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STATE OF WASHINGTON
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IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

Supreme Court Case No. 99855-8

Court of Appeals Case No. 52593-3-II

Clark County Superior Court No. 17-2-02006-4

VICKI G. WEATHERS,
Respondent,

v.

LARRY YARBROUGH,
Defendant,

and,

WILLIAM GHIORSO,
Petitioner.

PETITION FOR REVIEW

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A. Identity of Petitioner.

Petitioner William L. Ghiorso (“Ghiorso”) was the attorney for Defendant Larry Yarbrough (“Yarbrough”) in the proceedings below, and appealed after the superior court entered sanctions against him as a result of a discovery dispute related to the parties’ ownership of real property that improperly took place during a statutory unlawful detainer action rather than a civil action for ejectment. Ghiorso hereby asks the Court to accept review of the decision below, as designated below, to resolve the conflict created by that decision in the lower courts.

B. Court of Appeals Decision.

Ghiorso’s appeal argued that the superior court lacked subject matter jurisdiction and authority to enter the sanctions because it refused to convert the unlawful detainer action into a civil action for ejectment after holding that a factual issue existed regarding whether Defendant Larry Yarbrough was an owner of the property.

The sanctions arose out of discovery dispute that started when Respondent Vicki Weathers (“Weathers”) requested documents she intended to rely on to prove that Yarbrough had no ownership interest in the property. On appeal, Ghiorso argued that unlawful detainer actions are for landlords and “tenants” (not potential owners) and the factual issue regarding whether Yarbrough was a property owner required the superior court to convert the case into a civil action for ejectment to allow Yarbrough’s defenses to be heard and resolved in the proper forum.¹

On November 3, 2020, the Court of Appeals entered a written ruling that disagreed with Ghiorso’s above-described argument and affirmed the decision below. *See* A – 1 through A – 14. Ghiorso filed a motion to reconsider but that motion was denied on May 6, 2021. *See* A – 15.

¹ *See* Fed. Nat. Mortg. Ass'n v. Ndiaye, 188 Wash. App. 376, 384 (2015) (“[U]nlawful detainer actions are not the proper forum to litigate questions of title.”); *see also* Bar K Land Co. v. Webb, 72 Wash. App. 380, 384 (1993) (unlawful detainer should have been ejectment action).

C. Issues Presented for Review.

This case presents a single issue: whether the superior court has subject matter jurisdiction or authority to require parties to litigate factual issues concerning the title to a property during an unlawful detainer action.

D. Statement of the Case.

This case was a no-cause unlawful detainer action filed under RCW § 59.12.030(2) by Weathers against her ex-husband, Yarbrough. *See* CP – 4. Yarbrough purchased the subject property in July of 2010 with the assistance of his brother. *See* CP – 228; CP – 473; CP – 556, n.2. Soon thereafter, Yarbrough’s children from his marriage with Weathers moved into the home with him. *See* CP – 253.

For the next few years, Yarbrough and his son, Josh, made improvements to the property and significantly increased its value. *See* CP – 253-56. Yarbrough intended to leave the equity in the home to his children and grandchildren when he passed away. *See id.*; CP – 231.

Eventually, Yarbrough's health declined and Josh grew worried that he would lose the home if Yarbrough died. *See id.* To keep the house in his family's name, Josh asked his mother (and Yarbrough's ex-wife) to buy-out the ownership interests in the property owned by Yarbrough's brother and Yarbrough himself. *See id.* Josh testified that "even after [Weathers] bought the home," the family agreement "was still supposed to be the same." CP – 256. He explained that Weathers was buying the property "solely to get it out of [Yarbrough's brother's name]" and that Yarbrough's ownership and intent regarding the equity would still be honored. *See id.*

After Weathers purchased the home in 2014, she admitted that Yarbrough "contributed to the mortgage payments." *See CP – 556, n. 2.* Yarbrough's contributions to the equity in the home were also undisputed. *See CP – 253-56.* Within a couple of years, however, the family's relationship began to deteriorate. *See CP – 265.*

1. Weathers used a rental agreement to claim that Yarbrough was a tenant.

Josh began struggling with addiction and eventually went through a divorce with his wife while they were still living in the home with Yarbrough and Weathers. *See CP – 264*. Weathers testified that “everybody moved out and it turned into a mess.” *CP – 265*. As Yarbrough’s relationship with Weathers soured, she wanted to back track on the family’s agreement and kick Yarbrough out.

