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NO. 68727-1-I

Whatcom County No. 10-2-03030-8

COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON

ROBERT K. HALL, a single man and DAYLIGHT PROPERTIES, LLC, a Washington limited liability company,

Respondents/Cross Appellants,

v.

MATTHEW FEIGENBAUM,

Appellant/Cross Respondent.

APPELLANT FEIGENBAUM'S REPLY BRIEF

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ARGUMENT

1. Feigenbaum did appeal the trial court's Order Denying Defendant's Motion to Vacate.

Hall claims that Feigenbaum did not appeal the court's *Order Denying Defendant's Motion to Vacate and Dismiss for Lack of Jurisdiction* that was entered on September 1, 2011. *Respondents Hall/Daylight Properties LLC's Appeal Brief* ("Response"), pp. 5, 7 and fn 29, 18 fn 58, 20 fn 64. This is not correct. Feigenbaum's Notice of Appeal lists this Order. CP 97. This Order was attached to the Notice of Appeal. CP 118-123. This Order was designated at item number 144 in the Designation of Clerk's Papers and Exhibits. CP 6. Feigenbaum did not waive any issues relating to that order.

2. The correct standard of review is de novo.

Hall argues that the standard of review for all issues raised by Feigenbaum's appeal is abuse of discretion. *Response,* pp 8, 16, 21, 25, 27. This is incorrect. Compliance with the time/manner notice requirements of the unlawful detainer statute implicate the existence of the court's personal jurisdiction, the acquisition or exercise of the court's subject matter jurisdiction, and statutory interpretation. As such, the standard of review is *de novo.* See, e.g. Christensen v. Ellsworth, 162 Wn.2d 365, 370, 173 P.3d 228 (2007).

Hall argues that the trial court commissioner did not commit an "abuse of discretion" when she authorized service of the eviction summons and complaint by mail. *Response,* p. 17-18. This misstates the standard of review. The proper standard of review is *de novo.* Pascua v. Heil, 126 Wash.App. 520, 527 (2005).

3. The court should not establish different standards for compliance with the time/manner notice requirements of the unlawful detainer statute to commercial leases and residential leases.

Hall argues that the court should, as a matter of "first impression", establish a different level of compliance with the time/manner notice requirements of the unlawful detainer statute: namely, commercial landlords need only "substantially comply" with the requirements while residential landlords must strictly comply. *Response,* p. 10-11. In numerous cases, Washington courts have held that commercial landlords – like residential landlords – must strictly comply with the notice requirements of the unlawful detainer statutes. See, e.g., IBF, LLC v. Heuft, 141 Wn.App 624 (2007). Moreover, the Legislature has specified when a residential lease should be treated differently from a commercial lease for purposes of an unlawful detainer action. See, RCW 59.18.420. By making no such distinction with respect to RCW 59.12.030, .070, and .080 the Legislature expressed its intent that no such distinction should be made.

4. That Hall waited more than 20 days to file the summons does not cure the defect caused by Hall's use of a 3-Day Notice to Pay or Vacate instead of the 20-day Notice required by the lease.

Hall argues that it is immaterial that he used a 3-Day Notice to Pay or Vacate instead of a 20-Day Notice (as required by the parties' lease) because more than 20 days passed between the date the 3-Day Notice was mailed/posted (November 5) and the date that the eviction summons and complaint were filed (December 1). *Reply Brief,* p. 14-16. Hall cites First Union Management v. Slack, 36 Wn.App. 849 (1984) as support for this position.

First Union is not applicable to this issue. In First Union, the court specifically found that the parties' lease did not change the pre-litigation notice requirements for an unlawful detainer action; instead, the lease provision at issue only defined when a tenant would be in default for nonpayment of rent. *Id.* at 859[1].

In this case, paragraph 21 of the parties' lease did specify the notice that Hall had to give Feigenbaum after a default occurred.

> 21. DEFAULT AND RE-ENTRY: If Lessees hall fail to keep and perform any of the covenants and agreements herein contained, **and such failure continues for twenty (20) days**

[1] The lease provision at issue in First Union read as follows:

> In the event of any failure to pay any rent within ten days after it shall become due hereunder ... then Landlord may ... terminate this Lease or terminate Tenant's right to possession of the Leased Premises ...

