

FILED
Court of Appeals
Division III
State of Washington
10/29/2020 2:13 PM

FILED
SUPREME COURT
STATE OF WASHINGTON
10/30/2020
BY SUSAN L. CARLSON
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NO. 99180-4

SUPREME COURT OF THE STATE OF WASHINGTON

NO. 36612-0-III

DIVISION III COURT OF APPEALS
OF THE STATE OF WASHINGTON

SPOKANE AIRPORT BOARD,

Petitioner,

v.

EXPERIMENTAL AIRCRAFT ASSOCIATION, CHAPTER 79,

Respondent.

SPOKANE AIRPORT BOARD'S PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

The Spokane Airport Board (“Airport”) seeks review of the decision of the Court of Appeals opinion in Part II.

II. COURT OF APPEALS OPINION

The Court of Appeals filed its opinion on August 4, 2020 (the “Opinion”) which is set forth in the Appendix at pages A-1 through A-10.

III. ISSUES PRESENTED FOR REVIEW

(1) The Opinion is contrary to Washington Supreme Court and Court of Appeals decisions regarding the effect of lease cancellation provisions and application of RCW 59.12.030(1).

(2) The Opinion results in an impermissible judicial revision of RCW 59.12.030(1).

(3) The Opinion involves an issue of substantial public interest which should be determined by the Washington Supreme Court.

IV. STATEMENT OF THE CASE

Experimental Aircraft Association, Chapter 79 (“EAA”) leased Building No. 7 at Felts Field Airport from the Airport pursuant to a written Lease Agreement dated February 16, 2011 (“Lease”). CP 34-54. Under Article 1, the parties specifically defined the “term” of the Lease as follows:

The term of this Agreement shall be five (5) years commencing March 1, 2016 and ending February 28, 2021 *unless sooner terminated or canceled as provided herein. Either party may cancel this Agreement upon one hundred eighty (180) days advance written notice.* CP 34 (emphasis added).

Under the Lease, EAA had the option to renew for an additional five years once the term expired. CP 34-35.

On February 17, 2016, the parties executed a First Amendment to the Lease (“First Amendment”). CP 56-57. The First Amendment provided that unless specifically revised, all other Lease terms remained in effect. CP 56-57. Article 1 was revised and EAA’s option to renew for an additional five-year term was deleted. CP 56. However, Article 1’s definition of the Lease’s “term” was identical to the original contract provision and could be cancelled by either party before 2021 with 180 days advanced written notice. CP 56.

In November 2017, the Airport approved a contract to demolish Building No. 7 and replace it with a new hangar. CP 452. The contract was ultimately slated to commence on August 28, 2018. CP 100; CP 452. Because Building No. 7 was to be demolished, the Lease needed to be cancelled. On November 25, 2017 Lawrence Krauter (Chief Executive Officer of the Airport) e-mailed Jack Hohner (EAA’s President) and advised EAA that Building No. 7 would be demolished, notice cancelling

the Lease would be forthcoming, and EAA would have the opportunity to lease a different space at the Airport.¹ CP 448; CP 452.

On November 28, 2017, the Airport exercised its right of cancellation under Article 1 of the First Amendment and provided EAA with 180 days written notice of the cancellation, which EAA received. CP 60; CP 138; CP 333. Pursuant to that notice, EAA was required to vacate Building No. 7 no later than May 29, 2018. CP 138; CP 169.

The Airport subsequently sent several notices notifying EAA that, while the Lease had been cancelled, its occupancy would be extended as the new construction project solidified. On May 8, 2018, the Airport notified EAA that while the Lease had been cancelled, it was extending EAA's occupancy and it would need to vacate no later than June 30, 2018. CP 62; CP 528. On June 22, 2018, the Airport sent EAA the same notice, extending EAA's occupancy to no later than July 31, 2018. CP 64. On July 17, 2018, the Airport notified EAA that while the Lease had been cancelled, it was extending EAA's occupancy and it would need to vacate no later than Friday, August 17, 2018. CP 66. EAA conceded that it

¹ While not germane to the issues raised in this *Petition for Review*, the Airport attempted in good faith to negotiate a new lease at a different building, provided draft leases to EAA, and added terms and conditions to the proposed lease at EAA's insistence. EAA ultimately declined to sign a new lease and refused to vacate Building No. 7. *Answering Brief of Respondent*, pps. 10-13. CP 506-514; CP 522-523; CP 525; CP 529; CP 533; CP 537-538; CP 543-545; CP 568; CP 571; CP 576; CP 583-584; CP 590.

received these letters. CP 334.

