No. 85901-3-I



**SUPREME COURT OF THE STATE OF WASHINGTON**

EIGHT IS ENOUGH, LLC,

Plaintiff/Respondent,

v.

CYNTHIA OHLIG,

Defendant/Petitioner,

and

ALL OTHER RESIDENTS and OCCUPANTS,

Defendants.

# PETITION FOR REVIEW

Carrie Graf, WSBA #51999
Jason Kinn, WSBA #39567
**NORTHWEST JUSTICE PROJECT**
711 Capitol Way S, Suite 704
Olympia, Washington 98501
Tel. (360) 753-3610
Attorneys for Cynthia Ohlig

## TABLE OF CONTENTS

**Page**

## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Page**

**Cases**



**Statutes and Session Laws**

## TABLE OF AUTHORITIES

**Page**

## TABLE OF AUTHORITIES

**Page**



**Rules**



**Other Authorities**

## A. IDENTITY OF PETITIONER

Appellant/Petitioner Cynthia Ohlig asks this court to accept review of the Court of Appeals' decision terminating review designated in Part B of this petition.

## B. CITATION TO COURT OF APPEALS DECISION

Division 1 of the Court of Appeals issued its unpublished decision in this matter on March 4, 2024. On March 22, 2024, Ms. Ohlig moved for reconsideration of the decision. On April 5, 2024, the Court of Appeals issued its order denying the motion for reconsideration. A copy of the March 4, 2024 opinion is in the Appendix at pages A-1 through A-21. A copy of the order denying the Petitioner's motion for reconsideration is in the Appendix at pages A-22 through.

## C. ISSUES PRESENTED FOR REVIEW

1. Is the Court of Appeals' decision affirming the superior court's judgment for rent owing, despite the unlawful detainer not being premised on the default of nonpayment of rent, in conflict with *Castellon v. Rodriguez*, 4 Wn. App. 2d 8, 418 P.3d 804 (2018). Yes.

2. Is there a substantial public interest in this Court determining whether a landlord may obtain a judgment

for rent even if the eviction is not based on non-payment of rent? Yes.

## D. STATEMENT OF THE CASE

Cynthia Ohlig rented a home from Respondent Eight is Enough for approximately seven years. CP 7. She lived with her adult grandson, who helped care for her, and an emotional support animal, a dog named Hunni. CP 130. In early 2022, her landlord told her to get rid of her dog and that her grandson could no longer live with her. *Id.* Ms. Ohlig complied with her landlord's demand. CP 131. But, a few months later, with the help of an attorney, Ms. Ohlig provide her landlord with a written reasonable accommodation request letting her landlord know that she lived with disabilities and required a caretaker and emotional support animal. CP 51. She requested that her landlord permit her grandson to move back in as a caretaker and permit Ms. Ohlig to get a new emotional support animal. *Id.*

Her landlord immediately responded by verbally telling Ms. Ohlig that her request was "nonsense" and that she would raise Ms. Ohlig's rent and charge a pet deposit if Ms. Ohlig

pursued having an animal. CP 131. Then, just five days after Ms. Ohlig made her request, her landlord served Ms. Ohlig with a notice terminating her tenancy. The notice alleged that Respondent planned to sell the home. CP 15-16.

Ms. Ohlig was unable to move out in the 90 days provided for by the notice, and so Respondent started an eviction case against her based solely on the notice of intent to sell. CP 4. Ms. Ohlig's Answer, accordingly, focused on defending against that notice, including asserting that Respondent was evicting Ms. Ohlig because they did not want to have to accommodate her disabilities. CP 39-40. To the extent that the Complaint referenced unpaid rent, Ms. Ohlig disputed owing it and disputed that it could be awarded given that the case was not based on rent arrears. CP 33, 40.

At the show cause hearing on November 18, 2022, the court acknowledged that the eviction was based on a notice of intent to sell, and that Respondent had not served Ms. Ohlig with a notice alleging unpaid rent. RP 3-4. The court took no

testimony about whether rent was owing or how much rent was owing. When Respondent's counsel asked the court to sign their proposed judgment, Ms. Ohlig's counsel objected that Respondent had not served them with the proposed judgment and that she had never seen it. RP 15. The court nonetheless signed the judgment, which included $4,475 in alleged back-owed rent. CP 104. In response to Ms. Ohlig's request to stay the matter so she could review the judgment before entry, the court denied the request and said "[y]ou're welcome to file a motion for reconsideration." RP 23.