Id. at 859.

> **after written notice from Lessor**, unless appropriate action has been taken by Lessee in good faith the cure such failure, Lessor may terminate the Lease and re-enter the Premises, . . .

CP 1171. Hall mailed/posted a 3-Day Notice (per RCW 59.12.030(3)) instead of the 20-day Notice (per the lease). This precise set of facts was addressed in IBF, LLC v. Heuft, 141 Wn.App. 624 (2007). In IBF, LLC, the parties' lease provided for a 10-day pre-litigation notice in the event of default. After the tenant failed to pay rent, the landlord served the tenant a 3-Day Notice (per RCW 59.12.030(3)) on March 22, served the tenant with a summons and complaint on March 31 – nine days later -- and then filed the lawsuit with the court on April 11 – 20 days after serving the 3-Day notice. As in Community Investments Ltd. v. Safeway Stores, Inc., 36 Wn.App. 34 (1983), the IBF, LLC court ruled that the lease required the landlord to serve the tenant with a 10-day notice before instituting unlawful detainer proceedings. Although the landlord did not file the lawsuit until 20 days after service of the 3-Day notice, the court ruled that that the landlord's use of the 3-day notice was misleading, did not comply with the requirements of RCW 59.12.030, and deprived the trial court of jurisdiction. *Id.* at 632-33.

Under the holding of IBF, LLC, Hall was required to provide Feigenbaum with a 20-day notice. Moreover, the 3-day notice Hall used

stated in no uncertain terms that if Feigenbaum failed to cure within three days, he would be in unlawful detainer and he would be evicted.

> AND YOU ARE HEREBY NOTICED and required to pay rent through the undersigned or its agent below named, within three (3) days of the date of service of this Notice upon you, or in the alternative to vacate and surrender said premises. Vacation and surrender of the premises will not terminate your obligations pursuant to the Lease. **Failure to comply fully with the terms and conditions of this notice and the Lease will result in your being in unlawful detainer of the premises described and judicial proceedings will be instituted for your eviction.**

CP 1176. The notice did not state that Feigenbaum could cure up until the date an unlawful detainer lawsuit was filed in court or the date that he was served with such lawsuit; the notice stated that he had only three days – or, because the notice was mailed/posted on November 5, until November 8 – to cure the default or be evicted.

Under the parties' lease, Feigenbaum should have been given twenty days – or until November 25 – to cure. As in IBF, LLC, Hall's use of a 3-Day Notice violated the lease, misled Feigenbaum and did not comply with the requirements of RCW 59.12.030. Therefore, the court lacked personal jurisdiction over Feigenbaum[2] and was precluded from exercising its subject matter jurisdiction. Community Investments, at 38.

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[2] When Feigenbaum initially appeared at the show cause hearing on December 17, 2010, he made a special limited appearance to object to the court's personal and subject matter jurisdiction. VRP (Dec. 17, 2010) at 3 and CP 1111-1113.

5. The in-court personal service of pleadings by Hall's counsel on Feigenbaum at the December 17, 2010 show cause hearing did not solve Hall's jurisdictional problems.

Hall argues that by personally serving Feigenbaum with the pleadings when he appeared at the December 17 show cause hearing, Hall's counsel cured any defects associated with the service of the eviction summons and complaint by mail. *Response,* p. 17. This argument ignores RCW 59.12.070, which requires the summons to be served at least seven days before the return date. The return date in Hall's eviction summons was December 16. CP 1181. Clearly, personal service on December 17 -- the day after the return date -- fails to strictly comply with the statute.

6. The order authorizing service by mail was improper.

Hall filed the eviction summons and complaint for unlawful detainer on December 1. The eviction summons had a return date of December 16. After his process servers failed to personally serve Feigenbaum at his home six times within a 44-hour period, Hall went to court on December 6 and secured an ex parte Order Allowing Service by Mailing and Posting. On December 6, Hall then mailed Feigenbaum the same eviction summons that had been previously filed with the same return date of December 16.

