

72611-1

FILED
October 30, 2015
Court of Appeals
Division I
State of Washington

72611-1

NO. 72611-1-I

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

STEPHEN FACISZEWSKI and VIRGINIA L. KLAMON,

Respondents

v.

MICHAEL R. BROWN and JILL A. WAHLEITHNER,

Appellants

REPLY BRIEF OF APPELLANTS

KEANE LAW OFFICES
T. Jeffrey Keane, WSBA 8465
100 NE Northlake Way, Suite 200
Seattle, WA 98105
206/438-3737 / fax 206/632-2540
Email: tjk@tjkeanelaw.com
Attorneys for Appellants

TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. ARGUMENT AND AUTHORITY 3

A. Because the Notice Failed as a Matter of Law to State any Facts in Support of the Asserted Reason for Terminating the Tenancy, the Trial Court Erred in Failing to Enter Judgment in Favor of Brown and Wahleithner..... 3

1. Brown and Wahleithner raised the issue in the trial court..... 3

2. The Notice did not state any facts in support of the asserted reason for terminating the tenancy 4

3. The notice did not substantially comply with the ordinance... 5

4. The trial court erred..... 6

B. The Notice to Quit the Premises Was Improperly Served as a Matter of Law..... 7

1. Because Faciszewski admitted that he found Brown and Wahleithner at the premises, but did not deliver a copy of the notice to them or anyone else, service failed to comply with RCW 59.12.040..... 7

2. If the person attempting to serve the notice knows that the tenant is present at the premises, then the tenant necessarily *can* be found there..... 10

3. Even if Brown and Wahleithner could not be “found” at the premises, Faciszewski failed as a matter of law to establish that no other person of suitable age and discretion could be found..... 11

4. As a matter of law, Faciszewski failed to comply with RCW 59.12.040(3) by not “delivering a copy [of the notice] to a person there residing” 14

C. At the Very Least, Brown and Wahleithner Were Entitled to a Trial on the Issue of Whether the Notice was Properly Served..... 15

D. There Was a Genuine Issue of Material Fact as to Whether Faciszewski Sought Possession so that He or a Member of His Family Could Occupy the Property as a Principal Residence..... 15

1. The landlord must “prove in court” that just cause exists 15

2. The “remedies” discussed by Faciszewski are not exclusive, and neither of them relieves the landlord of his obligation to prove just cause in the unlawful detainer action..... 17

3. The issue is whether Faciszewski truly intended, at the time he declared the tenancy terminated, that he or a family member would occupy the house as a principal residence 18

E. By Refusing to Accept tenders of Rent from Brown and Wahleithner, Faciszewski Caused His Own “Damages” 19

F. Brown and Wahleithner Are Entitled to an Award of Their Reasonable Attorneys’ Fees in the Trial Court and on Appeal..... 19

III. CONCLUSION 20

TABLE OF AUTHORITIES

Cases

<i>American Express Centurion Bank v. Stratman</i> , 172 Wn.App. 667, 672, 292 P.3d 128 (2012)	12
<i>Council House, Inc. v. Hawk</i> , 136 Wn.App. 153, 157, 147 P.3d 1305 (2006).....	20
<i>Hall v. Feigenbaum</i> , 178 Wn.App. 811, 319 P.3d 61 (2014)	14, 15
<i>Indigo Real Estate Servs., Inc. v. Wadsworth</i> , 169 Wn. App. 412, 421, 280 P.3d 506, 508 (2012)	12
<i>Miller v. Likins</i> , 109 Wn.App. 140, 144, 34 P.3d 835 (2001)	9
<i>Payne v. Ryan</i> , 183 Wash. 590, 597, 49 P.2d 53, 56 (1935).....	19
<i>Scheib v. Crosby</i> , 160 Wn. App. 345, 353, 249 P.3d 184, 188 (2011).....	20
<i>State v. Langford</i> , 260 Or.App. 61, 69-70, 317 P.3d 905 (2013).....	8
<i>Town of Woodway v. Snohomish County</i> , 180 Wn. 2d 165, 174, 322 P.3d 1219 (2014).....	10, 11, 16
<i>Weiss v. Glemp</i> , 127 Wn.2d 726, 731, 903 P.2d 455 (1995)	5, 6

Statutes

RCW 4.28.080(15).....	5
RCW 59.12.030	13
RCW 59.12.040(1).....	7
RCW 59.12.040(2).....	7, 12
RCW 59.18.290	20
RCW 59.18.410	19

Other Authorities

SMC 22.206.160(C)(1)	passim
----------------------------	--------

SMC 22.206.160(C)(3)	3, 4, 5, 6
SMC 22.206.160(C)(4)	17
SMC 22.206.160(C)(7)	17

Rules

RAP 18.1	20
----------------	----

I. INTRODUCTION

The Seattle Just Cause Eviction Ordinance required Faciszewski to notify Brown and Wahleithner of the reason for terminating the tenancy *and* the facts in support of that reason. While the notice stated the purported reason, it set forth no supporting facts. Brown and Wahleithner properly raised this issue in the trial court. Faciszewski's notice did not substantially comply with this requirement because it did not comply at all. Brown and Wahleithner were entitled to judgment in their favor because, as a matter of law, the notice failed to state any facts in support of the asserted reason for terminating the tenancy. If the Court agrees, then it need not reach any of the other issues on appeal. It may properly direct the entry of judgment in favor of Brown and Wahleithner and award them the attorneys' fees they incurred in the trial court and on appeal.

