90297-6

NO. 68753-1-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION I

4105 1ST AVENUE SOUTH INVESTMENTS, LLC,

Respondent,

v.

GREEN DEPOT WASHINGTON PACIFIC COAST, LLC

Appellant.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENTS

4105 1st Avenue South ("4105") is the Respondent in both Case No. 68753-1-I in Court of Appeals Division I (the "First Appeal"), the basis for this Petition for Review, and is also the Respondent in Case No. 70051-1-I (the "Second Appeal"), which is still pending in the Court of Appeals Division I and which is seeking the same relief that was denied twice by the trial court and once in the First Appeal.[1]

B. COURT OF APPEALS DECISION

Petitioners are seeking review of the Court of Appeals decision in *4105 1st Ave. South Investments, LLC v. Green Depot WA Pacific Coast, LLC*, __ Wn.App. __, 321 P.3rd 254 (2014) as ordered for publication on March 10, 2011. Respondent 4105 opposes the Petition for Review for the reasons stated herein.

C. ISSUE PRESENTED FOR REVIEW

Whether a tenant that is in default under a lease is a "prevailing party" in an unlawful detainer action wherein the tenant obtained no affirmative relief but remained a defendant in a companion ordinary civil suit for its breach of the same lease.

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[1] The fact that Green Depot continues to seek relief in the Court of Appeals on the exact same issue raises a possible issue of ripeness for review at this point. As long as the Second Appeal is pending, any ruling by the Supreme Court could conflict with the outcome of the Second Appeal.

D. STATEMENT OF THE CASE

This case arises out of Green Depot WA Pacific Coast, LLC's ("Green Depot") breach of a commercial lease agreement for failure to pay rent in the amount of at least $106,194.01.[2] In connection with that breach, 4105 exercised its legal remedies under the terms of the lease to both recapture the leased premises and to obtain judgment against Green Depot for its unpaid rent. In its published opinion, the Court of Appeals stated the relevant facts as follows:

> ¶ 2 On March 22, 2007, Bit Holdings Sixty–One Inc. entered into a commercial lease agreement with Built–E Inc. for 38,148 square feet of commercial space located at 4121 First Avenue South in Seattle. The 60–month lease began on March 22, 2007 with agreed upon extensions for two successive terms. The lease sets forth an escalating monthly fixed minimum rent for the 60–month term with a provision that addresses interest on past due amounts owed. The lease contains an attorney fee provision for an award of reasonable attorney fees "to be paid by the losing party."
>
> ¶ 3 4105 1st Avenue South Investments LLC (4105) acquired the rights to the lease from Bit Holdings Sixty–One. Built–E assigned its rights under the lease to Green Depot WA Pacific Coast LLC (Green Depot). In February 2011, 4105 and Green Depot entered into an assignment and assumption of the March 22, 2007 lease agreement (Assignment and Assumption). Green Depot agreed to all of the terms and conditions of the lease, including the obligation to pay rent "and all other sums owing thereunder." The Assignment and Assumption also contains an attorney fee provision stating that the prevailing party in an action "arising out of or in connection with the Lease or this Agreement ... shall be entitled to recover from the losing party" reasonable attorney fees or costs without regard to whether "the action is filed or prosecuted to judgment."
>
> ¶ 4 In December 2011, 4105 served Green Depot with a three-day notice to pay $106,194.01 in past due rent or vacate. On January 9, 2012, 4105 filed a commercial unlawful detainer action requesting a writ of restitution and alleging breach of the lease agreement. 4105 alleged Green Depot had not paid $106,194.01 in past due rent. 4105 sought a judgment for past due rent, damages, and an award of attorney fees "as authorized by the parties' written agreement,"

[2] CP 1

King County Superior Court Case No. 12–2–01450–7 SEA. In the answer to the unlawful detainer action, Green Depot denied the claim for past due rent of $106,194.01 and that 4105 was entitled to a writ of restitution.