In total, EAA received 262 days' notice that the Lease had been cancelled as set forth in Article 1 and the specific date EAA would be required to vacate. When EAA refused to vacate the premises on August 17, 2018, the Airport commenced an unlawful detainer action pursuant to RCW 59.12.030(1). CP 6-69. The trial court ultimately granted the Airport's motion for summary judgment, ruling that EAA unlawfully detained the premises in violation of RCW 59.12.030(1) because it remained in possession after the term expired pursuant to Article 1 of the Lease and the notice of cancellation. CP 601-604. The Court of Appeals, Division III, reversed, holding that while parties may contractually agree to shorten a lease term with a notice of cancellation, a landlord cannot utilize RCW 59.12.030(1) to evict its tenant.²

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The Opinion correctly held that a lease term can be lawfully shortened by exercise of a contractual right of cancellation, either party

² The Opinion did not address EAA's additional arguments that the Lease could only be canceled before 2021 for "cause," that the Airport had agreed to relocate EAA under Article 38 at the Airport's expense, or that Article 1 was "ambiguous." As set forth in the Airport's briefing before the appellate court, these arguments had no merit. Article 1 was not ambiguous and allowed the Airport (or EAA) to cancel without *any* cause. Article 23 allowing the Airport to cancel *for cause* was separate and distinct from Article 1 allowing either party to cancel with written notice. Article 38 only required the Airport to relocate EAA if it chose to do so in its sole discretion, and the record clearly reflected the Airport did not select this option.

had the right to cancel the Lease prior to February 28, 2021 with written notice, the Airport provided such notice, and EAA refused to vacate in accordance with the terms of the Lease and that notice. However, the Opinion erroneously concluded that the trial court did not have subject matter jurisdiction to decide the issue of possession under RCW 59.12.030(1) because that statute is only available to evict a tenant who holds over after expiration of the “fixed term” of a lease, not a tenant that holds over after expiration of the term shortened by a lawful right of cancellation. *Opinion* at A-9.

As set forth below, review by the Supreme Court is warranted because the Opinion is contrary to Washington law that early cancellation provisions in a lease are valid and enforceable and once exercised, no leasehold remains, authorizing a landlord to evict a tenant under the plain language of RCW 59.12.030(1). In addition, the Opinion judicially revises RCW 59.12.030(1) to add terms and limiting conditions which are not present in the unambiguous statute. Furthermore, the Opinion requires courts to ignore bargained-for contract provisions and, contrary to Washington law, renders such provisions illusory or meaningless. Finally, the Opinion implicates a matter of substantial public interest because it bars a landlord’s right (in both commercial and presumably in residential

settings) to have the court determine the issue of possession in a speedy and efficient manner under the unlawful detainer statute. Instead, the Opinion restricts a landlord's remedy to presumably a costly ejectment action. Review is warranted pursuant to RAP 13.4(b)(1), RAP 13.4(b)(2), and RAP 13.4(b)(4).

A. The Opinion is contrary to decisions of the Washington Supreme Court and Court of Appeals regarding the effect of lease cancellation provisions and application of RCW 59.12.030(1).

While the Opinion correctly acknowledges that the term of a lease may be lawfully shortened by the exercise of a right of cancellation (as was done in this case), it incorrectly concluded that RCW 59.12.030(1) only allows eviction of a tenant that remains in possession after expiration of the "fixed term" generally set forth in a lease, and can never apply to a tenant remaining in possession after a valid option to cancel is exercised. *Opinion* at A-9. Review is warranted under RAP 13.4(b)(1) and 13.4(b)(2) because the Opinion conflicts with decisions of the Supreme Court and published decisions of the Court of Appeals.

1. The Opinion undermines contractual rights regarding early cancellation provisions, which are supported by Washington law.

The Opinion is contrary to Washington court decisions that no-fault cancellation provisions in a lease are valid and enforceable

contravenes contractual rights of parties. Washington law has consistently held that early cancellation provisions prior to the end of a lease term (even *unilateral* cancellation provisions) are valid and enforceable. *Lane v. Wahl*, 101 Wn.App. 878, 883-884, 6 P.3d 621, 624 (2000) and *Peoples Park & Amusement Ass'n v. Anrooney*, 200 Wash. 51, 93 P.2d 362 (1939).

In this case, the Opinion acknowledged that such provisions are “lawful.” *Opinion*, A-9. However, review is warranted because the Opinion’s conclusion that RCW 59.12.030(1) does not apply to early cancelled leases would require courts to ignore both a bargained-for agreement allowing early cancellation and a landlord’s statutory rights once that option is exercised. The Opinion thus cuts sharply against established Washington law. “Washington courts are loathe to interfere with the rights of parties to contract as they please between themselves.” *Salewski v. Pilchuck Veterinary Hosp., Inc.*, P.S. 189 Wn.App. 898, 908, 359 P.3d 884 (2015) quoting *Mgmt., Inc. v. Schassberger*, 39 Wn.2d 321, 326, 235 P.2d 293 (1951). A court will not re-write a contract where the intent of the parties is clearly expressed by its terms. *Willis v. Champlain Cable Corp.*, 109 Wn.2d 747, 758, 748 P.2d 621 (1988).

Although the Opinion correctly acknowledges that parties may agree to shorten the lease term, it does not allow a landlord to utilize RCW

59.12.030(1) to regain possession once exercised. The Opinion allows a tenant to disregard an enforceable contract right and continue possession. *See Bellevue Square, LLC v. Whole Foods Market Pacific Northwest, Inc.*, 6 Wn.App.2d 709, 717, 432 P.3d 426, 430-431 (2018) (Concluding that interpretations giving lawful effect to all contract provisions are favored over those that render other language meaningless and ineffective). The Opinion allows courts to improperly ignore, modify, and upset the balance of contractual rights between parties to a lease agreement.