On September 1, 2017, Weathers filed a complaint against Yarbrough for a no-cause unlawful detainer action under RCW § 59.12.030(2). *See CP – 4*. The complaint alleged that Weathers leased the property to Yarbrough under a “written rental agreement signed by [Yarbrough] on August 1, 2014.” *Id.* The rental agreement, however, had a copyright date of 2016 and actually did not exist in 2014. *See CP – 7; CP – 556, n.2*. Yarbrough was also listed as an “occupant” and not a “tenant.” *CP – 94-96*.

In response to the complaint, Yarbrough filed an answer that denied the allegation that he was “tenant” and alleged that there was “no lease between the parties” because he was an owner of the property. *See* CP – 9 ¶ 8. Yarbrough then filed a separate civil action (Case No. 17-2-05408-2) based on the same allegations. During the show cause hearing for the unlawful detainer action, Weathers stipulated to consolidating Yarbrough’s civil case with her action. *See* CP – 17. Thereafter, the parties started preparing for discovery and a trial on all issues.

As a result of the consolidation, the case was no longer entitled to the expedited calendar priority reserved for statutory unlawful detainer actions.² This meant that Weathers would be unable to evict Yarbrough from the property summarily before the trial on all issues.

² *See* Munden v. Hazelrigg, 105 Wash. 2d 39, 47 – 48 (1985). (“In any event, once converted, the civil suit is no longer entitled to the calendar priority afforded an unlawful detainer action by RCW 59.12.130.”).

2. Weathers bifurcated her unlawful detainer action from Yarbrough's case.

In order to summarily evict Yarbrough before his defenses related to his ownership of the property could be heard, Weathers asked the superior court to bifurcate her unlawful detainer action from Yarbrough's civil case. *See* CP – 82; CP – 133. Along with that motion, however, Weathers filed a motion to compel the production of Yarbrough's bank records, which Weathers claimed would show that Yarbrough paid “rent” and not the mortgage. This discovery was relevant only to the issues raised by Yarbrough's ownership defense. *See* CP 9 ¶ 8.

After the cases were bifurcated, Weathers continued litigating the issue of whether Yarbrough was a “tenant” while also objecting to Yarbrough introducing evidence to support his defense. In one motion, Weathers specifically requested a judgment declaring that Yarbrough “holds no legally enforceable interest in the property.” CP 192-201.

3. Weathers summarily evicted Yarbrough despite his defense that he was not a tenant.

On April 27, 2018, Weathers obtained the bank records that she requested from Yarbrough, which included images of checks that Weathers relied on to argue that Yarbrough paid “rent” and did not contribute to the mortgage as an owner would. *See* CP 569 ¶ 15. A second show cause hearing was held three days later, and the superior court granted a writ of restitution based on Weathers’s argument but did not rule on Yarbrough’s defense that he was a property owner. *See* CP 310-14

Critically, after the show cause hearing, the superior court held “that an issue of fact exists” regarding Yarbrough’s defense that he was not a “tenant” subject to unlawful detainer. *See* CP 314; *see also* CP 325 (the superior court clarified the factual issue on the record on June 1, 2018). Despite this, the superior court continued treating the case as an expedited unlawful detainer action.

Rather than ruling that the nature of Yarbrough's defense required the case to be converted to a civil ejectment action before Yarbrough could be evicted,³ the superior court refused to convert the action and summarily evicted Yarbrough after conceding that he produced enough evidence for a jury to conclude that he was an owner of the property and not a tenant at all.

4. The superior court sanctioned Ghiorso due to the delay in producing the discovery related to Yarbrough's ownership defense.

Months after the show cause hearing, Weathers filed a motion to sanction Ghiorso for the delays in producing the bank records related to Yarbrough's ownership defense. *See* CP – 567. The motion was granted over Ghiorso's objection that Weathers was litigating issues outside the scope of an unlawful detainer action. *See id.*

³ *Cf.* Bar K Land Co. v. Webb, 72 Wash. App. 380, 384 (1993).

In particular, Ghiorso defended against Weathers’s motion for sanctions on the ground that the superior court lacked subject matter or authority to enter any further orders so long as it refused to convert the unlawful detainer action into an ordinary civil action for ejectment after confirming that a factual issue existed regarding whether Yarbrough was a property owner.⁴ The superior court rejected that defense, and this appeal followed.

Ultimately, at the trial in Weathers’s unlawful detainer action, the superior court refused to permit Yarbrough to argue that he was not a “tenant” subject to the unlawful detainer statutes. At the same time, it allowed Weathers to argue that he paid “rent” and was occupying the property after the expiration of a lease – effectively resolving Yarbrough’s defense against him without giving him an opportunity to be heard.