¶ 5 On January 27, 4105 filed a separate cause of action against Green Depot alleging breach of the lease agreement and requesting an award for $106,194.01 in unpaid rent and damages, King County Superior Court Case No. 12–2–03517–2 SEA.

¶ 6 At the show cause hearing on February 24, the court set the unlawful detainer action for an expedited trial. RCW 59.12.130 states that "[w]henever an issue of fact is presented by the pleadings it must be tried by a jury." The court scheduled the trial date for March 26, four days after the end of the lease. The attorney representing 4105 told the court that 4105 had another tenant "lined up" to move into the space, and expressed concern that if Green Depot did not vacate at the end of the lease, 4105 "would be subject to damages in the millions for loss of this new lease agreement." In response, the Green Depot attorney stated his client "[did] not intend ... to overstay" and agreed that if Green Depot did not vacate by the end of its lease, 4105 "shall be entitled to issuance of a writ of restitution on or after March 23, 2012."

¶ 7 The parties entered into a written memorandum of understanding. In the memorandum, 4105 also agreed to give Green Depot the option to occupy a small portion of the premises through May 31, 2012 at a monthly rate of $8,164.80. The memorandum of understanding states:

DATED Feb. 24.2012

Memorandum of Understanding

As referenced in Ex Parte Case Scheduling

Order dated February 24, 2012.

The undersigned parties agree that Green Depot WA Pacific Coast, LLC, may hold over its occupancy at Suite 4003, consisting of approximately 13,608 [square feet], at the current premises through May 31, 2012, at an all-inclusive monthly cost of $8,164.80. If Green Depot opts not to hold over for either April or May, Green Depot shall notify 4105 1st Ave. S Investments, LLC, by the 15th of the preceding month. Green Depot's monthly payments shall be due no later than the 22nd of the month for the following month.

The certification for trial states, in pertinent part: "[P]laintiff shall be entitled to issuance of a writ of restitution on or after March 23, 2012 subject to terms agreed upon by parties in the Memorandum of Understanding incorporated herein by reference."

¶ 8 In a March 6 e-mail, the attorney representing Green Depot confirmed that the expedited trial date should be stricken. The attorney reiterated that if Green Depot did not vacate at the end of the lease, 4105 would be entitled to a writ of restitution. The email from the attorney representing Green Depot provides, in pertinent part:
[I]n light of the February 24 hearing and the parties' agreement that if Green Depot has not vacated the premises by March 23 (subject to the option to occupy a portion of the premises through May) Plaintiff will be entitled to receive a Writ of Restitution, right to possession of the premises is no longer in dispute and the expedited trial date of March 26th should be stricken.

The attorney representing Green Depot also acknowledged that 4015 could "still pursue its separate breach of contract action." In reply, the attorney representing 4105 requested Green Depot sign and return the lease amendment. The e-mail from the attorney representing 4105 also states that "[a]ssuming of course your client opts to vacate on or before [March 23,] I will also draft and send to you for signing a stipulation and order of dismissal of the eviction lawsuit." On March 20, the parties confirmed with the court that the March 26 trial date should be stricken.

¶ 9 On March 22, Green Depot moved out of the leased premises except for the portion it was allowed to continue to occupy. The next day, 4105 sent Green Depot a stipulation and order of dismissal of the unlawful detainer action. Green Depot did not return the stipulation.

¶ 10 On March 26, Green Depot filed a motion for an award of attorney fees and costs of $28,231. Green Depot claimed it was entitled to the award of fees as the "prevailing party" under the terms of the lease because it successfully defended against the unlawful detainer action, and 4105 "has received exactly none of the relief sought."

¶ 11 In opposition, 4105 asserted Green Depot was not the prevailing party because there was a separate pending breach of contract action to resolve the dispute over rent and damages.