Ms. Ohlig appealed the writ and judgment on the basis both that the trial court erred when it refused to hear her disability discrimination defense, and also that it erred by entering a judgment for rent when the eviction was based on the landlord's intent to sell the home, and not on rent arrears. Appellant's Brief 3-4. The Court of Appeals issued an unpublished opinion on March 4, 2024 (the "Opinion" or the "Ruling."). While the Court of Appeals agreed with Ms. Ohlig

that the trial court erred when it refused to let her assert a disability discrimination defense at the show cause hearing, the court affirmed entry of the judgment for rent. Confusingly, the court simultaneously remanded the case for consideration of the discrimination defense, but did not vacate the judgment.

Ms. Ohlig filed a timely request for reconsideration on this issue, which the Court of Appeals denied on April 5, 2024.

## E. ARGUMENT

Ms. Ohlig seeks review of the Court of Appeals' decision affirming entry of a judgment against her for rent despite the landlord's claim for possession having nothing to do with rent. This decision is in direct conflict with a published 2019 Court of Appeals decision, *Castellon v. Rodriguez,* as well as RCW 59.18.410(1), which permit unlawful detainer courts to issue judgments for rent only when unpaid rent was the basis for the landlord's claim for possession. RAP 13.4(b)(2).

This petition also involves an issue of substantial public interest that should be determined by the Supreme Court. The

legislature has repeatedly, since 2018, prioritized keeping tenants housed who have fallen behind in rent as a matter of "public concern." RAP 13.4(b)(4). Further, courts are currently, and will likely continue, to enter judgments for rent in cases not based on unpaid rent.

### 1. The ruling conflicts with a published Court of Appeals' decision, *Castellon v. Rodriguez*. RAP 13.4(b)(2)

Unlawful detainer actions are statutorily created, summary proceedings focused on a single issue: whether the landlord or tenant is entitled to possession of a rental property. Accordingly, the only damages an unlawful detainer court may award are those directly related to possession; the unlawful detainer statutes do not permit parties to seek general damages. *Castellon v. Rodriguez*, 4 Wn. App. 2d 8, 18, 418 P.3d 804 (2018). The plain language of the Residential Landlord Tenant Act (RLTA) permits an unlawful detainer court to award a judgment for rent *only* if the eviction was based on nonpayment

of rent, that is, only if the issue of rent is directly tied to possession. RCW 59.18.410(1).

The Court of Appeals in *Castellon v. Rodriguez* considered similar facts to those of Ms. Ohlig's case (neither eviction notice was based on non-payment of rent, but the unlawful detainer court in both nonetheless issued a judgment including rent). The Court of Appeals in *Castellon*, unlike here, vacated the judgment because "a court presiding over an unlawful detainer action sits as a special statutory tribunal, not as a court of general jurisdiction. As such, the court lacks authority to address disputes unrelated to possession." *Id.* at 18. But the Court of Appeals reviewing Ms. Ohlig's case found the opposite: that it was appropriate to allow a landlord to obtain a judgment for rent, despite the eviction not being premised on nonpayment of rent. Ms. Ohlig seeks Supreme Court review

because the Court of Appeals ruling in her case is in direct conflict with *Castellon.* RAP 13.4(b)(2).[1]

In *Castellon,* the landlord based the eviction on a 20-day "no cause" notice to vacate.[2] The trial court had signed a judgment for $5,335 for damages to the home and $1,000 in rent. The tenant appealed in part on the basis that the trial court could not exercise its subject matter jurisdiction over damages unrelated to possession. *Id.* at 17-18. The Court of Appeals agreed and vacated the judgment on the basis that "a judge presiding over an unlawful detainer action lacks authority to

---

[1] This issue is also currently before the Washington Court of Appeals in another case. *Garrand v. Cornett,* No. 58002-1-II (oral argument held April 29, 2024.). Regardless of the ruling in *Cornett*, a conflict will remain, either with *Castellon* in conflict with *Ohlig* and *Cornett*, or *Castellon* and *Cornett* in conflict with *Ohlig*. Further, the outcome in *Cornett*, if in line with Ms. Ohlig's position, will still be too late to help Ms. Ohlig, since the court did not order the judgment vacated.