⁴ *Cf.* Angelo Prop. Co., LP v. Hafiz, 167 Wash. App. 789, 821–22 (2012) (“...[T]he trial court lacked authority to issue any additional orders...”).

E. Argument Why Review Should Be Accepted.

It is critical that the Court accept review to answer what must be done when the defendant in an unlawful detainer action raises the defense that no tenancy actually exists and the unlawful detainer statute does not apply. *See* CP 9 ¶ 8. The appellate ruling below directly conflicts with its published decision in *Angelo Prop. Co., LP v. Hafiz*, 167 Wash. App. 789, 822 (2012), as well as the third division's published decision in *Bar K Land Co. v. Webb*, 72 Wash. App. 380, 384 (1993).

1. The conflict with *Angelo*.

As mentioned above, Ghiorso argued on appeal that the superior court lacked subject matter jurisdiction and authority to sanction him while maintaining unlawful detainer subject matter jurisdiction. *See* A – 6. The factual issue regarding Yarbrough's ownership deprived the superior court of authority to summarily evict Yarbrough or sanction Ghiorso until the action was converted.

In response, the Court of Appeals reasoned that the superior court's authority to enter sanctions arose out of the contempt statutes and the civil rules of procedure governing discovery.⁵ The Court of Appeals explained that the "superior court had general subject matter jurisdiction over the dispute," which was separate from its statutory authority over the unlawful detainer action. *See* A – 7.

In *Angelo*, however, the same division of the Court of Appeals explained that this reasoning is incorrect: "In an unlawful detainer action, the court sits as a special statutory tribunal to summarily decide the issues authorized by statute *and not as a court of general jurisdiction with the power to hear and determine other issues.*" *Angelo Prop. Co., LP v. Hafiz*, 167 Wash. App. 789, 822 (2012) (emphasis added).

⁵ *But see* *Angelo Prop. Co., LP v. Hafiz*, 167 Wash. App. 789, 822 (2012) (vacating trial court's grant of summary judgment under the civil rules of procedure because it was entered without authority in an unlawful detainer action).

In *Angelo*, the trial court refused to convert the case into an ordinary civil action after the right of possession was no longer at issue. The Court of Appeals held that the trial court lacked authority to enter *any* further orders, *regardless of the rule that authority arose from*, so long as it insisted on maintaining unlawful detainer subject matter jurisdiction. *See Angelo Prop. Co., LP v. Hafiz*, 167 Wash. App. 789, 822 (2012). This included a summary judgment and several other “orders, rulings, and factual determinations” entered under various other rules. *See id.*

The Court of Appeals specifically stated that a superior court in an unlawful detainer action “sits as a special statutory tribunal to summarily decide the issues authorized by statute and *not* as a court of general jurisdiction.” *Id.* at 822. Here, however, the Court of Appeals ignored that decision and held that the superior court *did* sit as a court of “general jurisdiction” when it entered the sanctions against Ghiorso. *See A – 7.*

2. The conflict with *Bar K Land Co.*

The only distinguishing factor between *Angelo* and this case is that Yarbrough maintained that he was entitled to possession of the property in this case (because he was an owner of the property), while the defendant relinquished possession in *Angelo* (because he did not dispute the existence of a tenancy). According to *Bar K Land Co. v. Webb*, 72 Wash. App. 380, 384 (1993), however, Yarbrough's assertion of ownership in this case had the same effect as the defendant's relinquishment of possession in *Angelo*, so this distinction is immaterial.

Like this case, *Bar K Land Co.* was an unlawful detainer action where the defendant raised the defense that "she had greater property interests than those of a tenant." *Id.* at 384. As a result of that defense, the Court of Appeals held that the case "should have been an action for ejectment rather than unlawful detainer," and remanded it to proceed as a civil action for ejectment. *See id.* at 386.

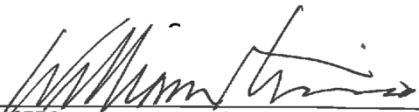
In this case, Yarbrough raised an identical defense to the one raised by the defendant in *Bar K Land Co.*, but the superior court in this case refused to convert the action into a civil case for ejectment and insisted on permitted Weathers to summarily evict Yarbrough without hearing his ownership defense. *See* CP 9 ¶ 8.

Thereafter, while purporting to maintain unlawful detainer subject matter jurisdiction, the superior court sanctioned Ghiorso for a delay in producing discovery that was relevant only to Yarbrough's ownership defense. *But see Fed. Nat. Mortg. Ass'n v. Ndiaye*, 188 Wash. App. 376, 384 (2015) (“[U]nlawful detainer actions are not the proper forum to litigate questions of title.”). But just as the superior court lacked authority to “issue any additional orders, rulings, and factual determinations while the case remained an unlawful detainer action” in *Angelo*, *cf. Angelo Prop. Co., LP*, 167 Wash. App. at 821–22, it lacked authority to sanction Ghiorso here.