2. *The Opinion ignores the effect of early cancellation provisions under Washington Supreme Court decisions.*

Though the Opinion acknowledges the right to an early cancellation provision in a lease, it is contrary to Washington Supreme Court authority regarding the effect of an early cancellation provision on the term of a lease. In *State v. Sheets*, 48 Wn.2d 65, 290 P.2d 974 (1955), the lease provided that if the premises were taken by condemnation through government action, either party could cancel before the end of the term. *Id.* at 66, 290 P.2d at 974. When the property was subjected to a condemnation action, the landlord provided a notice of cancellation of the lease. *Id.* The tenant demanded compensation for the remaining lease term that had been cancelled. *Id.* The Washington Supreme Court disagreed, stating: “When a written lease provides that the taking of all or a portion

of the leased property may terminate the lease at the option of either party, the term expires when such taking occurs, and the option is exercised, and no unexpired leasehold remains for which the lessee can claim compensation.” *Id.* at 68, 290 P.2d at 975. While *State v. Sheets* involved a condemnation proceeding, the legal principle is clear: when a lease authorizes one or both parties to cancel prior to the end of the term, and that option is exercised, the remaining term expires and no remaining leasehold remains. Here, once the Airport exercised its contractual right to cancel the Lease prior to 2021. EAA was then liable for unlawful detainer under RCW 59.12.030(1) because it remained in possession after the “term for which the property was let” as set forth in the statute and the Lease. The Opinion failed to correctly apply Washington case law and RCW 59.12.030(1).

3. *The Opinion did not apply Washington law that early cancellation results in termination of the tenancy.*

The Opinion is also contrary to Washington law that expiration of the lease term results in termination of the tenancy. *Western Union Telegraph Co. v. Hansen & Rowland Corp.*, 166 F.2d 258, 262 (9th Cir. 1948) (“While recognizing the distinction between the lease-term and the tenancy itself, the law of Washington holds that the expiration of the former results in termination of the latter.”); *Carlstrom v. Hanline*, 98

Wn.App. 780, 786-787, 990 P.2d 986, 989 (2000). While the Opinion recognized that an early cancellation provision in a lease is lawful, it failed to apply clear Washington law that once exercised, the lease term expired and the tenancy itself expired, thus authorizing an unlawful detainer action under RCW 59.12.030(1).

4. *The Opinion misapplied FPA Crescent.*

The Opinion relied exclusively on *FPA Crescent Associates, LLC v. Jamie's, LLC*, 190 Wn.App. 666, 360 P.3d 934 (2015). However, it misapplied that holding in several critical respects.

First, the Opinion concluded that “[t]he facts of this case fall squarely within *FPA Crescent’s* textual analysis and holding.” *Opinion*, A-8. They do not. In *FPA Crescent*, the narrow issue on appeal was “...whether a landlord may bypass the notice and right to cure provisions of RCW 59.12.030(3) by declaring the tenant in default for nonpayment of rent, then terminating the tenancy, and then arguing that the tenant is a holdover tenant unlawfully detaining under RCW 59.12.030(1). We answer ‘no’ to the issue presented.” *Id.* at 668, 360 P.3d at 935. In *FPA Crescent*, the lease gave the landlord the option to terminate the lease if the tenant defaulted in any respect, without any right to cure, as provided in the statute. *Id.* at 669, 360 P.3d at 935-936. Where an unlawful detainer

action is predicated on a default for nonpayment of rent, the Court in *FPA Crescent* held that a landlord cannot unilaterally terminate the lease. Instead, the landlord must proceed under RCW 59.12.030(3), giving the tenant notice of default, serving that notice pursuant to RCW 59.12.040, and giving the tenant the opportunity to cure by paying rent **before** commencing the lawsuit. *Id.* at 676, 360 P.3d at 939 citing *Housing Authority of City of Everett v. Terry*, 114 Wn.2d 558, 564, 789 P.2d 745 (1990).

Unlike *FPA Crescent*, the Airport's unlawful detainer action was not predicated on a "default" by EAA. The Airport did not attempt to bypass any statutory right of pre-litigation notice or right to cure owed to EAA. The Lease contained a mutually agreed upon, lawful, and enforceable right to cancel upon written notice. As set forth above, once the notice was provided to EAA, the term of the Lease expired, and the Airport was not required to provide any pre-litigation notice before filing suit because there was nothing to cure. *Kitsap County Consolidated Housing Authority v. Henry-Livingston*, 196 Wn.App. 688, 699, 385 P.3d 188, 193 (2016) citing *FPA Crescent*; *Savings Bank of Puget Sound v. Mink*, 49 Wn.App. 204, 207, 741 P.2d 1043, 1045 (1987). The Opinion ignored this distinction, holding that whether the cancellation option was a

mutual no-fault option rather than an option to terminate in the event of a default, “the reason for a lawful early termination makes no difference.” *Opinion*, A-8 & 9. This is clearly contrary to case law and the plain terms of RCW 59.12.030(1) as set forth above.