[2] Such "no cause" notices were permissible at the time pursuant to RCW 59.12.030(2), but no longer are after the enactment of Just Cause protections in 2021. See RCW 59.18.650.

consider general civil claims." *Id.* at 18. The Court of Appeals discussed that while unlawful detainer courts have the authority to convert evictions into a general action for damages, "the court must do something [to convert the case]. Merely granting a party's request for general civil damages is insufficient." *Id.*

The Ruling issued by the Court of Appeals in Ms. Ohlig's case directly conflicts with *Castellon*. The Court of Appeals in Ms. Ohlig's case held that landlords can seek rent owing "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." Ruling at 18. And, in fact, the court's holding goes even farther, suggesting that an unlawful detainer court could grant essentially any "other relief" requested by a landlord in their complaint. *Id.* at 17-18. That is, the Ruling would allow unlawful detainer courts to do the very thing *Castellon* prohibits: "granting a party's request for general civil damages."

The Ruling is based on a misreading of *Castellon*. First, the Ruling mischaracterizes the judgment in *Castellon* as including "5,335.04 in damages in addition to 'incidental issues' such as attorney fees, costs and rent." Ruling at 18. The Ruling appears to misunderstand rent as something like attorneys' fees or costs. That is, the Ruling appears to lump rent with things like attorneys' fees that are "collateral to the underlying proceeding," over which a court retains authority even if the court otherwise lacks jurisdiction over a case. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990); *Hawks v. Branjes*, 97 Wn. App. 776, 777-778 (1999).

But this characterization is nowhere to be found in *Castellon*, which never lumped rent together with collateral charges like attorneys' fees. *Castellon* did cite to case law describing unlawful detainers as "limited to the question of possession and related issues such as restitution of the premises and rent." 4 Wn. App. 2d at 18. But this is simply a restatement of the well-established principle that evictions are about

resolving possession. If unpaid rent is the reason for the eviction, then rent is a "related issue." But *Castellon*, contrary to the Ruling, made it clear that the unlawful detainer court only may exercise its subject matter jurisdiction over those issues related to possession. *Id.*

The Ruling goes on to reason that "*Castellon* still stands for the proposition that the landlord has avenues to seek the unpaid rent within the narrow scope of unlawful detainer." But this is exactly the *opposite* of *Castellon's* holding. *Castellon* vacated the judgment *because* it included rent and costs of damage to the property, i.e. "general civil damages," and therefore "the court lacked jurisdiction to enter a civil money judgment." *Id.* at 19.

Like Division Three in *Castellon*, Division Two has also determined that the statutory subject matter jurisdiction of an unlawful detainer court is limited to claims related to possession. *Angelo Property Co., LP v. Hafiz,* 167 Wn. App. 789, 818, 274 P.3d 107 (2012). In Angelo, the court held that if

a party wants the unlawful detainer court to consider claims unrelated to possession, the case must be converted to an ordinary civil damage case so the court can consider it under its general subject matter jurisdiction. *Id. See also Munden v. Hazelrigg*, 105 Wn. 2d. 39, 45-46, 711 P.2d 295 (1985).

The error of the *Ohlig* court's ruling becomes especially evident when considered in light of RCW 59.18.410(1), the RLTA statute governing entry of judgment in unlawful detainer actions. The statute references only one instance in which the unlawful detainer court can award a judgment for rent:

> …*if* the alleged unlawful detainer is *based* on default in the payment of rent, [the court shall] find the amount of any rent due, and the judgment shall be rendered against the tenant liable for the…rent, if any, found due.

RCW 59.18.410(1) (emphasis added). The plain language of the statute only permits an unlawful detainer court to award judgment for rent "if" the tenant's unlawful detainer status was based on nonpayment of rent. Implicit is that if the tenant is in unlawful detainer status for any other reason (like unlawfully

detaining the home after expiration of an intent to sell notice), then the court may not "find the amount of any rent due."

The only other relief authorized by RCW 59.18.410(1) is for restitution of the premises, forfeiture of the tenancy, and damages "arising out of the tenancy occasioned to the landlord by any… unlawful detainer." Damages occasioned by unlawful detainer are different than rent. Rent is the contracted amount for the use of the rental home prior to expiration of a pay-or-vacate notice. *Sprincin King St. Partners v. Sound Conditioning Club, Inc.*, 84 Wn. App. 56, 63, 925 P.2d 217 (1996). Damages, on the other hand, are the "fair market value of the use of the premises" after the notice expires, that is, after the tenant is unlawfully detaining the rental home. *Id.* This amount may or may not be the same as the rental amount.