¶ 12 The court denied Green Depot's motion for an award of attorney fees and costs as the prevailing party in the unlawful detainer action. On January 11, 2013, the court entered an agreed order dismissing the unlawful detainer action without prejudice to Green Depot's request for an award of attorney fees and costs in the pending breach of contract action. The order states, in pertinent part:

Green Depot's Motion is GRANTED and [4105]'s claims ... are dismissed with prejudice, PROVIDED that nothing in this Order shall prejudice either (1) [4105]'s rights, if any, to pursue its breach-of-contract claims raised in King

County Cause No. 12–2–03517–[2] or (2) Green Depot's rights, if any, to pursue an award of its fees and costs incurred in this matter.[3]

In each of Green Depot's prior futile efforts to twice convince the trial court, as well as its two cases at the Court of Appeals, that it was somehow the prevailing party below, Green Depot misconstrues the history of the unlawful detainer action, and attempts to convince each tribunal that 4105 did not obtain the relief it was seeking in the unlawful detainer action, therefore making Green Depot the prevailing party. In fact, 4105 obtained the exact relief that every Plaintiff in an unlawful detainer action seeks: The right to obtain a Writ of Restitution. In every pleading (including the most recent filings in the Second Appeal) Green Depot ignores the explicit language of the Commissioner's Certification for Trial which states: "Plaintiff shall be entitled to issuance of a writ of restitution on or after March 23, 2012 subject to terms agreed upon by parties in the Memorandum of Understanding incorporated herein by reference."[4] Thus, 4105 clearly obtained the relief provided for in Chapter 59.12 RCW, but agreed to forbear exercising that right in order to facilitate an orderly move out or allow a short holdover in a portion of the premises. To continually state that 4105 failed to obtain any relief under the unlawful detainer statutes is a misstatement of the facts.

While it is undisputed that Green Depot moved out before the trial date (and one step ahead of issuance of the actual writ as ordered by the

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[3] *4105 1st Ave. S. Investments, LLC v. Green Depot WA Pac. Coast, LLC*, __ Wn.App. ___, 321 P.3rd 254 (2014) (Emphasis added)

[4] CP 25 (Emphasis added)

Court), the underlying dispute as to whether Green Depot owed 4105 money under the lease did not end. Although the question of possession ended, the *gravamen* of 4105's complaint for unpaid rent and attorneys' fees it was entitled to under the lease remained in the breach of contract action that was pending in the companion case. Those claims survived and continued until the eve of trial at which time the dispute was settled through the required pre-trial mediation.[5]

In contrast to the Commissioner's order, which explicitly provides for issuance of a Writ of Restitution pursuant to Chapter 59.12 RCW, there is not a single court order granting *any affirmative relief* to Green Depot or otherwise finding that it prevailed on any aspect of its claimed affirmative defense that it did not owe rent to 4105. In fact, all of the parties recognized the central issue of Green Depot's unpaid rent (and the ultimate determination of who would "prevail" in this dispute) would be resolved in context of the ongoing breach of contract case. Nothing was resolved in the unlawful detainer action; the issue of the right of possession simply became moot.

E. ARGUMENT

Green Depot Merely Obtained a Trial Date

As the Court of Appeals properly noted, the only reason that a Writ of Restitution was not issued at the Show Cause Hearing was because Green Depot asserted an affirmative defense that it did not owe 4105 rent

[5] Green Depot paid a significant amount to 4105 in connection with that settlement.

and/or the amount claimed was incorrect.[6] Having raised a factual issue at the Show Cause Hearing, the Commissioner was required to certify the case for trial as provided for in RCW 59.12.130.

Had that trial occurred, Green Depot would have had the burden of proving its affirmative defense - that it did not owe 4105 rent under the lease. However, because the King County Superior Court could not provide an earlier trial date, the term of the lease expired before the matter could be heard at the expedited trial.[7] Had the expedited trial occurred while possession remained at issue and had Green Depot proved its affirmative defense, only then could it have claimed it was the prevailing party. However, here, the very basis that allowed Green Depot to survive the Show Cause Hearing remained live as the central issue of the parties' ongoing breach of lease dispute, namely Green Depot's failure to pay the rent it owed 4105. 4105 never retreated from its claim it was entitled to rent. In that regard, Green Depot's "affirmative defense" in the unlawful detainer action was left to be resolved in the breach of contract suit that was never abandoned by 4105.