Notice terminating the tenancy was improperly served as a matter of law. Faciszewski posted the notice on the door and mailed a copy to Brown and Wahleithner, but did not leave a copy of the notice with anyone. RCW 59.12.040(3) permits service by this method *only if* "a person of suitable age and discretion there cannot be found." Based on the evidence in the record, reasonable minds could reach only one conclusion: when he taped the notice on the door, Faciszewski knew that Brown and Wahleithner were present. Because he knew they were at the house, a person of suitable age and discretion not only could be found but actually was found. Therefore, the attempted service under RCW 59.12.040(3) was invalid as a matter of law.

Faciszewski argues that even though the person attempting to serve the notice knows that the tenant or some other person of suitable age and discretion is present, posting and mailing the notice is sufficient under RCW 59.12.040(3). To accept this argument would be to delete the

phrase “cannot be found” from the statute, and substitute the phrase “does not come to the door.” The court, of course, may not amend the statute.

Faciszewski’s attempted service of the Notice was also invalid because he failed to show that no other resident of the house could be found there. To comply with RCW 59.12.040(3), Faciszewski was required not only to post the notice at the premises and mail a copy to Brown and Wahleithner, but also to deliver a copy of the notice to “a person there residing, if such a person can be found.” There is no evidence in the record to support a finding that when Faciszewski taped the notice to the door, a resident of the rental house could not be found there. The only evidence on this issue supports a finding that a resident *could* be found there.

As a matter of law, Faciszewski failed to serve the notice in compliance with RCW 59.12.040. If the Court agrees that service of the notice was invalid, Brown and Wahleithner are entitled to the entry of judgment in their favor and to an award of attorneys’ fees incurred both here and in the trial court. A ruling in Brown and Wahleithner’s favor on the issue of service will make it unnecessary for the Court to consider any of the other issues raised on appeal.

Under the plain terms of the just cause ordinance, Faciszewski was required to “prove in court” that he was terminating the tenancy so that he or a family member could occupy the house as a principal residence. Nothing in the ordinance supports Faciszewski’s argument that the landlord could avoid this requirement simply by signing a declaration that this was his intent. Faciszewski also argues that the landlord need not prove his intent in the unlawful detainer action because another provision of the ordinance allows the tenant to recover a maximum of \$2,000 in damages if neither the landlord nor a family member actually moves in. But the possibility that the tenant might recover a minimal amount of damages after being evicted is not a substitute for the protection that the ordinance gives the tenant in the earlier fight over the right

to possession. The landlord must still prove in the unlawful detainer action that he or she (or a family member) truly intends to occupy the property as a principal residence. Because the evidence established a genuine issue of fact on this question, Brown and Wahleithner were entitled to a trial.

II. ARGUMENT AND AUTHORITY

A. Because the Notice Failed as a Matter of Law to State any Facts in Support of the Asserted Reason for Terminating the Tenancy, the Trial Court Erred in Failing to Enter Judgment in Favor of Brown and Wahleithner

Under the Seattle Just Cause Eviction Ordinance, the notice to the tenant must state not only the reasons for terminating the tenancy, but also the facts in support of those reasons.

With any termination notices required by law, owners terminating any tenancy protected by this section 22.206.160 shall advise the affected tenant or tenants in writing of the reasons for the termination *and the facts in support of those reasons*.

SMC 22.206.160(C)(3) (emphasis added).

1. Brown and Wahleithner raised the issue in the trial court

Faciszewski contends that Brown and Wahleithner did not raise this issue in the trial court. The record does not support this contention, however. In their answer to the complaint for unlawful detainer, Brown and Wahleithner stated: “The Notice of Termination failed to advise Tenants of facts which support Landlord’s reason for terminating the lease as required by Seattle Municipal Code (SMC) 22.206.160(C)(3).” CP 16, ¶ 5.7.

They again brought the issue to trial court’s attention in their Response in Opposition to Plaintiff’s Motion for Revision of Commissioner’s Order. In that Response, Brown and Wahleithner pointed out that “The Ordinance requires that the notice state the reason for the termination *and the facts supporting that reason*.” CP 164 (emphasis added). And in that

Response they argued that while the notice stated a general reason for terminating the tenancy, “No facts or other information is included with the notice.” CP 160.¹

Because Brown and Wahleithner clearly raised this issue in the trial court, it is properly before this Court.

2. **The Notice did not state any facts in support of the asserted reason for terminating the tenancy**

Faciszewski next argues that the notice complied with the ordinance because it stated that the “factual basis for the termination is so that ‘at least one immediate family member (or, in the alternative, one of us) may occupy the property.’” Brief of Respondent (Br. Resp.) at 8, n.3 (quoting CP 22). But this statement was merely the asserted reason itself. The notice offered no “facts in support of” the asserted reason. CP 22. Faciszewski appears to argue that under the ordinance, the reason for terminating the tenancy and the facts supporting that reason are one and the same.