The Court of Appeals in Ms. Ohlig's case appears to have been tripped up by the show cause provision of RCW 59.18.380, which lays out the process for the eviction show cause hearing. It authorizes the unlawful detainer court to enter

a judgment for "other relief as prayed for in the complaint *and provided for in this chapter*." RCW 59.18.380. (Emphasis added.) The Ruling relies only on the first half of this statement, "other relief as prayed for in the complaint," to support its holding that a landlord can seek unpaid rent in an eviction, regardless of the eviction's basis. But the Ruling ignores the statement in its entirety, never addressing what is meant by "provided for in this chapter." What must be meant by this is that the RLTA ("this chapter") limits the type of "other relief" the eviction court can provide. Those limits are found in RCW 59.18.410(1). What is not meant by the "other relief" provision is that a court must consider any other kind of relief a landlord might pray for in the complaint (i.e. declaratory judgments, forfeiture of a security deposit, restraining orders). The limitation in RCW 59.18.410(1) is similar to the limitation under RCW 59.18.290(3) regarding attorneys' fees. A landlord may pray for attorneys' fees in their complaint, but the court can only award them as "provided by this chapter," that is, if

the total amount of rent judgment is greater than either $1,200 or two months contract rent. RCW 59.18.290(3)(b). Awarding a landlord relief, purely because they request it in their complaint, renders the RLTA's statutory limitations meaningless.

*Castellon* makes clear that if a landlord wants to get a judgment against a tenant for non-possessory charges, unpaid rent, the landlord can convert the eviction to a civil case (or file a regular civil complaint) with the attendant civil timeline, discovery process and opportunity for the tenant to raise counterclaims. On the other hand, if the landlord wants to take advantage of the fast, summary eviction process, the landlord can serve the tenant with a notice providing 14-days to pay the rent. RCW 59.18.650(2)(a). This triggers multiple opportunities for the tenant to catch up on rent and reinstate the tenancy. *See* discussion *infra* Part 2.b. If the tenant does not pay, the landlord can proceed with an unlawful detainer action and obtain a writ and judgment for rent owed. If they proceed with that route, the

landlord gets the benefit of a summary process, but the tenant has the opportunity to reinstate their tenancy.

What a landlord may not do is what Ms. Ohlig's landlord did: give the tenant a 90-day notice based on the landlord's intent to sell, take advantage of the summary eviction process, and obtain a judgment against the tenant for alleged unpaid rent without the tenant having the opportunity to meaningfully contest the amount owing, nor an opportunity to reinstate their tenancy. Such action conflicts directly with *Castellon*.

**2. Ms. Ohlig's case involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(4)**

**a. This issue is likely to continue to reoccur before trial courts**

Petitioner's cursory review of a handful of recent eviction judgments in 2023-2024 turned up multiple instances in which landlords obtained rent judgments in cases based on something other than unpaid rent, including in federally

subsidized housing.[3] Further, this issue is likely to reoccur. 38% of evictions are, like Ms. Ohlig's case, based on reasons *other* than non-payment of rent.[4] This represents over three thousand Washington residents every year who potentially have been denied a chance to avail themselves of the RLTA's protections to remain housed, and who are instead burdened with a rent judgment keeping them from new housing.

There is a substantial public interest in this Court determining the legality of this practice, one which is likely to reoccur, so as to avoid confusion on a common issue. *Randy*

---

[3] Clark County Superior Court, No: 24-2-00339-06 (30-day "vacate or become a party to the lease" notice, $2,600 judgment for rent); Thurston County Superior Court, No: 23-2-00004-34 (90-day notice, $3,030 rent judgment); Thurston County Superior Court, No: 23-2-00028-34 (subsidized property, 20-day/30-day/3-day, $1,386 rent judgment); Thurston County Superior Court No: 23-2-00526-34 (120-day notice, $16,445 rent judgment).

[4] https://ocla.wa.gov/wp-content/uploads/2023/10/Final-Report-on-Implementation-of-Tenant-Appointment-Counsel-Program-10-2023.pdf.

*Reynolds and Associates v. Harmon*, 193 Wn. 2d 143, 153, 437 P.3d 677 (2019); *In re Flippo*, 185 Wn. 2d 1032, 380 P.3d 413 (Mem), 414 (2016).