The early initial outcome of the unlawful detainer action was similar to a baseball game that is "rained out". There is not a winner or a loser in the rained out game but, rather, it is scheduled to be replayed at a

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[6] *4105 1st Ave. S. Investments, LLC v. Green Depot WA Pac. Coast, LLC* at ¶ 21.

[7] Unlike RCW 59.18.380 (the Residential Landlord Tenant Act) which requires a trial be held "within thirty days", there are no specific time parameters in RCW 59.12.130, but the statute merely requires that the expedited trial "take precedence of all other civil actions." Thus, the fact that the trial date was set after the end of the lease term was a fortuitous event for Green Depot, but did not provide a basis that it prevailed on its affirmative defense that it did not owe rent to 4105.

later date. Here, Green Depot's claimed affirmative defense that it did not owe rent was never adjudicated in the unlawful detainer action, but was "rescheduled" for resolution in the breach of contract case on the ordinary civil trial calendar as opposed to the expedited unlawful detainer calendar. Had Green Depot been able to prove its affirmative defense (that it did not owe 4105 rent) in the breach of contract lawsuit, it could have then claimed "prevailing party" status which would have entitled Green Depot to seek attorneys' fees and costs as provided for in the lease.[8] In this case Green Depot elected not to go to trial on the breach of contract claim and settled the matter by paying a substantial portion of the rent it owed to 4105. Green Depot prevailed on nothing, the lease term expired and possession was no longer at issue.

Green Depot Was Not the Prevailing Party

Several of the cases cited by Green Depot actually provide a basis for denying the Petition for Review. In *Belfor USA Group, Inc. v Thiel*[9] Belfor, the contractor-plaintiff, having first commenced an action in Superior Court, subsequently filed and won a successful motion to compel

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[8] *4105 1st Ave. S. Investments, LLC v. Green Depot WA Pac. Coast, LLC* at ¶ 16. "***Attorney's Fees.*** If either party brings an action regarding terms or rights under this Lease, the prevailing party in any action, on trial or appeal, is entitled to reasonable attorneys' fees as fixed by the court to be paid by the losing party. The term "attorney's fees" shall include, but is not limited to, reasonable attorneys' fees incurred in any and all judicial, bankruptcy, reorganization, administrative and other proceedings, including appellate proceedings, whether the proceedings arise before or after entry of a final judgment and all costs and disbursements in connection with the matter." (Emphasis added). This attorneys' fee clause in the lease is sufficiently broad to encompass an award of any attorneys' fees incurred the unlawful detainer action *if Green Depot had come to trial and prevailed on its affirmative defense that it did not owe the rent.*

[9] *Belfor USA Group, Inc. v Thiel* 160 Wn.2d 669 (2007)

arbitration. In that case, the Court denied Belfor's claims for attorneys' fees based solely on its assertion that it prevailed on its motion to compel arbitration. While the Court denied those fees based on the limitations in the contract language, this Court held: "Nothing herein should be construed to mean that if Belfor prevails in arbitration, the arbitrator may not award Belfor all attorney fees incurred to that date in collecting under the contract. But at this point, Belfor is not yet a "prevailing party" for purposes of the contract's attorney fees provision."[10] Like Belfor, Green Depot had the opportunity in the breach of contract case to prevail on its claim that it did not owe rent to 4105, but declined to. Had it proved its affirmative defense in the breach of contract case, it could have asked for all of its attorneys' fees incurred in that defense, including the fees spent in the unlawful detainer proceeding. However, Green Depot never became the "prevailing party" on its affirmative defense it did not owe rent in the unlawful detainer action or the breach of contract trial.