F. Conclusion.

Review should be accepted because the Court of Appeals decision in this case conflicts with both its earlier published decision in *Angelo* and the third division's published decision in *Bar K Land Co.* As long as this contradiction stands, litigants are left without an answer as to the proper procedure for when a defendant raises the defense of ownership in an unlawful detainer action. This Court should accept review and provide that answer, and consistent with the relief in *Angelo*, vacate the superior court's "orders, rulings, and factual determinations entered after" it found a factual issue regarding whether Yarbrough was a property owner.

Dated July 7, 2021.


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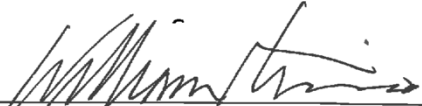
CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on **July 7, 2021**, I caused to be served, via electronic service, a true and correct copy of this **Petition for Review** to the following individual(s):

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APPENDIX

Opinion Below – A-1 through A-14

Order Denying Motion to Reconsider – A-15

November 3, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

VICKI WEATHERS,

Respondent,

v.

LARRY YARBROUGH,

Defendant,

WILLIAM GHIORSO,

Appellant.

No. 52593-3-II

UNPUBLISHED OPINION

LEE, C.J. — William Ghiorso appeals the superior court’s order imposing sanctions against him for contempt and discovery violations committed while he was representing Larry Yarbrough against Vicki Weathers’ unlawful detainer action. Ghiorso argues that the superior court lacked subject matter jurisdiction over the unlawful detainer action and that the imposed sanctions were improper punitive sanctions that were entered without due process or discovery sanctions that were an abuse of discretion. We hold that the superior court had subject matter jurisdiction to enter the order imposing sanctions. And although the superior court erred by imposing a punitive contempt sanction under chapter 7.21 RCW, the superior court did not abuse its discretion by imposing sanctions for discovery violations. Accordingly, we affirm the superior court’s order imposing sanctions.

FACTS

A. UNLAWFUL DETAINER ACTION

On September 1, 2017, Weathers filed an unlawful detainer action against Yarbrough. Yarbrough was represented by Erin McAleer. On November 27, Ghiorso, an attorney licensed to practice law in Oregon, obtained *pro hac vice* admission in Washington to represent Yarbrough in the superior court with McAleer as Ghiorso's sponsoring attorney.

Yarbrough answered the unlawful detainer complaint alleging that he was an equitable owner of the property and entitled to lawful possession of the property. Yarbrough also filed a separate complaint for damages alleging that he had an equitable interest in the property and seeking declaratory judgment, as well as several civil claims for damages. The superior court consolidated Weathers' unlawful detainer action with Yarbrough's complaint.

Yarbrough then filed a motion to dismiss Weathers' unlawful detainer complaint. In response, Weathers moved to vacate the order consolidating the cases. The superior court denied the motion to dismiss and granted Weathers' motion to vacate the order consolidating cases.

On April 30, 2018, the superior court held an unlawful detainer show cause hearing. Ultimately, the superior court entered judgment in favor of Weathers in the unlawful detainer action.

B. DISCOVERY VIOLATIONS

The discovery dispute that gives rise to this appeal began on January 25, 2018, when Weathers filed a motion to compel in the superior court proceedings. Weathers moved to compel responses to her first and second requests for production sent to Yarbrough. The requests for production included requests for copies of Yarbrough's bank records, cancelled checks, and

account statements. On February 2, the superior court granted Weathers' motion to compel and ordered Yarbrough to provide responsive documents within seven days.

On February 13, Weathers filed a motion for contempt because the responsive documents had still not been produced. On February 16, the superior court granted the motion for contempt. The superior court ruled that Yarbrough had failed to comply with the court's order compelling production and found Yarbrough in contempt. The superior court ordered Yarbrough to pay \$500 per day for each day that the contempt continued past February 9. The superior court also awarded Weathers her attorney fees.¹

On March 20, Yarbrough still had not produced any cancelled checks, so Weathers filed a motion for sanctions based on Yarbrough's continued failure to provide copies of the cancelled checks. Weathers and Yarbrough settled this motion without a hearing. Weathers agreed to dismiss the motion for sanctions in exchange for Yarbrough paying \$12,000 in sanctions for the period of February 9 through February 28.