**b. The legislature has created, as a matter of "public concern," dramatically more tenant protections against being evicted for non-payment of rent than in 2018. The Ruling allows landlords to bypass most of these**

Between 2018 and 2023, the Washington legislature passed a series of the most significant reforms to the RLTA since the RLTA's enactment in 1973. Generally speaking, these reforms provided tenants who had fallen behind on rent more time and opportunities to catch up on rent through the entirety of the eviction process, right up to execution of the writ.

Most recently, the legislature addressed the issue of debts owed by tenants to former landlords. The legislature made findings that such debts can bar low-income tenants from future housing, and that such debts disproportionately affects disabled, BIPOC, or other marginalized, low-income renters. Laws of 2023, ch. 331, § 1. Throughout all these reforms, the legislature

repeatedly emphasized that preserving stable housing for people who may have temporarily fallen behind in rent is "a most important public concern." Laws of 2019, ch. 356, § 1.

The issue Ms. Ohlig seeks review of squarely implicates the "public concern" driving the tenant protection reforms of the last six years. Ms. Ohlig is a person who lives with disabilities. She lives on a fixed income and now has a judgment on her record for over $5,000 in rent as the result of an eviction that had nothing to do with rent, but may nonetheless bar her from housing for years. If landlords are permitted to seek rent judgments in non-rent cases, the landlord can skip over all the tenancy reinstatement protections passed in the last 5 years. The tenant is left in the worst of both worlds: evicted without an opportunity to catch up on rent, but nonetheless saddled with a judgment for rent that will bar them from housing for years. As Ms. Ohlig's case demonstrates, the entry of the rent judgment in these circumstances can easily

happen without any meaningful opportunity to review the basis for the debt or contest it at all.

In 2018, a tenant who fell behind on rent had very few opportunities to catch up and avoid eviction. Their landlord was obligated to give them only a three day notice to pay or vacate, and that notice could include hundreds, even thousands, of dollars in ancillary charges like late fees, fees for service of the eviction notice, etc. If the tenant managed to find a church or social services provider who could pay the full amount within the three days, the landlord had no obligation to accept payments from these third-party sources. Once the three days expired, the tenant's only other opportunity to reinstate the tenancy occurred after a court entered a writ and judgment, but before the eviction writ executed, by which point the judgment could have ballooned to include not only rent and any other ancillary fees alleged by the landlord, but also attorneys' fees and court costs. Further, the landlord could require the tenant to, prior to a hearing, pay all money the landlord alleged was

owing into court. If the tenant failed to do so or failed to dispute the amount owing with a sworn statement, the landlord was entitled to an automatic writ of eviction. See former, RCW 59.18.375, repealed by Laws of 2021, ch. 115 § 19.

Now, the landscape for tenants looks dramatically different. The following is a summary of reforms passed by our legislature since 2018:

- In 2018, the legislature prohibited Source of Income Discrimination (SOID). Laws of 2018, ch. 66 § 1, codified as RCW 59.18.255. Among other things, landlords now must accept rent payments from charities, government entities, and any other legal source. Prior to enactment of SOID, a landlord could legally refuse payment from, for example, a church that wanted to pay off rent arrears to prevent a tenant from being evicted;
- In 2019, the legislature increased the amount of time tenants had to pay back rent before commencement of an

eviction from three days to fourteen days. Laws of 2019, ch. 356 § 2, codified as RCW 59.12.030(3);

- In 2019, the legislature created a mandatory pay-or-vacate form to be used in evictions for nonpayment of rent. Laws of 2019 ch. 356 § 3; codified as RCW 59.18.057;
- In 2019 the legislature mandated that all payments made by tenants must first be applied to rent before any other debts in order to limit the number of evictions for nonpayment of rent and further limited a landlord's ability to evict a tenant for nonpayment of amounts that were not rent. Laws of 2019 ch. 356 § 6; codified as RCW 59.18.283;
- In 2019, the legislature also limited the definition of rent so that landlords wanting to evict a tenant for non-payment could only seek actual rent, plus a maximum of $75 in late fees. Laws of 2019, ch. 356 §§ 2, 5, 7; codified as RCW 59.18.030(29) and RCW 59.18.410;