Faciszewski’s argument ignores the structure of the Just Cause Eviction Ordinance, which clearly distinguishes between the reason for the termination of the tenancy and the facts supporting that reason. The ordinance declares: “The *reasons* for termination of tenancy listed below, and no others, shall constitute just cause.” SMC 22.206.160(C)(1) (emphasis added). In subsections (1)(a) through (1)(p), the ordinance sets forth the reasons that constitute just cause. The ordinance then states that the notice must advise the tenant “of *the reasons* for the termination *and the facts in support of those reasons.*” SMC 22.206.160(C)(3) (emphasis added). There is nothing ambiguous about this language. It plainly requires that the notice contain both a reason which the ordinance recognizes as just cause *and* the facts supporting that reason.

¹ See also RP Sept. 2, 2014, at 11-14, 16-7 (arguing that Faciszewski presented no facts to support the reason asserted in the notice); CP 159 (“Tenants asserted affirmative defenses in their Answer to Landlords’ Complaint regarding both *the contents of Landlords’ notice of termination*, and the manner in which Stephen Faciszewski served the notice.”) (emphasis added).

The reason on which Faciszewski relied is the one set forth in subsection (e): “The owner seeks possession so that the owner or a member of his or her immediate family may occupy the unit as that person’s principal residence.” SMC 22.206.160(C)(1)(e). Faciszewski’s written notice merely recited subsection (e), almost verbatim. “The reason we must terminate your tenancy by this Notice: we seek to possess the Property so that at least one immediate family member (or, in the alternative, one of us) may occupy the Property as a principal residence.” CP 22. Because the notice included no “facts in support of” the asserted reason, it failed to comply with the Just Cause Eviction Ordinance.

3. The notice did not substantially comply with the ordinance

Faciszewski argues that the notice terminating the tenancy “substantially complied” with SMC 22.206.160(C)(3). Br. Resp. at 8, n.3. “Substantial compliance has been defined as actual compliance in respect to the substance essential to every reasonable objective of [a] statute.” *Weiss v. Glemp*, 127 Wn.2d 726, 731, 903 P.2d 455 (1995) (cited by Faciszewski). In *Weiss*, a process server attempted to serve the defendant in a civil action by displaying the summons and complaint to the defendant through a window, telling the defendant he had been served, and then placing the documents on the windowsill. *Id.* at 729. RCW 4.28.080(15) requires that service be accomplished either by delivering a summons to the defendant personally or by leaving it at the defendant’s usual abode with some person of suitable age and discretion who is residing there. The *Weiss* court held that the attempted service did not substantially comply with the statute because the process server did not leave the summons with anyone. *Id.* at 732. “That is noncompliance with the statute, not significant compliance combined with a merely technical deficiency.” *Id.* In addition, the court held that the attempted service did not accomplish one of

the essential objectives of the statute – i.e., that process actually be delivered to a responsible person. *Id.*

Just as the process server in *Weiss* did not leave the summons with *anyone*, here the notice did not state *any* of the facts supporting the asserted reason for terminating the tenancy. Instead, the notice simply recited language from SMC 22.206.160(C)(1)(e) – one of the subsections setting forth reasons that constitute just cause. CP 22. This was not “significant compliance combined with a merely technical deficiency.” *Weiss*, 127 Wn.2d at 732. Instead, it was “noncompliance.” *Id.*

Moreover, Faciszewski’s notice failed to accomplish one of the “essential objectives” of the ordinance. *Weiss*, 127 Wn.2d at 731. By requiring that the notice specify the “facts in support” of the reason for terminating the tenancy, SMC 22.206.160(C)(3) obligates the owner to include in the notice at least some of the factual detail necessary to determine whether the specified reason is genuine, or whether it is a pretext for a reason that does not constitute just cause. Since the notice in this case failed to include *any* such facts, it did not accomplish the essential objective of this requirement. There was no substantial compliance.

4. The trial court erred

Brown and Wahleithner properly raised this issue in the trial court. A simple comparison of the language of the Notice with the requirements of SMC 22.206.160(C)(3) shows that the notice included no “facts in support of” the purported reason for terminating the tenancy. The notice did not substantially comply with the requirement that it state the supporting facts. As a matter of law, the notice failed to comply with SMC 22.206.160(C)(3). Accordingly, the trial court erred by failing to grant judgment in favor of Brown and Wahleithner.²

² Even if Brown and Wahleithner were not entitled to judgment in their favor as a matter of law based on the deficient content of the notice, they were clearly entitled to a trial on this issue.