It is well established law in Washington that: "Under RCW 4.84.330, 'prevailing party' means the party in whose favor the court rendered final judgment. *Riss v. Angel,* 131 Wash.2d 612, 633, 934 P.2d 669 (1997); *Marassi v. Lau,* 71 Wash.App. 912, 859 P.2d 605 (1993), *abrogated on other grounds by Wachovia,* 165 Wash.2d 481, 200 P.3d 683."[11] In this case, Green Depot cannot point to a "final judgment" that is in its favor. While our courts also hold "a defendant who successfully

[10] *Id.* at 671 (Emphasis added)
[11] *Hawkins v. Diel*, 166 Wn. App. 1, 10 (2011)

defends may be a prevailing party,[12]" that is not what occurred in this case. In *Marine Enterprises* (which involved a "substantially prevailing party" attorneys' fee provision) the Plaintiff obtained a judgment of less than $6,000.00 on its $600,000.00 claim and therefore was not the substantially prevailing party. However, the relevant distinguishing factor in that case is that judgments were actually entered which adjudicated the claims. In this case, Green Depot failed to pursue its affirmative defense to conclusion, and therefore it cannot claim it prevailed on anything. As noted by the Court of Appeals in this case, the only reason a Writ of Restitution was not issued at the Show Cause Hearing was because of Green Depot's affirmative defense. Had Green Depot elected to prosecute that claim through trial (which it had a perfect right to in the breach of contract claim) it might have eventually been deemed a prevailing party. However, Green Depot ultimately elected to settle the matter before trial and never prevailed on anything.

In *Hawkins v. Diel*, the defendant (DMC) did not file a counterclaim against the plaintiff but, rather, asserted that it was a prevailing party because it successfully defended against a *portion* of the plaintiff's claims. In affirming the denial of DMC's attorneys' fee claims, the Court of Appeals held that "successfully defending a portion of the [plaintiff's] suit does not make them a prevailing party."[13] In this case,

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[12] *Marine Enters, Inc. v. Sec. Pac. Trading Corp.*, 50 Wn. App. 768, 772 (1988) *review denied* 111 Wn.2d 1013 (1988)
[13] *Hawkins v. Diel* at 12

Green Depot did not successfully defend against 4105's claims, and was never a prevailing party because no adjudication of the underlying dispute occurred in the unlawful detainer case; the claim for unpaid rent and Green Depot's affirmative defense it did not owe rent survived for final adjudication in the breach of contract case. The issue of possession became moot due to the expiration of the lease term, not because of anything Green Depot prevailed on.

Even when viewed in a light extremely favorable to Green Depot, there is no basis for an attorneys' fee award because it can be viewed as a case where each party got some measure of the relief it was seeking. As explained in *Hawkins*, "[w]hen both parties prevail on a major issue, there may no prevailing party for attorney fee purposes. *Phillips Bldg.Co. v. An*, 81 Wn. App. 696, 702 (1996).[14] Here, 4105 obtained an order authorizing a Writ of Restitution which was never issued because possession was no longer stake by the expedited trial date. If, by some stretch of the imagination, Green Depot can claim it "prevailed", 4105 can similarly claim it prevailed by obtaining the writ. Under that strained view of the case, each party can claim it "prevailed" on a major issue and no attorneys' fees award would be appropriate to either side.

The Decision Does Not Conflict With Other Court of Appeals Cases

Green Depot seeks review pursuant to RAP 13.4 (b) (2) claiming that the decision conflicts with *Walji*,[15] *Hawk*,[16] and *Council House*.[17] All