Second, while *FPA Crescent* identifies the situation where RCW 59.12.030(1) *does* apply the *Opinion* failed to correctly apply this legal principle. In *FPA Crescent*, the Court held that the plain language of the statutory term “expiration” in RCW 59.12.030(1) meant “the ending of a fixed period of time.” *Id.* 676-677, 360 P.3d at 939. The Court held, based on this plain language, that RCW 59.12.030(1) applies to tenants that continue in possession after expiration of the lease term as specified in the lease agreement. *Id.*

The *Opinion* failed to apply this basic principle. The parties agreed that either party could shorten the five-year lease “term” with written notice. As set forth above, once that early cancellation option was exercised, the term for which Building 7 was let expired, according to the Lease and the unambiguous meaning of “expired” in RCW 59.12.030(1). Thus, the Lease term expired on August 18, 2018. The *Opinion* ignored this distinction, mechanically applied *FPA Crescent* (which has no application) and held that at the time the Airport brought its unlawful

detainer action the “fixed term” had not expired within its definition assigned by the Court. *Opinion*, A-8. Because the Opinion misapplied *FPA Crescent* and based on the plain language of RCW 59.12.030(1), review is warranted.

The Opinion compounded this error by concluding that, though a lease provision shortening the lease term is “lawful,” RCW 59.12.030(1) cannot be used by a landlord as a basis to evict because it only applies to cases where the tenant remains in possession after the expiration of the entire term – even if either party exercises a mutually-agreed contract provision to cancel before the end of that term. *Opinion* A-9. The Opinion’s analysis is internally inconsistent and, as set forth above, contrary to Washington case law and the plain language of RCW 59.12.030(1). It undercuts the contractual rights of parties, the effect of a cancellation provision lawfully exercised under Washington law, and the plain language of RCW 59.12.030(1).

B. The Opinion results in an impermissible judicial revision of RCW 59.12.030(1).

Review is warranted because the Opinion adds terms to an unambiguous statute and creates uncertainty for both landlords and tenants. A court’s objective in construing a statute is to determine the legislature’s intent. *Christian v. Ellsworth*, 162 Wn.2d 365, 372, 173 P.3d

228, 231 (2007). If the statute’s meaning is plain on its face, the Court must give effect to that plain meaning as an expression of legislative intent.³ *Id.* at 373, 173 P.3d at 232. Plain meaning is discerned from the ordinary meaning of the statutory language, the context of the statute in which the provision is found, and the statutory scheme as a whole. *Id.* An undefined term should be given its usual and ordinary meaning. *Id.* Courts will not rewrite unambiguous statutory provisions under the guise of interpretation and will not add words where the legislature has not done so. *Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155, 158 (2006); *Lake v. Woodcreek Homeowners Ass’n*, 169 Wn.2d 516, 526, 243 P.3d 1283, 1287 (2010) quoting *Rest. Dev. Inc., v. Cananwill, Inc.*, 150 Wn2d 674, , 80 P.3d 598 (2003).

In this case, the Opinion adds terms to RCW 59.12.030(1) and impermissibly narrows the scope of its application. RCW 59.12.030(1) allows a landlord to proceed with an unlawful detainer action if a tenant continues in possession “after the expiration of the term for which it is let to him or her.” The Opinion correctly noted that the term “expiration” means the ending of a fixed period of time. *Opinion A-7-8*. The Opinion

³ Notably, while the Opinion provides that any ambiguities in the unlawful detainer statute must be strictly construed in favor of the tenant, the Court did not identify any ambiguity in RCW 59.12.030(1). In addition, the Opinion did not find any ambiguities in the Lease provision allowing either party to cancel with 180 days advanced written notice.

further recognized that a lease term may be lawfully shortened through the exercise of a right of cancellation. *Opinion*, A-9. However, the Opinion improperly applied the plain language of RCW 59.12.030(1) and held that even where that lawful right is exercised, the statute only applies to cases where the “fixed term” of the entire lease has expired.⁴ RCW 59.12.030(1) contains no such limitation, nor does it reference “fixed term.” It unambiguously applies to cases where the tenant remains in possession after the expiration of the *term*. By adding the phrase “fixed term”, which is not within the statute and not within the plain meaning of “expiration of the term,” the Opinion improperly excluded leases where a landlord or tenant lawfully exercises a right of cancellation from RCW 59.12.030(1).⁵ Review is appropriate to provide guidance to both landlords and tenants on this issue.

C. The Opinion involves an issue of substantial public interest which should be determined by the Washington Supreme Court.

The Opinion implicates an issue of substantial public interest and review is appropriate pursuant to RAP 13.4(b)(4) for four reasons. Each

⁴ “At the time the Airport brought its unlawful detainer action, the *fixed term* had not ‘expired’ within the meaning we gave that statutory term in *FPA Crescent*.” *Opinion*, A-8. (emphasis added).

⁵ The Opinion fails to contemplate what rights, if any, a property owner might have if the tenant exercised its mutually agreed contractual right to cancel and shorter the lease term. Based on the logic of the Opinion, presumably the landlord would have the right to seek specific performance of the “fixed term.”

basis for review is even more important given the current moratorium on evictions in Washington State. Once that moratorium is lifted, the Courts will likely face an onslaught of unlawful detainer cases concerning the right to possession. Even if a small percentage of those cases address leases which allow either party to cancel prior to the end of the term, landlords and tenants must have concrete direction from the Courts regarding the rights afforded by the unlawful detainer statute.

