Rasmussen*, 109 Wn. 2d 177, 745 P.2d 37 (1987).

At trial, Respondents’ counsel elicited testimony from their realtor, John Troupe,¹³⁶ that Respondents were not obligated to obtain a loan for \$317,431.00 for the purchase of 14712 72nd St. E., as the money was to be coming from Fred Roesch in accordance with Exhibit 10.¹³⁷ Even if the Court can overlook the inadmissible character of Exhibit 10, the fact remains that Exhibit 10 is neither initialed nor signed by either party. To the extent that Exhibit 10 was intended to modify the provisions of the October 15, 2008 REPSA, under paragraph n. of Form 21 attached to that REPSA, “[n]o modification of this Agreement shall be effective unless

¹³³ EX 9.

¹³⁴ RP III, p. 431.

¹³⁵ RP III, p. 384.

¹³⁶ John Troupe served as realtor for both parties in the October 15, 2008 REPSA. See EX 9, p. 1 ¶ 17.

¹³⁷ RP II, p. 256.

agreed to in writing and signed by Buyer and Seller.”¹³⁸ Nor can it be overlooked that Paragraph 6 of Exhibit 10 provided the Sellers (Respondents) with a second lien in the amount of \$317,431.00 on 16224 60th St. E., the same amount of the loan required from Respondents on 14712 72nd St. E.¹³⁹

To the extent that the testimony of John Troupe contradicts the language of Paragraph 1 of Form 22 attached to the October 15, 2008 REPSA, it must be disregarded as violating the parol evidence rule. Note *Cooley v. Hollister*, 38 Wn. App. 447, 452, 687 P. 2d 230 (1984):

In Washington, it is settled law that the parol evidence rule is not a device for exclusion, but a rule of substantive law. *Silverdale Hotel Assocs. v. Lomas & Nettleton Co.*, 36 Wash.App. 762, 770 n. 5, 677 P.2d 773 (1984) (citing *Becker v. Lagerquist Bros., Inc.*, 55 Wash.2d 425, 348 P.2d 423 (1960)). Therefore, regardless of whether, as here, it is admitted without objection, if the rule applies, the evidence is not competent and may not be considered as having probative value. *Fleetham v. Schneekloth*, 52 Wash.2d 176, 179, 324 P.2d 429 (1958).

Obtaining the loan was a condition precedent to enforcement of the REPSA. *Partlow v. Mathews*, 43 Wn. 2d 398, 406, 261 P. 2d 394 (1953) (“*A condition precedent is such as must happen or be performed before a*

¹³⁸ EX 9.

¹³⁹ EX 10.

right can accrue to enforce an obligation dependent upon the happening or performance thereof against another in favor of one claiming such right.”). Words that express the idea that performance is dependent upon some other event will create a condition. *Ross v. Harding*, 64 Wn. 2d 231, 236, 391 P. 2d 526 (1964). Form 22A provides, in pertinent part, that “[t]his Agreement is contingent on Buyer obtaining the following loan or loans to purchase the Property...”¹⁴⁰ Therefore, Respondents’ compliance with the loan obligation in Form 22 was a condition precedent to Appellant’s performance under the REPSA.

Respondents’ failure to satisfy the condition of obtaining a loan discharged any further duty owed by Appellant under the October 15, 2008 REPSA. Note *CHG International, Inc. v. Robin Lee, Inc.*, 35 Wn. App. 512, 515, 667 P. 2d 1127, *review denied*, 100 Wn. 2d 1029 (1983):

...A condition must be exactly fulfilled or no liability arises on the promise which it qualifies. 5 Williston, Contracts § 675, p. 184 (3d ed. 1961). Since the condition precedent to the contract was neither performed nor excused within the time required, both parties’ contractual duties were discharged. 6 Corbin, Contracts § 1252, p. 2 (1962). Cf. *Local 112, IBEW Bldg. Ass’n v. Tomlinson Dari-Mart, Inc.*, supra at 142, 632 P.2d 911. The trial court did not err in so holding.

¹⁴⁰ EX 9.

Respondents' failure to satisfy the financing condition precedent excuses any duty by Appellant to close the sale of the 72nd St. property. *See Willener v. Sweeting*, 107 Wn. 2d 388, 730 P. 2d 45 (1986); 224 *Westlake, LLC v. Engstom Properties, LLC*, 169 Wn. App. 700, 707-08, 281 P. 3d 693 (2012).