On May 23, Weathers filed a motion for sanctions because Yarbrough still had not complied with the court's order compelling production of cancelled checks. On May 24, Weathers filed an amended motion for sanctions. In her amended motion, Weathers asserted that Yarbrough produced some bank records on February 28, but he had failed to produce the cancelled checks as ordered by the court. The records that were produced showed that on January 24, the bank charged Yarbrough for research on all checks drawn on his account between 2014 and 2017, and on February 9, the bank charged Yarbrough for the production of check images.

¹ This contempt order is not at issue in this appeal.

Weathers also asserted that on April 4, Weathers again requested from Ghiorso the production of cancelled checks. Ghiorso stated that Yarbrough's bank does not produce copies of cancelled checks. On April 5, Weathers sent a subpoena to Yarbrough's bank seeking copies of Yarbrough's cancelled checks. Yarbrough's bank responded to the subpoena on April 27, providing hundreds of cancelled checks. Weathers further asserted that, at the April 30 unlawful detainer show cause hearing, Yarbrough testified that he had previously obtained the cancelled checks and provided them to Ghiorso.

Weathers sought sanctions for contempt of court under RCW 7.21.010 and 7.21.030(2)(b). Alternatively, Weathers requested sanctions for discovery violations under CR 37(b)(2). Specifically, Weathers requested sanctions in the amount of \$2,000 per day from February 28 through April 27 based on the statutory amount authorized by RCW 7.21.030(2)(b). Weathers also requested \$3,500 for attorney fees and costs.

Ghiorso responded to Weathers' motion for sanctions, arguing that Yarbrough's April 30 testimony at the unlawful detainer show cause hearing referred to checks from a different bank and were not the checks that were requested. And Ghiorso asserted that Weathers' subpoena was part of the agreement to resolve the motion for sanctions that had been filed on March 20. According to Ghiorso, Weathers agreed to subpoena the records herself and strike the March 20 motion for sanctions in exchange for Yarbrough paying Weathers \$12,000.

On September 26, the superior court ruled on Weathers' amended motion for sanctions. The superior court found facts consistent with Weathers' assertions in her amended motion for sanctions. The superior court concluded that the failure to provide the cancelled checks from

February 28 through April 4 was contempt of court for the purposes of chapter 7.21 RCW and a discovery violation under CR 37(b)(2).

The superior court imposed “a sanction of \$5,800 (\$100 per day x 58 days) for the defendant’s failure to provide copies of the defendant’s cancelled checks” and “\$3500 in attorney’s fees and costs on the defendant for the plaintiff’s having to repeatedly request the records in question, repeatedly confer with defense counsel and their staff concerning their failure to produce the documents, independently obtaining the records, and bringing this motion.” Clerk’s Papers at 571-72. The superior court allocated the responsibility for the sanctions as follows: 75 percent to Yarbrough and Ghiorso, and 25 percent to Ghiorso’s sponsoring attorney, McAleer. Accordingly, \$6,975 was apportioned to Yarbrough and Ghiorso, and \$2,325 to McAleer.

Ghiorso appeals the superior court’s Ruling and Order on Plaintiff’s Amended Motion for Sanctions.

ANALYSIS

Ghiorso appeals the superior court’s order imposing sanctions against him for failing to comply with the court’s order to compel. Ghiorso argues that the superior court lacked subject matter jurisdiction to enter the order. Ghiorso also argues that the superior court improperly imposed punitive sanctions without complying with the statutory requirements for criminal contempt and, alternatively, abused its discretion by imposing sanctions for discovery violations under CR 37(b)(2). We disagree.

A. STANDING

As an initial matter, Weathers argues that Ghiorso lacks standing to litigate claims on behalf of Yarbrough. Although we agree that Ghiorso lacks standing to litigate claims on behalf

of Yarbrough, to the extent Ghiorso's appeal relates to the order imposing sanctions against him personally, Ghiorso has standing.

“Standing refers to a party's right to make a legal claim or seek judicial enforcement of a right.” *Forbes v. Pierce County*, 5 Wn. App. 2d 423, 433, 427 P.3d 675 (2018). “A litigant cannot assert the legal rights of another person and must have a real interest before bringing a cause of action.” *Id.*

Here, Ghiorso filed a notice of appeal designating the superior court's order imposing sanctions against him personally. Therefore, to the extent he is challenging that order, Ghiorso is not asserting the rights of another person. He is asserting his own rights and has a real interest in the appeal. Therefore, Ghiorso has standing to challenge the order at issue on this appeal. To the extent Ghiorso's arguments do not relate to the order imposing sanctions against him, they are improper and we do not consider them.