First, the Opinion correctly recognizes that early cancellation provisions may be used to lawfully shorten a lease term but incorrectly held that RCW 59.12.030(1) can never be utilized by a landlord to regain possession if the tenant refuses to vacate once exercised. *Opinion*, A-8 & 9. This cuts against the basic purpose of the unlawful detainer statute: providing an expedited method of resolving the right to possession of property. *Faciszewski v. Brown*, 187 Wn.2d 308, 314, 386 P.3d 711, 715 (2016).

Second, in addition to undercutting the purpose of the unlawful detainer statute, the Opinion precludes relief to landlords under the statutory scheme. Once the Lease term expired, the Airport was not required to provide pre-litigation notice to EAA before filing suit. *Kitsap County Consolidated Housing Authority v. Henry-Livingston*, 196

Wn.App. at 699 (*citing FPA Crescent; Savings Bank of Puget Sound v. Mink*, 49 Wn.App. at 207). RCW 59.12.030(1) is the only section of the statute that permits a landlord to regain lawful possession of property when the parties have contracted for an early cancellation provision before the end of the lease term and the option is used.⁶ As is stands, the Opinion denies landlords the statutory right to have possession determined in an expedited manner.

Third, the reach of the Opinion is not limited to the facts of this case and would apply to any lease (be it commercial or residential) where parties agree to include an early cancellation provision. The Opinion creates uncertainty for both landlords and tenants regarding the issue of possession based on specifically negotiated contract provisions and remedies available under the unlawful detainer statute.⁷

⁶ For example, RCW 59.12.030(2) applies when a tenant holds over after the landlord gives notice of termination of a periodic tenancy. There is no periodic tenancy when a lease is cancelled early. The balance of the unlawful detainer statute pertains to evictions where the tenant fails to cure after pre-litigation notice, none of which would apply where the lease is cancelled early: RCW 59.12.030(3) (nonpayment of rent); RCW 59.12.030(4) (failure to perform a lease covenant); and RCW 59.12.030(5) (waste, nuisance or unlawful activity).

⁷ For a municipal airport that operates pursuant to chapter 14.08 RCW, such as the Airport, this has grave legal consequences. State law governing the Airport expressly requires that it complies with applicable federal law. RCW 14.08.120(2); RCW 14.08.160(1); RCW 14.08.330. To this end, the Airport must maintain a fee and rental structure that makes the Airport as financially self-sustaining as possible. 49 U.S.C. § 47107(a)(13); 61 Fed. Reg. 31994, June 21, 1996; 64 Fed. Reg. 7696, February 16, 1999. Based on these federal obligations, it is common practice for an airport to lease property on a short-term basis or with an ability to cancel the lease term in order to accommodate a use of such property that will result in a higher or greater financial return to the airport.

Finally, since no other section of the unlawful detainer statute would apply to resolve the issue of possession where a lease is lawfully cancelled with notice, the Opinion leaves parties no other recourse but to file an ejectment action pursuant to Chapter 7.28 RCW.⁸ Relegating parties to an ejectment action cuts against the basic purpose of the unlawful detainer statute. “The statutory action relieves a landlord from having to file an expensive and lengthy common law action for ejectment.” *FPA Crescent*, 190 Wn.App. at 675; *Housing Authority of City of Everett v. Terry*, 114 Wn.2d at 563.

The Opinion would effectively require parties to engage in a lengthy and expensive ejectment lawsuit to determine the right to possession. Limiting relief to an ejectment action rather than a streamlined, predictable, and efficient statutory remedy will invariably increase attorney fees and costs for all parties, unnecessarily lengthen the litigation process, and would not afford clear relief to a landlord entitled to

In the present matter, the Airport and EAA mutually agreed to a possible early cancellation of the Lease term for Building 7 based on the intended higher and greater use of the premises, which resulted with the new hangar to be constructed starting in late August 2018. CP 100. Without the ability to negotiate an early cancellation of the lease term with tenants, the only option for the Airport would be to offer continuing, short-term or month-to-month leases, which would not be acceptable to most tenants and result in lower financial return for the use of Airport property.

⁸ Under Washington law, a landlord may file an unlawful detainer or an ejectment case at its election. *Petsch v. Willman*, 29 Wn.2d 136, 137-138, 185 P.2d 992, 993 (1947); *Honan v. Ristorante Italia, Inc.*, 66 Wn.App. 262, 269-270, 832 P.2d 89, 93 (1992). The Opinion would eliminate this option.