- Between 2019 and 2023, the legislature has repeatedly and substantially enhanced the reinstatement provisions at RCW 59.18.410. See 2023 ch. 336 § 2; 2021 ch. 115 § 17; 2020 ch. 315 § 5; 2019 ch. 356 § 7. Prior to 2019, a tenant's only opportunity to reinstate a tenancy after the 3 day notice expired was a five-day period after a judgment (including attorneys' fees and court costs) was entered. Tenants now can reinstate at any point prior to commencement of the case by paying just rent owing and $75 late fees. Once the case is filed, but before a show cause hearing, tenants can reinstate by paying rent and $75 late fees, plus court costs.
- In 2019, the legislature created the opportunity for tenants to petition a court, after entry of judgment and up until the time the writ executes, for a repayment plan that allows them to reinstate if they can pay the judgment off within three months. Laws of 2019, ch. 356 § 7; codified as RCW 59.18.410(3);

- In 2021, the legislature enacted temporary COVID protections requiring landlords to offer tenants who had fallen behind on rent an opportunity to enter into a repayment plan and a prohibition on late fees for this period. Laws of 2021, ch. 115 §§ 3, 4; codified as RCW 59.18.625 and RCW 59.18.630;
- The legislature also enacted as part of its COVID protections mandatory mediation for non-payment cases prior to the start of an eviction. Laws of 2021, ch. 115 § 7; codified as RCW 59.18.660, expired July 1, 2023;
- In 2021, the legislature repealed RCW 59.18.375. This law had permitted landlords to demand that tenants pay all rent the landlord said was owing into a registry prior to a hearing or face an immediate entry of writ of restitution. 2021 ch. 115 § 19;
- Additionally, in 2021, the legislature further signified its commitment to keeping tenants housed by enacting the nation's first state-wide "right to counsel" program,

which ensures low-income tenants receive representation in evictions. Laws of 2021 ch. 115 § 8; codified as RCW 59.18.640. For the FY 22-23 biennium, the Legislature appropriated $24.1 million to the program.[5]

Had Respondent based the eviction on unpaid rent and given Ms. Ohlig the requisite 14-day pay or vacate notice, the RLTA would have provided Ms. Ohlig these many opportunities to reinstate her tenancy. Because the eviction happened while COVID protections were still in place, she also should have been offered a repayment plan prior to commencement of an eviction and a chance to mediate. But, because her landlord gave Ms. Ohlig an intent to sell

---

[5] Washington State Office of Civil Legal Aid, *Report to the Legislature on Implementation of the Appointed Counsel Program for Indigent Tenants in Unlawful Detainer Cases (RCW 59.18.640; 2.53.050; sec. 116(7), ch. 297, laws of 2022)* (July 28, 2022), https://ocla.wa.gov/wpcontent/uploads/2022/07/OCLA-Report-to-the-Legislature-Implementation-of-Indigent-Tenant-Right-to-Counsel-FINAL-7-28-22-.pdf

termination notice, and just tacked on allegedly owing back rent to the complaint, Ms. Ohlig had none of those opportunities. She was left instead evited and saddled with a judgment for rent that she had no meaningful opportunity to contest and that will serve as a barrier to housing for years to come.

There is a substantial public interest in ensuring that courts are properly interpreting the law in eviction actions, and taxpayer dollars for the Right to Counsel program are being effectively spent to stabilize tenancies.

### c. Ms. Ohlig's case meets the "substantial public interest" test this Court relied on to accept review of another case interpreting the eviction process

This Court has considered a "nonexclusive list of criteria" for determining whether there was a substantial public interest in the Court reviewing an eviction case that was otherwise moot. *Randy Reynolds & Assocs., Inc. v. Harmon*, 193 Wn. 2d 143, 152–53, 437 P.3d 677, 682 (2019). The issue presented by Ms. Ohlig meets all of these criteria:

1. The public or private nature of the question presented: the issue presented by Ms. Ohlig, like that in *Harmon*, is an issue of interpreting the RLTA, meaning it is more likely to be public in nature. *Id.* at 153;

2. The desirability of an authoritative determination for the future guidance of public officers: like *Harmon*, it is desirable to provide future trial courts guidance about whether or not they can award rent judgments in evictions based on something other than rent;

3. The likelihood of future recurrence of the question: *Harmon* found that there was a high likelihood of the future recurrence of the issue there (staying eviction writs) because evictions themselves are so common. Ms. Ohlig's petition involves an eviction, and also presents an issue (eviction based

on something other than non-payment of rent) that occurs in over 1/3 of eviction filings.