Hall offers no rebuttal whatsoever to Feigenbaum's argument (*Appeal Brief,* p. 22-23) that the trial court could not have found that Feigenbaum had left the state or was attempting to conceal himself. See *Response,* p. 17-18. How could such a finding be made, given that the evidence clearly showed that he was still living at his residence but simply was not home when the process servers knocked on his door? The order authorizing service by mail was error.

The process servers did not stake out Feigenbaum's house. They did not seek to serve him elsewhere. They did not contact known acquaintances. They did not go to Feigenbaum's place of business – the Nightlight. They only drove by his house six times within a 44-hour period and knocked on the door. This cannot be a "diligent search" so as to justify service by mail.[3]

7. The eviction summons did not give Feigenbaum the notice required by RCW 59.12.070 and CR 4(d)(4).

Feigenbaum argues that an eviction summons cannot be served by mail, because the answer to such a summons would not be due until 90 days after the mailing (CR 4(d)(4)), which is outside the 30-day notice period provided by RCW 59.12.070. But even if the court were to find

[3] Hall states that "the rented premises were empty." *Response,* p. 18, fn 56. This is incorrect. Several hundred thousand dollars worth of personal property that was used to operate the business was still located at the premises. Indeed, Hall's TRO prevented Feigenbaum from removing this property.

that an eviction summons can be served by mail, the service in this case was not timely.

a. Hall's arguments on CR 4(d)(4) are contradictory.

On the one hand, Hall argues that CR 4(d)(4) gives the trial court discretion to authorize service of an unlawful detainer summons by mailing – despite no mention of such authority in RCW 59.12.070, and .080. *Response,* p. 17-18. On the other hand, Hall argues that CR 4(d)(4)'s provision of 90-days to answer a mailed summons "does not apply" in the context of a mailed evictions summons because of the 30-day limit of RCW 59.12.070. *Response,* p. 20. Hall cannot have it both ways.

b. The fact that Hall had already scheduled the show cause hearing for December 17 is irrelevant.

Hall argues that CR 4(d)(4) gave the trial court discretion to issue its *Order Allowing Service by Mailing and Posting* on December 6, because "publication would have been pointless to provide timely service for the Show Cause Hearing on the 17th." *Response,* p. 17-18. This statement has no bearing on how CR 4(d)(4) is to be reconciled with RCW 59.12.070. If Hall could not serve the summons by publication in time for the December 17 hearing, he simply needed to change the date of the hearing.

c. Even if the court finds that an unlawful detainer summons can be served by mail, service in this case did not give Feigenbaum the 90-day notice required by CR 4(d)(4).

If this court determines that a trial court can order service of an eviction summons by mail, it must also determine how much notice of the return date such service must provide. In the case of service by publication, RCW 59.12.080 specifically provides, "in case of summons by publication, be served at least five days before the return day designated therein." RCW 4.28.110 defines when the published summons is "served" as after publication once a week for six consecutive weeks.[4] Thus, under RCW 59.12.080, the published eviction summons would have to contain a return date that is roughly 40 days after the first date of publication to be effective (five more weeks of publication to effect service plus 5 additional days' notice of the return date). Although this period is shorter than the sixty days to answer provided by RCW 4.28.110 (see fn 6) and longer than the 30-day notice period specified in RCW 59.12.070, the unlawful detainer statute gives the court authority to

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[4] **4.28.110. Manner of publication and form of summons**

The publication shall be made in a newspaper of general circulation in the county where the action is brought once a week for six consecutive weeks: PROVIDED, That publication of summons shall not be made until after the filing of the complaint, **and the service of the summons shall be deemed complete at the expiration of the time prescribed for publication**. The summons must be subscribed by the plaintiff or his or her attorney or attorneys. The summons shall contain the date of the first publication, and shall require the defendant or defendants upon whom service by publication is desired, to appear and answer the complaint within sixty days from the date of the first publication of the summons; . . .

alter the notice period "ín cases where the publication of summons is necessary." RCW 59.12.070.[5]