possession. For example, the unlawful detainer statute grants parties a right to an expedited trial. RCW 59.12.130. An action for ejectment does not. *Washington Real Property Deskbook*, §9.3(2) (4th Edition 2010). In the unlawful detainer statute, a landlord is entitled to a Writ of Restitution to regain possession of the property during the pendency of the action. RCW 59.12.090. There is no such provision in the ejectment statute. Most importantly, unlike the unlawful detainer statute, Washington law is essentially silent as to how a landlord can remove a tenant once it obtains an ejectment order. “Although an order for ejectment may be issued, there is no statutory guidance for enforcing the order to gain possession as in the unlawful detainer actions.” *Washington Real Property Deskbook*, §9.11(1) (4th Edition 2010). A landlord could *possibly* obtain a “writ of assistance” from the local Sheriff to restore possession. *Id.* citing *Hangerman v. Hetzel*, 21 Wash. 444, 58 P. 580 (1899). However, even this is not a guaranteed result.⁹

Thus, the Opinion (1) prevents a landlord from utilizing the unlawful detainer statute to regain lawful possession after exercising a contractual right to cancel a lease agreement before the end of the term;

⁹ “Presumably, the sheriff will execute a writ of assistance similar to the manner in which it executes writs of restitutions in evictions. The prudent lawyer will discuss procedure with the applicable county sheriff prior to embarking on this process.” *Washington Real Property Deskbook*, §9.11(1)

and (2) limits available relief to an expensive, cumbersome, and lengthy ejectment claim when the right to possession is not at issue. Even if an order for ejectment could eventually be obtained, Washington law is essentially silent on the how a landlord can finally obtain possession. This is neither the intent nor design of the unlawful detainer statute and review is appropriate.

VI. CONCLUSION

The Opinion is in conflict with Washington law which provides that parties may contractually agree to cancel leases prior to the end of the term. It further conflicts with Washington law that when the option is exercised, the lease term ends, and a landlord is entitled to have possession determined by RCW 59.12.030(1). The Opinion effectively ignores contractual rights, removes a landlord's statutory right under the unlawful detainer statute, and relegates all parties to an expensive and cumbersome ejectment claim with no clear relief to regain possession. The reach of the Opinion applies to both residential and commercial leases, leading to uncertainty in contractual agreements and the unlawful detainer statute addressing the lawful right of possession. This Court should accept review, reverse the ruling of the Court of Appeals, and award the Airport attorney fees and costs on appeal.

RESPECTFULLY SUBMITTED this 29th day of October, 2020.

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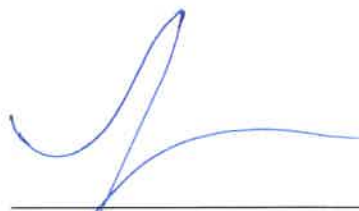
CERTIFICATE OF SERVICE

I, Lawrence W. Garvin, hereby certify that a true and correct copy of the foregoing was served by the method indicated below to the following this 29th day of October, 2020.

- U.S. Mail
- Hand Delivered
- Overnight Mail
- E-mail to:

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Lawrence W. Garvin

APPENDIX

FILED
AUGUST 4, 2020
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

SPOKANE AIRPORT BOARD,)	
)	No. 36612-0-III
Respondent,)	
)	
v.)	
)	
EXPERIMENTAL AIRCRAFT)	UNPUBLISHED OPINION
ASSOCIATION CHAPTER 79, a)	
Washington Nonprofit Corporation, and)	
ALL OTHER OCCUPANTS of 5829 E.)	
Rutter Avenue, (Felts Field Airport))	
Building No. 7 Spokane, Washington,)	
)	
Appellants.)	

SIDDOWAY, J. — The Experimental Aircraft Association, Chapter 79 (EAA) appeals the summary judgment determination in an unlawful detainer action that its landlord was entitled to possession of an airport hangar that EAA had leased. Under the controlling decision in *FPA Crescent Associates, LLC v. Jamie’s LLC*, 190 Wn. App. 666, 360 P.3d 934 (2015), the statutory basis for relief on which the landlord relied did not apply. We reverse the summary judgment and grant EAA’s request for an award of attorney fees on appeal.

FACTS AND PROCEDURAL BACKGROUND

EAA is an aeronautics group that “offer[s] facilities and training for aircraft construction, restoration, and flight training,” “provide[s] scholarships, flights, and aeronautical instruction to local youth,” and “sponsor[s] historic aircraft tour visits.” Clerk’s Papers (CP) at 417. In 2011, it signed a five year lease for an aircraft hangar, Building 7, at Felts Field Airport in Spokane. Its landlord, the Spokane Airport Board (Airport) is the governing body that operates Spokane International Airport, Felts Field Airport, and the Spokane International Airport Business Park. EAA’s lease gave it an option to renew for an additional five-year term. In 2016, the parties executed an amendment to the lease agreement that extended the term to a date in 2021, “unless sooner terminated or canceled as herein provided.” CP at 56. The amendment also modified the rent amount, but otherwise incorporated the terms of the original lease.

In November 2017, the Airport sent the then-president of EAA an e-mail saying it anticipated the Airport would terminate the parties’ lease because Building 7 was going to be demolished to build a new hangar. The e-mail characterized the Airport as “excited” about a new space EAA would have the opportunity to lease, and proposed a meeting to discuss transitional arrangements because the new space would not be available when EAA vacated Building 7. CP at 455.