The RESPA dated February 7, 2008, for the property at 16220 60th St. East involving Respondents and Fred Roesch¹⁴¹ provided no defense to Appellant's claim for unlawful detainer. That REPSA provided in Paragraph 8 for forfeiture of earnest money.¹⁴² Appellant provided a \$2,000.00 earnest money promissory note, dated February 16, 2008.¹⁴³ Under the RESPA's General Term P, forfeiture to Respondents of that portion of the earnest money that does not exceed five percent of the purchase price was Respondents' sole and exclusive remedy any failure by Fred Roesch to complete purchase of the property.¹⁴⁴

Defendants failed to provide any evidence of any oral or written agreement by Fred Roesch use the \$258,389.43¹⁴⁵ he received from the Rudolphs in April, 2009. The only such written agreement was found in Paragraph D of the Addendum to the January 30, 2008 REPSA for 14712

¹⁴¹ EX 17.

¹⁴² *Ibid.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ EX 16.

72nd St. E., which expired on September 26, 2008.¹⁴⁶ No mention of an agreement by Fred Roesch to use the \$258,389.43 to pay Michael Roesch's mortgages on the 14712 72nd St. E. property can be found in either the October 15, 2008 Addendum,¹⁴⁷ the January 30, 2008 Addendum,¹⁴⁸ or the November 29, 2008 RESPA.¹⁴⁹ No mention of such an agreement can be found in the HUD-1 for the close of sale on the 16224 60th St. E. property.¹⁵⁰ Absent such an oral or written agreement to so use those funds, Respondents had no claim against Fred Roesch for failure to do so. Note RCW 19.36.010 (2):

In the following cases, specified in this section, any agreement, contract, and promise shall be void, unless such agreement, contract, or promise, or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith, or by some person thereunto by him or her lawfully authorized, that is to say:... (2) every special promise to answer for the debt, default, or misdoings of another person

¹⁴⁶ EX 7.

¹⁴⁷ EX 10.

¹⁴⁸ EX 27.

¹⁴⁹ EX 13.

¹⁵⁰ EX 14.

In light of the foregoing, there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for Respondents on their affirmative defense. The trial court therefore erred in denying Appellant's motion under CR 50 (a).

E. The court erred in denying Appellant's motion for judgment pursuant to CR 50 (b).

Error is assigned to the court's Order Denying Plaintiff's Motions for New Trial or Reconsideration.¹⁵¹ Appellant incorporates herein the arguments and authorities in Paragraph VI D above.

The court's error in admitting the purchase and sale agreements and related addenda is once again revealed in the court's denial of Appellant's motion for judgment:

Purchase and sale agreements that provided the basis for your lease to be in existence in the first place. Purchase and sale agreements that provided a basis for why Candy Bohm intended to be in that home, as opposed to her own home. Purchase and sale agreements that provided a basis for why Candy Bohm with some rationale for why she should pay her rent up to some point. Purchase and sale agreements that gave the jury a basis, or not, for determining whether or not there was a reason to excuse Candy Bohm from making payment under the lease....I'm going to deny your motion.¹⁵²

¹⁵¹CP 1200.

¹⁵²RP 092515, p. 4-5.

F. The trial court erred in denying Appellant's motion for new trial or reconsideration.

Error is assigned to the court's Order Denying Plaintiff's Motion for New Trial or Reconsideration.¹⁵³ In his motion, Appellant argued the trial court erred in admitting Respondents' exhibits.¹⁵⁴ Appellant incorporates herein the arguments and authorities in Paragraph VI A above.

Appellant argued the irregularity in proceedings resulting from the Court's error in admitting Respondents' exhibits also caused the jury to err in denying Appellant any damages.¹⁵⁵ A new trial is therefore required under CR 59 (a) (6) to correct the jury's failure to award Plaintiff any damages.

Appellant argued there was no evidence or reasonable inference from the evidence to justify the verdict, or that it was contrary to law.¹⁵⁶ As set forth in Appellant's motion for judgment¹⁵⁷ filed contemporaneously with Appellant's motion for new trial, there was no admissible evidence or reasonable inference therefrom to justify the verdict, or that it is contrary to law.

¹⁵³ *Ibid.*

¹⁵⁴ CP 1103-06.

¹⁵⁵ CP 1106.

¹⁵⁶ CP 1106-07.

¹⁵⁷ CP 1121-29.

Appellant argued under CR 59 (a) (8), a new trial was necessary required to correct errors in law occurring at the trial and objected to at the time by the party making the application.¹⁵⁸ A court commits an error of law in admitting inadmissible evidence. *Dickerson v. Chadwell, Inc.*, 62 Wn. App. 426, 429, 814 P. 2d 687 (1991). As set forth in Paragraph VI A, above, the court committed errors of law in the admission of Respondents' exhibits which did not excuse their failure to pay rent to Appellant. Appellant objected to those exhibits in his Motion and Limine and at trial. A new trial is required to correct those errors of law.