There is substantial public interest in this Court taking up review of this issue. It is certainly a question that will continue to recur before out state's trial courts, and the outcome has the potential to impact thousands of Washington tenants most vulnerable to the impacts of eviction.

## F. CONCLUSION

The Ruling by the Court of Appeals in Ms. Ohlig's case is directly in conflict with a published Court of Appeals decision, and she requests that this Court accept her Petition for Review in order to resolve this conflict. Additionally, the Petition raises an issue of substantial public interest. The question of whether landlords can seek rent judgments in non-rent evictions is almost certain to reoccur. It also has a direct impact on housing stability, an issue that our legislature has repeatedly addressed over the past six years as a "public

concern." Ms. Ohlig requests that this Court accept her Petition for Review.

## CERTIFICATE OF WORD COUNT

Pursuant to RAP 18.17(b), I, Carrie Graf, counsel for Petitioner Cynthia Ohlig, hereby certify that the word count for this brief is 4759 words, which does not include any appendices, title sheet, table of contents, table of authorities, certificate of compliance, certificate of service, signature blocks, and pictorial images. This brief therefore complies with the rule, which limits a brief to 5000 words. I certify that I prepared this document in Microsoft Word, and that this is the word count Microsoft Word generated for this document.

Respectfully submitted,

Dated this 2nd day of May, 2024

*/s/ Carrie Graf*
Carrie Graf, WSBA #51999
Attorney for Petitione

CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on this 2nd day of May 2024, I caused to be delivered by E-service via the Washington State Appellate Courts' Portal, a true a correct copy of this MOTION FOR RECONSIDERATION, addressed to the following:

Andrew P. Mazzeo
Attorney for Plaintiff/Respondent
Harbor Appeals and Law, PLLC
2401 Bristol Ct. SW, Suite C102
Olympia, WA 98502-6037
Phone: (360) 539-7156
Email: office@harborappeals.com,

SIGNED at Olympia WA, this 2nd day of May, 2024.

*/s/ Carrie Graf*
Carrie Graf, WSBA #51999
Attorney for Appellant

## G. APPENDIX

| Description | Pages |
|---|---|
| March 4, 2024, Unpublished Opinion | 1-21 |
| April 5, 2024, Order Denying Motion for Reconsideration | 22 |

# A

FILED
3/4/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

| | |
|---|---|
| EIGHT IS ENOUGH, LLC.<br><br>Respondent,<br><br>v.<br><br>CYNTHIA OHLIG,<br><br>Appellant,<br><br>and<br><br>ALL OTHER RESIDENTS and OCCUPANTS,<br><br>Defendants.† | No. 85901-3-I<br><br>DIVISION ONE<br><br>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

---

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]

---

[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.

---

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.

# B

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.<br><br>Respondent,<br><br>v.<br><br>CYNTHIA OHLIG,<br><br>Appellant,<br><br>and<br><br>ALL OTHER RESIDENTS and OCCUPANTS,<br><br>Defendants.† | No. 85901-3-I<br><br>DIVISION ONE<br><br>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.

**NORTHWEST JUSTICE PROJECT**

**May 03, 2024 - 11:03 AM**

**Filing Petition for Review**

**Transmittal Information**

| | |
|---|---|
| **Filed with Court:** | Supreme Court |
| **Appellate Court Case Number:** | Case Initiation |
| **Appellate Court Case Title:** | Eight Is Enough, LLC, Respondent v. Cynthia Ohlig, Appellant (859013) |

**The following documents have been uploaded:**

- PRV_Petition_for_Review_20240503110253SC745787_6702.pdf
  This File Contains:
  Petition for Review
  *The Original File Name was Petition FINAL.pdf*

**A copy of the uploaded files will be sent to:**

- J.C.KINN@GMAIL.COM
- drewteams@harborappeals.com
- jason.kinn@nwjustice.org
- office@harborappeals.com
- scottc@nwjustice.org

**Comments:**

---

Sender Name: Carrie Graf - Email: carrie.graf@nwjustice.org
Address:
711 CAPITOL WAY S STE 704
OLYMPIA, WA, 98501-1237
Phone: 206-707-0992

**Note: The Filing Id is 20240503110253SC745787**