Feigenbaum argues that an eviction summons cannot be served by mail, because CR 4(d)(4) (which gives the defendant 90 days from the date of mailing to answer) is irreconcilable with RCW 59.12.070 (which requires service to be no more than 30 days before the return date) and nothing in RCW 59.12.070 or .080 either authorizes service by mail or gives the trial court specific authority to alter the notice period of RCW 59.12.070 and CR 4(d)(4) in cases of service by mail.[6]

Nevertheless, if this court were to find that service by mail of an eviction summons is possible, it must also find that the return date for the mailed summons is 90 days from the date of mailing (CR 4(d)(4)). This would at least give meaning to the language of RCW 59.12.080, which states that, "The summons must be served and returned in the same manner as summons in other actions is served and returned." In this case,

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[5] A summons must be issued as in other cases, returnable at a day designated therein, which shall not be less than seven nor more than thirty days from the date of service, **except in cases where the publication of summons is necessary,** in which case the court or judge thereof may order that the summons be made returnable at such time as may be deemed proper, and the summons shall specify the return day so fixed.

[6] The only way around this is to find that when the Legislature authorized service of the eviction summons by publication it both *impliedly* authorized service by mail and *impliedly* authorized a return date other than the 90 days specified by CR 4. Hall has provided no legislative analysis or authority for such a tortured reading of the statute. Given that the unlawful detainer statute predates Civil Rule 4, this statutory interpretation would seem impossible.

"returned" refers to the "return date" or time to answer in RCW 59.12.070. Because the defendant has 90 days to answer a mailed summons in other civil actions, the tenant in an unlawful detainer action should have 90 days to answer the mailed eviction summons, because nothing in RCW 59.12 *et seq.* specifies a shorter time to answer a mailed summons than the time provided by CR 4(d)(4).

d. Hall used the wrong form of the mailed summons and the court did not authorize a shorter return date.

Hall argues that the trial court's *Order Allowing Service by Posting/Mailing* authorized Hall to use the form of summons required by the unlawful detainer statute instead of the form of the summons required by CR 4(d)(4).[7] *Response,* p. 19 and fn 59. The problem with this argument is that it is contrary to the record. Hall filed the eviction summons and complaint on December 1 and secured the *Order Allowing Service by Mailing and Posting* on December 6. Although RCW 59.12.070 might be read as authorizing the court to order a shorter time period to answer than is specified by CR 4(d)(4), nothing in the *Order Allowing Service by Mailing and Posting* authorized such a shorter time period. CP 1119-1120. On the contrary, the order simply authorized service by mail with no mention of a return date or time to answer.

[7] "The [mailed] summons shall contain the date it was deposited in the mail and shall require the defendant to appear and answer the complaint within 90 days from the date of mailing."

Moreover, Hall did not prepare and file a new eviction summons for mailing that contained "the date it was deposited in the mail" (CR 4(d)(4)); on the contrary, Hall simply mailed and posted the same eviction summons that he had previously filed on December 1. CP 1116-1118.

Hall argues that the court's authorization for a return date less than the 90 days required by CR 4(d)(4) can be inferred from the fact that Hall's motion for the order authorizing service by mail was supported by "a declaration of counsel specifically requesting the form be consistent with RCW 59.12.070 & .080." *Response,* p. 19, fn 59. This only begs the question. Given that strict compliance with RCW 59.12.070 is required to preserve subject matter jurisdiction and to establish personal jurisdiction, any court order which alters the time or manner of service should be required to be explicit and not subject to inference. Because the *Order Allowing Service Allowing Service by Mailing and Posting* did not establish a return date, the trial court cannot be said to have exercised any authority it might have had to set the time for answering a mailed summons at less than 90 days.

e. It is not <u>necessary</u> for the court to find that the unlawful detainer statute impliedly authorizes service of an eviction summons by mail with a return date that is less than 90 days.

Hall argues that RCW 59.12.070 <u>must</u> be read to impliedly

authorize the trial court to order service by mail with a return date that is less than 90 days, because "[to hold otherwise would make it impossible for a landlord to evict a tenant that avoids service: summons via CR 4 would be required, but would violate RCW 59.12.070 and .080. *Response* p. 19-20, fn 61. This is incorrect.