Appellant argued under CR 59 (a) (9), a new trial was required as substantial justice had not been done.¹⁵⁹ The Court has duty to see that justice prevails. *Olpinski v. Clement*, 73 Wn. 2d 944, 951, 442 P. 2d 260 (1968). The court exceeded its jurisdiction in this case by admitting Respondents' exhibits, none of which excused their failure to pay rent to Appellant. A new trial is required to correct this injustice.

G. The court erred in dismissing Appellant's claims against Respondents.

Error is assigned to the Order on Jury Verdict.¹⁶⁰ Appellant incorporates the arguments and authorities in Paragraph VI A-F, above.

¹⁵⁸ CP 1107.

¹⁵⁹ CP 1107-08.

¹⁶⁰ CP. 1055-56.

H. The trial court erred in awarding attorney fees to Respondents.

Error is assigned to Findings of Fact and Conclusions of Law re: Attorney Fees and Costs, Findings Nos. 1-11 and Conclusions 1-6.¹⁶¹ Error is also assigned to the Order on Defendants' Motion for Attorney Fees and Costs and Judgment.¹⁶² As set for the Paragraphs VI A-G above, the court committed reversible error in this action. Respondents therefore have not "prevailed" under paragraph 11 of the lease¹⁶³ or RCW 4.84.330. Appellant therefore requests the Court to reverse the findings, conclusions and Judgment for attorney fees.

I. Appellant requests attorney fees on appeal.

In the event he prevails, Appellant requests an award of attorney fees incurred on appeal, pursuant to paragraph 11 of the lease¹⁶⁴, RAP 18.1 and RCW 4.84.330. Paragraph 11 of the lease provides "*[i]n the event is necessary for either party to employ an attorney to enforce any terms of this Agreement, the prevailing party is entitled to reasonable attorneys' fees as provided for by law. In the event of a trial, the amount shall be fixed by the Court.*" An award of attorney fees is mandatory. *Singleton v. Frost*, 108 Wn. 2d 723, 727-28, 742 P. 2d 1224 (1987); *Hawkins v. Diel*, 166 Wn. App. 1, 10, 269 P. 3d 1049 (2011).

¹⁶¹ CP 1093-97.

¹⁶² CP

¹⁶³ EX 9.

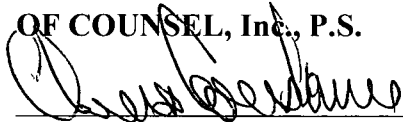
¹⁶⁴ EX 9.

VII. CONCLUSION

The trial court exceeded its limited subject matter jurisdiction in a residential unlawful detainer by admitting numerous exhibits that did not address the primary issue of possession and by permitting Respondents to present a civil claim against Appellant and his brother in an unlawful detainer. The court gave erroneous instructions to the jury. The court erred by denying Appellant's motions for judgment and for new trial, and by awarding Respondents attorney fees. The trial court's error in admitting Respondents' inadmissible exhibits permeates the record in this case. The Court should reverse the order on jury verdict, the verdict, the judgment and the other orders entered by the trial court and remand the case for trial. The Court should award Appellant attorney fees on appeal.

Respectfully submitted,

OF COUNSEL, Inc., P.S.

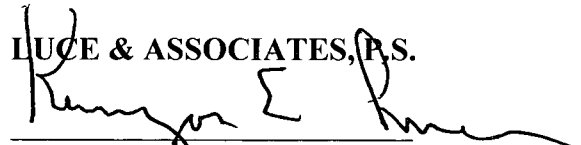


C.M. Constantine, WSBA

No. 11650

Of Attorneys for Appellant

LUCE & ASSOCIATES, P.S.



Kenyon Luce, WSBA

No. 3081

Of Attorneys for Appellant

VIII. CERTIFICATE OF MAILING

The undersigned does hereby declare that on February 26th 2016, the undersigned deposited a copy of BRIEF OF APPELLANT filed in the above-entitled case into the United States mail, first-class postage addressed to the following persons:

Clerk, Washington State Court of Appeals, Division II
950 Broadway, Suite 300 MS TB 06
Tacoma, WA 98402-4427

Klaus O. Snyder
Snyder Law Firm
16719-110th Ave Ste C
Puyallup, WA 98374-9156

DATED this 26th day of February __, 2016.

By: *Mark A. Luce*
Printed Name: Mark A. Luce

FILED
COURT OF APPEALS
DIVISION II
2016 FEB 26 PM 1:57
STATE OF WASHINGTON
BY *Mark A. Luce*
DEPUTY