B. The Notice to Quit the Premises Was Improperly Served as a Matter of Law

1. Because Faciszewski admitted that he found Brown and Wahleithner at the premises, but did not deliver a copy of the notice to them or anyone else, service failed to comply with RCW 59.12.040

Faciszewski argues that he satisfied RCW 59.12.040 by (1) posting a copy of the notice to quit the premises on the door, and (2) mailing a copy to Brown and Wahleithner. He contends that the factual predicate for service in this manner was established by the following statement in his declaration: “I attempted to deliver a copy of said Notice into the hands of the defendants but was unable to do so.” CP 171. This argument ignores the language of the statute and the obvious effect of the language that he crossed out in his declaration.

RCW 59.12.040 authorizes three different methods of serving the notice to quit the premises. First, the landlord may serve the notice “by delivering a copy personally to the person entitled thereto,” – i.e., the tenant. RCW 59.12.040(1). It is undisputed that Faciszewski did not do this. CP 171. Second, if the tenant “be absent from the premises unlawfully held,” the landlord may serve the notice “by leaving there a copy, with some person of suitable age and discretion, and sending a copy through the mail” to the tenant. RCW 59.12.040(2). Because Faciszewski did not leave a copy with anyone, he did not satisfy RCW 59.12.040(2).

Thus, if service was proper it must have satisfied the requirements for the third method of service: “[I]f a person of suitable age and discretion there cannot be found then by affixing a copy of the notice in a conspicuous place on the premises unlawfully held, and also delivering a copy to a person there residing, if such a person can be found, and also sending a copy through the mail addressed to the tenant.” RCW 59.12.040(3). As the first clause of this subsection indicates, the landlord may utilize this third method of service *only if* “a person of suitable age and discretion there cannot be found.”

Faciszewski crossed out the following language on the form declaration that he used: “I did not find them person [sic] at the premises, nor did I find any person present at the premises.” CP 171. By deleting this language, Faciszewski plainly indicated that it did not apply to the facts as they existed at the time he taped the notice on the door. In other words, Faciszewski admitted that Brown and Wahleithner *were* present at the premises.

The commonly understood meaning of crossing out language in a printed document is that the language does not apply or that it is incorrect under the relevant circumstances. E.g., *State v. Langford*, 260 Or.App. 61, 69-70, 317 P.3d 905 (2013) (by crossing out the printed words “work crew” on a sentencing form, the trial court unambiguously intended to exempt defendant from serving on a work crew). If it was true that Faciszewski could not find Brown and Wahleithner at the premises, then he would not have crossed out the statement to that effect on the declaration form. If it was true that he didn’t find anyone else there, then he would not have crossed out the phrase “nor did I find any person present at the premises.” A reasonable trier of fact could come to only one conclusion: Faciszewski knew that Brown and Wahleithner *were* present at the premises. Thus, “a person of suitable age and discretion” not only *could be found*, but in fact *was found* at the premises. Accordingly, the condition for serving the notice under subsection (3) of RCW 59.12.040 was not established.

Faciszewski contends that Brown and Wahleithner “waived” their argument concerning the effect of Faciszewski’s act of crossing out the language on the form. He contends that this is so because they cited no authority in their opening brief for the proposition that such an act constitutes, as a matter of law, a statement that the deleted language does not apply. Br. Resp. at 13, n.5.

But courts routinely determine the effect of a party's acts and/or words. That is precisely what a court does when it decides an issue as a matter of law. The court may decide an issue of fact as a matter of law if, based on the evidence in the record, reasonable minds could reach only one conclusion. E.g., *Miller v. Likins*, 109 Wn.App. 140, 144, 34 P.3d 835 (2001). Courts can and do decide factual issues as a matter of law without the need for legal authority concerning the factual conclusion to be drawn from the evidence in each particular case. Indeed, the universe of factual scenarios is so limitless that it would be impossible to establish "authority" that would pre-determine the factual decisions to be made by courts in all future cases. If reasonable minds could reach only the conclusion that the traffic light was red, a court may decide that factual issue as a matter of law. And it may do so despite the absence of an earlier opinion in another case holding that when facts A, B, and C exist, then the light must be red.

In the present case, Faciszewski signed a declaration saying that he attempted to deliver the notice into the hands of Brown and Wahleithner, but was unable to do so. CP 171. He then proceeded to cross out the statement, "I did not find them person [sic] at the premises." And he crossed out the statement, "nor did I find any person present at the premises." Considering these facts, along with the undisputed evidence that Brown and Wahleithner were at home when Faciszewski posted the notice on their door, reasonable minds could reach only one conclusion: Faciszewski knew that Brown and Wahleithner were present at the premises.³

A landlord may use the third method of service described in the statute *only if* "a person of suitable age and discretion there cannot be found." RCW 59.12.040(3). Because Faciszewski

³ Faciszewski offered no evidence about why he crossed out the printed language in the declaration of service. And in his brief he proposes no alternative to the only explanation for his act of doing so. As a matter of law, he crossed out the language because he knew that Brown and Wahleithner were at home when he posted the notice on their door.

knew that Brown and Wahleithner were at the house, they were “found” there. Therefore, the attempted service under RCW 59.12.040(3) was invalid as a matter of law.

