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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
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Court of Appeals No. 48083-2-II

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IN THE WASHINGTON STATE COURT OF APPEALS  
DIVISION II

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MICHAEL L. ROESCH,  
Appellant,

v.

CARL BOHM and CANDY BOHM,  
Respondents.

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APPELLANT'S REPLY BRIEF

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### III. ARGUMENT

#### A. Appellants correctly state the standard of review.

Contrary to Respondents' argument<sup>1</sup>, whether the trial court exceeded its subject matter jurisdiction in this case by admitting evidence unrelated to the issue of possession of the subject property is a question of law, reviewable *de novo*. *Angelo Property Co., LP v. Hafiz*, 167 Wn. App. 789, 808, 274 P. 3d 1075, *review denied*, 175 Wn. 2d 1012 (2012). Respondents' failure to cite, let alone distinguish, controlling authority in *Angelo Property Co.* demonstrates an appalling lack of candor to this Court.

##### 1. The trial court's admission of Respondents' purchase and sale documents far exceeded the limits of its subject matter jurisdiction in a residential unlawful detainer.

Respondents choose to ignore the limitations noted in *Angelo Property Co.* on the trial court's subject matter jurisdiction in unlawful detainers. Respondents apparently believe the limitations placed on the trial court's subject matter jurisdiction in an unlawful detainer are confined a prohibition against hearing counterclaims.<sup>2</sup> To the contrary, the limitations placed on the trial court's subject matter jurisdiction preclude consideration of issues outside the scope of the unlawful detainer statute. *Angelo Property Co.*, 167 Wn. App. 809 (“[W]hen the superior

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<sup>1</sup> Respondents' Brief, p. 20.

<sup>2</sup> Respondents' Brief, p. 15.

*court hears an unlawful detainer action under RCW 59.12.030, it sits in a statutorily limited capacity and lacks authority to resolve issues outside the scope of the unlawful detainer statute.* (Emphasis added).”

One such issue the trial court lacks authority to resolve in an unlawful detainer is any issue of title. See *Federal National Mortgage Association v. Ndiaye*, 188 Wn. App. 376, 382, 353 P. 3d 644, 648 (2015); *Puget Sound Inv. Grp. v. Bridges*, 92 Wn. App. 523, 526, 963 P. 2d 944 (1998); *Snuffin v. Mayo*, 6 Wn. App. 525, 528, 494 P. 2d 497 (1972); *Proctor v. Forsythe*, 4 Wn. App. 238, 241, 480 P. 2d 511 (1971). Under the rule in those cases, the trial court plainly exceeded its authority by admitting numerous title-related documents such as Exhibits 7, 9, 10, 12, 13, 17, 23, 24, 25, 26, and 37, and by instructing the jury in Instructions 2, 11 that Respondents were excused from paying rent due to the alleged failure of Appellant and his brother to transfer title to the subject property to Respondent Candy Bohm.

Respondents make no attempt to address the decisions in *Federal National Mortgage Association v. Ndiaye*, *Puget Sound Inv. Grp. v. Bridges*, *Snuffin v. Mayo*, and *Proctor v. Forsythe*. Instead, Respondents ignore those authorities as they ignore *Angelo Property Co.*

Instead of addressing the issue of the trial court’s lack of subject matter jurisdiction to consider title issue, Respondents seek refuge in the

affirmative equitable defense recognized in cases such as *Munden v. Hazelrigg*, 105 Wn. 2d 39, 711 P.2d 295 (1981), *Foisy v. Wyman*, 83 Wn. 2d 22, 515 P. 2d 160 (1973), *Income Properties Investment Corp. v. Trefethen*, 155 Wash, 493, 506, 284 P. 782 (1930), and *Andersonian Investment Co. v. Wade*, 108 Wash. 373, 378-79, 184 P. 327.<sup>3</sup>

Respondents' reliance on those cases is misplaced, as none of those involve any issue of title.

It is questionable whether Respondents were entitled to invoke an equitable defense under any circumstances. That term is defined in *People's National Bank v. Ostrander*, 6 Wn. App. 28, 31, 491 P. 2e 1058 (1971):

An equitable defense, as defined by our court, arises when:  
[T]here is a substantive legal right, that is, a right which comes within the scope of juridical action, as distinguished from a mere moral right, and the procedure prescribed by statute for the enforcement of such right is inadequate or the ordinary any usual legal remedies are unavailing, it is the province of equity to afford proper relief, unless the statutory remedy is exclusive. (*Quoting Motoda v. Donohoe*, 1 Wn. App. 174, 175, 459 P. 2d 654 (1969) (*Quoting Rummens v. Guaranty Trust Co.*, 199 Wash. 337, 347, 92 P.2d 228 (1939)).