Any landlord who has a tenant that is avoiding personal service, can serve the tenant by publication. RCW 59.12.070. and .080. Such a landlord need only publish the summons per RCW 4.28.110, with a return date that is roughly 40 days after the first date of publication. This conforms to the requirements of RCW 59.12.070. See section 7(c), above.

8. The eviction summons did not give Feigenbaum the notice required by RCW 59.12.070 and RCW 4.28.080(16).

RCW 59.12.180 states that the laws governing civil practice apply to unlawful detainer action except as otherwise provided in RCW 59.12. *et seq.*[8] As noted above, nothing in RCW 59.12 *et seq.* alters the laws governing service of the eviction summons by mail. Therefore, RCW 4.28.080(16) applies to the determination of when service of the mailed eviction summons in complete. Because such service is not complete

[8] **59.12.180. Rules of practice**

Except as otherwise provided in this chapter, the provisions of the laws of this state with reference to practice in civil actions are applicable to, and constitute the rules of practice in the proceedings mentioned in this chapter; and the provisions of such laws relative to new trials and appeals, except so far as they are inconsistent with the provisions of this chapter, shall be held to apply to the proceedings mentioned in this chapter.

until 10 days after the date of mailing,[9] the eviction summons that was mailed to Feigenbaum on December 6 was not "served" until December 16. Because December 16 was also the return date in the eviction summons, Hall failed to give Feigenbaum at least 10 days notice of the return date as required by RCW 59.12.070 and CR 6(e).

Hall argues that service of the mailed summons was timely, because Feigenbaum admits that he received the mailed summons on December 9, and on December 17, 2010 (at the show cause hearing), the court continued the return date from December 16 to December 21, and this new return date (December 21) was more than seven days after December 9. *Response,* p. 20. This argument fails for several reasons:

1. The date of service of process by mail is <u>not</u> based on when the mail is actually received; it is based on when the process is mailed. See RCW 4.28.080(16) and CR 4(d)(4).

2. The timeliness of service is determined with reference to the return date in the eviction summons – not some date subsequently set by the court at a later hearing. RCW 59.12.070.

3. The court did not continue the return date from December 16 to December 21. The court only continued the show cause hearing from December 17 to December 22. VRP (Dec. 17, 2010) at 9-10.

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[9] (16) In lieu of service under subsection (15) of this section, where the person cannot with reasonable diligence be served as described, the summons may be served as provided in this subsection, **and shall be deemed complete on the tenth day after the required mailing . . . .**

4. Even if this court were to find that the trial court attempted to continue the return date, it must also find that the trial court lacked jurisdiction to do so. RCW 59.12.070's requirement that the tenant be served at least seven days (or 10 days in the case of mailing) before the return date in the eviction summons is jurisdictional. Because the trial court did not have personal jurisdiction and was precluded from exercising subject matter jurisdiction when Feigenbaum appeared at the show cause hearing on December 17, it lacked authority to order any continuance of the return date. Community Investments, Ltd. *supra* at 38.

Hall argues that the 10-day period described in RCW 4.28.080(16) only applies when the date of actual service is not known. *Response,* p. 21. Hall offers no authority for this proposition. Such a reading conflicts with the plain language of the statute. Service by mail is intended as a substitute for personal service. Had the Legislature intended service to be complete in a shorter time period than ten days, it would have included language like "or upon actual receipt of the mailed summons, whichever is sooner."

9. RCW 4.28.100(6) has no bearing on the determination of whether Feigenbaum received the required notice of the return date.

Hall argues RCW 4.28.100(6) -- not CR 4(d)(4) – applies to the determination of whether Feigenbaum received the statutory notice required by RCW 59.12.070. *Response,* p. 20, fn 65. But RCW 4.28.100(6) only authorizes service by publication in certain instances; it does not specify the notice period for such service by publication. Therefore, it is inapposite.