2. **If the person attempting to serve the notice knows that the tenant is present at the premises, then the tenant necessarily can be found there**

Faciszewski claims “the evidence shows that the Defendants were home but refused to make themselves available for service.” Br. Resp. at 14.⁴ According to Faciszewski’s reading of the statute, if the landlord knocks at the door of the premises and the tenant does not come to the door, then service by posting and mailing under RCW 59.12.040(3) is sufficient, *even if the landlord knows that the tenant is present*. This argument is inconsistent with the plain meaning of the statute.

Again, the statute allows service to be performed under RCW 59.12.040(3) only if “a person of suitable age and discretion there cannot be found.” Again, the evidence shows as a matter of law that Faciszewski knew that Brown and Wahleithner were at their home. Thus, a person of suitable age and discretion was in fact “found” at the premises. When the words in a statute are clear and unequivocal, the court must assume the Legislature meant exactly what it said and apply the statute as written. *Town of Woodway v. Snohomish County*, 180 Wn. 2d 165, 174, 322 P.3d 1219 (2014). If the person attempting to serve the notice knows that the tenant or

⁴ As evidence of his assertion that Brown and Wahleithner refused to come to the door, Faciszewski cites his statement that he “attempted” to deliver the notice into their hands but was unable to do so. CP 171. But there is no evidence in the record concerning the nature of Faciszewski’s “attempt.” There is no evidence that he knocked on the door, rang the doorbell, announced his presence in a loud voice, or did anything to inform anyone that he was there. Did he knock loudly on the front door? Or, reluctant to serve the notice face-to-face, did he tap on the door so softly that no one could be expected to hear and to know that he was there? Faciszewski asserts that “Ms. Wahleithner and Mr. Brown both state that they were home when Mr. Faciszewski attempted to serve them.” Br. Resp. at 2-3. This is not an accurate description of their testimony. They did *not* say that “Mr. Faciszewski attempted to serve them.” See CP 118-119, 153, 191, 225. They said only that they were home when Faciszewski taped the notice on their door. *Id.* Thus, there is no evidence that Brown or Faciszewski had any reason to believe that Faciszewski wanted to speak to them or to hand-deliver a document to them. Regardless of whether Brown and Wahleithner deliberately refused to go to the door or whether Faciszewski’s “attempt” was so anemic that they had no idea he was there, the language that Faciszewski crossed out on the declaration of service establishes that he knew they were home.

some other person of suitable age and discretion is present at the premises, then such a person can be “found” there.

A decision by this Court to accept Faciszewski’s argument would rewrite the statute. It would eliminate the phrase “cannot be found.” It would amend the statute to say that service may proceed under RCW 59.12.040(3) if the landlord attempts to deliver the notice to the tenant personally and if the tenant does not come to the door. Courts, however, may not rewrite statutes. *Town of Woodway*, 180 Wn. 2d at 176.

The Court need not decide on the degree of effort that a person attempting to serve a notice must exert in order to support a finding that “a person of suitable age and discretion there cannot be found.” RCW 59.12.040(3). To decide the issue presented here, the Court need only apply the plain language of the statute to the only factual conclusion that reasonable minds could reach. Brown and Wahleithner could be “found” at the premises because Faciszewski knew they were there.

3. **Even if Brown and Wahleithner could not be “found” at the premises, Faciszewski failed as a matter of law to establish that no other person of suitable age and discretion could be found**

Because Faciszewski knew as a matter of law that Brown and Wahleithner were present at the house, a person of suitable age and discretion clearly could be found and was found there. But even if the evidence could somehow establish that Brown and Wahleithner could not be found at the premises, the steps taken by Faciszewski still failed to satisfy RCW 59.12.040(3) as a matter of law.

Under subsection (1) of RCW 59.12.040, the landlord may serve the notice by delivering a copy personally to the tenant. If the tenant is “absent from the premises unlawfully held,” then under subsection (2) of the statute the landlord may serve the notice “by leaving there a copy,

with some person of suitable age and discretion,” and mailing a copy to the tenant. Only if “a person of suitable age and discretion there cannot be found,” may the landlord serve the notice in the manner set forth in subsection (3). If any person of suitable age and discretion *can* be found at the premises, then service under subsection (3) is not permitted.

Faciszewski’s declaration says he attempted to deliver the notice personally to Brown and Wahleithner, but was unable to do so. *But there is no evidence that he attempted to deliver a copy to some other person of suitable age and discretion.* Thus, even if an unsuccessful attempt to deliver the notice into the hands of a person amounts to a conclusion that the person is “absent” (RCW 59.12.040(2)) or “cannot be found,” RCW 59.2.040(3), there is no evidence that some person of suitable age and discretion other than Brown and Wahleithner could not be found.

A “person of suitable age and discretion” need not be an adult. *American Express Centurion Bank v. Stratman*, 172 Wn.App. 667, 672, 292 P.3d 128 (2012) (16-year-old daughter of defendant was person of “suitable age and discretion” with whom summons could be left to effect service on defendant). It is undisputed that Brown and Wahleithner’s two children lived with them at the rental house. CP 189, 224. At the time when Faciszewski taped the notice to quit on the premises, Brown and Wahleithner’s son Christopher was old enough to drive a car legally on the public roads. CP 127.