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<sup>3</sup> Respondents' Brief, p. 16, n. 94.

Here, the usual legal remedies are (or were) available to Respondents in the form of a general civil action. Respondents make no effort to explain why they did not over the course of the past eight years avail themselves of that remedy. Having slept on their rights, Respondents were not entitled to any equitable defense. *Kingery v. Department of Labor & Industries*, 132 Wn. 2d 162, 176, 937 P. 2d 565 (1997) (“...*Equity aids the vigilant, not those who slumber on their rights.*”).

In addition to *Munden*, *Foisy*, *Income Properties*, and *Andersonian Investment Co.*, numerous other Washington decisions reveal how narrow the exception for facts which excuse a tenant’s breach is. *See Skarperud v. Long*, 40 Wn. App. 548, 551, 699 P. 2d 786 (1985) (“*[A] covenant to pay rent is independent of any covenant to supply water to the leased or adjacent premises or any agreement to supply labor or materials....*”); *Heaverlo v. Keico Industries, Inc.*, 80 Wn. App. 724, 733, 911 P. 2d 406 (1996) (In an unlawful detainer action, lessor’s alleged misrepresentation as to suitability of land for agricultural development does not excuse lessee’s nonpayment of rent on property already developed, occupied and farmed.); *Savings Bank of Puget Sound v. Mink*, 49 Wn. App. 204, 209, 741 P. 2d 1043 (1987) (“*Mink’s affirmative defenses and counterclaims include allegations of breach of Regulation Z and the Truth in Lending*



*Act, intentional infliction of emotional distress, defamation, slander of title, breach of contract, abuse of process, outrage, fraud, malicious prosecution, usury and unjust enrichment. These do not directly relate to the "question of possession" and may not be raised in an unlawful detainer action.*"); *Sprincin King Street Partners v. Sound Conditioning Club, Inc.*, 84 Wn. App. 56, 66-67, 925 P. 2d 217 (1996) (Commercial tenant's counterclaim for lessor's failure to keep hallways and common areas clean could not be asserted in an unlawful detainer.); (*Angelo Property Co., LP v. Hajiz*, 167 Wn. App. 815-16 (Trial court in unlawful detainer proceeding lacked jurisdiction over tenant's counterclaims for constructive eviction and interference with quiet enjoyment where the tenant's counterclaims did not excuse tenant's breaches of those lease covenants relied upon by lessor to support unlawful detainer). Respondents fail to cite, let alone distinguish or even discuss any of those cases.

In light of the foregoing, Respondents are unable to identify a single authority to support their reliance upon an affirmative equitable defense based upon an alleged failure by their landlord to convey title to the leased premises to them. Appellants are also unaware of any such authority. It follows that any failure by Appellant or his brother to transfer

title to the subject property to Respondent Candy Bohm does not excuse their failure to pay rent.

Respondents point out that the trial court noted the lease had been incorporated into some other agreement.<sup>4</sup> Whether the lease had been incorporated into the October 15, 2008 REPSA<sup>5</sup> is irrelevant, as the parties cannot between themselves expand the court's jurisdiction. *Angelo Property Co.*, 167 Wn. App. 808 (“*Parties cannot confer subject matter jurisdiction on the court by agreement between themselves: a court either has subject matter jurisdiction or it does not.* (Citation omitted)”).

Respondents defend the admission of the REPSAs as relevant under ER 401.<sup>6</sup> Respondents fail to explain how the REPSAs can be relevant when the trial court lacks subject matter jurisdiction in an unlawful detainer to consider title issues.

Respondents point to the trial court's comment that this case was “*much more complicated than just simply a landlord tenant.*”<sup>7</sup> The trial court's comment reflects a basic misunderstanding of the nature of an unlawful detainer. Note *Phillips v. Hardwick*, 29 Wn. App. 382, 385-86, 628 P. 2d 506 (1981):

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<sup>4</sup> Respondents' Brief p. 17.

<sup>5</sup> EX 9.

<sup>6</sup> Respondents' Brief p. 15.

<sup>7</sup> Respondents' Brief p. 17.

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

By allowing Respondents to litigate issues other than possession of the property, the trial court exceeded the limited purpose of an unlawful detainer and deprived the action before it of its summary character. By allowing Respondents to litigate issues of title, the trial court, as in *Angelo Property Co.*, impermissibly hybridized its unlawful detainer and general civil jurisdiction. As in *Angelo Property Co.*, the trial court lacked subject matter jurisdiction to do so.