B. SUBJECT MATTER JURISDICTION

Ghiorso argues that the superior court lacked subject matter jurisdiction over Weathers' unlawful detainer action² and, therefore, the superior court lacked subject matter jurisdiction to

² Unlawful detainer actions are a statutory alternative to the common law action of ejectment. *River Stone Holdings NW, LLC v. Lopez*, 199 Wn. App. 87, 92, 395 P.3d 1071 (2017). Chapter 59.12 RCW governs unlawful detainer actions and allows for a summary proceeding that provides an expedited means for landlords and tenants to resolve competing claims to possession of leased property. *Angelo Prop. Co. v. Hafiz*, 167 Wn. App. 789, 808, 274 P.3d 1075, *review denied*, 175 Wn.2d 1012 (2012). Unlawful detainer actions are “limited to resolving questions related to possession of property and related issues like restitution of the premises and rent.” *River Stone Holdings*, 199 Wn. App. at 92. As part of an unlawful detainer action, a landlord may seek a writ of restitution restoring the property to his or her possession. RCW 59.12.090.

enter the order imposing sanctions against him. However, Ghiorso's argument about subject matter jurisdiction is misplaced.

The Washington Constitution generally provides superior courts with subject matter jurisdiction in cases involving title or possession of real property. WASH. CONST. art. IV §6. Because of the superior court's constitutional jurisdiction, "it is incorrect to say that the court 'acquires' subject matter jurisdiction" only when a lawsuit satisfies the requirements of the unlawful detainer statute. *Hous. Auth. of the City of Seattle v. Bin*, 163 Wn. App. 367, 376, 260 P.3d 900 (2011). When the statutory requirements for an action are not met, the superior court is not deprived of subject matter jurisdiction, rather, the party "may not maintain such action or *avail itself* of the superior court's jurisdiction" *Tacoma Rescue Mission v. Stewart*, 155 Wn. App. 250, 254 n.9, 228 P.3d 1289 (2010) (emphasis added).

Here, Ghiorso appeals an order granting sanctions based on contempt and violations of the discovery rules. The superior court's authority to enter these orders does not come from the unlawful detainer statute.

Contempt is governed by a separate statutory scheme, chapter 7.21 RCW. RCW 7.21.020 grants a superior court judge the authority to impose sanctions for contempt of court. Contempt of court includes disobedience of a court order and refusal to produce records or documents without lawful authority. RCW 7.21.010(1)(b), (d). Similarly, the civil rules governing discovery apply universally to civil cases in the superior court, including unlawful detainer actions. *See* RCW 59.12.180.

Here, the superior court had general subject matter jurisdiction over the dispute and the superior court judge's authority to sanction Ghiorso is separate from the statutory authority over

an unlawful detainer action. Therefore, Ghiorso's argument that the superior court lacked subject matter jurisdiction to enter an order imposing sanctions against him fails.

C. PUNITIVE SANCTION

Ghiorso argues that the superior court improperly imposed a punitive sanction without complying with the statutory requirements for criminal contempt. Because the sanction was imposed based on Ghiorso's past conduct and was not coercive or remedial in nature, the superior court abused its discretion by imposing a punitive contempt sanction under chapter 7.21 RCW.

Chapter 7.21 RCW governs contempt of court. Contempt of court includes intentional disobedience of a lawful court order. RCW 7.21.010(1)(b). Civil contempt, authorized by RCW 7.21.030, involves imposing remedial sanctions. *In re Det. of Young*, 163 Wn.2d 684, 693 n.2, 185 P.3d 1180 (2008). A "remedial sanction" is one which is "imposed for the purpose of coercing performance when the contempt consists of the omission or refusal to perform an act that is yet in the person's power to perform." RCW 7.21.010(3). RCW 7.21.030(2) provides, in relevant part,

If the court finds that the person has failed or refused to perform an act that is yet within the person's power to perform, the court may find the person in contempt of court and impose one or more of the following remedial sanctions:

(a) Imprisonment if the contempt of court is of a type defined in RCW 7.21.010(1)(b) through (d). The imprisonment may extend only so long as it serves a coercive purpose.

(b) A forfeiture not to exceed two thousand dollars for each day the contempt of court continues.

(c) An order designed to ensure compliance with a prior order of the court.

In contrast, criminal contempt, authorized by RCW 7.21.040, involves imposing punitive sanctions. *Smith v. Whatcom County Dist. Court*, 147 Wn.2d 98, 105, 52 P.3d 485 (2002). A

“punitive sanction” is a sanction which is “imposed to punish a past contempt of court for the purpose of upholding the authority of the court.” RCW 7.21.010(2). Imposing punitive sanctions is initiated by a prosecutor filing a complaint or information and requires other procedural protections. RCW 7.21.040(2).