In an unlawful detainer action the burden is on the plaintiff to prove, by a preponderance of the evidence, the right to possession. *Indigo Real Estate Servs., Inc. v. Wadsworth*, 169 Wn. App. 412, 421, 280 P.3d 506, 508 (2012). An unlawful detainer action is a statutory proceeding. The applicable statute provides:

A tenant of real property for a term less than life is guilty of unlawful detainer . . . :

(2) When he or she, having leased property for an indefinite time with monthly or other periodic rent reserved, continues in possession thereof . . . after the end of any such month or period, *when the landlord*, more than twenty days prior to the end of such month or period, *has served notice (in manner in RCW 59.12.040 provided) requiring him or her to quit the premises* at the expiration of such month or period

RCW 59.12.030 (emphasis added). As the statute declares, the tenant is guilty of unlawful detainer only if the notice to quit was served in the manner provided in RCW 59.12.040. Thus, under RCW 59.12.030, the plaintiff bears the burden of proving that service of the notice complied with RCW 59.12.040. Proof that the landlord served the notice in accordance with RCW 59.12.040 is an element of the landlord's case.

To establish that he was entitled to proceed under RCW 59.12.040(3), it was incumbent on Faciszewski to produce evidence that "a person of suitable age and discretion there [could not] be found." There is no evidence in the record that Faciszewski made any attempt to deliver the notice to any person other than Brown and Faciszewski. Indeed, the only evidence that he made any attempt to deliver the notice to anyone is the statement in his declaration of service that he "attempted" to deliver the notice into the hands of Brown and Faciszewski but was unable to do so. CP 171. But there is no evidence in the record concerning the nature of Faciszewski's "attempt." There is no evidence that he knocked on the door, rang the doorbell, announced his presence in a loud voice, or did anything to inform anyone that he was there. In summary, there is no evidence in the record to support a finding that a person of suitable age and discretion (including Brown and Wahleithner's son Christopher) could not be found at the premises. Accordingly, the attempted service under RCW 59.12.040 was invalid as a matter of law.

//

//

4. **As a matter of law, Faciszewski failed to comply with RCW 59.12.040(3) by not “delivering a copy [of the notice] to a person there residing”**

To comply with RCW 59.12.040(3), Faciszewski was required not only to post the notice at the premises and mail a copy to Brown and Wahleithner, but also to deliver a copy of the notice to “a person there residing, if such a person can be found.” The statute does not require that the “person there residing” be a person of suitable age and discretion. RCW 59.12.040(3). Faciszewski did not deliver a copy of the notice to anyone. Thus, if “a person there residing” could have been found, then the attempted service did not satisfy the requirements of RCW 59.12.040 (3).

It is undisputed that Brown and Wahleithner’s two children also lived at the rental house. CP 189, 224. There is no evidence in the record that when Faciszewski taped the notice to the door, no resident of the rental house could be found there. On the contrary, the only evidence on this issue supports a finding that a resident *could* be found there. Faciszewski crossed out the following language in his declaration: “nor did I find any person present at the premises.” CP 171. Reasonable minds could reach only one conclusion on this issue: Faciszewski *did* find “a person there residing.”

Faciszewski cites *Hall v. Feigenbaum*, 178 Wn.App. 811, 319 P.3d 61 (2014) for the proposition that under subsection (3) of RCW 59.12.040, the landlord need only take two steps: posting the notice at the premises and mailing a copy to the tenant. But *Hall* did not address the issue presented here: i.e., whether the landlord must also deliver a copy of the notice to a “person there residing, if such a person can be found.” RCW 59.12.040(3). The tenant in *Hall* argued only that the landlord should have mailed the notice to the tenant’s home address, rather than to the commercial property that was the subject of the lease. 178 Wn.App. at 820. The tenant simply didn’t raise the issue of whether the landlord should also have delivered a copy to a

“person there residing, if such a person can be found.” In addition, since the property was rented for operation as a nightclub, there was apparently no one “residing there.” *Id.* at 815.

Moreover, the court in *Hall* expressly recognized that when service is attempted under subsection (3) of RCW 59.12.040, the landlord must not only post the notice at the premises and mail a copy to the tenant, but must also “hand a copy to any person “there residing” if such a person is present.” 178 Wn.App. at 821, n.19 (quoting 17 Stoebeck & Weaver, *Washington Practice, Real Estate* § 6.80 (2d ed. 2004)).

There is no evidence in the record to support a finding that when Faciszewski taped the notice to the door, a resident of the rental house could not be found there. On the contrary, the only evidence on the issue supports the opposite finding – i.e., that a resident of the rental house *could* be found there. Faciszewski did not deliver a copy of the notice to anyone at the house. As a matter of law, Faciszewski failed to serve the notice in compliance with RCW 59.12.040.

C. **At the Very Least, Brown and Wahleithner Were Entitled to a Trial on the Issue of Whether the Notice was Properly Served**

There was no evidence to support the conclusion that the notice was served as required by RCW 59.12.040. All the evidence supported the opposite conclusion. But if for any reason Brown and Wahleithner were not entitled to judgment in their favor on this ground as a matter of law, they were certainly entitled to a trial on the issue.