[14] *Id* at 10
[15] *Walji v. Candyco, Inc.*, 57 Wn. App. 284 (1990)

of those cases are distinguishable by a common fact that, in each case, the landlord- plaintiff took a voluntary non-suit leaving the tenant in the same position as it was in at the outset of the case. Unlike those "landlord walk away" cases, 4105 vigorously pursued its claims for unpaid rent through the eve of the breach of contract trial. By relying on *Walji* while ignoring *Wachovia Lending SBA,* Green Depot fails to recognize an important Supreme Court case that calls *Walji* into question. The Court of Appeals in this case, properly recognized that *Walji* is not a controlling case as it was abrogated in *Wachovia SBA Lending, Inc. v. Kraft.*[18] In *Wachovia SBA Lending* this Court explains how *Walji* has been misapplied in prevailing party cases:

> Court of Appeals decisions that have explored this question rest on the mistaken "general rule" that "if a plaintiff voluntarily dismisses its entire action under CR 41, the defendant is considered to be the prevailing party for purposes of attorney fees under RCW 4.84.330." *Marassi v. Lau*, 71 Wash.App. 912, 918–19, 859 P.2d 605 (1993) (citing *Walji v. Candyco, Inc.*, 57 Wash.App. 284, 288, 787 P.2d 946 (1990)); *Allahyari v. Carter Subaru*, 78 Wash.App. 518, 522–24, 897 P.2d 413 (1995)
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> This reflects an incorrect view of our precedent. *Marassi* attributed this general rule to *Walji,* but Walji made no such statement. *Walji* merely held that the statutory definition of "prevailing party" under RCW 4.84.330 could not be imposed where there was already a bilateral contract. *Walji*, 57 Wash.App. at 287–88, 787 P.2d 946. Although the *Walji* court explained that a voluntary dismissal cannot be used for the "purpose of precluding attorney fees to a defendant who has 'prevailed' as things stand at [the point of dismissal]," *Id.* at 289, 787 P.2d 946, this language was applicable to a bilateral contract that was not controlled by RCW 4.84.330. *Walji* never set forth a general rule that equated voluntary dismissal to a final judgment for the purposes of determining a

[16] *Hawk v. Branjes*, 97 Wn. App. 776 (1999)
[17] *Council House, Inc. v. Hawk*, 136 Wn. App. 153 (2006)
[18] *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481 (2009)

> prevailing party under RCW 4.84.330. The court in *Marassi* erred by applying the language of RCW 4.84.330 to a bilateral contract and further erred by citing *Walji* to suggest that under the statute, a voluntary dismissal amounts to a final judgment. Any reliance on *Marassi* in this case would be similarly flawed.[19]

In addition to ignoring *Wachovia SBA Lending*, Green Depot's citation of excerpts from *Walji* omits language that clearly places that case in its proper context. In citing *Walji*, Green Depot omits the words:

> [Since this case may never be renewed] it is essential to apply the attorney fee provision of the lease at the time of dismissal to effectuate the intent of the parties. If the litigation is renewed, the attorney fee provision might once more come into play and be applied to the plaintiff's benefit. There would be no inconsistency in such a result. This interpretation will inhibit frivolous or badly prepared lawsuits and will protect parties from the expense of defending claims which do not result in liability.[20]

Those omitted words clearly distinguish *Walji* from the facts in this case. The fact that *Walji* was final at that point (with no other actual case pending) was crucial to the Court's reasoning. The matter was over and finished with no further action pending, other than a hypothetical possibility that the litigation could be renewed. In this case, the ongoing litigation was not hypothetical, but was actually continuing. That ongoing litigation provided the forum for Green Depot to prove its affirmative defense and become the prevailing party. However, Green Depot gave up its chance to become the prevailing party when it elected to settle the breach of contract case rather than prove its affirmative defense (that was

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[19] *Id.* at 490 (Emphasis added)
[20] *Walji* at 288 - 289

the sole basis for avoiding a Writ or Restitution at the Show Cause Hearing) that it owed no rent.

The bottom line is that *Walji, Hawk, Council House* all present situations where the landlord sought possession of the premises, yet then on the eve of trial, with possession still at issue and the lease term continuing beyond the trial date, abandoned its effort to retake possession. Thus, the tenants in those cases prevailed on the issue of possession. Here, Green Depot did not prevail on the issue of possession, rather that issue became moot because of the expiration of the lease term, not anything Green Depot did in the litigation. 4505 continued to seek recovery of unpaid rent before the lease term expired and after it recovered the leased premises. In the end, Green Depot took nothing.