We review the superior court’s contempt findings for an abuse of discretion. *Rhinevault v. Rhinevault*, 91 Wn. App. 688, 694, 959 P.2d 687 (1998), *review denied*, 137 Wn.2d 1017 (1999). However, whether the superior court exceeded its authority is a question of law, which we review *de novo*. *In re Rapid Settlements, Ltd’s*, 189 Wn. App. 584, 614, 359 P.3d 823 (2015).

To determine whether a contempt sanction is punitive or remedial, we examine the substance of the proceedings and the type of relief afforded by the sanction. *Rhinevault*, 91 Wn. App. at 694-95.

A punitive sanction is imposed for a past contempt, while remedial sanctions coerce performance where the contempt involves a person omitting or refusing to perform an act yet in their power to perform. *See* RCW 7.21.010(2), (3). Thus, a sanction is punitive if there is a determinate sentence and no opportunity to “purge” the contempt. *See King v. Dep’t of Social & Health Servs.*, 110 Wn.2d 793, 799, 756 P.2d 1303 (1988). But it is remedial where it is indeterminate and the contemnor is released upon complying with the court’s order. *Id.* (citing *State v. Browet, Inc.*, 103 Wn.2d 215, 218, 691 P.2d 571 (1984)). A punitive sanction generally is imposed to vindicate the court’s authority, while a remedial sanction typically benefits another party. *Id.* at 800, 756 P.2d 1303.

Rhinevault, 91 Wn. App. at 694. The superior court may also impose a remedial sanction with no coercive effect if the sanction’s purpose is to compensate the opposing party for losses incurred as a result of the contempt. *Rapid Settlements*, 189 Wn. App. at 608-09. If the sanction is for compensation, it must be based on evidence of actual losses. *Id.* at 609.

Here, the superior court's sanctions clearly were meant to address past conduct because they were based on the failure to produce the cancelled checks that the court previously ordered be produced. In its order, the superior court clearly imposed two distinct sanctions: the \$5,800 sanction and the \$3,500 for attorney fees. But there is no evidence in the record that Weathers incurred any losses besides those related to her attorney fees because Weathers had already obtained copies of the cancelled checks. Therefore, while the attorney fees award is a remedial sanction that provides compensation to Weathers, the \$5,800 sanction was unrelated to any losses incurred as a result of the contempt of court. Accordingly, while the attorney fee award was an appropriate remedial sanction under RCW 7.21.030, the \$5,800 sanction was an improper punitive sanction that was imposed without complying with the requirements of RCW 7.21.040. However, for the reasons explained below, the trial court did not abuse its discretion in imposing the \$5,800 sanction as a discovery sanction.

D. DISCOVERY SANCTION

Ghiorso also argues that the superior court improperly imposed the sanctions for discovery violations under CR 37. Because the superior court did not abuse its discretion in imposing a sanction for discovery violations under CR 37, we disagree.

The superior court has broad discretion in imposing discovery sanctions under CR 37. *Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). We will not disturb the superior court's determination absent a clear abuse of discretion. *Id.* "An abuse of discretion occurs when a decision is 'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *Id.* (quoting *Associated Mortgage Investors v. G.P. Kent Constr. Co.*, 15 Wn. App. 223, 229, 548 P.2d 558, *review denied*, 87 Wn.2d 1006 (1976)).

A discretionary decision rests on “untenable grounds” or is based on ‘untenable reasons’ if the trial court relies on unsupported facts or applies the wrong legal standard; the court’s decision is “manifestly unreasonable” if “the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take.”

Id. (internal quotations omitted) (quoting *State v. Rorich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

Under CR 37(b)(2), “if a party fails to obey an order entered under rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just.” A nonexclusive list of such sanctions include ordering that certain facts are deemed established, that particular claims or defenses cannot be asserted, or that default judgment be entered. *See* CR 37(b)(2)(A)-(E). CR 37(b)(2) also provides that

[i]n lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or her or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

In *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997), our Supreme Court stated,

When the trial court “chooses one of the harsher remedies allowable under CR 37(b), . . . it must be apparent from the record that the trial court explicitly considered whether a lesser sanction would probably have sufficed,” and whether it found that the disobedient party’s refusal to obey a discovery order was willful or deliberate and substantially prejudiced the opponent’s ability to prepare for trial.