D. **There Was a Genuine Issue of Material Fact as to Whether Faciszewski Sought Possession so that He or a Member of His Family Could Occupy the Property as a Principal Residence**

1. **The landlord must “prove in court” that just cause exists**

According to Faciszewski, by contending that the landlord must prove his intent to occupy the premises, Brown and Wahleithner are seeking an additional “remedy” beyond what the ordinance provides. *Br. Resp.* at 2, 6. But they do not ask the Court to create a new remedy

under the ordinance. On the contrary, Brown and Wahleithner simply ask this Court to hold that the landlord must do what the ordinance plainly requires. The landlord must “prove in court” that “the owner seeks possession so that the owner or a member of his or her immediate family may occupy the unit as that person’s principal residence.” SMC 22.206.160(C)(1) & (1)(e).

“Owners of housing units *shall not evict or attempt to evict any tenant, or otherwise terminate or attempt to terminate the tenancy of any tenant unless the owner can prove in court that just cause exists.*” SMC 22.206.160(C)(1) (emphasis added). Faciszewski attempted to terminate the tenancy and then commenced an unlawful detainer action to evict Brown and Wahleithner. Under the plain language of the ordinance, Faciszewski was not entitled to prevail in the unlawful detainer action unless he could “prove in court that just cause exists.” *Id.*

The “just cause” on which Faciszewski relied was, “The owner seeks possession so that the owner or a member of his or her immediate family may occupy the unit as that person’s principal residence.” SMC 22.206.160(C)(1)(e). Together these two provisions require the owner to “prove in court” that “the owner seeks possession so that the owner or a member of his or her immediate family may occupy the unit as that person’s principal residence.” SMC 22.206.160(C)(1) & (1)(e).

As Faciszewski acknowledges, courts apply statutes and ordinances in accordance with their plain meaning. When the words in a statute are clear and unequivocal, the court must assume the Legislature meant exactly what it said and apply the statute as written. *Town of Woodway v. Snohomish County*, 180 Wn. 2d 165, 174, 322 P.3d 1219 (2014).

The Seattle ordinance states that the owner may not evict a tenant or otherwise seek to terminate a tenancy unless the owner “can prove in court that just cause exists.” SMC

22.206.160(C)(1). There is nothing ambiguous about this language.⁵ Because this requirement is clear and unequivocal, the Court must apply it as written. Faciszewski, therefore, was required to justify his termination of the tenancy by proving in the unlawful detainer action that he sought possession so that he or one of his family members could occupy the house as a principal residence. In his brief, however, Faciszewski ignores this requirement.

2. **The “remedies” discussed by Faciszewski are not exclusive, and neither of them relieves the landlord of his obligation to prove just cause in the unlawful detainer action**

Although he does not discuss the requirement that the landlord must prove just cause in court, Faciszewski implicitly argues that two provisions of the ordinance completely supplant that requirement in this case. First, he points to SMC 22.206.160(C)(4), which allows the tenant to complain to the City that the landlord does not intend to carry out the stated reason for the eviction. If the tenant complains, then the landlord must file a certification of his intent. *Id.* Nothing in this provision, however, states that it relieves the landlord of the general requirement – applicable to all asserted just causes – that he must prove just cause in court.

Faciszewski argues that once the landlord has signed the certification contemplated by SMC 22.206.160(C)(4), just cause has been established and the tenant must move out. If the city council had intended this result, it would have said so. But it did not.

Second, Faciszewski points to SMC 22.206.160(C)(7). This subsection allows the tenant to bring an action for a maximum of \$2,000 in damages. The tenant may recover these limited after-the-fact damages if the tenancy was terminated for the stated reason that the landlord or a family member intended to occupy the property, but then neither the landlord nor a family

⁵ Faciszewski argues that if the ordinance is ambiguous, the Court should construe the ambiguity in favor of the landlord. But the language in question is not ambiguous. The ordinance plainly required Faciszewski to prove in the unlawful detainer action that he sought possession so that he or one of his family members could occupy the house as a principal residence.

member carries out that intention. But nothing in the ordinance suggests that this later opportunity to recover a minimal amount of damages is a substitute for the protection that the ordinance gives the tenant in the earlier battle over possession.

Neither of these two “remedies” is exclusive. The ordinance still plainly requires that in an action for unlawful detainer, the owner must prove in court that he or she (or a family member) intends to occupy the unit. SMC 22.206.160(C)(1) & (1)(e).

Faciszewski’s arguments would force tenants to endure the disruption and inconvenience of moving out of their premises while waiting and seeing if, in fact, the landlord will carry out his or her stated plan to occupy the property as a principal residence. The landlord’s “certification” proves nothing. It is evidence of the landlord’s intent but it is certainly not conclusive. And the right to sue for a maximum of \$2,000 in damages will in most cases be too little too late. By the time at which the landlord’s post-eviction conduct can be evaluated, the wrongfully dispossessed tenant may lack the resources or motivation to sue his or her former landlord. In addition, the harm sustained by the tenant in relocating may be more intangible than monetarily quantifiable, thereby making an after-the-fact damages remedy less attractive.