A few days later, the Airport’s properties and contracts director mailed EAA a letter stating that the Airport was cancelling the parties’ lease pursuant to its amended

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article 1, which provided in part, "Either party may cancel this Agreement upon providing one hundred eighty (180) days advance written notice." CP at 56. It notified EAA that it would be required to vacate Building 7 "no later than May 29, 2018." CP at 60.

Thereafter, and through August 2018, representatives of the Airport and EAA communicated and met to explore new housing for EAA, and the Airport eventually provided EAA with a proposed replacement lease. As the original cancellation date of May 29 approached, the Airport notified EAA by letter that it wished to extend EAA's occupancy in Building 7 to June 30 and the cancellation of EAA's lease would now be effective on that date. On June 22, the Airport confirmed in a letter to EAA that it was extending the cancellation of the lease agreement again, and EAA would now be required to vacate Building 7 no later than July 31. In mid-July, the Airport notified EAA in a third letter that it was extending EAA's occupancy to August 17. This third letter informed EAA that it was required to vacate Building 7 no later than August 17 and it would be permitted to move its property into a portion of Building 17 before the end of August. The July letter included a draft version of a new lease for a portion of Building 17.

It became apparent over the following month that EAA and the Airport had different understandings of their rights and obligations under the 2011 lease and its amendment. Drafts of a replacement lease were provided by the Airport, but none was

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accepted and signed by EAA. The Airport had agreed to move EAA's property to a portion of Building 17 but EAA delayed in returning an indemnity agreement the Airport requested as a condition of its assistance, and the Airport had to cancel its arrangements for the move when EAA failed to confirm agreement to the scheduling. The Airport then learned that EAA members were balking at moving at all.

When EAA did not vacate Building 7 by the Friday, August 17 deadline, the Airport filed a complaint for unlawful detainer against EAA the following Monday, August 20, and moved for a writ of restitution. It alleged that EAA was in unlawful detainer of the property "[p]ursuant to RCW 59.12.030(1)." CP at 11. It attached its letters cancelling the lease and extending the effective date of the cancellation. The trial court granted ex parte relief, entering both an order authorizing a writ of restitution and the writ itself.

EAA responded with a motion to stay the writ if it posted a \$1,000 bond (the bond amount that had been required of the Airport), arguing the Airport had attempted to improperly and prematurely cancel the parties' lease in a manner not allowed by its terms. When the Airport asked that any stay be predicated on a \$350,000 bond from EAA and the court settled on a \$230,000 bond requirement, EAA relented and vacated Building 7 on or about August 27. It persisted in its position that the Airport had no right to evict it.

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In September 2018, the Airport moved for summary judgment, seeking to establish that it had a right of possession and, on that basis, to recover double its damages and its attorney fees and costs occasioned by EAA's unlawful detainer. EAA opposed the motion and later filed its own motion for summary judgment. Among EAA's arguments were that read as a whole, the lease could only be cancelled or terminated for the causes identified in its article 23 and 24; because it lacked cause, the Airport had been proceeding under a "relocation" provision at article 38 of the lease, which the Airport then breached; and under this court's decision in *FPA Crescent*, the Airport had no right to proceed with an unlawful detainer action under RCW 59.12.030(1) because the fixed term of the lease had not expired.

The trial court granted the Airport's motion for summary judgment on the issue of the right to possession, but reserved issues of damages and attorney fees. EAA appeals.

ANALYSIS

We review an order granting summary judgment de novo, engaging in the same inquiry as the trial court. *Grundy v. Thurston County*, 155 Wn.2d 1, 6, 117 P.3d 1089 (2005). Summary judgment is appropriate "if the pleadings . . . together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). The controlling issue here is the proper application of RCW 59.12.030(1). We review questions of law

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de novo. *Indigo Real Estate Servs., Inc. v. Wadsworth*, 169 Wn. App. 412, 417, 280 P.3d 506 (2012).

The unlawful detainer action in chapter 59.12 RCW provides an expedited method for resolving the right to possession and hastening the recovery of real property. *McRae v. Way*, 64 Wn.2d 544, 546, 392 P.2d 827 (1964). “In such proceedings the superior court sits as a special statutory tribunal, limited to deciding the primary issue of right to possession together with the statutorily designated incidents thereto, i.e., restitution and rent or damages.” *Id* (emphasis omitted).¹ Because the unlawful detainer statute is in derogation of common law, any ambiguities are strictly construed in favor of the tenant. *Hous. Auth. of City of Everett v. Terry*, 114 Wn.2d 558, 563, 789 P.2d 745 (1990).

This court’s decision in *FPA Crescent* is controlling. In that case, the parties had entered into a commercial lease whose expiration date was in July 2021. 190 Wn. App. at 669. The lease defined the “lease term” as beginning on the commencement date and ending on the expiration date unless terminated sooner pursuant to the terms and conditions of the lease. *Id*. In the spring of 2014, the lessee fell behind in its payment of

¹ Where, as here, the right to possession ceases to be at issue, the action may be converted into an ordinary civil suit for damages and the parties may then properly assert cross claims, counterclaims, and affirmative defenses. *Castellon v. Rodriguez*, 4 Wn. App. 2d 8, 18, 418 P.3d 804 (2018) (citing *Munden v. Hazelrigg*, 105 Wn.2d 39, 45-46, 711 P.2d 295 (1985)). Because the trial court had taken no step to convert the Airport’s unlawful detainer action to an ordinary civil suit, the summary judgment decision on possession was a final judgment, appealable as a matter of right under RAP 2.2(a)(1).