The Case Does Not Present an Important Issue

Viewed in light of RAP 13.4 (b) (4), this case does not involve "an issue of substantial public interest that should be determined by the Supreme Court." In fact, this is a rather pedestrian landlord-tenant dispute that has little "substantial public interest" and which was decided in accord with well-established jurisprudence in Washington State.

This Court has long recognized the principle that landlord-tenant disputes that are no longer subject to the limited jurisdiction conferred under Chapter 59.12 RCW can continue through to resolution on the regular civil calendar. *Munden v. Hazelrigg*[21] and its progeny clearly

[21] *Munden v. Hazelrigg,* 105 Wash.2d 39 (1985)

support the proposition that claims that were originally asserted as part of an unlawful detainer action can survive as an ordinary civil lawsuit once the issue of possession is no longer at stake. Also, this case is clearly distinguishable from the landlord "walk away" cases that result in finding the tenant to be the prevailing party when the landlord abandoned its claim for possession and any other relief. Here, the landlord never gave up its claims, but vigorously continued to pursue them in the context of a regular civil action in accordance with the holding of *Hazelrigg*.[22]

Green Depot has not shown that the matters in this case are issues of substantial public interest. In reality, the general public has little or no interest in an attorneys' fee fight between a landlord and tenant in a commercial lease dispute. The discrete issues in this case are clearly governed by existing law and do not merit further review by the Supreme Court.

F. CONCLUSION

There is no basis for the Court to review this matter. The decision of the Court of Appeals is in total accord with existing Washington law, and Green Depot presents no compelling arguments that the issues in this case are of substantial public interest.

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[22] In fact, by commencing a separate civil action, 4105 avoided much of the confusion that surrounds "converting" unlawful detainer cases to ordinary civil cases. Some of the cases cited by Green Depot clearly show the confusion that can result from trial court's failure to properly convert a case. *See e.g. Angelo Property Co., LP v. Hafiz*, 167 Wn. App. 789 (2012) (Trial court initially states it had converted an unlawful detainer case to an ordinary civil case, but later reversed its own ruling.); *Hall v. Feigenbaum*, 178 Wn. App. 811 (2014) (Confusion in the record regarding when a court actually "converted" the unlawful detainer action to an ordinary civil suit.)

Green Depot did not "prevail" on a single claim in this dispute. All it did was assert an affirmative defense that required the issue of possession to be set for trial. It never proved its "claim" that it did not owe the rent under the lease and never obtained any affirmative judgment on that or any other issue. Green Depot had its chance to prove its claim and be the prevailing party if it had elected to stand trial in the breach of contract case. If Green Depot's alleged affirmative defenses were viable, it would have prevailed at trial and could then rightfully claim all of its attorneys' fees, including those incurred in the initial unlawful detainer action. Having elected not to try its "claim" Green Depot cannot be found to have prevailed on any matter in this case.

The Court of Appeals properly distinguished the landlord "walk away" cases that Green Depot relies upon. This case is not at all like those because 4105 never gave up its claim for unpaid rent and pursued Green Depot to the eve of trial.

For the foregoing reasons, 4105 requests that the Petition for Review by the Supreme Court be denied.

RESPECTFULLY SUBMITTED this 1st day of May, 2014.

AHLERS & CRESSMAN PLLC

By: _____

Scott R. Sleight, WSBA #27106
Lawrence S. Glosser, WSBA #25098
Counsel for Respondent 4105 1st Avenue South Investments, LLC,

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the state of Washington that I am now and at all times herein mentioned, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused this document to be served upon designated counsel of record in the manner noted below:

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DATED this 1st day of May, 2014, at Seattle, Washington.

Dianna Hubacka