10. Hall's error in providing inadequate notice was not harmless.

Hall argues that any error regarding the timeliness of service was harmless, because "Feigenbaum received all pleadings and was granted a continuance at his request that allowed him to timely respond as provided in the statute." *Response*, p. 21. This argument is baseless. Feigenbaum raised his objections to the court's jurisdiction at the very outset of the initial show cause hearing on December 17, 2010. VRP (Dec. 17, 2010) at 4. Errors with respect to the court's exercise of subject matter or personal jurisdiction are not harmless.

Moreover, because the eviction summons was mailed on December 6, service on Feigenbaum was not complete until December 16. RCW 4.28.080(16). By operation of RCW 59.12.070 (7 days) and CR 6(e) (additional three days), the mailed summons should have given Feigenbaum at least 10 days' notice of the return date – or until December 26.[10] Thus, even the continued date of December 22 did not give Feigenbaum the notice required by the statute and the rules.

11. Feigenbaum did not waive any arguments or issues on appeal.

Hall claims that because Feigenbaum failed to assign error to certain alleged oral statements about the unsuccessful attempts at personal service that the court apparently made during the course of a

[10] As noted in section 7 above, Feigenbaum maintains that the return date for a mailed summons should be 90 days from the date of mailing. CR 4(d)(4).

hearing on January 21, 2011, Feigenbaum's appeal of the *Order Allowing Service by Mailing and Posting* is somehow in jeopardy. This claim has no merit. Feigenbaum appealed the order in question. Feigenbaum appealed the *Order Denying Defendant's Motion to Vacate and Dismiss for Lack of Jurisdiction* which contained the written finding. Feigenbaum has no obligation under the rules to assign error to every oral statement by the trial court that is not even reduced to a written order.

Similarly, Hall argues Feigenbaum waived his due process objection to the *ex parte* issuance of the writ of restitution because he failed to appeal the court's oral ruling on December 22, 2010, that was never reduced to writing. *Response,* p. 26, fn 77. As discussed in section 14 below, the court did not authorize an *ex parte* writ of restitution with respect to future rents; moreover, Feigenbaum's appeal of the writ that was in fact issued *ex parte* is sufficient to preserve the issue.

All issues raised by Feigenbaum on appeal were argued in the trial court with the lone exception of Feigenbaum's argument that the trial court lacked authority to issue a TRO and preliminary injunction as part of the unlawful detainer proceeding. (*Appeal Brief*, p. 16 and p. 31). Either because this issue goes to the existence of the court's jurisdiction or its authority to exercise that jurisdiction, Feigenbaum should be

permitted to raise the issue for the first time here.[11] Moreover, Feigenbaum's appeal raises numerous, related jurisdictional issues that were before the trial court.

12. There was no emergency or irreparable harm to justify issuance of the TRO without notice to Feigenbaum.

Hall argues that Feigenbaum's prior statement (at an undisclosed point in time), "You don't want me to leave and tear all my improvements out" was sufficient to establish an emergency and immediate and irreparable injury to justify the TRO. *Response,* p. 23, and CP 1154. This is incorrect. The lease gave Feigenbaum the right to remove all installed improvements at the end of the lease. CP 1169. The court's judgment found that the lease gave Feigenbaum the right to remove the improvements. CP 1191. Exercising one's rights over one's own property cannot constitute an emergency or irreparable harm.

Hall argues that the TRO was simply a "stand-still order" and as such was harmless and did not require the posting of a bond. *Response,* p. 24. This is incorrect. The TRO (and the preliminary injunction) prevented Feigenbaum from removing property that he owned from the premises so that Hall could later levy against them. As such, the TRO

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[11] Feigenbaum acknowledges that this argument is contrary to this court's ruling in MHM&F LLC v. Pryor, 168 Wn.App 451 (2012). However, the issue in MHM&F has not yet been ruled on by the Supreme Court; therefore, Feigenbaum preserves this issue on appeal.

and preliminary injunction were tantamount to a prejudgment writ of attachment. Because Hall did not give Feigenbaum notice of the TRO, he not only violated RCW 7.40.050 but also article 1, Section 3 of the Washington constitution, and the due process clause of the U.S. Constitution. Corning & Sons v. McNamara, 8 Wn.App 441, 445; Connecticut v. Doehr, 501 U.S. 1, 12 (1991); Sniadich v. Family Finance Corp of Bay View, 395 U.S. 337, 342 (1969).