3. **The issue is whether Faciszewski truly intended, at the time he declared the tenancy terminated, that he or a family member would occupy the house as a principal residence**

The question is whether Faciszewski sought possession of the house “so that” he or a family member could move in. SMC 22.206.160(C)(1)(e). If Faciszewski sought possession so that he could accomplish any other purpose, there was no just cause. The language of the ordinance plainly puts his intention at issue.

Faciszewski points out that it would be impossible to show whether he or a family would actually occupy the house until the tenant had already left. But in an unlawful detainer action,

what happens after the tenant has been evicted is not the issue. Again, the ordinance prohibits the landlord from terminating the tenancy or evicting the tenant unless the landlord can prove just cause in court. SMC 22.206.160(C)(1). Thus, when the asserted just cause is the landlord's announced intention that he or a family member will occupy the property, the issue is whether that is in fact the landlord's *bona fide* intention. Here, the evidence established a genuine issue of fact on this issue. See Brief of Appellant at 34-36.

E. **By Refusing to Accept tenders of Rent from Brown and Wahleithner, Faciszewski Caused His Own "Damages"**

It is undisputed that after Faciszewski declared the tenancy terminated, Brown and Wahleithner tendered rent payments on three separate occasions. RP Aug. 12, 2014, at 8; CP 161-162, 168, 174-177. Faciszewski does not dispute the established principle that "One who prevents a thing may not avail himself of the nonperformance which he has occasioned." *Payne v. Ryan*, 183 Wash. 590, 597, 49 P.2d 53, 56 (1935).

Instead, Faciszewski appears to argue that the provision in RCW 59.18.410 for the recovery of damages trumps the common-law rule set forth in *Payne*. But he cites no authority for this proposition. Moreover, RCW 59.18.410 allows the landlord to recover "damages arising out of the tenancy *occasioned* to the plaintiff by . . . *unlawful detainer*." (Emphasis added). Brown and Wahleithner offered to pay rent while they continued in possession. Thus, Faciszewski's damages were not "occasioned by" unlawful detainer. They were "occasioned" by Faciszewski's refusal to accept the rent that Brown and Wahleithner repeatedly tried to pay.

F. **Brown and Wahleithner Are Entitled to an Award of Their Reasonable Attorneys' Fees in the Trial Court and on Appeal**

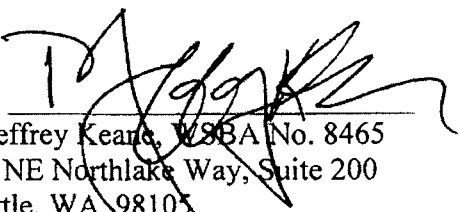
As Brown and Wahleithner noted in their opening brief, The Residential Landlord Tenant Act allows the prevailing party in an unlawful detainer action to recover reasonable attorneys'

fees and costs. RCW 59.18.290; *Council House, Inc. v. Hawk*, 136 Wn.App. 153, 157, 147 P.3d 1305 (2006). If this Court agrees that Brown and Wahleithner are entitled to judgment as a matter of law, then they are the prevailing parties. In that event, they are entitled to an award of their reasonable fees and costs in the trial court. If attorneys' fees are allowable at trial, the prevailing party may recover fees on appeal. RAP 18.1; *Scheib v. Crosby*, 160 Wn. App. 345, 353, 249 P.3d 184, 188 (2011). This Court should therefore award Brown and Wahleithner their attorneys' fees incurred on review. RAP 18.1.

III. CONCLUSION

The Court should direct the entry of judgment in favor of Brown and Wahleithner. They are entitled to recover all sums they paid in satisfaction of the erroneous judgment entered by the trial court, plus interest. The Court should also hold that Brown and Wahleithner are entitled to recover the reasonable attorneys' fees and costs they incurred in the trial court and on appeal. In the alternative, the Court should remand the case for trial.

Dated this 30th day of October, 2015.

By: 
T. Jeffrey Keane, WABA No. 8465
100 NE Northlake Way, Suite 200
Seattle, WA 98105
206/438-3737 / fax 206/632-2540
Email: tjk@tjkeanelaw.com
Attorney for Appellants

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

STEPHEN FACISZEWSKI and VIRGINIA L.)
KLAMON,)
)
Plaintiffs,)
)
vs.)
)
MICHAEL R. BROWN and JILL A.)
WAHLEITHNER,)
)
Defendants.)

**No. 72611-1-I
CERTIFICATE OF SERVICE**

I hereby certify that on the date set forth below a copy of Appellants Reply Brief was served as follows:

Evan L. Loeffler
Loeffler Law Group, PLLC
500 Union Street, Suite 1025
Seattle, WA 98101

- U.S. Mail, First Class Postage Prepaid
- Fax
- Legal messenger
- Express mail

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

DATED at Seattle, Washington this 30th day of October, 2015.



Donna M. Pucel