This rule applies only to the harsher remedies of default, dismissal, or exclusion of evidence available under CR 37(b)(2)(A)-(E). *Mayer*, 156 Wn.2d at 688. It does not apply to every instance where a superior court imposes sanctions for discovery abuses. *Id.* And it does not apply to the imposition of monetary sanctions. *Id.* at 688-89.

“The purposes of sanctions orders are to deter, to punish, to compensate and to educate.” *Washington State Physicians Ins. Exchange & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 356, 858 P.2d 1054 (1993). The superior court is given wide latitude to determine appropriate sanctions for discovery violations. *Id.* at 355. Sanctions should be the least severe sanctions that is adequate, but they should not be so minimal that they undermine the purpose of discovery. *Id.* at 356. “Where compensation to litigants is appropriate, then sanctions should include a compensation award.” *Id.* And, where appropriate, sanctions should be severe enough to deter attorneys from engaging in future discovery violations. *Id.*

Here, the trial court imposed a sanction for discovery violations because after receiving the requests for productions, receiving the cancelled checks from Yarbrough, and being ordered to provide the cancelled checks to Weathers, Ghiorso failed to do so. As a result, Weathers was required to file motions to compel production of those documents and motions for sanctions, and ultimately had to subpoena the records herself, despite the records being in Ghiorso’s or Yarbrough’s possession since early February. Given the circumstances, the superior court did not abuse its discretion when it ordered attorney fees to compensate Weathers for the discovery violations. And while the superior court improperly imposed the \$5,800 sanction under chapter 7.21 RCW, the superior court was within its discretion to impose that amount under CR 37(b)(2). Therefore, the trial court did not err in imposing sanctions against Ghiorso. Accordingly, we affirm the superior court’s order imposing sanctions.

E. ATTORNEY FEES ON APPEAL

Weathers requests attorney fees on appeal under RCW 7.21.030(3), RAP 18.1, or RAP 18.9.

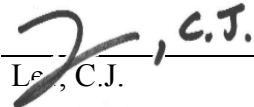
RAP 18.1(a) allows us to grant reasonable attorney fees or expenses “[i]f applicable law grants to a party the right to recover reasonable attorney fees or expenses on review.” “Reasonable attorney fees are recoverable on appeal if allowed by statute, rule, or contract.” *In re Guardianship of Wells*, 150 Wn. App. 491, 503, 208 P.3d 1126 (2009).

RCW 7.21.030(3) states, “The court may . . . order a person found in contempt of court to pay a party for any losses suffered by the party as a result of the contempt and any costs incurred in connection with the contempt proceeding, including reasonable attorney’s fees.” Because we have determined that the \$5,800 sanction under RCW 7.21.030 for contempt was improper, we exercise our discretion and deny Weathers’ request for attorney fees under RCW 7.21.030(3).

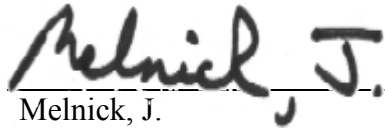
RAP 18.9(a) allows for compensatory damages to the harmed party if the offending party’s appeal was frivolous. “An appeal is frivolous if no debatable issues are presented upon which reasonable minds might differ, and it is so devoid of merit that no reasonable possibility of reversal exists.” *Chapman v. Perera*, 41 Wn. App. 444, 455-56, 704 P.2d 1224, *review denied*, 104 Wn.2d 1020 (1985). Although, we ultimately affirm the superior court, this appeal was not so devoid of merit to be considered frivolous. Therefore, we deny Weathers’ request for attorney fees under RAP 18.9.

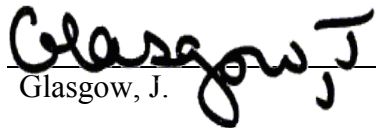
Accordingly, we affirm the superior court’s order imposing sanctions and deny Weathers’ request for attorney fees.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

 _____
L. J. Le, C.J.

We concur:

 _____
Melnick, J.

 _____
Glasgow, J.

Filed
Washington State
Court of Appeals
Division Two

May 6, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

VICKI WEATHERS,

Respondent,

v.

LARRY YARBROUGH,

Defendant,

WILLIAM GHIORSO,

Appellant.

No. 52593-3-II

ORDER DENYING MOTION
FOR RECONSIDERATION

Appellant, William Ghiorso, filed a motion for reconsideration of this court's unpublished opinion filed on November 3, 2020. After consideration, it is hereby

ORDERED that the motion for reconsideration is denied.



LFE, CHIEF JUDGE

July 07, 2021 - 3:48 PM

Transmittal Information

Filed with Court: Supreme Court
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Appellate Court Case Title: Vicki Weathers v. William Ghiorso
Superior Court Case Number: 17-2-02006-4

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