Respondents argue the trial court considered evidence of the purchase and sale agreements for all three properties to allow Respondents to establish their affirmative defense that excused Respondent Candy Behm's breach of the rental contract.<sup>8</sup> As indicated above, no Washington authority has been found to support the use of REPSAs to establish an excuse of failure to pay rent. Respondents' failure to cite any such authority supports the conclusion that no such authority exists. *DeHeer v.*

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<sup>8</sup> Respondents' Brief, p. 17.

*Seattle Post Intelligencer*, 60 Wn. 2d 122, 126, 372 P. 2d 193 (1962)  
 (“Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none. Courts ordinarily will not give consideration to such errors unless it is apparent without further research that the assignments of error presented are well taken. 5 C.J.S. Appeal & Error § 1325, page 342.”).

Respondents quote trial court’s question “Doesn’t [Ms. Bohm] have an opportunity to provide some sort of excuse for why she didn’t pay?”<sup>9</sup> Since an equitable defense is not available to Respondents, their only opportunity to provide such an excuse is by way of a general civil action.

Respondents discuss the trial court’s explanations of its reasons for admitting the January 30, 2008 REPSA and other purchase and sale agreements.<sup>10</sup> Those explanations represent additional manifestations of the trial court’s impermissible hybridization of its unlawful detainer jurisdiction and general civil jurisdiction. *See Angelo Property Co.*, 167 Wn. App. 823 n. 67.

Respondents argue the trial court did not abuse its discretion in admitting evidence of the REPSAs to establish Respondents affirmative

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<sup>9</sup> Respondents’ Brief, p. 17.

<sup>10</sup> Respondents’ Brief, p. 18-19.

defense.<sup>11</sup> Respondents once again choose to ignore controlling precedent in *Federal National Mortgage Association v. Ndiaye*, *Puget Sound Inv. Grp. v. Bridges*, *Snuffin v. Mayo*, and *Proctor v. Forsythe*. Those cases prohibit the introduction in an unlawful detainer of title-related issues.

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

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

Appellant argued the trial court committed error in the content of Instructions 2 and 11.<sup>12</sup> Legal errors in jury instructions are reviewed *de novo*. *Fergen v. Sestero*, 182 Wn. 2d 794, 803, 346 P.3d 708 (2015).

Appellant argued that by instructing the jury on issues related to Appellant's alleged duty to transfer title to the subject property to Respondent Candy Böhm, the trial court exceeded its subject matter jurisdiction in unlawful detainer, in violation of *Federal National Mortgage Association v. Ndiaye*, *Puget Sound Inv. Grp. v. Bridges*, *Snuffin v. Mayo*, and *Proctor v. Forsythe*.<sup>13</sup> Respondents once again choose to ignore those authorities.<sup>14</sup>

Respondents instead argue each party is entitled to have his theory of the case presented to the jury on proper instructions, citing *De Koning*

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<sup>11</sup> Respondents' Brief, p. 20-22.

<sup>12</sup> Brief of Appellant, p. 28-31.

<sup>13</sup> Brief of Appellant, p. 29-30.

<sup>14</sup> Respondents' Brief, p. 22-23.

v. *Williams*, 47 Wn. 2d 139, 141, 286 P.2d 694 (1955).<sup>15</sup> *De Koning* was as automobile case. *De Koning* involved no issue of the trial court's subject matter jurisdiction in an unlawful detainer. *De Koning* is therefore not controlling here.

Respondents argue it was not an abuse of discretion to instruct the jury on Respondent Candy Bohm's affirmative defense.<sup>16</sup> To the contrary, Instructions 2 and 11 represent another manifestation of the trial court's impermissible hybridization of its unlawful detainer jurisdiction and general civil jurisdiction. *Angelo Property Co.*, 167 Wn. App. 823 n. 67.

**C. The court erred in denying Appellant's motions for judgment pursuant to CR 50 (a) and (b).**

Respondents mischaracterize Appellant's argument regarding the trial court's denial of his CR 50 (b) motion as based upon the presumption that Respondent Candy Bohm was pursuing a counterclaim.<sup>17</sup>

Respondents fail to support their argument with either a single citation to the record or authority. Respondents' argument should therefore not be considered. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 801, 809, 828 P. 2d 549 (1992).

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<sup>15</sup> Respondents' Brief, p. 23.

<sup>16</sup> *ibid.*

<sup>17</sup> Respondents' Brief, p. 24.