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rent. *Id.* at 669-70. The parties' lease defined "default" as including a failure to pay rent when due, and authorized the lessor to terminate the lease in the event of default. *Id.* at 669. The lessor exercised its right to terminate the lease, giving notice of termination to the lessee. *Id.* Although the lessee tendered late payment, the lessor refused to accept it. *Id.* at 670.

The lessor then brought an unlawful detainer action, relying on RCW 59.12.030(1), which provides that "[a] tenant of real property for a term less than life is liable for unlawful detainer if:"

(1) When he or she holds over or continues in possession, in person or by subtenant, of the property or any part thereof after *the expiration* of the term for which it is let to him or her. When real property is leased for a specified term or period by express or implied contract, whether written or oral, the tenancy shall be terminated without notice at the expiration of the specified term or period.

(Emphasis added.) The lessor argued that the lessee was a holdover tenant under subsection (1) in light of its early termination of the lease. The lessee disagreed; it argued that a lessee who continues in possession after an early termination of a lease is not a lessee who continues in possession "after *the expiration* of the term for which it is let."

This court agreed with the lessee. It held:

RCW 59.12.030(1) has no application here because it applies only to tenants who continue in possession "after the expiration of the term for which [the property] is let." Even if we were not charged with construing ambiguities in the unlawful detainer act strictly in favor of tenants, we

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would hold that this construction is required by the plain language of the statute. “Expiration” is defined in *Black’s Law Dictionary* as “[t]he ending of a fixed period of time.” BLACK’S LAW DICTIONARY 700 (10th ed. 2014). “Let” means “[t]o offer (property) for lease.” *Id.* at 1043. Thus, under the plain language of the statute, a tenant is guilty of unlawful detainer if the tenant remains in possession of property past the fixed period of time for which the property is leased.

Thus, RCW 59.12.030(1) is applicable only after the expiration of the fixed term as specified in the lease agreement. Here, the lease contained a fixed term of 90 months with the option to extend for an additional fixed period. The initial 90 months had not expired prior to FPA’s summons for unlawful detainer. FPA could not rely on RCW 59.12.030(1) to determine the right of possession.

FPA Crescent at 676-77 (alterations in original).

The facts of this case fall squarely within *FPA Crescent*’s textual analysis and holding. Amended article 1 of the Airport/EAA lease, like the lease in *FPA Crescent*, contained a fixed term of five years, subject to earlier termination or cancellation:

The term of this Agreement shall be five (5) years commencing March 1, 2016 and ending February 28, 2021 unless sooner terminated or canceled as herein provided. Either party may cancel this Agreement upon one hundred eighty (180) days advance written notice.

CP 56. At the time the Airport brought its unlawful detainer action the fixed term had not “expired” within the meaning we gave that statutory term in *FPA Crescent*. Rather, as in *FPA Crescent*, the parties’ lease had come to an early end as the result of the Airport’s exercise of a cancellation option. The option in this case was a mutual no-fault cancellation option rather than an option to terminate in the event of default. But under

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the textual basis for the holding in *FPA Crescent*, the reason for a lawful early termination makes no difference.

The Airport argues that *FPA Crescent* only held that where a lessee failed to pay rent, lessors could not bypass the notice and opportunity to cure provisions of RCW 59.12.030(3) by terminating the lease and relying on the subsection (1) holdover provision. *FPA Crescent* makes that observation, but the pertinent question for this case is *why* this court held that the lessor could not rely on subsection (1). The principal holding of *FPA Crescent* is its construction of RCW 59.12.030(1) as applying only to lessees who hold over following the *expiration* of a fixed term, not to lessees who hold over after a term that has not expired but has been lawfully shortened by the exercise of a right of cancellation or termination. It was merely a consequence of our construction of subsection (1) in *FPA Crescent* that if a lessor wishes to sue for unlawful detainer after terminating an unexpired lease for nonpayment of rent, its only alternative is to comply with subsection (3).

Because EAA was not a holdover tenant within the meaning of subsection (1) of RCW 59.12.030 and the Airport identifies no other basis under that statute for its request for relief, the trial court lacked jurisdiction to decide the right to possession.

Both parties request an award of reasonable attorney fees and costs on appeal and agree that such fees and costs are recoverable by the prevailing party under article 26 of

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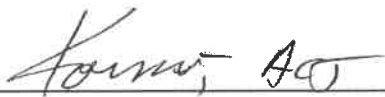
their lease. We award reasonable fees and costs on appeal to EAA, subject to its timely compliance with RAP 18.1(d).


The trial court's order granting partial summary judgment is reversed. We remand to the trial court with directions to dismiss the unlawful detainer claim and for such other proceedings as are consistent with this opinion.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.


Siddoway, J.

WE CONCUR:


Korsmo, A.C.J.


Fearing, J.

WITHERSPOON BRAJCICH MCPHEE, PLLC

October 29, 2020 - 2:13 PM

Transmittal Information

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