Hall offers no justification for his failure to post a bond for the TRO. *Response,* p. 24.

13. Hall offers no real justification for the preliminary injunction.

Hall argues that a bond is not mandatory for the issuance of a preliminary injunction, because RCW 7.40.080 leaves the sum of the bond to the discretion of the court. *Response,* p. 25. This argument is baseless. See Evar, Inc. v. Kurbitz, 77 Wash.2d 948, 951 (1970).

Hall offers no rebuttal to Feigenbaum's argument that the preliminary injunction was an abuse of discretion because it did not contain findings of fact or conclusions of law. *Response,* p. 24-25.

14. The trial court never stated that Hall could secure an *ex parte* writ of restitution if Feigenbaum failed to pay future rent.

Hall argues that at the second show cause hearing on December 22, 2010, the court instructed Feigenbaum that unless he paid future rent

into the court's registry as it came due, Hall would be authorized to secure a writ of restitution *ex parte*. *Response,* p. 26. Hall fails to cite to the record, and the record does not support Hall's claim.

At the December 22 show cause hearing, the court ruled that Feigenbaum had until Monday, December 27 at 4:30 p.m. to pay the $14,400 back-rent obligation into the court registry (VRP (Dec. 22, 2010) at 23)); if Feigenbaum failed to make this payment by that time, the court ruled that Hall could secure an *ex parte* writ of restitution. VRP (Dec. 22, 2010) at 32.[12] At the same show cause hearing, the court also ordered Feigenbaum to make future rent payments of $7,096 into the court registry on or before the 5th day of the month, beginning January 5, 2011. VRP (Dec. 22, 2010) at 23. Nowhere in the court's oral ruling does the court state that Hall could secure an *ex parte* writ of restitution if Feigenbaum failed to make these future rent payments into the court's registry.

Hall also argues that the bond requirement for a writ of restitution is discretionary. *Response*, p. 27. This argument is contradicted by the mandatory language of RCW 59.12.090 and the holding of IBF, LLC *supra,* at 636.

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[12] This portion of the court's ruling is not at issue, because Feigenbaum made this payment into the court's registry. CP 1099-1101.

15. Feigenbaum did not invite the court's error in converting the unlawful detainer action into a general civil action.

Hall argues that Feigenbaum is barred from contesting the court's conversion of the case into an ordinary civil action because Feigenbaum invited the error or did not adequately contest it. *Response.* p. 28. This is incorrect. Feigenbaum brought a motion to clarify whether the case had been converted to a civil action because of conflicting statements that had been made by the trial court. CP 324-328. Feigenbaum argued to the trial court that the case had not been converted because Feigenbaum had not conceded the right to possession of the premises. CP 382. Feigenbaum did not bring counterclaims in the trial court, because he believed that the court lacked authority to convert the matter to a general civil action. The court's error was not harmless.

Hall also claims that possession was no longer an issue because Feigenbaum never made any effort to regain possession of the premises. *Response,* p. 28. This claim is absurd. Feigenbaum filed numerous motions – as well as a motion for discretionary review to this court -- to have the writ of restitution vacated so that he could regain possession of the premises and regain control over the property still held at the premises. See CP 384-393; 786-795; 963-975; *Appeal No. 67694-6-I.*

16. Because Hall chose to pursue a statutory unlawful detainer action, Hall's damages are limited to those provided by RCW

59.12.170, which do not include lost rent for the balance of the lease term and the cost of reletting.

Hall argues that he was entitled to recover damages in the form of lost rent for the balance of Feigenbaum's lease term because the lease provided for this recovery. *Response,* pp. 31-32 (citing Metropolitan Nat. Bank v. Hutchinson, 157 Wash. 522, 529 (1930); Hargis v. Med-Mad, 46 Wash. App. 146 (1986), and Heuss v. Olson, 43 Wash. 2d 901, 905 (1953)). None of these cases involved an unlawful detainer proceeding. Instead, each of these cases involved breach of a lease that provided for the landlord's right to re-enter upon the tenant's default and to hold the tenant liable for rent for the balance of the lease term.