Respondents argue the REPSAs were admitted to provide the jury with a factual background and context for how Respondents and the Rudolphs wound up on Appellant's property and as support for Respondent Candy Bohm's affirmative defense of why she never paid rent.<sup>18</sup> Respondents again fail to support their argument with either a single citation to the record or authority, so their argument should not be considered. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 809.

Respondents argue Appellants' arguments against the January 30, 2008 and October 15, 2008 REPSAs and their addenda are irrelevant because Respondent Candy Bohm was not allowed to bring a counterclaim against Appellant or his brother based on those documents.<sup>19</sup> Respondents once again fail to support their argument with either a single citation to the record or authority, so their argument should not be considered. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 809.

Respondents argue a reasonable jury could and did find that the REPSAs supported Respondent Candy Bohm's defense that she should be excused from paying rent.<sup>20</sup> Respondents ignore that the trial court exceeded its subject matter jurisdiction by allowing the jury to consider issues of title in an unlawful detainer, contrary to *Federal National*

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<sup>18</sup> Respondent's Brief, p. 25.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Id.*

*Mortgage Association v. Ndiaye, Puget Sound Inv. Grp. v. Bridges, Snuffin v. Mayo, and Proctor v. Forsythe.*

**D. The trial court erred in denying Appellant’s motion for new trial or reconsideration.**

Respondents continue to advance the trial court’s explanation of its reasons for admitting the REPSAs in support of the trial court’s denial of Appellant’s motion for new trial or reconsideration.<sup>21</sup> Respondents’ argument fails, as they steadfastly refuse to address the limitations on the trial court’s subject matter jurisdiction in an unlawful detainer. The trial court’s admission of the REPSAs violated *Federal National Mortgage Association v. Ndiaye, Puget Sound Inv. Grp. v. Bridges, Snuffin v. Mayo, and Proctor v. Forsythe*. By admitting those REPSAs, the trial court conflated its subject matter jurisdiction in unlawful detainer with its general civil jurisdiction, contrary to *Angelo Property Co.*, 167 Wn. App. 823 n. 67.

**E. The court erred in dismissing Appellant’s claims against Respondents.**

Respondents repeat their argument that the trial court admitted the REPSAs to support Respondent Candy Bohm’s affirmative defense. The trial court’s admission of the REPSAs violated *Federal National Mortgage Association v. Ndiaye, Puget Sound Inv. Grp. v. Bridges, Snuffin*

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<sup>21</sup> Respondents’ Brief, p. 26-30.



*v. Mayo*, and *Proctor v. Forsythe*. By admitting those REPSAs, the trial court conflated its subject matter jurisdiction in unlawful detainer with its general civil jurisdiction, contrary to *Angelo Property Co.*, 167 Wn. App. 823 n. 67.

**F. The trial court erred in awarding attorney fees to Respondents.**

As set forth in Paragraphs III A-E above, by admitting the REPSAs and in giving the jury Instructions 2 and 11, the trial court exceeded its limited subject matter jurisdiction in unlawful detainer. Respondents therefore have not prevailed for purposes of an award of attorney fees under paragraph 11 of the lease<sup>22</sup> or RCW 4.84.330. Appellant therefore requests the Court to reverse the findings, conclusions and judgment for attorney fees.

**G. Appellant requests attorney fees on appeal.**

Appellant requests an award of attorney fees incurred on appeal, pursuant to paragraph 11 of the lease<sup>23</sup>, RAP 18.1 and RCW 4.84.330. Paragraph 11 of the lease provides “[i]n the event is necessary for either party to employ an attorney to enforce any terms of this Agreement, the prevailing party is entitled to reasonable attorneys’ fees as provided for by law. In the event of a trial, the amount shall be fixed by the Court.” An award of attorney fees is mandatory. *Singleton v. Frost*, 108 Wn. 2d 723,

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<sup>22</sup> EX 9.

<sup>23</sup> EX 9.

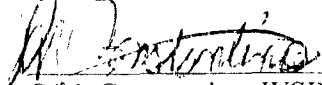
727-28, 742 P. 2d 1224 (1987); *Hawkins v. Diel*, 166 Wn. App. 1, 10, 269 P. 3d 1049 (2011).

## VII. CONCLUSION

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

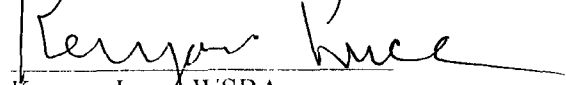
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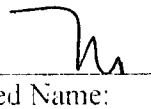
**CERTIFICATE OF MAILING**


The undersigned does hereby declare that on May 10, 2016, the undersigned delivered a copy of APPELLANT'S REPLY BRIEF filed in the above-entitled case to the following persons:

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