Had Hall elected to pursue a breach of contract claim, he might have been able to re-enter the premises and hold Feigenbaum liable for the balance of the lease term.[13] But Hall chose not to pursue a breach of contract claim. Instead, Hall pursued an unlawful detainer action. By electing to proceed according to the summary proceedings available under the unlawful detainer statute, Hall limited his damages to those provided by RCW 59.12.170.

a. RCW 59.12.170 does not provide for damages for unpaid rent to the end of the lease term.

[13] As stated in his *Appeal Brief*, pp. 45-47, Feigenbaum argues that such an action would have failed.

RCW 59.12.170 only provides for the recovery of unpaid rent prior to the unlawful detainer proceedings, and double the fair market rental value of the premises during the period that the tenant unlawfully detained the premises. Sprincin v. Sound Conditioning, 84 Wn.App 56, 63-54 (1996). It does not provide for rent for the balance of the lease term or for the costs associated with reletting.

Hall argues that his artful demand in the 3-Day Notice "to recover rent reserved in the future and other damages" preserved his contract claim. *Response,* pp. 30-31. Nothing in RCW 59.12.030 or RCW 59.12.170 provides that the landlord can seek damages above and beyond those provided by the statute. The court should not interpret the statute to provide relief that is not specifically provided, especially since unlawful detainer statutes are to be construed strictly in the tenant's favor. Sprincin, at 65 (citing Wilson v. Daniels, 31 Wn.2d 633, 644 (1948).

b. Either Feigenbaum's failure to comply with the 3-Day Notice to Pay or Vacate or the court's issuance of the Writ of Restitution terminated the lease.

Feigenbaum is unaware of a Washington case that definitively declares at what point the unlawful detainer proceeding terminates the lease. As a matter of logic, that point might be when the tenant fails to comply with a valid 3-Day Notice to Pay of Vacate. RCW 59.12.030 defines such a tenant as being in unlawful detainer. By definition a

person who unlawfully detains the premises has no legal right to possess the premises. If the tenant no longer has the right to possess the premises, his lease must have been terminated.

This interpretation is supported by Sprincin, *supra*, which held that the damages for the period that the tenant unlawfully detained the premises is based on the fair market rental value of the premises – not the lease rate. If the lease had not been terminated, the court would have applied the lease rate – not the fair market rental value – to calculate the damages. Alternatively, the court might declare that the lease is terminated – or was forfeited -- when the court issues the Writ of Restitution and the tenant is evicted. This interpretation is supported by Christiansen, at 371 ("The purpose of the [3-Day] notice is to provide the tenant with "*at least* one opportunity to correct a breach before forfeiture of a lease under the accelerated restitution provisions of RCW 59.12.")

Under either interpretation, the trial court's measure of damages was incorrect. Because the unlawful detainer action terminated or forfeited the lease, the court should not have awarded contract damages for rent owed on the balance of the lease term and the cost of reletting. Instead the court should have limited its damage award to any rent owed for the period up until November 9, 2010 (4 days after service of the Notice, CP 1178 and Christensen, *supra,* at 371 (mailing and posting

adds an extra day)) and double the fair market rental value of the period of unlawful detainer -- November 10, 2010 to January 7, 2011, the date of eviction.[14]

CONCLUSION

This court should reverse the trial court, award Feigenbaum costs and reasonable attorney's fees as the prevailing party on appeal, and remand to the trial court for an award of costs and reasonable attorney's as well as damages associated with the wrongful TRO, the wrongful preliminary injunction, and the wrongful Writ of Restitution.

RESPECTFULLY SUBMITTED this 4th day of March, 2013.

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[14] The Sheriff's Return on the Writ of Restitution states that Writ was issued on January 78, 2011, posted on the premises on January 12, 2011, and that the plaintiff – Hall – informed the sheriff that Feigenbaum had vacated the premises on or before January 27, 2011. CP 1064-1066.